The UN Declaration On Indigenous Peoples' Rights

Prof. Solomon Salako

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Professor Solomon E. Salako

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An Appraisal

The UN Declaration On Indigenous Peoples' Rights: An Appraisal
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Preface

Historically, the genesis of indigenous peoples' rights could be traced to the late fifteenth century and early sixteenth century. Theologians and founders of international law Bartholomé de las Casas (1474–1566) and Francisco de Vitoria (1486–1547) chronicled the relationship between Europeans and indigenous peoples in the Indies and asserted that Indians, as indigenous peoples, have certain autonomous powers and entitlement to their lands which Europeans were bound to respect. The debate on indigenous peoples' entitlement was kept alive from the seventeenth century to mid-eighteenth century by Grotius, Hobbes, Wolff and Vattel. It was in the mid-twentieth century that the "principle" of self-determination ascribed, inter alia, to the Declaration of Independence of the United States of America of 4th July 1776 evolved into peoples' "right" to self-determination in two international human rights documents: the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Social and Cultural Rights 1966 (ICESCR).

The main thesis of this book is that the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) is a redeployment of the rights in the ICCPR and ICESCR to address global issues such as poverty and human rights, protection of the environment and intra- and inter-generational justice and the protection of the lands, natural resources, biogenetic resources and related traditional knowledge and folklores of indigenous peoples which are inextricably intertwined with their religions, cultures and customary laws.

The book, constructed around the development of indigenous peoples' rights in international law, is a jurisprudential analysis of the rights promulgated in the UNDRIP. It is argued that the collective rights of indigenous peoples promulgated in the UNDRIP are not incongruous with individual rights; that the right to development of indigenous peoples is a fundamental right; and that present and future generations of indigenous peoples who inhabit islands have the right not to be adversely affected by flooding or submerged totally because of climate change caused by present generation. Finally, the right of indigenous peoples to their biogenetic resources and related traditional knowledge developed over millennia and protected by UNDRIP is reconciled with the intellectual property rights of transnational agrobiotechnology corporations asserted to recoup the vast sums spent on research into exploiting the specific genetic characteristics of plants and animals which are sometimes the result of millennia of breeding and improvement by indigenous peoples.

In writing this book, I have acquired so many debts which I should like to acknowledge here. My most important debt is to my wife, Diane Salako, who has had to deal with my preoccupation with this project. My sincere gratitude to Karin Hamilton Jacobsen and the editorial staff of Bookboon for their support and understanding during the gestation period. I must also express my gratitude to Sue Wiseman for using her immense word-processing skills in typing and formatting the manuscript within a short space of time.

The book is dedicated to my wife, Diane Salako, and my late father, Samuel Oluseye Salako (1910–2010).

Solomon E. Salako

Liverpool
United Kingdom

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1 Indigenous Peoples and the Development of Their Rights

For most of the twentieth century, the proposition that groups can hold rights was received with a mixture of scepticism and suspicion. And yet, questions concerning the rights of indigenous peoples have been asked since the advent of European exploration and the conquest in the Western hemisphere. The fundamental question is: who are these indigenous peoples?

According to Anaya, indigenous peoples are "those living descendants of pre-invasion inhabitants of lands now dominated by others".[1] This is a rather narrow definition limited to the narratives on the discovery of the New World by European explorers. The term 'indigenous peoples', often used pejoratively to marginalise these peoples and limit the protection of the treaties dealing with indigenous interests, have been used in modern political geography in the study of no fewer than 1,500 peoples – both extinct and extant – divided into five regionally based sections: the Americas; Europe; South and Central Asia and Middle East; and East and Southern Asia and Oceania.[2] Hanning describes 'indigenous peoples' as human groups which have all or some of five characteristics. These characteristics are:

1. Peoples who are descendants of the original inhabitants of a territory.
2. Nomadic or semi-nomadic peoples such as shifting cultivators.
3. Peoples without centralised political institutions who are organised at the level of the community.
4. People who have all the characteristics of a national minority who share a common language, religion or culture.
5. Individuals who consider themselves as indigenous and are recognised as such.[3]

Reflections on the relationship between Europeans and indigenous peoples in the late fifteenth century and the early sixteenth century have led to theories on the legality of claims to the New World. The two notable theorists of this period were Dominican clerics Bartolomé de las Casas (1474–1566) and Francisco de Vitoria (1486–1547). De las Casas, who was a Roman Catholic missionary among Indians, chronicled in his **Short Account of the Destruction of the Indies**[4] the enslavement and massacre of indigenous peoples by Spanish conquerors and colonists in the early sixteenth century. Writing in a similar vein, Francisco de Vitoria, a professor of theology at the University of Salamanca, in his lecture on Indians which established him as a founder of international law, asserted that Indians, as indigenous people, possessed certain autonomous powers and entitlement to land which Europeans were bound to respect and elaborated the ground on which Europeans could validly acquire Indian lands and assert authority over Indians. His prescriptions formed the basis of principles governing encounters among peoples of the world and influenced later theorists such as Hugo Grotius (1583–1645). Grotius in **De Indis** which appeared in 1609, Chapter XII of which was prepared separately as the famous **Mare Liberum** (*The Freedom of the Seas*[5]) relied heavily on Vitoria.

The emergence of modern system of states which was traced to the Treaty of Westphalia in 1648 which ended the Thirty Year War and the hegemony of the Roman Catholic Church prompted a re-evaluation of Vitoria's thesis that indigenous peoples possessed autonomous powers and entitlement to land (i.e., rights) that Europeans were bound to respect. Drawing first from Hobbes's **Leviathan** (1651) where he posited the dichotomy of individuals and states, and began to formulate the law of nations, theorists including Samuel Pufendorf and Christian Wolff began to focus on the law of nations as the law binding sovereign states. It was Emerich de Vattel in **The Law of Nations** or **The Principles of Natural Law** (1758) who rationalised the post-Westphalian concept of law of nations in which nations or states were the bearers of rights and duties and stated that once "a people…has passed under the rule of another, [it] is no longer a State, and does not directly come under the Law of Nations",[6] thus excluding indigenous peoples as subject of international law. This was the state of affairs until the enunciation of the principle of self-determination.

The principle of self-determination which could be traced back to the Declaration of Independence of the United States of America[7] of 4th July 1776[8] and to Lenin and the Bolsheviks[9] has evolved into peoples' right to self-determination. The "principle" of self-determination" was mentioned thrice in the 1945 Charter of the United Nations.[10] In those provisions, self-determination emerged as the legal foundation of decolonization. It became applicable to non-self-governing territories, trust territories and mandates. Under the moral and political imperatives of decolonisation, the vague 'principle' of self-determination evolved into the 'right' of self-determination.

In the 1960s, there were attempts in the United Nations and elsewhere to assert a new category of rights, a so-called 'third generation' of collective and indigenous peoples' rights. (The first generation of rights are civil and political rights while the second generation of rights are social, economic and cultural rights.) The three attempts to assert indigenous peoples' rights could be gleaned from three international human rights documents. The first is the International Labour Organisation Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries[11] which gives indigenous peoples the right to be consulted and to participate in national and regional development plans and strategies for their cultures and relationship to the environment to be respected, the rights to natural resources in their lands to be safeguarded, and to participate also in use, management, and conservation of these resources.

The second attempt is the Convention for Biological Diversity[12] (CBD) and its Protocols – the Cartagena Protocol[13] and the Nagoya Protocol.[14] The CBD, in its twelfth preambular recital, recognises

> "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."

Article 8 (j) of the CBD requires state parties "to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities…relevant for conservation and sustainable use of biodiversity".

The third attempt is the African Charter on Human and Peoples' Rights 1981 (ACHPR). Article 19–24 of the ACHPR protect the rights of indigenous peoples to their lands, biogenetic resources and related knowledge, environment and development.

It is worthy of note that the United States refused to join up to the CBD and stated as one of its reasons for withdrawing from UNESCO in 1984 its distaste for UNESCO's support for peoples' rights and at the danger that they could create excuses for the denial of individual rights.

After twenty-five years of contentious negotiations, the United Nations Declaration on the Rights of Indigenous Peoples 2007[15] (UNDRIP) was adopted by the General Assembly.[16] The preamble to the UNDRIP recognised "the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their right to their lands, territories and resources".[17] Article 1 of the UNDRIP re-enacts all fundamental freedoms protected in the Universal Declaration of Human Rights (1948) (UDHR[18]) in particular and international human rights in general. Article 2 of the UNDRIP protects freedom from discrimination while Articles 3 and 5 protect the political, social and economic rights of indigenous peoples. Ethnobotany and ethnoveterinary medicine[19] are protected by Articles 18, 24 and 25. Article 11 (1) protects the folklores, cultures and technologies of indigenous peoples and Article 13 (1) protects the revitalisation, use, development and transmission to future generations, their histories, languages, and traditions, philosophies, writing systems and literature".[20]

2 Indigenous Peoples in International Law

2.1 Introduction

The genesis of the UN Declaration on the Rights of Indigenous Peoples could be traced to the early 1970s. In 1971, the Economic and Social Council authorised the Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities to make:

> "a complete and comprehensive study of the problem of discrimination against indigenous *populations* and to suggest the necessary national and international reasons for eliminating such discrimination, in co-operation with other organs and bodies of the United Nations and with the competent international organizations."[21]

In 1972, Mr Jose R. Martinez Cobo was appointed a Special Rapporteur by the Sub-Commission to undertake the study. In 1982, a Working Group on Indigenous Populations was set up to review "the evolution of standards concerning the rights of indigenous populations" and submit a report to the Sub-Commission. In 1994, the Working Group submitted a Draft Declaration which the Sub-Commission called "United Nations Declaration on The Rights of Indigenous Peoples".

It must be stressed at this convenient juncture that the term "populations" – rather the contested term "peoples" – was lifted from the International Labour Organization (ILO) Convention No 107 of 1957 whose thrust was "to promote improved social and economic conditions for *indigenous populations*". While the Convention recognised indigenous customary laws, there was a perceived deference to national programmes of integration and noncoercive assimilation as encapsulated in the following Articles of the Convention, viz.

Article 2

> "1. Governments shall have primary responsibility for developing co-ordinated and systematic action for the protection of the *populations* concerned and their progressive integration into the life of their respective countries.
>
> …
>
> 3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.
>
> …

Article 3

> 1. So long as the social, economic and cultural conditions of the *populations* concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of institutions, persons, property and labour of these *populations*."

The emphasis on *populations* is based on the traditional view that individual rights must be promoted by the state and prevail over any interest of the collectivity and that people's entitled self-determination include the aggregate populations of independent states, as well as those of colonial territories. This way of thinking did not last for long. In the 1960s, it was realised that many indigenous groups have signed agreements with current states that entitled them to group differential rights and that indigenous peoples are rightful owners of their land and have territorial rights. The liberal view that individual rights must be protected does not trump the collective rights of indigenous peoples to their land, natural resources and culture. In other words, liberalism does not trump communitarianism: the collective rights of these indigenous groups are compatible with the Rawlsian conception of justice discussed in Chapter 4 of this book or the Dworkinian conception of justice elaborated in **Sovereign Virtue**[22] that every community is entitled to protect its ethical and economic environment. In 1960, under the moral and political imperatives of decolonisation, the vague "principle" of self-determination evolved into the "right" of self-determination and the term "peoples" was used instead of "populations" to identify the beneficiary groups. The General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Colonial Independence") declares that

> "[a]ll people have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The Declaration on Colonial Independence was followed by the Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which were both entered into force in 1976 and each ratified by over 110 countries. The first Article of both Covenants is identical:

Article 1

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their own natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The Indigenous and Tribal Peoples Convention (ILO Convention No. 169) adopted by the International Labour Organization in 1989 recognises "the aspirations of indigenous *peoples* to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

The above-mentioned international legal instruments, among others, fired the imagination of the authors of the Draft "United Nations Declaration on the Rights of Indigenous Peoples". In nineteen preambular paragraphs, indigenous "peoples" are said to have suffered from discrimination, violations of human rights and fundamental freedoms and dispossession of their lands and resources. The taxonomy of rights of indigenous peoples in international human rights law protected are (i) the right to self-determination; (ii) land and environmental rights; (iii) cultural rights; (iv) right to wealth and natural resources, and (v) right to development. These categories of rights were promulgated in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) which was adopted by General Assembly Resolution 61/295 of 13 September 2007. The first three categories are discussed in this Chapter. The last two rights – viz. (i) to wealth and natural resources and (ii) to development – are discussed in Chapters 3 and 4 respectively.

2.2 The right to self-determination

The preamble to the UNDRIP recognises "the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights in their lands, territories and resources". Article 1 of the UNDRIP re-enacts all fundamental freedoms protected in the Universal Declaration on Human Rights in particular and in international human rights in general. The right to self-determination is protected by Articles 3 and 4 of the UNDRIP. Article 3 states:

> "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Article 4 states:

> "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions."

There are two aspects of self-determination: the internal and the external aspects. External self-determination is the self-determination for colonial peoples which ceases to exist under customary international law once it is implemented, that is, once the people have attained self-government. Internal self-determination, unlike external self-determination, is an ongoing right of the people to choose its own political and economic regime.[23] This right of self-determination afforded to indigenous peoples exists under treaty law by virtue of Article 1 of the ICCPR 1966 and ICESCR 1966, Article 20 of the African Charter on Human and Peoples Rights and now Articles 3 and 4 of the UNDRIP.[24] It is a right conferred on racial and religious groups – "peoples" – who are denied access to the political decision-making process.

The International Court of Justice recognised the peoples' right to self-determination in the **Western Sahara Advisory Opinion,**[25] the **Namibia Advisory Opinion**[26] **Frontier Dispute (Burkina Faso v Mali)**,[27] **Certain Phosphate lands in Nauru (Nauru v Australia)**[28] and **East Timor (Portugal v Australia)**.[29]

In the **Kosovo Advisory Opinion**,[30] the question put to the Court by the General Assembly was formulated in the following terms:

> "Is the unilateral declaration of independence by the Provision Institution of Self-Government of Kosovo in accordance with international law?"[31]

The Court noted that a prohibition of unilateral declarations of independence was implicit in the principle of territorial integrity enshrined in the UN Charter. Article 2 (4) of the Charter provides:

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in a manner inconsistent with the Purposes of the United Nations."

The Court also noted Principle IV of the Helsinki Final Act which stipulated that "the participating States will respect the territorial integrity of each of the participating States" but observed that the principle of territorial integrity is confined to the sphere of relations between states. The Court, therefore, concluded that the declaration of independence of 17 February 2008 did not violate international law but stopped short of deliberating on secession which was not within its remit. Cassese argues that the Declaration on Friendly Relations[32] ranks at the level of customary international law and that the Declaration warrants the contention that secession is implicitly authorised by the Declaration when one of the following conditions exists:

> "[t]he central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or social group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of State structure."[33]

Judge Cançado Trindade, in a Separate **Kosovo Advisory Opinion** went a vital step further by arguing in favour of unilateral secession: that the current evolution of international law and international practice of States and international organizations provides support for the exercise of the right to self-determination by people under permanent adversity or in case of systematic oppression and subjugation.[34]

2.3 Land and Environmental Rights

The conventional wisdom is that land rights form part of indigenous peoples' right to self-determination discussed above. In theory, the rationale is that there is an economic side to the right to self-determination derivable from Article 1 (1) of the ICCPR 1966 and ICESCR which states:

> "All peoples may, for their own ends freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

In practice, the land rights of indigenous peoples transcend the right to self-determination: it includes the rights of indigenous peoples to their territories, resources, traditional knowledge and culture. For indigenous peoples, biodiversity – the maintenance of essential ecological processes and life-support systems, the preservation of genetic diversity and sustainable use of species and ecosystems – and traditional knowledge are inextricably intertwined with their own culture and land.[35] Land rights are protected by Articles 26 and 27 of the UNDRIP. Article 26 (1) states that "[i]ndigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired" while States are enjoined "to give legal recognition and protection to these lands, territories and resources" (Article 26 (3)) and implement in conjunction with indigenous peoples a fair, independent and transparent process giving due recognition to indigenous peoples' laws, traditions and customs.

The UNDRIP also protects the environment of indigenous peoples which have been occupied, used, confiscated and damaged without their free, prior and unforced consent (Article 28); and, cutting away the frills, Article 29 states that indigenous peoples have the right to the conservation and protection of their environment. This raises the pertinent question: Is there a right to a clean environment?[36]

Although the conceptualisation of "clean environment" as an inalienable right has been doubted, the establishment of criteria for the evaluation of state compliance with the obligations stemming from environmental human rights is not an insurmountable political problem by some commentators.

Prior to the promulgation of the UNDRIP, Article 24 of the African Charter on Peoples and Human Rights provides peoples with a right to "a general satisfactory environment favourable to their development". In the **Ogoniland case**, the African Commission on Human and Peoples Rights held, inter alia, that Article 24 of the Charter imposes an obligation on the State to take reasonable steps "to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources".[37] In this case, the Ogoni people of south-eastern Nigeria alleged that the Nigerian government had directly participated in unsustainable oil development practices in Ogoniland in that the state-owned oil company had caused environmental degradation which included widespread contamination of soil, water and air, destruction of houses, burning of crops and killing of farm animals. The African Commission on Human Rights (an organ of the African Union) found that although Nigeria had the right to make use of a natural resource, oil, Nigeria had breached its human rights obligation to Ogoniland because the level of pollution and human degradation was humanly unacceptable and made living in Ogoniland a nightmare.

In **Certain Phosphate Lands in Nauru (Nauru v Australia)**,[38] the International Court of Justice finds, as a principle of general international law, that a State which is responsible for the administration of a territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of the territory. In this case, the Nauruan people argued that the exploitation of certain phosphate lands in Nauru by the British Phosphate Commission constituted a violation, among others, of their right to self-determination and of the obligation "to respect the rights of the Nauruan people to permanent sovereignty over their natural wealth and resources".

Again, Article 11 of San Salvador Protocol to the American Convention on Human Rights provides:

> "1.Everyone shall have a right to live in a healthy environment and to have access to basic public service.
>
> 2.The State Parties shall promote the protection, preservation, and improvement of the environment."

Although there is no provision as to the justiciability of the above provisions in the Protocol, the Inter-American Commission on Human Rights have linked environmental degradation and human rights when deciding cases regarding indigenous peoples' rights.[39]

Even in the European Union, indirect environmental human rights could be gleaned from the Aarhus Convention[40] in spite of the restrictive practice of the European Court of Human Rights based on Articles 8 and 10 of the European Convention for the Protection of Fundamental Rights and Freedoms 1950.[41]

Environmental human rights law has developed through the interaction of state and non-state actors: through the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries – Article 14 (regarding ownership and possession of land) and Article 15 (regarding the right to participate in the use, management, and conservation of natural resources; and through the work of the United Nations Economic and Social Council (ECOSOC) dealing especially with indigenous peoples. Environmental human rights are defined, refined and made more effective by being grounded in national law and in international human rights law.

2.4 Cultural Rights

Several definitions of the term "culture" have been proffered by both international legal scholars and anthropologists. As for the former, culture is perceived as "the accumulated material heritage of humankind in its entirety or of particular groups".[42] From this perspective, culture is viewed as capital that creates rights either for the individual, or the state or humankind. For anthropologists, culture means

> "the totality of the knowledge and practices both intellectual and material, of each of the particular groups of a society, and – at a certain level – of a society itself as a whole. From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, to their relationships and their totality, 'culture."[43]

The right to culture has been "translated" or "re-articulated" or "re-conceptualized"[44] as the right to equal access to the accumulated cultural capital, the right of states to protect national cultures or the right to protect the culture of indigenous peoples.

Prior to the UNDRIP, numerous international human rights instruments were promulgated to protect minorities, notable among which, are

- Article 27 of the International Covenant on Civil and Political Rights 1966
- United Nations Declaration on the Rights of Persons Belonging to National or Ethnic or Linguistic Minorities 1992
- The International Convention on the Elimination of All Forms of Racial Discrimination 1966.

These instruments are ill-equipped to deal with the cultural rights of indigenous peoples because of the substantial difference between indigenous and non-indigenous understandings of culture, the concept of cultural property inscribed in international law and the focus on states rather than peoples as beneficiaries of the protection of cultural objects.[45]

The strategy adopted in Draft of the UNDRIP in the fifth preambular paragraph is to characterize some indigenous peoples which, according to international law, constitute independent members of national communities represented by States as victims of "internal colonialism".

Article 1 of the UNDRIP states that indigenous peoples have the right to full enjoyment of all human rights and fundamental freedoms "recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law"; and Article 2 affirms that indigenous peoples are free and equal to all other "peoples in dignity and rights". Read conjunctively, the individual rights proclaimed in the UN Charter and human rights documents could be exercised as collective rights by indigenous peoples.

Articles 11–16 protect all forms of intellectual production regarded as culture as broadly defined above.[46] The various aspects of culture protected are:

Article 11: past, present and future manifestations of culture such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature

Article 12: spiritual and religious traditions, customs and ceremonies

Article 13: their histories, languages, oral traditions, philosophies, writing systems and literatures

Article 14: educational systems and institutions providing education in their own language

Article 15: cultures, traditions, histories and aspirations reflected in their education and public information

Article 16: the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2.5 Concluding Remarks

The rights of indigenous peoples – discussed above – are collective rights. In the Hohfeldian sense,[47] group or collective rights which are enforceable by national and international tribunals are conferred on indigenous peoples and correlative duties are imposed on individuals, states and transnational corporations not to interfere with those rights. Seen from the point of view of rights recognised in the ICCPR, ICESCR, ACPHR, the Declaration on the Right to Development[48] and other regional instruments such as the European Convention for the Protection of Fundamental Rights and Freedoms 1950 and the San Salvador Protocol to the American Convention on Human Rights 1988, the attention given to the indigenous peoples' right to self-determination, their lands and environment and culture (i.e., the totality of their intellectual production) is adequate.

The right to wealth and natural resources which includes indigenous biogenetic resources and related traditional knowledge is the subject of the next chapter.

3 International Intellectual Property Rights System, Traditional Knowledge and Indigenous Peoples' Rights

3.1 Introduction

The feeding of the world's population which is expected to be 10 billion in 2020[49] could be achieved by genetically engineered crops developed by agrobiotechnology[50] corporations. These corporations, notable amongst which are Hoechst Schering AgrEvo Gmbh (or AgrEvo), Agrigenetics, Cargill Seed, Dupont, Monsanto, Novartis, Pfizer, Pioneer Hi-Breed, Syngenta and Zeneca cultivate genetically engineered crops which ripen faster, mature quickly and last longer than conventional crops. Hybridization introduced a plant breeding technique that is capable of providing more productive varieties but eliminating the possibility of saving or replanting the seed. With hybridization came the commodification of germplasm. The germplasm which contains information and is sometimes the result of millennia of breeding and improvement by indigenous peoples based on traditional knowledge becomes the property of transnational agrobiotechnology corporations.

On the one hand, the agrobiotechnology corporations perceive the acquisition of intellectual property rights in plant genetic resources and transgenic or pharm animals[51] as the only way of recouping vast sums of money spent on research into isolating and exploiting specific genetic characteristics in order to produce stronger pest – and disease – free crops. On the other hand, agrobiotechnology and intellectual property rights undermine the rights of indigenous peoples to their territories, indigenous biogenetic resources and related traditional knowledge.

3.2 Protection of plant genetic resources, traditional knowledge and intellectual property systems

The importance of indigenous peoples for *in situ* conservation of plant genetic resources is recognised by the Convention for Biological Diversity (CBD).[52] The CBD, in its twelfth preambular recital recognises:

> "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."

Article 8 (j) of the CBD requires state parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities…relevant for conservation and sustainable use of biodiversity." Article 15 of the CBD authorises states to limit or place conditions on access to genetic resources. This could be achieved by export ban or licensing. But Article 15 is subject to the discipline of General Agreement for Trade and Tariffs (GATT) and the Agreement on Trade – Related Aspects of Intellectual Property Rights (TRIPS Agreement). The difference between the CBD and the TRIPS agreement is that the former is premised on the preservation of plant genetic resources for agriculture as the heritage of humankind while the latter is based on free-market intellectual property system. Although there was a consensus[53] in WIPO (World Intellectual Property Organization) and TRIPS Council that TRIPS should contain protection for traditional knowledge, culture and folklore, it seems that TRIPS do not recognise collective rights based on culture.

The pertinent question is: What is traditional knowledge? Traditional knowledge of flora and fauna (ethnobotany[54]) and indigenous peoples' knowledge of practices and beliefs concerning animal health (ethnoveterinary medicine[55]) exist across cultures. In view of the pejorative sense in which the term "indigenous peoples" are often used to marginalise these peoples and limit the scope of protection of treaties dealing with indigenous interests, we must state clearly what we mean by "indigenous peoples". "Indigenous peoples" are the original inhabitants of their respective territories before the advent of the European colonizers and their descendants.[56] In any discourse of indigenous peoples, as defined, the term "ethnobotanical knowledge" must be distinguished from "ethnobiological knowledge". While "ethnobotanical knowledge" is defined as the knowledge of ecosystems and their functioning and the study of plants by Western researchers during or after contact with indigenous peoples, "ethnobiological knowledge" is defined as "all indigenous knowledge of the ecosystems historically and/or presently surrounding the indigenous people".[57] For Koning, folklore is inextricably intertwined with ethnobiological knowledge and there are three categories of folklore, viz. "*(i)* [A]rtistic folklore which relates to indigenous works of visual or performing arts such as drawing, sculpture, stories, dances, music and crafts; *(ii)* physical folklore which refers to traditional knowledge of flora, fauna, medical knowledge and techniques of preparing natural substances; and *(iii)* spiritual folklore representing indigenous religions, mythology, superstitions and *customary laws*."[58]

While the first two categories are eligible for intellectual protection, the third category – "spiritual folklore representing indigenous religions, mythology, superstitions and *customary laws*" – is the least explored by Western legal systems. This is due to the core conception or ethnocentric generalisation from Western history which describes a regime of customary laws as either "law improperly so-called" (Austin[59]) of pre-legal (Hart[60]) forced the distinction between tangible and intangible aspects of folklore. And what is more, there is no difference between one religion and another because all religions play the same role and "answer to the given conditions of human existence."[61] For indigenous peoples, biodiversity and ethnobiological knowledge cannot be divorced from culture.

In view of the holistic view of indigenous peoples and the conflicting provisions of international instruments instantiated above, how do we reconcile the international intellectual property right systems with the indigenous biogenetic resources and related traditional knowledge? The four possible models of response proffered by Frabioni and Lenzerini are as follows:

i. the use of mechanism of intellectual property protection;
ii. sharing of benefits arising from the exploitation of indigenous biogenetic resources and traditional knowledge;
iii. exclusion *tout court* of the patentability of indigenous biogenetic resources and related traditional knowledge; and
iv. the use of *sui genesis* system of protection.[62]

To these, we may add the fifth and the sixth models, viz. (v) protection to be rooted in human rights treaties[63] and (vi) a regional solution supervised by a regional agency with authority to institute infringement actions abroad, process request to use folklore and distribute compensation collected for the use of folklore.[64] All the aforementioned models are problematic.

The first model, the use of mechanism of intellectual property protection, is fraught with difficulties. Patent laws protect inventions of all kinds but the invention must be novel, useful and non-obvious. The patentability of micro-organisms[65] and microbiological processes[66] assures that pharmaceutical and agrobiotechnological inventions which include plants and animals are patented. In the **Novartis Case**[67] Pioneer Hi-Breed, a subsidiary of Du Pont, obtained 17 utility patents for its inbred and hybrid corn under the US Patent Code. **Monsanto v Schmeiser**[68] is a neat illustration of the principles that patent protection prevails over the rights of indigenous ancestral lands and that issues of biosafety and co-existence are of low importance. The translocation of the mechanisms of intellectual property that are utilised for non-indigenous-related inventions to indigenous communities is problematic. It is true that traditional knowledge and folklore of indigenous peoples are protected by copyright laws in Ghana[69] and Nigeria.[70] The problem, however, with protecting these items in traditional intellectual property categories such as patent or copyright is the fixation requirement inasmuch as traditional knowledge and folklore are unwritten and the protection based on patent or copyright is limited in time whereas traditional knowledge or folklore could exist for centuries before it is abandoned or forgotten.

The use of trade secrets for the protection of folklore of spiritual significance,[71] fascinating as it is, is of dubious utility. Trade secret laws are territorial and protect against business espionage and disclosure of information by former employees. To constitute misappropriation, it must be shown that the exploiter knew or had reason to know that the piece of folklore is a trade secret.

The second model, the sharing of benefits arising from the exploitation of indigenous biogenetic resources and related knowledge, is inappropriate because of the principled and empirical objections. According to the principled objection, not all indigenous peoples are willing to commodify their traditional biogenetic resources and related traditional knowledge; and the empirical objection is that it is difficult to obtain informed consent from indigenous communities.

The third model or the exclusion *tout court* of the patentability of indigenous biogenetic resources and related traditional knowledge is not a pragmatic answer to the proffered question: how do we reconcile the intellectual property rights system with the indigenous biogenetic resources and related traditional knowledge. In Europe and the United States where big agrobiotechnology corporations are based, patent laws extend to plant genetic resources and objections to patents granted for genetically engineered plants on the grounds that they are contrary to *odre public* or morality have been rejected consistently by the courts.[72] The consensus in the international community is to resolve the tension between intellectual property right system and indigenous biogenetic resources and related traditional knowledge through *sui generis* legislation, the fourth model.

Countries that have ratified the International Convention (Union) for the Protection of New Varieties of Plant (UPOV[73]) of 2 December 1961, as revised at Geneva on 10 November 1972, on 23 October 1978, and 19 March 1991 have used domestic legislation to secure intellectual property rights for indigenous biogenetic resources and traditional knowledge. The Convention contains no enforcement mechanism; individual States are left to enforce their respective regimes within the standards of the Convention. The domestic legislation enacted by North America Free Trade Agreement (NAFTA) states – the Plant Breeder's Act 1990 (Canada), the Anteproyecto de hoy para la Proteccion de Variedades Vegetales en Mexico (APVV) (Mexico), and the Plant Variety Protection Act 1994 (USA) protect individuals or their fictional equivalents – corporations – and not indigenous peoples. As one commentator observes:

> "The UPOV and the resultant domestic laws of the NAFTA states follow a pattern that analysts see in IPR conventions – protection of individuals… [The] UPOV offers no protection to Indigenous Peoples and their landraces [in botany, an ancient or primitive cultivated variety of a crop plant] when such plant genetic resources are used by biotechnicians and breeders to develop high-yielding varieties."[74]

The fifth model – protection rooted in human rights treaties – remains uncertain in spite of the theoretical and moral case posited for human rights to transnational corporations (TNCs).[75]

The genesis of the liability of TNCs under international human rights law is the Universal Declaration of Human Rights 1948 (UDHR) where the preamble states that "every living organ of society" is bound by international human rights provisions. However, international human rights are State centric: only States are charged with the duties to secure human rights for individuals within their jurisdiction. It is true that non-governmental bodies (NGOs) are prohibited under customary international law from committing universal crimes such as piracy, genocide, war crimes and crimes against humanity but the extent of the liability of the NGOs is uncertain.[76] The efficacy of human rights litigation on human rights abuses of transnational corporations is highly questionable. The ICCPR is aptly described as a "toothless tiger"[77] because the United States attached to its ratification five reservations, five understandings and one proviso. There are also formidable hurdles such as the doctrine of *forum non conveniens*[78] (that an appropriate competent court may divest itself of jurisdiction if it appears that the action should proceed in another forum) and the aversion of the judiciary in developed countries to judicial imperialism in the form of refusing to pass judgment on actions within the proper jurisdictions of developing nations.[79]

3.3 What is to be done?

It has been suggested that private codes of conduct promulgated by transnational corporations are socially responsible and bring "more stability and predictability to relations between [TNCs] and developing nations".[80] The problem, however is that these private codes are not enforceable under international law and not justiciable in domestic courts.

The Universal Declaration on the Rights of Indigenous Peoples (UNDRIP) is not a novel instrument for the protection of the rights of indigenous peoples to their biogenetic resources and related traditional knowledge. In fact these rights in their nascent rendition were protected in the Convention for Biodiversity (CBD). Ethnobotany and ethnoveterinary medicine are protected by Articles 11, 18 and 24–25 of the UNDRIP. Article 11 (1) protects the folklores, cultures and technologies of indigenous peoples and Article 13 (1) protects the revitalization, use, development and "transmission to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures…" Traditional knowledge of indigenous peoples and the exploitation of this knowledge are protected by Articles 24 and 25. Article 24 (1) provides:

> "Indigenous peoples have an equal right to their traditional medicines and to maintain their health practices, including the conservation of their health practices including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services."

Again, Article 25 provides:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

3.4 Concluding Remarks

Intellectual property rights systems are unsuited to the protection of traditional knowledge because, for indigenous peoples, traditional knowledge is not associated with commerce but inextricably intertwined with religion and culture; and not because "traditional knowledge" is incapable of precise definition. The enforcement of human rights provisions promulgated in the UNDRIP underpinned by customary laws by regional agencies is the best model for resolving the clash between the intellectual property rights of transnational agrobiotechnology corporations to genetically engineered plants and animals and the rights of indigenous peoples to their lands, traditional knowledge and culture. Since, as Unger reminds us, "every society reveals through its laws the innermost secrets of the manner it keeps men together" and "the conflicts amongst kinds of law reflect different human groups",[81] the recognition of customary law as an important element in defining and protecting "traditional knowledge" as defined,[82] is mandatory in enforcing the rights of indigenous peoples under human rights treaties.

4 The Right to Development of Indigenous Peoples

4.1 Introduction

It is an incontrovertible fact that the right to development of indigenous peoples is hindered by poverty. The pertinent question, however, is: Is poverty a violation of human rights?

Article 1 of the Universal Declaration of Human Rights 1948 provides: "All human being are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood." In this Article it is posited that human dignity is the foundation stone of human rights and, by implication, poverty is incompatible with human rights. Again, the Vienna Declaration of the 1993 Conference on Human Rights observed that the "existence of widespread extreme poverty inhibits the full enjoyment of human rights and that extreme poverty and social exclusion constitute a violation of human rights".[83]

It is estimated that each day some 50,000 human beings – mostly children in developing countries – die from starvation, diarrhoea, pneumonia, tuberculosis, malaria, measles, perinatal conditions and other related poverty causes.[84] According to the World Health Organization, 2,735 million people constituting 44 per cent of the world's population are living below the international poverty line, consume 1.3 per cent of the global product and need just 1 per cent more to escape poverty. By contrast, the high income countries with 955 million citizens have about 81 per cent of the global product.[85]

In **World Poverty and Human Rights**, Pogge poses the following questions:

1. How can severe poverty of half humankind continue despite enormous economic and technological progress and despite the enlightened moral norms and values of our heavily dominant western civilization?
2. Why do citizens of affluent Western states not find it morally troubling, at least, that a world heavily dominated by us and our values gives such very deficient and inferior starting positions and opportunities to so many people?"[86]

Pogge argues that Marx's historical materialism – that dominant conceptions of justice are shaped by dominant group's shared interest – is a rather too neat account of causal factor. Historical materialism, he contends, is "too thin a theory to explain all the changes in moral norms and values, or even justify the major historical shifts.[87] Opponents of the claim upon the rich to compensate or assist developing countries to eradicate poverty argue that a project of egalitarian redistribution of wealth to end the poverty of 2,800 million human beings would sap arts and culture in the West and the capacity to achieve social justice.

The term "poverty" is defined by Amartya Sen in **Development as Freedom** as the lack of substantial freedoms: "freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illness, or the opportunity to be adequately clothed or sheltered, or to enjoy clean water or sanitary facilities."[88] Sen defines "development" as "the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states."[89]

4.2 Sen's Capability Thesis

Sen, drawing from Aristotle's focus on "flourishing" and "capacity" in **The Nicomachean Ethics**[90] which relates to quality of life and substantial freedoms and Adam Smith's championing of "sympathy" and "prudence" in **The Theory of Moral Sentiments**[91] in advocating restrictions in economic fields in which nonmarket institutions will be needed to supplement what the markets can do,[92] argues that poverty is a deprivation of basic capabilities. Sen contends that without substantial freedom and capability to do something, a person cannot be responsible for doing it.[93] He, therefore, poses the rhetorical question: Do democracy and basic political and civil rights help to promote the process of development? In answering this question, Sen observes that no famine has ever taken place in a functioning democracy whether economically rich as in contemporary Western Europe or North America or relatively poor such as post-independence India (note that India is now the ninth richest country in the world) or Botswana or Zimbabwe. He asserts that famines have tended to occur in colonial territories governed by rulers from elsewhere as in Ireland when administered by the alienated English rulers or in one-party states (the Ukraine in the1930s, China during 1958–61 and Cambodia in the late 1970s) or in military dictatorships (Ethiopia, Somalia, Sahel countries,[94] North Korea and Sudan).[95] He therefore concludes that democracy and civil and political rights can have a major role in providing incentives and information in the solution of acute economic needs, namely, poverty.

The opposition to Sen's capability thesis based on democracy and civil and political freedoms comes from three sources. The first is the Lee Kuan Yew thesis (named after Mr. Lee Kuan Yew, the former Prime Minister of Singapore) that civil and political freedoms hamper economic growth. The second is that if the poor are given the choice between having political freedoms and fulfilling economic needs, they will choose the latter. The third is that the emphasis on democracy and political freedoms is a "Western" priority which is alien to Asian values which are based on order, discipline and loyalty rather than on liberty and freedom.

4.3 The Declaration on the Right to Development: An Overview

The debate on the right to development took place in 1977. The arguments against the right to development are as follows:

1. *Quantifiability:* Opponents argue that many or most of the human rights concerns are incapable of being quantified effectively and factored into the development equation – "development" as succinctly defined by Sen above.
2. *Justiciability:* The argument is that the right is not justiciable and thus not appropriate to be considered as human right.
3. *Philosophical incompatibility:* Proponents of this argument contend that the nature of the right makes it incompatible with the philosophy underlying the existing body of international human rights law, that is natural rights theories. This position will be assessed later in this excursus.

4. *Incongruency:* Some reject the notion of social and economic rights as incongruent with free markets. This is a neoliberal position.[96]
5. *The Avalanche Argument* is that the whole concept and phraseology of the right to development will trigger an avalanche. In the words of Cassese (the chief exponent):

> "[It is] unrealistic to think [that] at this juncture the whole diplomatic action instituted by developing and socialist states might be given a different turn. Such diplomatic waves are like avalanches, and an attempt to divert their course might be counterproductive."[97]

Proponents of the right to development argue:

> "[T]he right to development does little more than synthesize various strands of existing international law and emerging international policy which have hitherto been artificially compartmentalized into separate domains of human rights on the one hand and development on the other."[98]

Arguably, the genesis of the right to development is Article 1 (2) of the International Covenant on Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which states:

> "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

Although Article 1 (2) of the ICCPR and ICESCR is often described as the economic aspect of the right to self-determination, the right espoused in Article 1 (2) is *stricto sensu* the nascent right to development which is reaffirmed in Article 47 of the ICCPR and Article 25 of the ICESCR which states that "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their mutual wealth and resources."

The right to development was first proclaimed in Article 1 of the Declaration of the Right to Development 1986 (DRD)[99] as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political developments in which all human rights and fundamental freedoms are fully realized." In spite of the opposition of some states for the reasons stated above,[100] a consensus was reached at the UN World Conference on Human Rights in 1993[101] and the Vienna Declaration and Programme of Action reaffirmed the right to development as a "universal and inalienable right and an integral part of fundamental human rights".[102]

Article 1 of the DRD is an extension of natural rights theories: it protects not only economic, social and cultural rights but also the right to development. Articles 2, 3 and 4 of the DRD are hortatory and variously exhorts States "to formulate appropriate national development policies aimed at the constant well-being of the entire population and of all individuals"; create national and international conditions conducive to the realization of the right to development; and "take steps, individually and collectively, to formulate international development policies. Article 6 of the DRD removes the distinction between civil and political rights which, hitherto, were binding and economic, social and cultural rights which, hitherto, were aspirational (and not binding). Article 6 (2) of the DRD simply states:

> "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights."

Article 8 of the DRD is an endorsement of Rawls's two principles of justice as fairness derived from the original position.[103] Article 8 (1) provides for "equal opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income" and adopts a position akin to Rawls's difference principle that States embark on appropriate economic and social reforms to eradicate social injustices.

Article 10 states:

> "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at national and international levels."

While Articles 8 and 10 pave the way for rich states to compensate and assist poor indigenous peoples who are affected or likely to be affected by global climate change, there are problems with global justice. These problems will be discussed under the right to development as incorporated into the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) and global justice, and to these we now turn.

4.4 The Right to Development in UNDRIP and Global Justice

In two preambular statements the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) recognise not only the inherent rights of indigenous peoples which derive from their political, economic and social structures and their cultures, spiritual traditions, histories and philosophies – especially their rights to their land territories and resources – but also affirmed the urgency of respecting the characteristics and promoting their development in accordance with their aspiration and needs.

While Article 1 (2) of the ICCPR and the ICESCR and Article 1 of the DRD guarantee the economic rights of indigenous peoples, Articles 21 and 26 of the UNDRIP protect the rights of indigenous people to maintain their own economic system and secure the means for their development and subsistence. Article 23 of UNDRIP protects the indigenous peoples' right "to determine and develop priorities and strategies for exercising their right to development."

The autonomy of indigenous peoples to pursue economic activities including those relating to the management of land and resources is recognised in Article 31 of the UNDRIP. Their right to obtain adequate financial and technical assistance for the pursuit of economic activities is protected in Articles 22 and 38. The ICCPR, the ICESCR, and the UNDRIP and the hortatory sections 3, 4, 8 and 10 of the Declaration on the Right to Development 1986 vest on indigenous peoples the right to development and impose a correlative duty, in the Hohfeldian sense, on states to create favourable conditions nationally and internationally favourable to the indigenous peoples' realization of the right to development, and this raises issues of global justice. The pertinent question is: What is global justice?

Global justice is traceable to the beginnings of civilisation and has been variously described as "international justice", "international ethics", and "the law of nations".[104] In view of the fact that most salient inequalities are not within states but between states, philosophers have shifted their focus from 'What is distribution within a State?' to 'What is a just distribution globally?' Global justice addresses not only poverty which, according to Pogge, has overtaken war as the greatest source of avoidable human misery[105] but also global climate change (and attendant environmental problems) in conjunction with global economic problems.

Caney, and MacAdam and others[106] argue that the ill effects of global climate change will be felt predominantly by the poor as climate change will result in the rise of sea levels which will, in turn, adversely affect the inhabitants of Bangladesh who are vulnerable to flooding and some island states such as Tonga, the Marshall Islands, Antiqua, Maldives, Tuvalu and Kiributi which could be submerged totally. Global climate change raises questions of distributive justice, that is, questions concerning the distribution of environmental burdens and benefits. It also raises questions of intergenerational justice, that is, granting rights to future generations, the objections to granting such rights and the adaptation of domestic principles of distributive justice to global environmental problems we face.

There are several objections to granting rights to future generations. The first is the non-existence challenge: that future generations do not yet exist and could not have rights. The other is one of causation: whether present actions can have an impact in the future; and the third is that future people cannot have interests today.[107] The reply to the first objection is simple: barring a nuclear holocaust, there is a strong overwhelming presumption that there will be future people who will have fundamental interests and therefore fundamental rights. These future people will have, as we are reminded by Caney,[108] same interests as us: interests of not dying from heat-stress, not dying because of water shortage and of not having their islands totally submerged because of global change caused by the damage we are inflicting on the eco-system. On causation, the harmful acts of present generation is like a time-bomb ticking and primed to explode in the future. Hence, both the **factual** causation and the **legal** causation or legal attribution of harm to future generations are present.[109]

The adaptation of domestic principles of distributive justice to global justice must now be breached. It has been suggested that Rawls's position could be developed to address problems of global justice. This suggestion, as we shall see bristles with practical problems as we can gather from a critical analysis of Rawls' theory of justice as fairness in **A Theory of Justice**,[110] **Political Liberalism**[111] and **The Law of Peoples**.[112]

The purpose of Rawls's **A Theory of Justice** and **Political Liberalism** is to show how a liberal society might be possible and that of **The Law of Peoples** is to show how a World Society of liberal and non-liberal (but decent) peoples might be possible.[113] (Rawls chose "peoples" rather than "states" in his reflections because liberal democratic and decent peoples are actors in the World Society of Peoples just as citizens are the actors in domestic society.[114]) In **The Law of Peoples**, Rawls applies the original position – the second time – to the international sphere, that is, to a world Society of Peoples comprising well-ordered societies; liberal societies and hierarchical (or decent) societies. Rawls suggests that the liberal rights affirmed in the first principle of distributive justice should be regarded as human rights enforceable in liberal and non-liberal (but decent) societies. Rawls's second principle of distributive justice, the difference principle, applicable within different societies but not among them drops out of the picture because a world government is not feasible. Rawls, like Kant, felt that a world government to enforce such a principle would either be "a global despotism" or "a fragile enterprise torn by frequent civil strife as various regions and peoples tried to gain their political autonomy".[115] So Rawls's difference principle is not global in its reach. And yet, **The Law of Peoples** was designed to address problems that arise in the contemporary globalized world such as unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, and to enunciate principles of foreign policy for well-ordered societies, that is, liberal and non-liberal but decent societies.[116]

Some critics such at Beitz, Pogge and Buchanan argue that for the same reason that parties agree to the difference principle in the original position, the global principle of justice should be the difference principle. For Pogge and Buchanan, the global basic structure comprises regional and international agreements such as GATT, WTO, NAFTA and the various EU treaties including IMF, World Bank and various treaties governing currency exchange mechanism. They further argue that there is an increasing global system of private property rights including intellectual property rights spreading across the globe and the difference principle should apply at the global level.[117]

Arguing along the same lines, Beitz contends that:

> "The growth of the world economy…and the elaboration of global financial and regulatory regimes only strengthen the impression of an evolving global structure with consequences for individual life prospects whose scale and character are analogous to those of institutional structure of domestic society."[118]

Beitz's position embodies two levels of international society: the domestic and international levels. While the domestic (i.e., the state) level societies have primary responsibility for their people, the international level establishes and maintains background conditions applicable to state-level societies.[119] Beitz's position is presumptuous, ethnocentric and overlooks the principle of autochthony which ordains that the legal and constitutional system of each sovereign state must be autochthonous, that is, indigenous to the state, home-grown and home-bred. As Hill stated:

> "Individuals are embedded in cultures and often clearly identify themselves and their ground projects in terms intelligible only in their cultural contexts… The various cultures, and subcultures, are not equal in power, and throughout history powerful groups have tended to persecute, exploit and try to dominate weaker groups, sometimes with open enmity but often in the name of *universal ideals*… The almost universal tendency to bias and the frequent moral imperialism of dominant groups understandably lead to suspicion about the objectivity of cross-cultural judgments, especially the judgments of the relatively privileged."[120]

Hill's observation highlights the EuroAmericocentric[121] nature of the 'universal values' canvassed by cosmopolitan theorists such as Beitz, Pogge and Buchanan. The suggestion of these cosmopolitan theorists that the institutions such as GATT, WTO, NAFTA, EU treaties, alluded to as the global basic structure, be regarded as integral part of Rawls's World Society of Peoples and that the difference principle should apply, bristles with a practical problem: the absence of a world government, that is, a unified political regime with *legal powers* normally exercised by central governments.

It is true that Rawls's **The Law of Peoples** does not match the sophisticated treatment of economic justice in **A Theory of Justice**[122] or proffer a theory of environmental justice. The fact remains that Rawls postulates a set of human rights principles such as principle of self-determination, non-intervention, the principle that treaties are to be kept, rules of *ius in bello* and "the duty to assist peoples living under unfavourable conditions that prevent them having a just and decent social regime".[123]

Since Rawls's thesis lacks a theory of environmental justice, an attempt by Mathias Risse[124] to construct a theory of justice based on collective ownership of the earth is an old way of thinking in moral and political philosophy attributable to seventeenth-century philosophers such as Hugo Grotius, Samuel Pufendorf, John Locke and others who regard the earth as the common heritage of humankind. The view that God had given the earth to humankind is applied in international law to the high seas, the ocean floor, Antarctica and outer space. However, the conception of collective ownership of the earth clashes with rival concepts such as joint ownership[125] which violates the autonomy of one joint owner by requesting the consent of the other joint owner or owners; and equal division[126] which requires a heap of resources to be divided in equal parts. The problem with equal division is the assignability of values to original resources.

Risse's resuscitated conception of collective ownership of earth as a ground of justice is displaced by the right of sovereign states over resources within their territories and the doctrine of eminent domain, that is, the inherent powers of a government entity to take privately owned land and convert it to public use subject to reasonable compensation.

Since Rawls's difference principle is not global in its reach and the concept of collective ownership of the earth as a ground of justice is displaced by the right of sovereign states over resources in their territories and the doctrine of eminent domain, the pertinent question is: how do we propound a conception of justice underpinning the right to development?

Alston suggests that the philosophical foundation of the right to development "cannot be confined exclusively to some conveniently Western natural law theories, but are to be found in a more diverse, pluralistic set of justifications."[127] One pluralistic form of justification is Rawls's idea of overlapping consensus. In **Political Liberalism**,[128] Rawls tackles the problem of stability and justice in an everchanging and multicultural society. "How", Rawls inquires, "is it possible that there may exist over a time a stable and just society of fee and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[129] For a society to be stable and just, Rawls introduces the idea of public reason, reasonable pluralism and *overlapping consensus* that includes all opposing philosophical and religious doctrines likely to persist.[130] But that is not all. In his last book, **The Law of Peoples**,[131] Rawls uses the idea of the "original position" a second time with the parties now understood to be representative of peoples to show how a World Society of liberal and nonliberal (but decent) peoples might be possible.[132]

Although Rawls is averse to the adaptation of the difference principle at a global level for lack of a world government to enforce this principle, any adaption of overlapping consensus is equally fraught with insurmountable problems. The first problem with Rawls's idea of overlapping consensus is that it is not supported by empirical evidence. The second problem is that Rawls's other perplexing question – "how is a just and free society possible under deep doctrinal conflict with no prospect of resolution?"[133] – remains unanswered as Hill observes in this illuminating passage:

> "Many, if not most people in our society, I suspect, do not have any commitment to comprehensive moral, religious or political doctrines. Perhaps a majority can name a religious affiliation, but this does not mean that they understand and use the doctrines with which they associate themselves. Many people seem to be doctrineless ethical pluralists, with diverse opinions on particular matters but no 'theory'."[134]

The most problematic aspect of Rawls's position in **The Law of Peoples** is the projected translocation of Western liberalism to non-Western but decent societies. S.P. Huntington, in his seminal work, argues that "[t]he philosophical assumptions, underlying values, social relations, customs, and overall outlooks on life differ significantly among civilizations."[135] In other words, there is a clash of civilizations and cultures. For the above reasons, the Rawlsian paradigm is inapt for a conception of global justice. What is required is a monist-naturalist conception of justice where the norms of municipal and international legal orders are not derived from the same Grundnorm as in Kelsen's pure theory of law[136] but one which privileges human dignity as one of its guiding principles. This conception of justice recognises the difference between cultures and civilizations. In his polemical writings, Hill contends that we live in a world where interests are diverse and often conflicting and human beings are worthy of respect "regardless of how their values differ and whether or not we disapprove of what they do".[137] He identifies four basic attitudes for human dignity in a multi-cultural world: (i) that people in different cultures have different legal systems, interpersonal relationships, tastes, preferences and aspirations; (ii) that people identify themselves and their projects in a cultural context; (iii) that there is a tendency towards ethnocentricity on cross-cultural issues, and (iv) the cultures and sub-cultures are unequal.[138]

4.5 Conclusion

Mindful of the four basic attitudes to human dignity described above, the right to development analysed above must be underpinned by a monist-naturalist conception of justice which upholds human dignity as one of its guiding principles. That such a conception of justice which underpins the Council of Europe Convention on Human Rights and Biomedicine1997, a regional instrument, could be adopted globally is incontrovertible.[139]

A monist-naturalist conception of justice upholding human dignity as one of its guiding principles prevents indigenous peoples being used instrumentally and prevents powerful groups from dominating and imposing their ideas on weaker groups in the name of universal values while underpinning the right to development.

5 Conclusion

The book is constructed around the development of indigenous peoples' rights in international law. Its main thesis is that the United Nations Declaration on the Rights of Indigenous Peoples is a redeployment of right to self-determination developed in the mid-twentieth century in the ILO Convention no. 107 of 1957, ICCPR 1966, ICESCR 1966 and culminating in the Declaration on the Right to Development 1986.

We note the misconceptions and misapprehensions in dealing with indigenous peoples' rights:

1. that the right to self-determination applies to the populations of territories that are under conditions of classical colonialism;
2. that the term "indigenous peoples" is incapable of precise definition;
3. that the customary laws of indigenous peoples which underpin their lands, culture, biogenetic resources and related traditional knowledge and folklore are not laws properly so-called;
4. that the biogenetic resources of indigenous peoples and related traditional knowledge and folklore could not be protected under intellectual property rights system and international human rights law;
5. that there is no right to a clean environment; and
6. the non-existence of the right of future generations of inhabitants of island states (who are indigenous peoples) not to be adversely affected by flooding or submerged totally because of climate change caused by the present generation.

A jurisprudential analysis of peoples' right to self-determination in Chapter 2 shows conclusively that international law recognises not only "peoples" as defined[140] but also the two aspects of self-determination: external self-determination (for colonial peoples and ceases to exist once it is implemented) and internal self-determination (an ongoing right of people to choose its own economic and political regime).[141] The objection that individual rights clash with collective rights of indigenous people is rebutted by the robust argument that the Rawlsian and Dworkinian conceptions of justice[142] show that individual rights are not incongruous with collective or communal rights. As a matter of fact, we need a strong community with strong moral values in order to protect individual rights.

The protection of the rights of future generations and the biogenetic resources and related traditional knowledge and folklore of indigenous peoples raises issues of global justice which are broached in Chapters 3 and 4. It is true that global justice in the sense of applying Rawls's difference principle is not feasible because of the absence of a world government to enforce such a principle. The fact remains that there are ethics of international relations governing liberal and non-liberal (but decent) societies – two of the eight principles enunciated by Rawls in **The Law of Peoples**,[143] viz., "[p]eoples are to obey treaties and undertakings" (Principle 2) and "[p]eoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political regime" (Principle 8) are relevant when we discuss the right to development or the environmental human rights of indigenous peoples promulgated in the UNDRIP.

Reconciling the intellectual property rights of agrobiotechnology transnational corporations to plant genetic resources and transgenic animals with the rights of indigenous peoples to their biogenetic resources and related traditional knowledge and folklore is not an insurmountable problem in spite of the fixation requirements of patent and copyrights and the fact that traditional knowledge and folklore are not associated with commerce but are inextricably intertwined with religion and culture. A defensible model for for resolving the clash between the intellectual property rights of transnational agrobiotechnology corporations to genetically engineered plants and animals and the right of indigenous peoples to their lands, traditional knowledge and culture is the enforcement of human rights promulgated in the UNDRIP underpinned by customary laws by regional agencies.

The rights promulgated under UNDRIP are justiciable rights which, in the Hohfeldian sense, impose duties on individuals, States, nongovernmental organizations and transnational corporations. We cannot predict how domestic and international tribunals and regional agencies will interpret the provisions of the UNDRIP, but one thing is certain: that domestic and international tribunals will, henceforth, take cognisance of indigenous peoples' rights and enforce them.

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7 Appendix A

Declaration On The Right To Development[144]

General Assembly Res. 41/28 (1986)

"The General Assembly,

…

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such as manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

…

Article 6

…

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

…

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

…

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels" (Steiner, Alston and Goodman 2008: 1443–4).

8 Appendix B

United Nations A/RES/61/295

General Assembly Distr.: General
2 October 2007

Sixty-first session
Agenda item 68

Resolution adopted by the General Assembly

[without reference to a Main Committee ((*A/61/L.67 and Add. 1*)]

61/295. **United Nations Declaration on the Rights of Indigenous Peoples**

The General Assembly.

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[145] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2005, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights,[146] as well as the Vienna Declaration and Programme of Action,[147] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[148] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:

    a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
    b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
    c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
    d) Any form of forced assimilation or integration;
    e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and theatre.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, to a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education,. or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned though their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes though their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without discrimination, to all social and health services.
2. Indigenous peoples have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not a take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine their structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals in their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right of access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

9 Endnotes

1. S. James Anaya, **Indigenous Peoples in International Law** (Oxford: Oxford University Press, 2005), 3.
2. John M. MacKenzie (ed.); **Peoples, Nations and Cultures; An A–Z of Peoples of the World, Past and Present** (London: Wiedenfeld and Nicolson, 2005), 16–17.
3. Mark Hanning, 'An Examination of the Possibility of Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties' (1996) 13 *Arizona Journal of International and Comparative Law* 175–252, at 178.
4. de las Casas, **Short Account of the Destruction of the Indies**, ed. Nigel Griffin (London: Penguin, 1999) (Andrée Collard ed. and trans, 1971).
5. Hugo Grotius, **The Freedom of the Seas**, trans. Of 1633 edn. by Ralph van Deinan Magoffin, Carnegie Endowment for International Peace edition (New York: Oxford University Press, 1916).
6. Emerich de Vattel, **The Law of Nations or The Principles of Natural Law**, 1759 edn., trans. and ed. by Charles Fenwick, Classics of International Law series (Washington D.C. Carnegie Institution of Washington, 1916), 12.
7. The Declaration of the Independence of the United States proclaimed that governments derive "their just powers from the consent of the governed" and that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it."

8. D. Thürer and T. Burri, 'Self-Determination" (2012), *Max Planck Encyclopaedia of Public International Law* 1–7; available at www.pepil.com
9. I.G. Shivji, 'The Rights of People to Self-Determination: An African Perspective' in William Twining (ed.), **Issues of Self-Determination** (Aberdeen: Aberdeen University Press, 1991), 34.
10. See Articles 1 (2), 55 and 73 of the UN Charter.
11. ILO Convention 169, available at www.ilo.org
12. Convention on Biological Diversity, available at www.cbd.int
13. Secretariat of the Convention on Biological Diversity, **Cartagena Protocol on Biosafety to the Convention on Biological Diversity: Text and Annexes**, World Trade Centre (2000).
14. See the Text of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, available at http://bch.cbd.int/protocol/NKL_text.shtml
15. UNDRIP, available at www.un.org
16. See UNGA Res 61/295, adopted on 13 September 2007, by 143 votes in favour, 4 against.
17. Supra, note 15.
18. UDHR, available at www.un.org
19. "Ethnobotany" is the traditional knowledge of plants and "ethnoveterinary medicine" is people's knowledge of practices and beliefs concerning animal health which exists across cultures and over time and space.
20. Supra, note 15.
21. Resolution 1589 (1) of 21 May 1971 of the Economic and Social Council; emphasis added.
22. R. Dworkin, **Sovereign Virtue: The Theory and Practice of Equality** (Cambridge Mass.: Harvard University Press, 2000), 211–212.
23. Antonio Cassese, **Self-Determination of Peoples: A Legal Reappraisal** (Cambridge: Cambridge University Press, 1998), 101.
24. See also the Universal Declaration on the Rights of Peoples 1976 (the Algiers Declaration) and the American Declaration of Rights and Duties of Man promulgated by the Organization of American States.
25. (1975) ICJ Rep. 12, para. 36
26. (1971) ICJ Rep. 16, para. 52
27. (1986) ICJ Rep. 554, para. 25.
28. (1992) ICJ Rep. 240.
29. (1995) ICJ Rep. 90.
30. (2010) ICJ Rep. 403.
31. Ibid., para. 49.
32. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations ("Declaration on Friendly Relations") states, inter alia:

    > "Every State has the duty to promote, through just and separate action, realization of the principles of equal right and self-determination of peoples…"
33. Antonio Cassese, **Self-Determination of Peoples: A Legal Appraisal** (Cambridge: Cambridge University Press, 1998), 120–121.
34. (2010) ICJ Rep. 523–617, especially para. 184.

35. See Catherine Redgwell, "Biotechnology, Biodiversity and Sustainable Development: Conflict or Consequence?" in Francisco Francioni and Tullio Scovazi (eds.) **Biotechnology and International Law** (Oxford: Hart Publishing, 2006), 63.
36. See, for example, Günther Hendl, "Human Rights and the Protection of the Environment" in Asbjørn Eide, Catrina Franse and Allen Ross (eds.), **Economic, Special and Cultural Rights: A Textbook**, 2nd edn. (Dordrecht: Martinus Publishing, 2001), 303-328.
37. **The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria**, ACHPR, No. 155/96 (2002) paras 52–53 [**'SERAC v Nigeria**].
38. (1992) ICJ Rep. 240.
39. See **Yanomani Indians v Brazil**, IA Comm HR Res 12/85 (5th March 1985) where the Inter-American Commission held that the construction of a road through the applicants' traditional lands violated their right to life and the right to health.
40. 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' done at Aarhus, Denmark on 25 June 1998 available at http://www.unece.org/env/pp/documents/cep43e.pdf
41. See **Lopez Ostra v Spain** (1994) 20 EHRR 27. Contrast **X and Y v Federal Republic of Germany**, 15 DR 161 (1976) and **Powell and Rayner v United Kingdom** (1990) 12 EHRR 355.
42. Alexandra Xanthaki, **Indigenous Rights and United Nations Standards** (Cambridge: Cambridge University Press, 2007), 204.
43. Lyndel V. Pratt, "Cultural Rights as Peoples' Right in International Law" in James Crawford (ed.), **The Rights of Peoples** (Oxford: Clarendon Press, 1988).

44. David Morley and Kuan-Hsing Chen (eds.), **Stuart Hall: Critical Dialogues in Cultural Studies** (London: Routledge, 1996), 393.
45. Alexandra Xanthaki, op cit., 204.
46. Supra, note 43.
47. Wesley Newcomb Hohfeld (1879–1918) in his **Fundamental Legal Conception as Applied in Judicial Reasoning**, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1966), pointed out the correlation of "right" and "duty". To say that a person has a "right" is to imply that there is a "duty" on another person not to interfere with that right.
48. The right to development is discussed in Chapter 4.
49. United Nations Population Fund, **The State of the World** (2009), 25.
50. "Agrobiotechnology" is defined as "the application of new and promising scientific processes and techniques in the field of biotechnology to crop germplasm and the novel use of plants, animals and microorganisms for the improvement of crops and livestock in terms of yield and quality" (see Mary E. Foster, "Agricultural Biotechnology, Food Security and Human Rights" in Franciso Francioni and Tullio Scovazi (eds.), **Biotechnology and International Law** (Oxford: Hart Publishing, 2006), 259).
51. Transgenic or pharm animals are animals (such as transgenic pigs) genetically engineered by introducing human genes into the animals so that in case of transgenic pigs they can harvest their organs for transplantation into human body (see Mae-Wan HO, **Genetic Engineering – Dream or Nightmare? The Brave New World of Bad Science and Big Business** (Bath: Gateway Books, 1988, 182.
52. Available at http://www.cbd.int/convention/text
53. See Thomas Cottier, "The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations on World Trade Law" (1998) 1 *Journal of International Economic Law* 555, 581–84.
54. Steven A. Newmaster and S. Ragupathy, "Ethnobotany genomics – a discovery and innovation in a new era of exploratory research" (2010) 6 (2) *Journal of Ethnobiology and Ethnomedicine* 1–11 defined ethnobotany as "the scientific study of the relationships that exist between people and plants".
55. See Maine V.A. Confessor, Livia E.T. Mendança, José Movrão and Rõmulo R.N. Alvis, "Animals to heal animals: ethnoveterinary practices in semiarid region, Northeastern Brazil", *Journal of Ethnobiology and Ethnomedicine*, 2009, **5**: 37.
56. Mark Hanning, "An Examination of the Possibility of Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties" (1996) 13 *Arizona Journal of International and Comparative Law* 175–252, at 178.
57. Martin de Koning, "Biodiversity Prospecting and the Equitable Remuneration of Ethnobiological Knowledge: Reconciling Industry and Indigenous Interests" (1998) 12 *Intellectual Property Journal* 261 at 264.
58. Ibid., 275.
59. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfred E. Rumble (Cambridge, Cambridge University Press, 1996), 10.
60. H.L.A. Hart, *The Concept of Law*, 2nd edn., ed. P.A. Bullock and J. Raz (Oxford: Clarendon Press, 1994), 94.
61. Émile Durkheim, **The Elementary Forms of Religious Life**, trans. Joseph Ward Swain (London: George Allen & Unwin, 1971), 3.

62. Maurizo Frabioni and Federico Lenzerini, "Indigenous Peoples' Rights, Biogenetic Resources and Traditional Knowledge: The Case of Sateré-Mawé People" in Francisco Francioni and Tullio Scovazi, **Biotechnology and International Law** (Oxford: Hart Publishing, 2006), 341–366, esp. 350–354.
63. Mitsuo Matsushita, Thomas J. Shoenbaum and Petros. C. Mavroidis, **The World Trade Organization: Law, Practice, and Policy**, 2nd edn. (Oxford: Oxford University Press, 2006), 712.
64. Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States" (1999) 48 *American University Law Review* 769–849.
65. **Diamond v Chakrabaty**, 477 US 303.
66. **OncoMouse** [1989] OJEPO 451 (Exam); [1990] OJEPO 476, 490 (TBA); [1991] EPOR 525 (Exam). In this case, an experimental animal which was developed for the study of breast cancer was patented.
67. **Novartis/Transgenic plant** (T1054/96) [1999] EPOR 123 (EPO) discussed in Mark Shillito, "Patenting genetically engineered plants" (2002) 24 (6) EIPR 333–336.
68. (2004) 1 SCR 902 (Supreme Court of Canada).
69. See Copyright Law (Ghana), s.53 (21 March 1985), as quoted in Paul Kuruk, supra n.16, 778.
70. See Copyright Decree (Nigeria), s.28 (5) (19 December 1988), as quoted in Paul Kuruk, supra n.16, 778.
71. Supra, n.58.
72. See **Greenpeace UK v Plant Genetic System** (1993) 24 *International Review of Industrial Property and Copyright* 618 and **Novartis/Transgenic plants**, supra n.67.
73. "UPOV" stands for the French acronym *Union pour la Protection des Obtentions Végétales* (International Union for the Protection of New Varieties of Plants.
74. Mark Hanning, "An Examination of the Possibility to Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of NAFTA States: Domestic Legislation Under the International Convention for the Protection of New Plant Varieties" (1996) 13 |*Arizona Journal of International and Comparative Law* 175 at 250–51.
75. Peter T. Muchlinski, **Multinational Enterprises & Law** (Oxford: Oxford University Press, 2007), 282.
76. Sarah Joseph, **Corporations and Transnational Human Rights Litigation** (Oxford: Hart Publishing, 2004), 6.
77. Kirsten D.A. Carpenter, "The International Covenant on Civil and Political Rights: A Toothless Tiger?" (2000) 26 *North Carolina Journal of International Law and Commercial Litigations* 1–55.
78. See **Wiwa v Royal Dutch Petroleum**, 226 F 3d 88 (2d Circ 2000); 96 Civ 9386, 2002 US Dist LEXIX 3293 (SDNY 2002) where the plaintiffs who are members of the Ogoni tribe of Nigeria under the Aliens Tort Claims Act sued the Royal Dutch Shell Company (Shell) in the Southern District of New York for their involvement in the arrest, torture and execution of Mr. Saro-Wiwa and eight other Ogoni leaders who protested against widespread environmental damage caused by oil and gas extraction and transport. The case dismissed on *forum non conveniens* grounds was settled out of court. For an intellectually stimulating discussion of the case, see Saman Zia-Zarifi, "Suing Multinational Corporations in the US for Violating International Law" (1999) 4 *UCLA Journal of International Law and Foreign Affairs* 81–147, esp. 94–96. See, also, **In re Union Carbide Corp Gas Plant Disaster at Bhopal**, 634 F Supp 842 (SDNY 1986) 850–51; aff'd 809 F 2d 195 (2d Cir 1987) which concerned litigation arising out of a catastrophic industrial accident in Bhopal, India. Kennan J. noted that India was the proper forum as "India had a very strong interest in the aftermath of the accident which affected its own citizens on its own soil."

79. **Union Carbide Bhopal**, supra note 78.
80. Mark B. Baker, "Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?" (1993) 4 *University of Miami Inter-American Law Review* 339–433, at 432.
81. R.M. Unger, **Law in Modern Society: Toward a Criticism of Social Theory** (New York: The Free Press, 1975), 47.
82. Supra, notes 54, 55 and 58.
83. P. Alston, "Ships Passing in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of the Millenium Debate Goals" (2005) 27 *Human Rights Quarterly*, 755 at 786.
84. T. Pogge, **World Poverty and Human Rights** (Cambridge: Polity, 2007), 2.
85. T. Pogge, "World Poverty and Human Rights" (Symposium) (2005) 19 (1) *Ethics and International Affairs* 1–7, at 1.
86. Supra, note 84, at 3.
87. Ibid., 3.
88. A. Sen, **Development as Freedom** (Oxford: Oxford University Press, 1999), 4.
89. Ibid., 3.
90. Aristotle, **The Nichomachean Ethics**, translated by D. Ross (Oxford: Oxford University Press, revised edn., 1980), book1, section 5, p. 7.
91. Adam Smith, **The Theory of Moral Sentiments** (1759); revised edn. 1790; republished, edited by D.D. Raphael and A.L. Macfie (Oxford: Oxford University Press, 1976).
92. A. Sen, **On Ethics and Economics** (Oxford: Blackwell, 1988), 22–23.

93. A. Sen, **Development as Freedom** (Oxford: Oxford University Press, 1999), 284. For an illuminating discussion of Sen's capability thesis, see P. Vizard, **Poverty and Human Rights: Sen's Capability Perspective** (Oxford: Oxford University Press, 2006), Chapter 1.
94. Sahel countries are countries situated in the Sahel region, that is, between the Sahara desert in the North and the Sudanese Savannah in the South. The Sahel region stretches from Atlantic Ocean in the west to the Red Sea in the east: from Northern Senegal, Southern Mauritania, Central Mali, Southern Algeria and Niger, Central Chad, Southern Sudan, Northern Sudan and Eritrea.
95. A. Sen, **Development as Freedom**, (Oxford: Oxford University Press, 1999), 11.
96. The neoliberal position or neoliberalism is a system of political economic principles espoused by neoliberals. These principles are liberalisation of market and finance, deregulation, macroeconomic stability (end inflation), privatisation, and the withdrawal of the state from many areas of social provisions and the destruction of all forms of social solidarity such as trade unions. See D. Harvey, **A Brief History of Neoliberalism** (Oxford: Oxford University Press, 2011).
97. A. Cassese, **International Law in a Divided World** (Oxford: Clarendon Press, 1985), 370–371.
98. P. Alston, "Making Space for New Human Rights" (1988) 1 *Harvard Human Rights Yearbook* 3–40, at 20–21.
99. Available at http://www.un.org
100. For quantifiability, justiciability, philosophical incompatibility, incongruency, and the avalanche argument, see H.J. Steiner, P.Alston and R. Goodman, **International Human Rights in Context: Law, Politics, Morals**, 3rd edn. (Oxford: Oxford University Press, 2008), Chapter 16.
101. Supra, note 83.
102. H.J. Steiner, P. Alston and R. Goodman, op cit. 3rd edn. (Oxford: Oxford University Press, 2005), 1455.
103. John Rawls in **A Theory of Justice** (Oxford: Oxford University Press, 1972, revised 1999) at p. 291 argues that justice as fairness can only be derived from an original position: a position of equality which corresponds to the state of nature in the traditional theory of social contract. The original position is a purely hypothetical situation characterised so as to lead to a conception of justice. It is a counterfactual hypothesis.

    In the original position, two principles of justice as fairness proffered by Rawls are as follows:

    "(a). Each person has an equal right to a fully adequate scheme of equal liberties which is compatible with a similar scheme of liberties for all.
    (b). Social and economic inequalities are to satisfy two conditions. First, they must be attached to office and positions open to all under conditions of fair equality of opportunity, and second, they must be to the greatest benefit of the least advantaged members of society." (The second condition that those who are disadvantaged or worse-off be compensated is "the difference principle".

    Contrast Robert Nozick in **Anarchy, State, and Utopia** (Oxford: Blackwell, 1974) where he propounds his entitlement theory of justice. According to this theory, once a person's acquisition of property satisfies the three principles of just acquisition, transfer and rectification, even the state has no right over its power of redistribution. For Nozick, "the minimal state is the most expensive state that can be justified. Any state more extensive violates people's rights" (p. 149).
104. T. Pogge, **Politics as Usual: What Lies Behind the Pro-Poor Rhetoric** (Cambridge: Polity Press, 2010).
105. Ibid., 11.

106. Simon Caney, "Cosmopolitan Justice, Rights and Global Climate Change" (2006) 19 (2) *Canadian Journal of Law and Jurisprudence* 255–278, especially 270–271 and Jane MacAdam (ed.). **Climate Change and Displacement: Multidisciplinary Perspectives** (Oxford: Hart Publishing, 2012)
107. See Axel Gosseries, "On Future Generations' Future Rights", *The Journal of Political Philosophy*, Vol. 16, no. 4, 2008; 446–474.
108. S. Caney, op cit., 268.
109. See J. Feinberg, **Rights, Justice and the Bounds of Liberty** (Princeton NJ: Princeton University Press, 1980), p. 181 who writes that "whoever these [future] human beings may turn out to be…they have interests that we can affect, for better or worse,, right now."
110. John Rawls, **A Theory of Justice** (Oxford: Oxford University Press, 1972, revised in 1999).
111. John Rawls, **Political Liberalism** (New York: Columbia University Press, 1993).
112. John Rawls, **The Law of Peoples** (Cambridge, MA: Harvard University Press, 1999).
113. Ibid., 6.
114. Ibid., 111–112.
115. Ibid., 36.
116. For Rawls, the principles of the Law of Peoples are as follows:
    "1. Peoples are free and independent, and their freedom and independence are to be respected by others.
    2. Peoples are to observe treaties and undertakings.
    3. Peoples are equal parties to the agreements that bind them.
    4. Peoples are to observe a duty of non-intervention..
    5. Peoples have the right of self-defence.
    6. Peoples are to honour human rights.
    7. Peoples are to observe certain restrictions in the conduct of war.
    8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political regime" (J. Rawls, **The Law of Peoples** (Cambridge, Mass.: Harvard University Press, 1999), 37).
117. Thomas W. Pogge, "Rawls on international justice, *The International Quarterly* (2001): 51, 246–53 and "Priorities of global justice", *Metaphilosophy*, vol. 32, nos 1/2 (2001): 6–24. See also A. Buchanan, "Rawls's Law of Peoples" *Ethics* 110 (2000), 706.
118. Charles R. Beitz, **Political Theory and International Relations** (Princeton, New Jersey: Princeton University Press, 1999), 202.
119. Ibid., 214–215.
120. Thomas E. Hill, Jr., **Respect, Pluralism and Justice** (Oxford: Oxford University Press, 2000), 81-82.
121. "EuroAmericocentrism" or cultural imperialism is the derivation of universal values from Western culture discussed in David Morley and Kuan-Hsing Chen (eds.), **Stuart Hall: Critical Dialogues in Cultural Studies** (London: Routledge, 1996), Chapter 17.
122. See Samuel Freeman, **Justice and Social Contract: Essays on Rawlsian Political Philosophy** (Oxford: Oxford University Press, 2007), 287–289.
123. John Rawls, **A Theory of Justice** (Oxford: Oxford University Press,1999), 332–333 and **The Law of Peoples** (Cambridge, MA: Harvard University Press, 199), 37.
124. Mathias Risse, **On Global Justice** (Princeton: Princeton University Press, 2012).
125. James Grunebaum, **Private Ownership** (New York: Routledge and Kegan Paul, 1987).

126. Hilel Steiner, **An Essay on Rights** (Oxford: Blackwell, 1994).
127. Philip Alston, "Making Space for New Human Rights: The Case for the Right to Development" (1988) 1 *Harvard Human Rights Yearbook* 3–40, at 32.
128. John Rawls, **Political Liberalism** (New York: Columbia University Press, 1993).
129. Ibid., xx and 133.
130. Ibid, Lecture 4. See, also, John Rawls, **Collected Papers**, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), Ch. 20.
131. John Rawls, **The Law of Peoples** (Cambridge, Mass.: Harvard University Press, 1999).
132. Ibid., 17.
133. John Rawls, **Political Liberalism**, xxx.
134. Thomas E. Hill, Jr., **Respect, Pluralism and Justice** (Oxford: Oxford University Press, 2000), 71.
135. Samuel P. Huntington, **The Clash of Civilizations and the Remaking of World Order** (New York: Simon & Schuster, 1996), 28.
136. Hans Kelsen, **The Pure Theory of Law**, trans. by Max Knight (Berkeley: University of California, 1967), 4–15.
137. Supra, note 124, 69.
138. Supra, note 124, 81.
139. See Solomon E. Salako, "The Council of Europe Convention on Human Rights and Biomedicine: A new look at international biomedical law and ethics" (2008) 27 *Medicine and Law* 339–356 and Solomon E. Salako, "The UNESCO Universal Declaration on Biomedicine and Human Rights: Protecting Future Generations and the Quest for a Global Consensus" (2008) 27 *Medicine and Law* 805–823.

140. See Chapter 1, note 3 and Chapter 2, notes 25–29 and 30.
141. Antonio Cassese, **Self-Determination of Peoples: A Legal Reappraisal** (Cambridge: Cambridge University Press, 1988), 101.
142. J. Rawls, **A Theory of Justice** (Oxford: Oxford University Press, 1972, revised in 1999), 291 and R. Dworkin, **Sovereign Virtues: The Theory and Practice of Equality** (Cambridge, Mass.: Harvard University Press, 2000), 211–212.
143. J. Rawls, **The Law of Peoples** (Cambridge, Mass.: Harvard University Press, 1999), 37.
144. Available at http://www.un.org
145. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II. Sect. A.

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    www.un.org (accessed on 29/11/2010)
146. See resolution 2200 A (XXI), annex.
147. A/CONF. 157/24 (Part I), chap. III.
148. Resolution 217 (A (III).