

# **The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples**

By Margot E. Salomon with Arjun Sengupta

issues paper

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### Minority Rights Group International

Minority Rights Group International is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. We are guided by the needs expressed by our worldwide network of minority and indigenous partner organizations.

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Minority Rights and Development is a research and advocacy programme, established by MRG and its partners, to address the development-related exclusion and marginalization of minority and indigenous communities, and to work towards the elimination of poverty. Minority Rights and Development programme publications include issues papers, macro studies and micro studies.

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# Preface

The right to development is one of the most debated rights in international law. The United Nations (UN) Declaration on the Right to Development was adopted in 1986, and continues to be the focus of much deliberation within the UN inter-state Working Group on the Right to Development mandated to advance its implementation.

The reason the right to development elicits such interest is not least because it raises important questions regarding the meaning of international cooperation in the protection and promotion of human rights. The obligations of states to act multilaterally and beyond their own borders to realize the right to development for all is clearly stated in the Declaration on the Right to Development, but consensus on how this obligation can be put into effect has proved difficult to achieve.

This issues paper, written by Margot Salomon of Minority Rights Group International (MRG), in cooperation with the UN Independent Expert on the Right to Development, Arjun Sengupta, is therefore a useful contribution to the understanding of states' obligations. Although this is primarily a legal analysis of rights and obligations in the right to development, it does not lose sight of the practical implications that stem from these rights and obligations. We hope that the paper not only responds to many outstanding questions on the legal justification for international cooperation in promoting human rights, but also gives a better sense of the value of the right to development as a principle to guide development practice.

It is this necessary link between the law and the practice of development that attracted both MRG and the Independent Expert to working collaboratively on this issues paper. The Independent Expert has been widely praised for his excellent contribution to elaborating the right to development. The work he has undertaken in this paper with MRG gives added-value to his existing reports

to the Working Group on the Right to Development by providing a much needed legal analysis of rights, and obligations of states.

This issues paper also adds to the work of the Independent Expert by filling a gap in his reports that previously paid little attention to the rights of minorities and indigenous peoples. In 2001, the UN Commission on Human Rights recognized in its resolution 2001/9 'that in the process of the realisation of the right to development, special attention should be given to persons belonging to minorities ... indigenous people ... Roma, [and] migrants'. In 2002, this paragraph was not repeated. Sadly, this omission by the Commission on Human Rights only serves to underline just how marginalized minorities and indigenous peoples are in development.

The UN Declaration on the Right to Development offers great scope for improving the situation of excluded groups, emphasizing as it does the importance of meaningful participation, non-discrimination and the fair distribution of the benefits of development. This issues paper gives insight into how the rights of minorities and indigenous peoples should be read as part of the right to development. It also makes some innovative arguments for recognizing group rights of minorities and indigenous peoples as the best means to fulfilling their right to development.

MRG hopes that this issues paper will be a resource for the Independent Expert, the Working Group on the Right to Development, for governments and for other ongoing projects on the right to development. This paper may raise more questions than it gives answers, but it does contribute to the goal of reaching consensus on what the UN Declaration on the Right to Development means for international relations, the responsibilities of states and the rights of minorities and indigenous peoples.

**Mark Lattimer**

*Director*

January 2003

# Introduction

The right to development was recognized as an inalienable human right by the United Nations (UN) General Assembly in 1986 with the adoption of the Declaration on the Right to Development (DRD). The DRD is significant in that it moved the concept of development beyond the economic growth of a state and past earlier UN debates which were centred on development as a right among states. By casting development as a human right, the Declaration brought to the fore an appreciation that development is not what happens as a result of economic growth or development planning, it is a process that allows for the exercise of the full range of rights and has as its goal the pursuit of self-actualization of people, in conditions of dignity through the exercise of their rights.<sup>1</sup>

With equal passion the legitimacy of a right to development has been both challenged and endorsed over the past decades. Its critics have attempted to invalidate it on a range of grounds – for example, that ‘development’ often compromises basic human rights and as such exists in opposition to them;<sup>2</sup> that it is a right void of agency (‘who or what is to be developed and who or what is to do the developing?’).<sup>3</sup> One writer felt that postulating a right to development simply confused rights with moral claims that failed to specify rights-holders and duty-bearers; this notion was further complicated, he suggested, by the fact that a right to development was often considered as having both individual and collective elements.<sup>4</sup> Those who support a right to development are many and diverse<sup>5</sup> but they defend it with vigour, perhaps recognizing its proximity to the right to life itself.<sup>6</sup>

The DRD does not offer absolute answers but provides the framework required to give meaning to the right. Significantly, it begins to address the question of agency. It clearly defines development as a human right and recognizes individuals and peoples as right-holders – as subjects and not objects of development. It also recognizes states, acting at the national level and cooperating at the international level, as duty-bearers. The DRD integrated structure and agency and in so doing began a process of defining this seemingly elusive norm.<sup>7</sup>

Professor Arjun Sengupta, the Independent Expert on the Right to Development appointed by the UN Commission on Human Rights (CHR), has spent the past several years developing and refining the concept and means of implementing this right. Based on the provisions of the DRD, he has drawn on the work of seminal

thinkers in several disciplines and, combining principles of law and economics, he has provided a meaningful elaboration of the right to development. While his conceptualization has not met with universal acceptance among states and stakeholders active at the UN where his work is discussed, he has done much to advance the debate on what a right to development *qua* a human right means in theory and practice.

This issues paper is informed by the logic developed and applied by the Independent Expert. As such, it is premised on the understanding that the right to development entails a right to a process of development. This particular process of development is one in which all human rights are considered as an integrated whole in both the process and outcomes of development and which has as its objective the expansion of capabilities or freedoms of people to realize what they value.<sup>8</sup>

Building on this foundation as provided by the DRD, the paper looks to international law to determine the scope and application of existing human rights standards as understood within this process, and the corresponding obligations of states to see them realized within the right to development. The particular rights this paper has chosen to consider in the context of a right to development are those of minorities and indigenous peoples. It outlines what their rights are and what it means to apply them within the right to development. As a right that aims at the realization of all human rights and fundamental freedoms, the right to development cannot be realized for anyone within a state if the rights of minorities and indigenous peoples – such as the right to non-discrimination, to effective participation and to cultural identity – are not also respected in the process of national ‘development’.

The standards that apply to minorities and indigenous peoples are considered in separate sections of this paper, in order to reflect the fact that, for the most part, separate instruments are adopted to protect and promote their particular rights. However, minorities and indigenous peoples are addressed in this issues paper because for both, the preservation of their identity as distinct communities is critical to their existence and forms the cornerstone of their rights. Moreover, they both suffer from discrimination and exclusion based on their ethnicity, language or religion, which bars them from exercising their right to development. While the right to development is a collective right of all the people in a given state, a significant

conclusion reached by this report is that the rights of minorities and the rights of indigenous peoples are best fulfilled within the right to development as recognized group rights within the greater collective. It is the protection of their rights as groups that offers the best method by which their right to development can be realized. Considered as groups, the policies for their development should be devised to meet their particular rights and requirements and then integrated into a national programme for development.

Addressing the obligations that apply in the realization of the right to development, this paper considers not only the obligations of states acting at the national level, as the primary responsibility for the implementation of the right lies with them, but the obligations of states acting individually and jointly at the international level. Particular attention is given to the obligations imposed on states at the international level. This is not because the actions of the international community should be perceived as more significant than those of the state acting at the national level, but rather to address the essential element of international cooperation in the realization of the right to development in an interdependent world; and indeed because the right to development exists in relation to the international system and its international community, and can be achieved only through joint effort.<sup>9</sup>

While Northern states equally have obligations to ensure the realization of the right to development of their people, the emphasis in this paper on fulfilling the right to development in the South relates to the often negative impact the international system has on the ability of people in the South to realize their right to development. Similarly, the somewhat stronger focus on economic, social and cultural rights is in response to the more direct

influence states acting internationally have on the protection and promotion of these rights in other countries.

When addressing the obligations of states within the right to development, the paper reflects on the methods that fulfilling those obligations would require, and then considers the parallel obligations owed to minorities and indigenous peoples within that system. In light of the overall analysis that links process and outcomes to obligations, the latter is elaborated on by assessing and applying the distinction between obligations of conduct and obligations of result in terms of the right to development generally, and in relation to protecting the rights of minorities and indigenous peoples particularly. The distinction between obligations of conduct and of result is useful in that it prescribes certain conduct even if the outcome remains uncertain and, in the progressive realization of rights, facilitates implementation, the designation of responsibilities, and the attribution of accountability.

This paper presupposes that any process and outcome of a right to development necessarily implies, in line with the DRD, that the human person is the central subject of development and the active participant and beneficiary of the right to development.<sup>10</sup> Thus, the fulfilment of this right must reflect the priorities of the right-holders, be they the collective of individuals in a state, or minority and indigenous groups within the collective. There is not one concept of 'development', despite the predominant neo-liberal modernization model favoured by many governments. The right to development can be seen as a process of expanding the rights and freedoms that people enjoy and it is through this process that they will be able to fully develop. As for all human rights, it is for states to create the enabling environment in order for the right to be realized.

# Part I Rights

## What is the right to development?

The right to development was accepted as a human right with the adoption by the United Nations General Assembly of the Declaration on the Right to Development (DRD) in 1986.<sup>11</sup> Article 1 states:

‘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.’

The individual and all peoples are thus named as the right-holders of a right to development. With the DRD, a circle that had effectively been broken at the international level after the adoption of the Universal Declaration of Human Rights (UDHR)<sup>12</sup> was completed. The UDHR conceived of all the human rights as interrelated and interdependent. The unity of those rights was broken with the spread of the Cold War, the divide clearly demonstrated by the formulations of two different covenants, one dealing with civil and political rights and the other with economic, social and cultural rights. Other human rights were eventually codified in subsequent instruments recognizing and elaborating rights relating to children, women, the environment,<sup>13</sup> minorities and indigenous peoples. With the adoption of the right to development, the unity of all human rights was restored in that the right to development was presented as a composite of all human rights and fundamental freedoms. The DRD recognizes all rights and freedoms as ‘indivisible and interdependent’<sup>14</sup> and explicitly refers to the failure to observe civil and political as well as economic, social and cultural rights as an obstacle to development.<sup>15</sup>

Development has been defined in the Preamble of the DRD as

‘a comprehensive economic, social, cultural and political *process*, which aims 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 benefits resulting therefrom’.<sup>16</sup>

The Preamble also has the General Assembly ‘[r]ecognizing that the human person is the central subject of the development *process* ...’.<sup>17</sup> The right to development can thus be understood as entailing the right to a particular process of development. A process that aims at improving human well-being has been described as having as its objective the expansion of the capabilities or freedoms of individuals to realize what they value.<sup>18</sup> The right to this particular process of development is significant in that it refers to the realization of all the rights and freedoms recognized as human rights – civil and political, economic, social and cultural as well as the specific rights articulated to promote and protect the rights of minorities and indigenous peoples, children, women and other entities identified as warranting particular attention under international law. The right to development then seeks to treat them as interrelated and interdependent, reflecting their relationship as an integrated whole and not as simply an aggregate or sum of existing rights.<sup>19</sup>

A second significant element of the right to a process of development is that both the outcomes of development, as well as the ways in which the outcomes are realized, form part of the human right to development. As such, while duty-bearers have obligations to produce results, they can also be understood as having obligations of conduct. Obligations of result relate to the outcomes of the process of development while the obligations of conduct refer to the policies and programmes of development. The duty-bearers of the right to development, as the DRD makes clear, are states acting at the national level and acting individually or collectively at the international level.<sup>20</sup> The conceptualization of a human right to development has thus come a long way from the concept of development.

In the 1950s and 1960s economic growth, measured as growth of Gross Domestic Product (GDP), was the principal objective of development. In the decades that followed, the human development approach added value to the conventional economic growth approach by replacing GDP growth with human development indicators such as the provision of food, health, education, nutrition, gender parities and employment, as measurements of development. More recently, the human rights approach added value to the human development approach by con-



verting the indicators regarding the provision of food, health, education, etc. into recognized rights to food, health, education, etc. as objectives of development.<sup>21</sup> This rights-based approach thus also describes development not in terms of human needs but in terms of responding to the rights of individuals and groups. Moreover, recognition of rights as indicators refers not just to the provision or availability of the services but also to the way in which the services are provided, and thus issues related to access, cultural acceptability and non-discrimination become equally important in the determination of whether or not development objectives are being met.

The term 'human development' has come to embody the ideas of development that reach beyond the growth of material products, markets and physical infrastructure, to include the development of the human person as an outcome of development. It does not, however, address the way in which these outcomes are brought about. The integration of human rights standards and principles, both in the process and outcome of development programmes and policies, is reflected in the 'human rights-based approach to development'. In this rights-based approach, human rights standards and principles, as derived from international human rights instruments, are meant to underscore all phases of the development process. The language of human rights – one of rights, obligations and accountability based on binding international law – is meant to provide both the programming tools and the essential references.<sup>22</sup> The right to development, while sensitive to human development and inclusive of the rights-based approach, takes the development formula one step further by treating all rights as an integrated whole and the right to development as a comprehensive process for their achievement.<sup>23</sup> A development process which takes account of the objectives that must be met to realize the right to development would include, for example, consideration of whether all rights are protected and promoted with due respect for their indivisibility and interdependence, whether all states acting at the national and international levels are contributing to the fulfilment of the right, and whether the procedures and outcomes are consistent with the rights-based approach to development.

The right to development, then, requires that states ensure that development benefits individuals,<sup>24</sup> including, therefore, persons belonging to minority and indigenous communities. Minority and indigenous rights are constitutive elements of the right to development like any other recognized human right, to be respected in the process and realized in the outcomes of, development. The human rights of minorities and indigenous peoples are not simply rights comprising the right to development, but are an integral part of each civil, political, economic,

social and cultural right comprising the right to development; as such, they are to be adhered to in the realization of each right, as well as in the method of realizing each right, and in any processes for realizing the right to development.<sup>25</sup>

The right to development is a collective right, and can also be a group right. However, it is individuals who are meant ultimately to benefit from the exercise of that right even if they cannot individually assert the right. The implementation of the rights, whether individual or group, must ensure the centrality of the individual person as beneficiary, as stated in Article 2(1) of the DRD.<sup>26</sup> There is a danger that rights held by a group or by society as a (collective) whole will then have to be exercised by the state on their behalf,<sup>27</sup> but this can be addressed where mechanisms exist to establish the correspondence between the states asserting the right and the individual or group enjoying the right. These mechanisms would include a system for attributing accountability at all levels of the development process and access to remedies both for individuals who constitute the group, and for groups.<sup>28</sup> The right to development articulated and endorsed as a human right, as in the case of all human rights, implies corresponding accountability. It is indeed this binary relation which distinguishes human rights from the general valuing of freedom that exists without a correlated obligation to help bring about that freedom.<sup>29</sup>

This particular process, defended by the Independent Expert, is one that enables the realization of all human rights and fundamental freedoms together. It is also one which is carried out in a manner consistent with human rights and which builds on the traditional process of the expansion of wealth and allocation of resources, incorporating concerns of equity and justice<sup>30</sup> along with human rights standards.<sup>31</sup> This approach would seem critical to integrating the rights of minorities and indigenous peoples, who are often the unequal recipients of resource distribution, even during periods of high growth in both developed<sup>32</sup> and developing countries.<sup>33</sup> Furthermore, international pressure for economic growth commonly results in the commercial exploitation of indigenous peoples' lands and territories, leading to, for example, their displacement and impoverishment, and, at times, to conflict.<sup>34</sup>

While there is substantial agreement on the wrongs of development, consensus on the definition of what constitutes the right to development has not been reached. For example, the rights-based approach, although enjoying considerable support,<sup>35</sup> has not been universally endorsed.<sup>36</sup> Similarly, framing the right to development as a right to a process of development has its supporters<sup>37</sup> but also its detractors.<sup>38</sup> While most, if not all, states agree that the right to development has both national and international dimensions, unsurprisingly there is widespread

disagreement on whether or not there exists an obligation to cooperate internationally in the realization of the right to development, with Southern states supporting the existence of this obligation, and Northern states rejecting it.<sup>39</sup> Other areas of disagreement include: whether the right to development is an individual or collective right (as well as a right of groups), with some states also arguing that it is a 'right' of states; what the appropriate balance between the national and international elements is, and what the content of the right at each level is;<sup>40</sup> what practical methods of implementation are viable, as well as the most suitable permanent follow-up mechanism.<sup>41</sup>

The United Nations open-ended Working Group on the Right to Development is the principal international forum for debate on the right to development *qua* a right. In this forum, Northern states tend to place considerable emphasis on elements of the national dimension, particularly as they pertain to the South, while the Southern states tend to focus on specific elements in relation to the international dimension. Thus the direction of discussion set by the South is usually towards issues such as inequalities in the international financial system, greater participation of developing countries in global decision-making on economic policy, and promoting a fairer international trade regime. The Northern states tend to draw more on national implications of international cooperation, focusing on the need for suitable domestic conditions in the South, including, for example, good governance, democracy, human rights and responsible economic management. While the focus by the North is on the implementation of certain aspects of the right to development by the South, Northern states do not sufficiently consider the incorporation of the right to development for people in their own countries. Furthermore, when the Working Group addresses both the international and national dimensions of the right to development, there is much greater scope for a people-centred debate. Overall, much of the discussion that occurs within the meetings of the Working Group relates to interpretations of international cooperation that stems from the right to development; this means that development cooperation policy gets the most attention

while the examination of obligations towards the beneficiaries of development is not considered in depth.<sup>42</sup>

As set out in the DRD, the right to development entailing a right to a process of development, leading to an outcome of the fulfilment of all the human rights, involves obligations at two levels – national and international. While the state has the primary obligation to implement the right to development at the national level, in an interdependent world, economic growth in any one country is dependent on the states and other actors of the international economy that influence trade, finance and flows of capital and technology. International cooperation therefore becomes crucial for any state to be able to formulate and execute those policies and deliver those rights to the people in the country. Whereas the obligation of international cooperation is applicable to a range of human rights, and increasingly relevant in an interdependent world, for the right to development the obligation for such international cooperation becomes almost as important as the obligation imposed on states acting at the national level.

The right to development, then, is not a right of states to be developed; it is a right that entails a process of development for all people, respecting all human rights, which necessarily means a development process where effective participation allows for people to determine the terms and nature of development. In the current international system, still largely characterized by inter-state relations, governments may often be in the most suitable position to demand an equitable international system that will contribute to their ability to fulfil the right to development. However, this is in their capacity as duty-bearers. Rights and obligations and thus accountability, in relation to the right to development understood as a human right, go beyond inter-state accountability to address the accountability of the state, or the international community of states, to the people who are meant to benefit from development. The right-holders are the collective populations of a state and in the case of minorities and indigenous peoples, the right-holders are also groups with specified rights within the collective. And the ultimate beneficiaries of the right to development are individuals.

# Considering collective rights, group rights and peoples' rights

Discrimination and inequality, on grounds such as race, colour, language and religion, affect both minorities and indigenous peoples, yet are unequivocally prohibited in the DRD and under conventional and customary international law. Further, for minorities as for indigenous peoples, their existence is linked to the preservation of their cultural identities as a group. The rights of minorities and those of indigenous peoples may often differ, but they all aim to address these recognized fundamental needs. Though the individual is the ultimate beneficiary of the promotion and protection of human rights, it is only through certain group rights that individual rights are given meaning; that is, the enjoyment of individual human rights may require that particular human rights devolve directly upon groups.<sup>43</sup> Classified as such – individual and group – these rights do not exist in binary opposition but complement and supplement each other. With regard to the right to development that is exercised by the collective of people within a state, the position of non-dominance occupied by minority and indigenous groups requires that their rights be addressed by policies and programmes that go beyond their rights as individual members of the collective and seek to ensure that their additional rights as groups within the collective are guaranteed. This is somewhat more straightforward in the case of indigenous peoples who, as peoples, are recognized as having certain group rights under international law. Minorities, however, are considered under international law as having collective rights which are distinguished from group rights. This section addresses this distinction, and while it is largely devoted to proposing a new rationale as to what may distinguish 'collective rights' from 'group rights', its ultimate aim is to suggest that it is through group recognition that the rights of both minorities and indigenous peoples are best protected within the right to development.

Given the existing classifications of the rights of persons belonging to minorities and those of indigenous peoples, the question this paper seeks to address by revisiting the conceptual boundaries in international law of individual rights, collective rights and group rights (including peoples' rights) is the best method for realizing the right to development of minorities and indigenous peoples. In order to determine the most suitable rights construct a common

understanding as to the classifications of existing rights must be applied. From an examination of some of the literature on the rights of minorities, group rights and the rights of peoples, there appears to be conceptual and terminological inconsistency in the application of the terms.<sup>44</sup> Moreover, the fact that the terms collective and group rights are often, although not always, used interchangeably in the literature adds to the confusion. This paper will begin by attempting to provide conceptual clarity.

The perennial debate over the definition of individual, collective and group rights as it relates to minorities and indigenous peoples appears ill conceived, because it seems to correlate peoples (or those who are not 'peoples', e.g. minorities) with the application of either one or the other category of rights: individual (collective), or group. Moreover, even where a group is recognized as a people, as is the case with indigenous peoples, their rights as peoples are often qualified in international legal instruments. It would seem that the desire to avoid giving minority groups the capacity to vindicate their rights before a competent international body, by providing the group with international legal personality,<sup>45</sup> and to limit any potential claim to secession, has underpinned the rationale for distinguishing individual/collective rights from group rights in international law. This is typified by the language of Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which refers to 'persons belonging to minorities' and not simply to minorities.

## Differentiating collective rights from group rights

Putting aside for a moment the notion of peoples' rights, a point to which we will return, we suggest that there is clarity to be gained by viewing collective rights and group rights, as they relate to minorities as well as indigenous peoples, as determined not by the identity of the holder, traditionally defined in international law (as persons belonging to minorities and indigenous peoples), but by the aim of the right itself. Dinstein argues that collective rights, exemplified by Article 27 of the ICCPR, if defined just as individual rights of persons belonging to minorities as exercised in community with other members of their group, would provide little more than, for example, the

right to freedom of thought, conscience and religion provided in Article 18 of the ICCPR,<sup>46</sup> unless the definition goes beyond the ambit of Article 18, to provide what that Article does not: ‘the granting of a collective human right *qua* a group right’.<sup>47</sup>

The prohibition of genocide provides a cogent example of determining what constitutes a group right on the basis of what the right aims to achieve. The freedom from genocide exists to protect an entire group. It would not exist without the existence of a group that it is meant to protect. That the right is a group right, does not alter the fact that the right serves to protect individuals but it *also* serves to protect the group. As egregious as the killing of members of a particular group is, and although the individual’s right to life would be protected by the effective application of the prohibition of genocide, the application of the term genocide to such a crime is relevant only when the aim is to wipe out the group (in whole or in part). In the case of the Convention on the Crime and Punishment of Genocide, and the International Convention on the Suppression and Punishment of the Crime of Apartheid, there are explicit references to, *inter alia*, racial groups.<sup>48</sup> Similarly, the right to internal self-determination is a right to ensure the autonomy or sovereignty of a group.<sup>49</sup> In the same way, sovereignty over natural resources is a group right. While groups themselves are collective entities (made up of individuals), group rights may be said to reflect the rights of ‘units and not simply as aggregations of individuals’<sup>50</sup> and so, although ‘the individual is the object of protection, the fundamental element is the group’.<sup>51</sup> This, it seems, would apply equally to the preservation of a minority language as to the sovereignty over natural resources, suggesting therefore that the insistence on the distinction between collective and group rights, and minority and indigenous rights, which is perpetuated by the language of, *inter alia*, ICCPR Article 27, is factitious.

‘Collective’ rights as defined in international law are rights that are exercised by individuals collectively. In the case of minorities (including, where relevant, indigenous peoples) this includes, for example, the right to enjoy their own culture, to practise their own religion, or to use their own language. The right is cast as a collective one, since a minority language, for example, cannot be used and hence maintained by an individual alone. However, according to the theory outlined above (which looks to the aim of the right itself to determine whether it is a collective or group right, and not at whether the right-holder is recognized as having collective rights or group rights), although the protection afforded by that right is aimed at the individual, *a fundamental element is the group*. Collective rights that are not specific to minorities or indigenous peoples, such as the right to form a trade

union or to freedom of association, or the right to strike, or the right to development (planning policies), may serve to clarify the distinction between collective individual rights and collective group rights as we have articulated it. The fundamental element in the examples just mentioned is not the group, but rather the protection of the rights of individuals exercised collectively. While the right to strike can be enjoyed only by a collective of people (a ‘group’), and only the ‘group’ allows for the realization by the individual of the right, it is best classified as a (collective) individual right and not a (collective) group right, because the right to strike or the right to form a trade union exists only to protect the rights of the individuals. These collective rights cannot be called group rights, as we have defined it. Even though in both cases a ‘group’ exercises the right, and the individual benefits, the people have formed a group in order to assert their right, and *the group itself has no objective raison d’être*, no objective function, no quality of its own. In other words, *when the maintenance or perpetuation of the group is a factor unto itself*, in addition to the group being a vehicle for the realization of the rights of individual members of the group, the rights in place to protect or promote it should be recognized as group rights and thus, the people who form it should be acknowledged as constituting a group.

In the case of the rights of indigenous peoples, for example, the group exists first and when the rights are elaborated to protect the group, because the preservation of their identity, for example, is a value in itself, they are group rights. Where minorities form a cohesive group and thus where certain minority rights are meant to protect and preserve the identity of a minority group as an object in itself, the minority rights should also be regarded as group rights. This is not to say that all minorities can be identified as cohesive self-contained groups – and indeed, individuals belonging to minority or indigenous communities may claim rights aimed not at enhancing the group itself, but rather at enabling them to enjoy rights and freedoms which as individual minorities among the majority(ies) they may be denied.

This way of looking at collective and group rights does not contradict the principle that it is the individuals who are the beneficiaries of the rights. In both cases the collective or the group exercises the right. In the case of collective rights where right-holders are individuals, they are the direct beneficiaries. For group rights, the groups hold the rights and directly benefit from their exercise, in terms of well-specified criteria of enhancement of the worth or interests of the group. But the individuals who constitute the group would be the ultimate beneficiaries, at least potentially so, even if not immediately. The group and its objectives have to be conditioned so that there is an unequivocal indication

when the group benefits or is better off, irrespective of whether or not all the individuals constituting the group are better off. Human rights jurisprudence accommodates this possible conflict between the right of the individual and that of the group in the application of principles of proportionality,<sup>52</sup> and of reasonableness and objectivity,<sup>53</sup> a point revisited below.

In addition to collective rights and group rights there are individual rights applicable to everyone which do not require collective exercise in order to be protected or realized, such as the right to a fair trial or the right to privacy. However, some individual rights may also have a collective dimension.<sup>54</sup> Obiora notes, for example, that while many economic, social and cultural rights, such as the right to education or the right to health, or to safe and healthy working conditions, can only be implemented in a collective manner, the rights are not held by the group. Although they may be best promoted by group-based policies or programmes, they are not, per se, group rights (or collective rights).<sup>55</sup>

## A legal fiction: Devaluing group rights

While the rights of indigenous peoples need not only be framed as group rights but can also be both individual and collective rights,<sup>56</sup> the rights of peoples are recognized in international law as comprising group rights. While there is no agreed definition of 'peoples' in international law,<sup>57</sup> it has been suggested that the term 'group' is broader in scope than peoples, but includes peoples.<sup>58</sup> Indigenous peoples would constitute both a people and a group, and while groups include peoples, not every group can claim the rights of a people.<sup>59</sup> Minorities are conceived of as individuals in a group but not as groups or as peoples under international law.<sup>60</sup> In practice the trend has been to promote respect for the human rights of the members of the relevant minority group without promoting their status as peoples.<sup>61</sup> Even though group rights and peoples' rights are not the same, they seem to be applied interchangeably, resulting in a denial of group rights to national or ethnic, religious and linguistic groups not granted legal recognition as peoples.

The codification of minority and indigenous rights is aimed at guaranteeing, *inter alia*, the rights of those groups (although in the case of minorities they are not referred to as groups)<sup>62</sup> as well as the rights of the members of those groups. Part of the confusion that currently exists in terms of the application of international law stems from the legal fiction that regards minorities as having individual rights exercised collectively and indigenous peoples as having both those rights that are exercised collectively as well as group rights. Procedurally, this fic-

tion is maintained in the form of individual petition under the Optional Protocol to the ICCPR. The distinction between individual/collective rights and group rights may address the concerns of certain states which aim to minimize grounds upon which secessionist claims might be based, but it fails to recognize the group element of minority rights, as well as the group element of indigenous peoples' rights where the reference is not to 'peoples' as it is for the right to self-determination and sovereignty over natural resources.<sup>63</sup> Alston has remarked that '[t]he language [the Human Rights Committee regarding Article 27] has chosen to use acknowledges in only a very oblique way the inevitable interplay between the individual and the group in any consideration of minority rights.<sup>64</sup> Similarly, Thornberry has noted that 'the law on indigenous peoples reflects developments in thinking about minorities and collective [e.g. group] rights generally. The two issues cannot be finally separated, despite the tendency of the international community to develop separate bodies of law.'<sup>65</sup> Mbaye put it simply when he wrote: 'In one case, man is considered essentially as an individual, whereas in the other he is with others, united by historical, geographical and social ties, and the rights concerned are accorded to the whole group.'<sup>66</sup>

Legal fiction has been defined as 'the resort to pretense in the process of legal argumentation'.<sup>67</sup> It has been remarked that a legal fiction is a proposition, purporting to be a principle or rule material to the determination of cases, 'which rests in whole or in part on the factual premises known to be inaccurate at the time of the fiction's invocation'.<sup>68</sup> Of equal concern to that of the inherent inaccuracy of a legal fiction is the issue of intent. While law has always made use of legal fictions, it is highly questionable as to whether they can be generally defined 'as assumptions of a beneficial or at least harmless character which are intended to *promote a just outcome*', as has been suggested elsewhere.<sup>69</sup>

Whether certain minority groups constitute 'peoples' is a question of ongoing debate, and resolution need not be attempted here. Certain minorities may or may not constitute peoples in an anthropological or popular sense, but this does not alter the fact that they may constitute a group with common historical and ethnic attributes. Whether minorities constitute 'peoples' in a legal sense matters only if they are required to claim their rights within a constructed legal fiction which attributes certain rights, such as self-determination, to peoples but not to individuals as collectives (as per ICCPR Article 27), and further which does not recognize those collectives as groups.<sup>70</sup> While the desire to be recognized as a people may be important for a range of reasons, it is relevant in a legal sense only in so far as the legal fiction is applied.

The existing legal construct that prevents minorities from being recognized as ‘peoples’ should not, at a minimum, prevent them being recognized as having group rights. This brings us to the crux of a question posed by Alston: is the maintenance of the legal fiction that frames minority rights only as individual rights (exercised collectively), and not as group rights, actually harmful to their protection?<sup>71</sup> And further, does the recognition of indigenous peoples as groups actually allow them to claim their rights as peoples or indeed as groups? On the basis of the definition of group rights that we have provided, in the context of the right to development, the first question may be answered in the affirmative: casting minority rights exclusively as individual rights (exercised collectively) may be harmful to attempts to ensure their protection within the development process. And by applying our definition, indigenous peoples would be able to assert their group rights as indigenous peoples in the process of realizing the right to development, and actively claim their right as recognized groups *qua* peoples.

## The compatibility of group rights with individual human rights

The concern is often raised that group protection might imply imposing the will of a group entity against the individual freedoms of its members,<sup>72</sup> and hence the debate is set in terms of a dichotomy: a choice between individual and group rights.<sup>73</sup> Packer proposes that the dichotomy does not in fact exist, in that ‘human beings possess both individual and social dimensions’,<sup>74</sup> a point of particular relevance with regard to minorities and indigenous peoples where the social dimension can also be understood in terms of group preservation. In practice, the implementation of group rights is restrained by the principles that apply to all rights under international human rights law. In the case of ‘collective’ rights of indigenous peoples, the UN Human Rights Committee has indicated that the right of an individual to participate in aspects of community life may be restricted if the relevant legislation reflects the legitimate aim of minority group survival and well-being, and if the restriction is not disproportionate to that aim.<sup>75</sup> Further, any restriction on the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability of the minority group as whole.<sup>76</sup> Group rights are not an entity created to assert ‘the right of the group against its own members’,<sup>77</sup> but rather as a voluntarily formed group ‘who agree to pool their individual rights for a specific purpose’.<sup>78</sup> The free and informed consent of the members of the group is critical, along with the effective exercise of the group rights through

suitable arrangements such as legitimate representation,<sup>79</sup> as is the option to opt out of the group.<sup>80</sup> The exercise of group rights is considered in light of the principles that all rights are subject to limitations or modified by duties. The reasoning behind recognition of group rights is to give practical meaning to the human rights that are meant to be protected, as Obiora explains:

‘The problem is not whether collective [group] rights are deducible from or compatible with individual human rights. In strict logic, collective [group] rights may conflict as much with other categories of human rights as they do with each other. The point is to recognize any claim made for collective [group] rights as valid only in so far as it extends, rather than deprecates other human rights.’<sup>81</sup>

So, this paper endorses the view that a group right, where it exists, is vested in the people in question as a group and that therefore it is, in the words of Crawford, ‘a genuinely collective right’.<sup>82</sup> For the sake of simplicity, then, instead of referring to ‘a genuinely collective right’ this paper has argued for the use of the term ‘group right’ for the relevant rights as they apply to both minority groups and indigenous peoples.

## Group rights within the right to development

The right to a process of development is a right of all (individual) people in a country which is exercised collectively; within that collective there are individuals and groups of individuals, as in the case of minorities and indigenous peoples who require that their additional rights are respected within the process of development and in the outcomes of that process. The right to development is, then, an individual right exercised collectively by all the people in a given country, when the right-holders are individuals, and the collective is recognized in order to realize the right through a collective development policy. The right to development is also a group right for groups of minorities and indigenous peoples – that is, groups which exist within the broader collective. The right to development can be understood, therefore, as both an individual right exercised collectively by the whole of a population in a given state, and a group right with regard to certain rights that pertain to minorities and indigenous peoples.

When some individuals belong to a category or group defined as minority or indigenous, then the method of fulfilling those obligations will necessarily be different, requiring simultaneous adherence to policies and programmes designed for the individual as well as the group. This is necessary in order to ensure the fulfilment of the

rights of minorities and indigenous peoples in the development process. When minorities and indigenous peoples are considered as groups, the policies for their development should be designed as sub-plans of a national programme for development, with special provisions for meeting the requirement of those groups in terms of, for example, the preservation of areas they inhabit and with regard to traditional ways of life as related to work, which the usual national policies for development of all individuals may not take into account. The rights of peoples, including indigenous peoples,<sup>83</sup> to self-determination and the right to full sovereignty over natural resources, is recognized in the DRD,<sup>84</sup> and it is suggested herein that other rights aimed at the preservation of minorities and indigenous peoples should be recognized as group rights in order to, *inter alia*, facilitate the realization of the right to development for these groups. Recognizing group rights within the right to development therefore also allows for corresponding indicators, such as those relating to expropriation of resources, to detect forms of discrimination, determine who is excluded from the development process, and reveal the violation of group rights; conventional analysis, based on the human development approach that uses aggregated welfare indicators would not bring these issues to light.<sup>85</sup>

National policies and programmes, as well as international cooperation by states acting singly or collectively,

are required to consider the interdependence of all rights in order to respect the right to development. Policies must be consistent with human rights standards, which would include the rights of minorities and indigenous peoples, directed also at their identities as groups and the preservation of what makes the group distinct.<sup>86</sup> Any sub-plan aimed at ensuring that development benefits individuals as members of minority or indigenous groups would have an improved chance of realization when also aimed at the group within the particular process of development that is rights-based, including in terms of redistributive policies and economic growth.

The DRD already recognizes and diffuses the inter-relationship between individual rights, collective rights and group rights by referring to the individual as both participant and beneficiary; by emphasizing that the right to development is a comprehensive process aimed at the well-being of the entire population; and by referring to the right to development as an inalienable human right of every human person and all peoples. While a group consists of the individual people who compose it, an approach to policy formation that recognizes the distinctiveness of the group within the collective may serve to best ensure the protection and promotion of their rights within national development, and indeed the fulfilment of their right to development.

# The rights of minorities and the rights of indigenous peoples

## A brief historical overview of minority rights

Minorities and the need to protect and promote their rights were recognized under the League of Nations even though the rights of minorities were not incorporated into the Covenant of the League of Nations itself. In the period between the First and Second World Wars, protecting the rights of minorities was acknowledged as being of international concern and treaties related to newly created states or states that were newly expanded by war<sup>87</sup> had to include provisions for the protection of religious, racial and linguistic minorities which were then placed under the guarantee of the League of Nations.<sup>88</sup>

Following the Second World War the League of Nations was succeeded by the United Nations in 1945 and while any reference to minorities was omitted from the UN Charter<sup>89</sup> and the Universal Declaration of Human Rights (UDHR), this decision can be seen to reflect the sense in the immediate post-war period that recognition of universal individual human rights on a non-discriminatory basis would provide the best means of underpinning the 'new world order'.<sup>90</sup> Moreover, it was felt that a system of general recognition of basic human rights for all would serve to avoid political difficulties which might accompany a regime for the protection of minorities.<sup>91</sup> Although the focus on human rights for all rather than any regime that could be viewed as potentially divisive reflected the sensitivities at the time,<sup>92</sup> countries of immigration were most vocal in arguing for provisions related to the prevention of discrimination without specific reference to the protection of minorities.<sup>93</sup> As a result of these factors, only a general prohibition of distinction on the grounds of race, sex, language, or religion is found in the Charter,<sup>94</sup> a provision further elaborated in Article 2 of the UDHR.<sup>95</sup>

Despite the lack of attention paid to minority issues at the San Francisco Conference<sup>96</sup> and in the UDHR, it seems that some sections of the UN recognized the benefit of the qualitatively different form of protection that minority rights could provide.<sup>97</sup> This can be seen in the establishment as early as 1947 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was mandated to 'examine what provisions should be adopted in

the definition of the principles which are to be applied in the field of the protection of minorities'.<sup>98</sup> Subsequently, the inclusion of a provision specifically on the promotion and protection of the rights of persons belonging to minorities was included in the International Covenant on Civil and Political Rights, which was adopted by the General Assembly in 1966 and entered into force in 1976.<sup>99</sup>

## Rights of minorities in light of the right to development

Article 27 of the ICCPR provides an important global and specific standard applicable to the rights of minorities. It holds:

'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

Article 27 explicitly refers to three aspects of the rights of minorities, namely: culture, religion and language.<sup>100</sup> The logic behind Article 27 is such that in addition to protection against discrimination, members of minority groups require particular rights to enable them to preserve and develop their ethnic, religious or linguistic characteristics.<sup>101</sup>

In international law, minority rights are cast in terms of individual rights exercised collectively. Article 27 of the ICCPR makes this clear by stating that '*persons* belonging to such minorities will not be denied the right, in community with other members of their group'. It has been remarked that

'[t]he rights in Article 27 are a hybrid between individual rights and collective rights because of the "community" requirement: the right of a member of a minority is not exercised alone; enjoyment of culture, practice of religion, and use of language presupposes a community of individuals endowed with similar rights. Minority rights have therefore been described as benefiting individuals but requiring collective exercise.'<sup>102</sup>



These rights, as the Human Rights Committee (HRC) reminds us, are ‘distinct from and additional to, all other rights to which, as individuals in common with everyone else, they are entitled to enjoy under the Covenant’.<sup>103</sup> While Article 27 addresses the need to preserve the distinct characteristics of minorities, it falls short of explicitly referring to minorities as forming a group. In the realization of the right to development, it is recognition of the rights of minorities as having rights as a group that will provide the strongest safeguard of the very rights that the minorities legal regime seeks to protect.

It is important to note that no conclusive definition exists as to what constitutes a minority group,<sup>104</sup> and recognition as a minority is to be based on self-identification and objective criteria. As has been stated by the HRC, ‘The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.’<sup>105</sup> Objective criteria can be understood as depending on the characteristics of individuals belonging to the group, such as their religion or language, and on the characteristics of the group itself, such as its size and position of non-dominance within the state. Self-identification, on the other hand, speaks to the will or decision of those individuals to collectively see themselves as different from other inhabitants of the state, who hold or evidence a sense of belonging to the group and who wish for those differences to be maintained in order for the group in its distinctiveness to continue.<sup>106</sup> It is this position of non-dominance of the group as a whole that risks limiting the protection of the rights of persons belonging to minorities in any development process.

On 1 December 1992 the UN General Assembly adopted a resolution approving a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM).<sup>107</sup> As the Declaration’s fourth preambular paragraph makes clear, the UNDM is ‘inspired by the provisions of Article 27’. The significance of having the UNDM ‘inspired by’, as opposed to ‘based on’, Article 27 of the ICCPR reflects a deliberate decision during drafting to emphasize that, while the interpretation of Article 27 may take the UNDM into account, the Declaration is not restricted by limitations of that Article.<sup>108</sup> The UNDM in fact goes beyond Article 27 of the ICCPR, addressing the rights of minorities to protect themselves and employing explicit language as to the positive action required of states. The rights of minorities have been elaborated in the Minorities Declaration, the content of which may serve to inform the scope of Article 27.

The Preamble defines the object and the purpose of the instrument and provides the framework through which the operative paragraphs should be interpreted.<sup>109</sup> The preambular paragraphs of the UNDM that are of particular

interest to the rights of minorities in the realization of the right to development include the desire of the General Assembly to promote the realization of the principles contained in the UN Charter, the UDHR, the two Covenants and other relevant instruments that have been adopted at the universal or regional level.<sup>110</sup> Preambular paragraph 4 of the UNDM, as was previously mentioned, is ‘[I]nspired by the provisions of Article 27 of the International Covenant on Civil and Political Rights’. This is a significant point as the UNDM departs from Article 27 by placing considerable emphasis on participation rights, a point central to the right to development and to which we will return. Notably, however, the HRC has repeatedly taken the view that the right to participate is to be read into Article 27.<sup>111</sup> The emphasis in preambular paragraph 6 that links the ‘constant promotion and realization of the rights of ... minorities’ to the ‘development of society as a whole’ and most specifically to the ‘strengthening of friendship and cooperation among peoples and States’ sums up the essential role of minority rights as a constitutive element of the right to development. It also places minority rights within the context of Article 55 of the UN Charter from which the language was derived, leading one commentator to deduce that, as such, ‘[m]inority rights are therefore placed in an analogous position to the principles of self-determination and human rights’.<sup>112</sup> Article 55 provides the foundation upon which the obligations of international cooperation in the DRD stem, evidenced by its reference to, *inter alia*, the statement that ‘the United Nations shall promote ... higher standards of living, full employment, and conditions of economic and social progress and development ... solutions of international economic, social, health, and related problems ... and universal respect for and observance of human rights’, a point to which we shall return later.

Article 1(1) of the Minorities Declaration, which affirms that ‘States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity’, moves beyond Article 27 by explicitly enshrining, in mandatory language by use of the word ‘shall’, the right of minorities to their existence, protected by states, and the right to the promotion by the state of their identity. While the UNDM provides no definition of existence, the scope of the right can begin to be defined in light of existing standards, such as the right to be protected from genocide, the rights to basic subsistence, and the cultural dimensions of the right to existence, such as protection from ethnocide or forced assimilation.<sup>113</sup> Further, the right to existence may be linked to the notion of individuals being able to live in community with others.<sup>114</sup> While several applications of the right may have relevance for the right to development, the right to

existence as a right to subsistence and the maintenance of cultural existence are closely associated with the process of development.<sup>115</sup> Although there is no specific reference to minority rights in the DRD, it speaks of the realization of *all* human rights. To deprive a group of the economic resources necessary to sustain its existence, both physical and in terms of its cultural traditions in securing the right to food,<sup>116</sup> such as the use of traditional farming techniques or crop selection, systems of community exchange, or nomadic lifestyle, constitutes a failure to respect minority rights. It is significant that Article 1 of the UNDM on the obligation of states to protect the right to existence (and identity) was deliberately placed as the first article (having been moved from the position of Article 2 in the draft text), reflecting the importance of its content and its logic in relation to the rest of the Declaration.<sup>117</sup> Article 1(2), again cast in mandatory language and without qualifiers that are found in other provisions, obliges states to ‘adopt appropriate legislative and other measures to achieve those ends’.

Article 2(1) states:

‘Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.’

Article 2(1) outlines the rights of persons belonging to minorities, providing an elaboration of and improvement on Article 27 of the ICCPR in several areas. Significantly, while Article 27 is cast in negative terms (‘persons belonging to such minorities shall not be denied the right ...’), the UNDM replaces this with the positive (‘[p]ersons belonging to ... minorities have the right to ...’), emphasizing a requirement of action on the part of states, and an aim of expanding the capabilities of minorities. While the language of UNDM Article 2(1) makes the positive obligation of states clear, ICCPR Article 27, despite its negative wording, has been interpreted by the HRC as imposing positive obligations on states:

‘Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against acts of the State party itself, whether through legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.’<sup>118</sup>

Additional language found in Article 2(1) of the UNDM that is not explicitly referred to in ICCPR Article 27 includes reference to the fact that minority rights may be exercised ‘in private and in public, freely and without interference or any form of discrimination’.

The Minorities Declaration pays considerable attention to the right of minorities to participate. The right to participate is a well-established principle of international law<sup>119</sup> and a tenet central to the process of realizing the right to development. Article 2(2) of the UNDM states that persons belonging to minorities ‘have the right to participate effectively’ in *inter alia* ‘economic and public life’. Article 2(3) reflects the right of persons belonging to minorities to participate effectively in decisions that ‘concern[ing] the minority to which they belong or the regions in which they live’. Article 4(5) reflects recognition of the need for states to consider taking measures ‘so that persons belonging to minorities may participate fully in the economic progress and development in their country’. Article 5(1) implies the participation requirement by recognizing that ‘national policies and programmes *shall* be planned and implemented *with due regard for the legitimate interests* of persons belonging to minorities’.<sup>120</sup> Participation can be understood as requiring the involvement of minority ‘communities and associations and their representatives at the earliest stages in the development and implementation of policies and programmes affecting them and to ensure sufficient transparency about such policies’, as the UN Committee on the Elimination of Racial Discrimination (CERD) has clearly stated in its 2000 General Recommendation on Discrimination Against Roma, and subsequently in its General Recommendation of 2002 on Descent-Based Discrimination.<sup>121</sup> Articles 4(5) and 5(1) of the UNDM, when read together, indicate that the ‘legitimate interests’ of minorities include ‘economic progress and development in their country’.<sup>122</sup> In the interpretation of ICCPR Article 27, the HRC recognizes that the enjoyment of the rights may require positive legal measures in order ‘to ensure the effective participation of members of minority communities in decisions which affect them’.<sup>123</sup> Article 25 of the ICCPR, which recognizes and protects the right of individuals to participate in processes which constitute the conduct of public affairs,<sup>124</sup> of course applies equally to persons belonging to minorities. As the HRC has made clear, the term ‘public affairs’ is defined broadly and includes ‘the exercise of legislative, executive and administrative powers [and] [c]overs all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels’.<sup>125</sup>

The provisions relating to minority participation in the UNDM and ICCPR complement the participation provisions of the DRD. The first article of the DRD refers to ‘[t]he right to development as an inalienable

human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy ... development'. Reference to the 'active, free and meaningful participation in development' of the entire population is found in preambular paragraph 2 and in Article 2(3) of the DRD, as is reference to the 'human being [as] the main participant and beneficiary of development'.<sup>126</sup> The importance of 'popular participation in all spheres as an important factor in development and in the full realization of all human rights', is found in Article 8(2) of the DRD. Hence, development requires the full and effective participation of persons belonging to minorities and the protection of their rights in the design and implementation of development policies and programmes, both nationally and as derived through international cooperation.<sup>127</sup> Just as the DRD requires a process based on the participation of all people in order to realize the right to development, the provisions of the UNDM and ICCPR reflect the particular implications of participation in promoting the rights of minorities.

The application of the principle of non-discrimination is also crucial for fulfilling the right to development, as discrimination remains a key barrier to the development of minorities. The right to non-discrimination is a conventional and customary human rights norm found in, *inter alia*, UNDM Article 4(1),<sup>128</sup> and in the Preamble and in Article 6 of the DRD. The non-discrimination provisions in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been applied by their respective Committees to address discrimination against minority groups in areas usually linked very closely to development. CERD's Concluding Observations of states reports, for example, have highlighted the Committee's concerns as to the impact of discrimination in the enjoyment of economic, social and cultural rights for certain minority groups within their territories under Article 5 of ICERD.<sup>129</sup> Similarly, the Committee on Economic, Social and Cultural Rights (CESCR), in its review of states' periodic reports routinely requests that States parties supply information as to the application of the provision on non-discrimination through the presentation of, *inter alia*, disaggregated data. CESCR has also emphasized in its statement on 'Poverty and ICESCR', that discrimination is a major factor in the perpetuation of poverty amongst many groups, and that such discrimination has 'profound implications for anti-poverty strategies'.<sup>130</sup>

Article 4 of the Minorities Declaration can be seen as laying the foundation for specific requirements necessary to protect minority rights in the realization of the right to development. In addition to a non-discrimination provision in Article 4(1), it provides in Article 4(2): 'That

States shall take measures to create favourable conditions to enable ... minorities to express their characteristics and to develop their culture, language, religion, traditions and customs ...'. Article 4(3) refers to the opportunity for mother-tongue tuition; Article 4(4) refers to the need for states to consider measures in the field of education that encourage knowledge of their history and traditions etc. and, as previously mentioned, Article 4(5) specifically calls upon states to consider measures that may be required to enable minorities to participate in the economic process and development of their country. Where the language in Article 4 is qualified by the reference to taking measures 'where appropriate', analogous language in the ICESCR nonetheless requires that 'steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized'.<sup>131</sup>

The resources available to states to ensure the protection and promotion of minority rights, including their participation, as laid out in Article 4(5) of the UNDM, national policies and programmes planned and implemented with due regard for their interests as per Article 5(1), cooperation and assistance at the international level as per Article 5(2), and the cooperation of states in the promotion of the rights set forth in the UNDM should all be understood to also include resources available from the international community.<sup>132</sup> Applied in the context of the right to a particular process of development, the allocation of resources must be consistent with human rights standards,<sup>133</sup> and economic growth must be undertaken with respect for equity and justice.

The UNDM recognizes in Articles 5(2), 6 and 7, the significance of international cooperation among states in the promotion and protection of the rights of minorities. Article 9 specifically refers to the role of 'specialized agencies and other organizations of the UN ... in the full realization for the rights and principles set forth in this Declaration, within their respective fields of competence'; this is a provision with direct relevance to, for example, the World Bank and the International Monetary Fund. International cooperation is also a key component of the right to development, a theme to which we return in subsequent sections.

The right to development has been defined in light of Article 1 of the DRD and subsequent articles in the Declaration as the right to a process of development that leads to the realization of all the human rights and fundamental freedoms and that expands the capabilities and well-being of all. These freedoms are identified with human development in both its instrumental and substantive forms.<sup>134</sup> The rights-based approach to development aims to ensure that the process and the outcomes of the process are implemented in a manner consistent with human rights standards. The essential elements of this approach is that it

should respect human rights principles – be equitable, both in decision-making and sharing the benefits, non-discriminatory, participatory, accountable and transparent<sup>135</sup> – as well as aim at the realization of human rights standards as derived from international human rights instruments. While inclusive of the rights-based approach to development, the right to development goes one step further by treating all rights as an integrated whole and the right to development as a comprehensive process for their achievement. Minority rights as human rights and as constituent elements of the right to development must be understood as a part of this particular process, and as such, imposing on all duty-bearers of the right to development, not only obligations of result, but also obligations of conduct.

## Rights of indigenous peoples in light of the right to development

While indigenous peoples most often constitute a minority in the states in which they live, they are groups that have distinct identities and corresponding rights under international law from those of ethnic, linguistic and religious minorities. Indigenous peoples emphasize that they share a distinct history, culture, language and institutional structures<sup>136</sup> with their own specific laws, values, traditions and unique economic, religious and spiritual relationship with their lands.<sup>137</sup> There is a clear trend in support of distinguishing the question of indigenous rights from that of minorities, evidenced by the separate treatment of the situations facing minorities and indigenous groups within the UN system and by the decision in 1995 to elaborate a declaration on the rights of indigenous peoples signifying that the Minorities Declaration does not comprehensively address the rights of indigenous peoples.<sup>138</sup> Rights that protect minorities can apply to members of indigenous groups, exemplified by the numerous cases for the protection of indigenous rights brought under Article 27 of the ICCPR.<sup>139</sup> This does not, however, preclude indigenous peoples from claiming other rights aimed specifically at their identity as indigenous peoples. The specific rights attributed to indigenous peoples, then, are in addition to all individual human rights and minority rights, if they qualify as a minority.

As is the case with the term minority, there is no universally accepted definition as to who is indigenous. However, self-identification is central to the determination, as are objective criteria<sup>140</sup> along with historical territorial continuity that predates colonization or invasion by other peoples.<sup>141</sup>

The rights of indigenous peoples within the right to development can be closely linked to several broad interna-

tional legal standards and principles: participation rights, the right to self-determination, and recognition and implementation of related group rights, such as those pertaining to land and natural resources. As for minorities, fulfilment of the right to development includes their active, free and meaningful participation<sup>142</sup> in the formulation, implementation, monitoring and evaluation of any policies and programmes that will affect them. It also refers to the ability to share in the benefits of development and requires respect for the principle of non-discrimination throughout. Another closely related standard is that of the right of peoples to self-determination, an inviolable principle of international law. The right to self-determination is explicitly recognized in the DRD as integral to the realization of the right to development, and includes, as the DRD reaffirms, ‘the exercise of [the inalienable right of peoples] to full sovereignty over their wealth and natural resources’.<sup>143</sup> The provisions on self-determination in the DRD are aimed at strengthening the rights of peoples to determine for themselves the forms of development that are appropriate to their cultural values<sup>144</sup> and, as such, self-determination in development includes the right to participate as a group in the design and implementation of a sustainable system of development and the policies that drive it. Another key element pertaining to the promotion and protection of the rights of indigenous peoples in the right to development is the recognition of their rights as a group, including as peoples. Recognition of the right of the group is essential for group rights to be protected within the realization of the right to development, which is a collective right of an entire population exercised against the state and the international community of states, and which requires particular methods within its process of realization that address the rights of specific groups. As for minorities, indigenous peoples are entitled to have their right to a process of development fulfilled by having obligations of conduct met through a set of policies that are necessary in order for those results to be achieved. These policies will be aimed at particular groups (devised with their full participation) within the broader national collective.

With regard to international standards, the International Labour Organization (ILO) was the inter-governmental body to take the lead on addressing indigenous rights and in 1957 adopted the Indigenous and Tribal Populations Convention 107. Eventually recognized as assimilationist, it was revised by the 1989 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169. Convention 107 was ratified by 27 states and while it is closed to further ratification it remains in force for States parties that have not subsequently ratified Convention 169, such as Bangladesh and India, although these States parties are still subject to more contemporary interpretations of the rights con-

tained in it. Convention 169 came into force on 5 September 1991 and has been ratified by 17 countries.<sup>145</sup> Although it is considered by some indigenous peoples as outdated in light of more recent developments and trends involving indigenous rights, and has a low level of adherents to date, its impact on the process and programmes in the realm of development is nonetheless seen as significant. According to the Guide to the Convention,<sup>146</sup>

‘In spite of the relatively slow rate of ratifications, this Convention has had significant influence on domestic policies and programmes, as well as the policy guidelines of several funding agencies. This shows that, to induce changes in the perception of the problems and the ways to solve them, ratification, though desirable and in the long term necessary, is not indispensable in the short and medium term.’

Moreover, despite certain shortcomings,<sup>147</sup> Convention 169 is significant in that it is currently the only binding international instrument, still open for ratification, dedicated to the rights of indigenous peoples.<sup>148</sup>

The term ‘indigenous populations’ was widely used until the adoption of Convention 169 which, in the process of revising Convention 107, replaced the term with ‘indigenous peoples’. This was the result of strenuous lobbying by, among others, the representatives of indigenous organizations who felt that the term ‘indigenous populations’ failed to reflect their fundamental identity as peoples and their distinct attributes, beliefs, traditions and historical relationship to land.<sup>149</sup> The reticence of states to embrace the term ‘peoples’ reflects their perpetual concern that the unqualified use of the term might imply a right to (external) self-determination such as through secession. It is not therefore uncommon to see references to indigenous peoples followed by a clause stating that the use of the term ‘peoples’ shall not be construed as having any implications as regards the rights which may attach to the term under international law.<sup>150</sup> This general acceptance by states that indigenous groups have a distinct identity and corresponding rights, combined with the unwillingness of certain states to apply the term free from explicit references that offer legal safeguards to their territorial integrity, was still apparent in the language endorsed in the Durban Declaration of the World Conference Against Racism in 2001. Significantly, however, the UN World Summit on Sustainable Development held in 2002 adopted its final documents with an unqualified use of the term, which is largely felt to reflect a vital step in appropriately defining the rights of indigenous peoples.<sup>151</sup>

The rights of indigenous peoples relevant to the development process as articulated in ILO Convention 169, include their right to participate in the process. Specific

reference can be found in the Preamble, which recognizes ‘the aspirations of these peoples to exercise control over their ... ways of life and economic development’.<sup>152</sup> Article 2(2)(b) refers to the responsibility of governments ‘for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity ... [and] shall include measures ... promoting the full realisation of the social, economic, and cultural rights of these peoples’. Article 6 insists that governments, when applying the provisions of the Convention, shall ‘(a) consult the peoples concerned, through appropriate procedures ... (b) establish means by which these peoples can freely participate ... at all levels of decision-making [in all bodies] responsible for policies and programmes which concern them’. Article 6(2) makes clear that ‘[t]he consultations carried out in the application of this Convention shall be undertaken in good faith and in a form appropriate to the circumstances with the objective of achieving agreement or consent to the proposed measures’. Article 7 refers specifically to the rights of indigenous peoples in the process of development, stating in Article 7(1) that indigenous peoples shall ‘have the right to decide their own priorities for development ... and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.’ Regarding the conditions of life and work and levels of health and education, Article 7(2) states that ‘their participation and co-operation, shall be a matter of priority in plans for overall economic development of the areas they inhabit’. The Guide on Convention 169 suggests that while Article 7 does not provide for a right of veto by indigenous peoples over development plans, there must be:

‘actual consultation in which [indigenous and tribal] ... peoples have a *right to express their point of view and a right to influence the decision*. This means that governments have to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a meaningful contribution.’<sup>153</sup>

In relation to land which indigenous peoples have traditionally occupied, Article 14 provides that ‘measures shall be taken in appropriate cases to safeguard the right of [indigenous] peoples to use lands not exclusively occupied by them, but to which they have traditional access for their subsistence and traditional activities’. With regard to natural resources, Article 15 recognizes the rights of indigenous peoples to have such land specially safeguarded, including through the right ‘to participate in

the use, management and conservation of these resources', and by ensuring that if the state retains ownership of the resources,

'governments shall establish or maintain procedures through which they shall consult [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive ... compensation ...'.

Article 16 addresses compensation if 'as an exceptional measure' indigenous peoples have been removed from the lands which they occupy. The criteria to be applied in the determination of compensation, including in the case of relocation, should be 'their free and informed consent' and entail 'wherever possible, the right to return to their traditional lands, as soon as the grounds for relocation cease to exist'.

Although many indigenous groups are not satisfied with the promotion and protection afforded them under Convention 169 (and are contemptuous of Convention 107), it does provide a minimum standard. Furthermore, it can be considered as far-reaching in its recognition of the group rights of indigenous peoples,<sup>154</sup> it commits states to positive action, and has codified standards that have been instrumental in increasing the awareness of indigenous rights.<sup>155</sup> Beyond Convention 169, there is a large body of universal and inter-American law that also deals with indigenous rights; some of which goes further than Convention 169 and serves to strengthen the scope of their rights, thereby giving further practical meaning to the particular process and content of the right to development.

In addition to the monitoring mechanisms of the ILO,<sup>156</sup> human rights monitoring bodies, including the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and the Inter-American Commission on Human Rights (IACHR), have paid particular attention to the rights of indigenous peoples. These bodies have contributed to the progressive development of international human rights law through the interpretation of human rights instruments of general applicability to the specific rights of indigenous peoples. The African Commission on Human and Peoples' Rights has also recently turned its attention to the rights of indigenous peoples by establishing a Working Group on indigenous peoples in Africa.<sup>157</sup> This forum could provide a meaningful contribution to the importance of indigenous peoples' rights and the right to development, given that the African Charter on Human and Peoples' Rights

clearly recognizes the rights of peoples and provides for a binding right to development.<sup>158</sup>

While the Convention on the Elimination of All Forms of Racial Discrimination does not specifically mention indigenous peoples, they are clearly entitled to the protection of the Convention. This is reflected in CERD's extensive consideration of the obligations of States parties with regard to indigenous issues in the review of states' reports,<sup>159</sup> and in its adoption in 1997 of a General Recommendation on the Rights of Indigenous Peoples.<sup>160</sup> The General Recommendation addresses several key rights integral to the fulfilment of the right to development. The areas it covers include the provision by States parties of conditions 'allow[ing] for sustainable economic and social development compatible with their cultural characteristics';<sup>161</sup> ensuring 'equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent';<sup>162</sup> recognizing and protecting 'the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources traditionally owned or otherwise inhabited or used without their free and informed consent'.<sup>163</sup> With regard to restitution, the General Recommendation also refers to 'the right to just, fair and prompt compensation [which] should as far as possible take the form of lands and territories'.<sup>164</sup> The General Recommendation uses both the terms 'indigenous peoples' and 'indigenous communities', and elsewhere is individual in its construct, referring to 'members of indigenous peoples'.

One commentator has recognized the normative potential of ICERD to cope with 'new forms of racism'.<sup>165</sup> While racial discrimination against indigenous peoples is not new, CERD's interpretation of the Convention reflects the latter's normative potential to cope with new forms of oppression, and hence new ways in which discrimination impacts on the lives of those who are discriminated against. The Committee has remarked on threats to indigenous lands posed by, for example, displacement in the case of the Philippines,<sup>166</sup> mining activities in Panama,<sup>167</sup> and privatization of Saami lands in Sweden.<sup>168</sup> In the Concluding Observations on Australia's report, the Committee emphasized the need to 'ensure effective participation by indigenous communities in decisions affecting their land rights' and the 'importance of ensuring "informed consent" of indigenous peoples'.<sup>169</sup> Indeed, the General Recommendation refers to the discrimination against indigenous peoples and the deprivation of their rights not only at the hands of colonists, but by 'commercial companies and State enterprises'.<sup>170</sup>

The right to participate and rights related to the land, territories and resources of indigenous peoples is increasingly recognized as a right to free, informed and prior

consent, as recent work of CERD reflects. While Convention 169 refers to 'free and informed consent' in respect of relocation as a result of the removal of indigenous peoples from the lands which they occupy,<sup>171</sup> the same language is not used in the provisions addressing the rights of indigenous peoples to participate, including in rights integrally linked to the development process. This lacuna is addressed in Article 30 of the UN Draft Declaration on the Rights of Indigenous Peoples, which explicitly states:

'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources ...'.

In meetings such as those of the UN Working Group on Indigenous Populations, denial of access and control over their own resources is noted as one of the most important causes of the poverty faced by indigenous peoples. International standards recognize the rights of indigenous peoples over their lands, territories and natural resources, as evidenced in Article 14<sup>172</sup> and Article 15 of Convention 169, Chapter 26 of Agenda 21<sup>173</sup> and the recent normative developments emerging from the Draft Declaration on the Rights of Indigenous Peoples. The relevance of these rights to the fulfilment of the right to development is made clear in Principle 3 of the Rio Declaration on Environment and Development,<sup>174</sup> and in both the Preamble and Article 23 of the Draft Declaration. The Preamble reflects the concern that: 'Indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in 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', and Article 23 states that: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development ...'.

The Human Rights Committee which monitors state compliance with the ICCPR, both in its views on individual communications under Article 27 and in its Concluding Observations on states reports, recognizes that 'development' measures may pose a threat to the traditional way of life and culture of indigenous peoples in violation of their rights under the Covenant. In the case of the *Lubicon Lake Band v. Canada*, the Committee decision affirms that projects aimed at the economic development of a country are to be assessed with consideration to their obligations under Article 27 which

protects, *inter alia*, the cultural rights of persons belonging to minorities.<sup>175</sup> In the *Lansman* case of 1992, the HRC remarked that the scope of the state's freedom to encourage development or allow economic activity by enterprises 'is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27'.<sup>176</sup> In its Concluding Observations on the report submitted by Mexico, the Committee remarked on the importance of the sovereignty of indigenous peoples over natural resources when it noted:

'The State party should take all necessary measures to safeguard for the indigenous communities respect for the rights and freedoms to which they are entitled individually and as a group; to eradicate the abuses to which they are subjected; and to respect their customs and culture and their traditional patterns of living, enabling them to enjoy the usufruct of their lands and natural resources and that appropriate measures should also be taken to increase their participation in the country's institutions and the exercise of the right to self-determination.'<sup>177</sup>

As the DRD makes clear, participation is central to the right to development, a right also emphasized by the HRC with regard to the participation of members of indigenous communities in decisions that affect them. In the *Lansman* case of 1995, the Committee recalled the terms of paragraph 7 of its General Comment on Article 27, 'in which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that all measures must be taken to "ensure the effective participation of members of minority communities in decisions which affect them"'.<sup>178</sup> The participation of members of indigenous communities in decision-making and its importance in ensuring the sustainability of their culture and their way of life is also addressed in a range of Concluding Observations issued by the HRC, for example, with regard to Sweden,<sup>179</sup> Venezuela,<sup>180</sup> and Mexico.<sup>181</sup>

Increasingly, participation rights, such as those we have referred to, are being interpreted not merely as a right to consultation but as a right to consent. In 2002, the Inter-American Court of Human Rights (IACtHR) ruled on the importance of consent and the implied need for prior participation in decision-making regarding indigenous peoples and their land in *Awas Tingni Indigenous Community of Mayagna v. the State of Nicaragua*. Finding that Nicaragua had violated the right to property, judicial protection and due process of law, by granting logging concessions on the lands of indigenous

peoples without taking steps to title and demarcate those lands, the IACtHR held that:

‘The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awás Tingni lands, without the consent of the Awás Tingni Community.’<sup>182</sup>

While this was the first case regarding indigenous people to be heard by the Inter-American Court, the Inter-American Commission on Human Rights in its capacity to consider petitions has examined allegations against governments for the violation of the rights of indigenous peoples. The submission regarding the Huaorani in Ecuador listed the ills of ‘development’ to which this indigenous group had been exposed, including colonization, land speculation and dispossession, logging, disease epidemics and displacement from traditional territories. The Commission’s recommendations addressed, *inter alia*, access to information and participation in relevant decision-making processes, interpreting this to mean:

‘... that the State take measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival. “Meaningful” in this sense necessarily implies that indigenous representatives have full access to information which will facilitate their participation.’<sup>183</sup>

In addition, the underlying principle of ‘respect for the inherent dignity of the person’ – and as such the right to life and physical integrity – was recognized by the Commission as a key right at issue in the process of development.<sup>184</sup> The Commission’s conclusion reflected an appreciation of the right to development which entails a process and form of development that respects all human rights when they observed that ‘the norms of the Inter-American system neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals concerned’.<sup>185</sup>

In the concluding recommendations on indigenous issues in its 1999 Report of the State of Human Rights in Colombia, the Inter-American Commission remarked that it expected the state to ensure that processes of development did not ‘cause irreparable harm to the religious, economic or cultural identity and rights of indigenous

communities’.<sup>186</sup> In the same report the Commission referred specifically to the right to development,

‘in the sense of future development of their social groups, their culture, and *improvement of their own quality of life*, in accordance with their cultural and social systems and the life plans they devise or carry out as peoples, and their development in terms of their inter-cultural relationship with national development’.<sup>187</sup>

Just as in the DRD, the IACHR has defined the right to development as providing an improvement in well-being.<sup>188</sup> This reflects an appreciation of the right to development as a right to a particular process of development which has as its aim the constant improvement of all people. Increasingly, the right to development understood as a legal right to a particular process of development, is being addressed in international judicial fora, and international and regional standards and jurisprudence are elaborating its scope.

The full range of international human rights standards, including those elaborated specifically to protect the rights of minorities and indigenous peoples, must be consistently respected in development. The right to development builds on the coordination of these standards and requires not only that they are consistently applied by states<sup>189</sup> acting at the national level and by the international community of states, but that their interdependence is reflected in the process of development. The interdependence of rights in a process of development aims to ensure that the realization or improvement of one right is not achieved at the cost of another’s deterioration. As such, the right to development is not an aggregate of existing rights but a distinct right, in which the rights of minorities and indigenous peoples, including their effective participation in all stages of the development process, as well as access to its benefits,<sup>190</sup> are essential to its fulfilment. The application of the principle of non-discrimination and the implementation of special measures,<sup>191</sup> where required, is also of central importance, because discrimination against minorities and indigenous peoples dramatically hinders their development. Detailing the rights of minorities and indigenous peoples within the realization of the right to development serves also to illustrate how the right to development is violated, and thus the relevance of treating the right to development in a comprehensive manner in which all rights are integral to it. Consequently, protecting and promoting the rights of minorities and indigenous peoples in any development process, and ensuring their ability to develop according to their values and in line with their human rights, imposes on states obligations not only of result, but of conduct.



# Debunking the notion that the right to development is a right of states

Under international human rights law right-holders are individuals, or individuals owed rights collectively or as groups with regard to rights which only a group can claim. Within the right to development the right-holders are the collective of individuals in a given state as well as groups within the collective, as is the case for minorities and indigenous peoples. People are the subjects of international human rights law.

While individuals cannot assert their right to the process of development individually, they are nonetheless right-holders (as are groups) and certainly beneficiaries. With regard to the right to development, states acting at the international level as duty-bearers play an essential role in fulfilling obligations of international cooperation in order to assist in the realization of the right. States acting nationally within the existing inter-state system are the entity through which the international component of the right is asserted. The role of developing states in asserting the right to development of their people internationally does not, however, render the right to development a right of states, as some commentators and representatives of several developing states insist on arguing.

Indeed, the debate on the right to development began with the developing countries propounding that the right to development was distinct from civil, political, economic, social and cultural rights and instead should be understood as a right of developing countries seeking to build a new international economic order.<sup>192</sup> Bedjaoui<sup>193</sup> is among those who claim that the right to development is a right of states. He defends the view that the right to development is primarily a right belonging to developing states in claiming their entitlement 'to receive a fair share of what belongs to all', although he recognizes that the beneficiaries should be individuals, as well as the state.<sup>194</sup> The DRD offers a different interpretation, casting the right to development as a human right at the centre of which is 'the constant improvement and ... well-being of the entire population and of all individuals<sup>195</sup> ... [aimed at] conditions favourable to the development of peoples and individuals<sup>196</sup> ... [and] [c]onfirming that the right to development is an inalienable human right'.<sup>197</sup>

The primary concern of those who defend the right to development as a right of states is to extend the human rights principles of equality, non-discrimination, participation and accountability, as well as democratic decision-making, to international relations. This, it is felt, would facilitate the development of their countries thwarted

by the unequal relationships of the international economic systems that govern trade and finance. While developing countries emphasize the need for equity and participation in inter-national relations, in the early debates of the 1970s this was not matched by equivalent attention given to their domestic obligations, a problem that persists, as is apparent in many of the exchanges in the Working Group on the Right to Development. Although there is little doubt that it is reasonable for developing states to expect equitable treatment that mirrors universally agreed human rights standards within the scope of their international interactions, in order for the right to development of people or groups to be fulfilled, representation must be established as genuine and democratic. The need for legitimate democratic structures is part of the right to development, which, as the DRD makes clear, includes respect for civil and political rights. The duty placed upon states to cooperate with each other in ensuring development and in eliminating obstacles to development<sup>198</sup> is meaningful only if the benefits of that cooperation further the rights of people to develop. This is critical to advancing the rights of minorities and indigenous peoples who, because of discrimination and marginalization, are less likely to benefit from the fulfilment of any obligations at the international level when this has a positive impact at the domestic level. Since in many cases they have little or no access to any form of political influence or public participation, overall development of a country may not contribute to their ability to develop. Respecting existing standards that pertain to minorities and indigenous peoples, redressing discrimination, ensuring participation, as well as assessing the impact of development activities,<sup>199</sup> are part of what is required in realizing the right to development. To suggest the right belongs to the state is to fail to fully comprehend the implications of the nature of human rights, whose beneficiaries are individuals for whom mechanisms must exist to ensure that their rights are protected, and that any benefits derived of international cooperation are accrued accordingly.

The views of some detractors notwithstanding, there is now a general consensus that the right to development is a human right. The right to development as a human right was reaffirmed, *inter alia*, in the Vienna Declaration and Programme of Action<sup>200</sup> adopted by consensus by 171 states at the World Conference on Human Rights in 1993. A consensus document, elaborated and adopted by the states of the world community, reflects a strong endorsement of its content, indeed there is support for

the view that consensus is replacing consent as a basis of international legal obligation.<sup>201</sup> Article 10 of the Vienna Declaration and Programme of Action states, *inter alia*: ‘The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.’<sup>202</sup> Its recognition and acceptance as a human right, at least from the adoption of the DRD onwards, implies the existence of a binary relationship between right-holders and duty-bearers – where there are rights there are duties.

Now if humans are the right-holders, who are the duty-bearers of the right to development? The answer is that the duty-bearers are both the state and the international community of states. It is at both these levels that the obligation to realize the human right to development exists. As international law is still a system that operates within an inter-state paradigm, at the international level it is for the state to claim the right to development from the international community *on behalf of its people*, and therefore it follows that it is for the state to deliver the right to development to the people, within a framework that respects existing human rights standards. Despite the prospect that international law may be gradually transforming itself into a law of the worldwide community of human beings and transcending its inter-state basis, the machinery does not exist as yet for allowing people to demand that the international community put their right to development into effect.<sup>203</sup> Within the framework of international human rights law, rights and obligations, and thus accountability in the right to development, goes beyond inter-state accountability to respond to the accountability of the state or the international community of states, to the people who are meant to benefit from a process of development. However, no mechanism currently exists to assess compliance with the principles enumerated in the DRD.<sup>204</sup> While it is beyond the scope of this paper to consider systems whereby states could be held accountable for violations of the right to development, including the rights of minorities and indigenous peoples, the Committee on Economic, Social and Cultural Rights is providing guidance in terms of the content of obligations under the ICESCR, both nationally and internationally. An optional protocol allowing for communications under the ICESCR could contribute to strengthening accountability, as do the views of the Human Rights Committee in relation to Article 27. Domestic courts have also adjudicated on economic, social and cultural rights, and an international mechanism to enforce the right to development, including the particular process it entails, could complement the contribution being made by judicial and quasi-judicial bodies at the national and international levels.

So while the international community of states has human rights obligations to all people (an important topic addressed in subsequent sections), the fulfilment of these

obligations is often made possible through the state. When certain states assert that the right to development is a right of states, their argument can only be understood as another way of remarking on its role as a vehicle in the realization of the human right to development. Although a state may need to claim the right to development from the international community before it can be realized by the people to whom it is owed, this does not make the right to development a right of states. It simply reflects the role of the state in an inter-state system. The government may be the agent through which the right can be vindicated; however, it will be acting in a secondary capacity, rather than as the holder of the rights.<sup>205</sup> So while there may be situations in which the state can claim the human right on behalf of people and groups, the condition of this claim must be that a procedure is established for the delivery of the human right in question. As previously mentioned, this procedure must be democratic and representative in order to ensure that the rights of individuals and of groups, including those of minorities and indigenous peoples, are met in the processes and in the outcomes. Obiora provides a cogent summary:

‘Where LDCs [Least Developed Countries] become the subject of the right to development at the international level, their citizens and subjects are endowed with the right at the national level as individuals and/or as members of relevant ... groups. In this mode, development constitutes a collective process and the individual, while not able to assert the right *per se*, may claim the establishment of conditions necessary for her or his development in interaction with others. In turn the state becomes the plenipotentiary or international dimension of peoples ...’<sup>206</sup>

Developing states’ drive to participate as equals in the international economic order and to claim this prerogative in relation to the international community, in order to allow for their viable and sustainable economic development, is by no means without merit, and is reflected in the DRD. The Preamble confirms that ‘the right to development is an inalienable human right and that the equality of opportunity for development is a prerogative both of nations and of individuals who make up nations’.<sup>207</sup> The reference to the prerogative of nations recognizes the international dimension of the right to development and hence the implications of international cooperation on the ability of certain states to fulfil the right. As right-holders it is human beings who are owed the rights, including the right to international cooperation, even though these may have to be asserted by their state. States do have rights (and obligations) under international law; they do not, however, have rights under international human rights law beyond that which facilitates the realization of the human rights of people.

Article 2(3) of the DRD provides that

‘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’.

The formulation implies that the state can assert the right of its people to development against other states and the international community.<sup>208</sup> In the current globalized world Article 2(3) can indeed be interpreted as a developing state’s need for international cooperation because of individual states’ increasing loss of autonomy, a loss that characterizes the contemporary global economy. Hence, the ability of the state to fulfil its domestic obligations, including the duty to formulate appropriate policies to deliver the right to development, may be constrained by the actions of the international community.

In light of this reasoning, the interpretation of the right referred to in Article 2(3) is that the right of states is the ‘right to develop human rights-based development policies in the interests of their people<sup>209</sup> made possible, where necessary, through international cooperation. The role of the state, then, is not as a holder of the right to development but as a vehicle through which the right can be realized by its people<sup>210</sup> and as primary duty-bearer. The international community of states, for its part, has an obligation to cooperate in order to enable the realization of the right and to contribute to the ability of the developing state to fulfil the right. Perhaps Kéba Mbaye, former Vice-President of the International Court of Justice and among the first advocates of a right to development, best explained the distinction when he wrote:

‘Admittedly, it is usually States, as representatives ... that exercise the [human] rights accorded to [individuals considered jointly]. But it in no way alters the basic legal fact that these rights are accorded to peoples and nations ... The State itself plays the role of the equivalent of legal trustee.’<sup>211</sup>

The ‘right’, then, ‘is exercisable by the state against those with the power to deny or constrain the capacity of the state to formulate national development policies that benefit the people within the state’.<sup>212</sup> While this is consistent with the role of the state as an agent of the people, it *presupposes* that the state is representing the interests of the people and their ability to realize their right to development – which necessarily includes their effective participation in the elaboration and implementation of any development policy or programme, a right central to the protection of the rights of

minorities and indigenous peoples. Should the recipient state be unable or unwilling to represent its people in accordance with accepted international standards, it should necessarily forfeit its ‘right to formulate appropriate national policies’. International human rights law places constraints on a nation’s sovereignty and, as a result, along with international law, the notion of sovereignty has evolved and has long since ceased to suggest the allowing of a state’s unlimited power over its people. While effective and legitimate states may provide the best means of ensuring rights, the notion of ‘sovereignty as responsibility’ in both internal functions and external duties has redrawn the acceptable scope of the definition of sovereignty.<sup>213</sup>

Under international human rights law, states are the primary duty-bearer<sup>214</sup> (although by no means the only duty-bearer). By establishing an international human rights regime in the aftermath of the Second World War, states sacrificed a part of their sovereignty in order to allow for external assessment and regulation of the degree to which they ensure the promotion and protection of human rights, both within their jurisdictions and wherever their activities, or activities of any other agent falling within their jurisdiction, would have an impact on human rights. States are consequently subject to the law of international human rights, their role being that of duty-bearer and not direct beneficiary of the rights. While states have the duty to formulate development policies (under the condition of aiming to improve the well-being of all people, including their full participation, and giving effect to the fair distribution of resulting benefits), in a globalized world states can also be said to have a *right* exercisable against the international community, because they face constraints that can be removed only by the cooperation of the international community; for example, through market access, debt relief, and the redesigning of structural adjustment.<sup>215</sup>

Finally, it should be noted that global cooperation can take many forms and is not limited to financial assistance. International obligations include the requirement that states acting singly respect the enjoyment of human rights in other countries, and acting collectively as part of international organizations, take due account of human rights.<sup>216</sup> In this respect, international cooperation could include: meeting commitments provided for in international environmental treaties, the creation of patent laws that are more equitable than those which currently hinder access to medicine in less affluent countries, and other institutional reforms to the global economy.

The DRD was adopted by General Assembly resolution 41/128<sup>217</sup> and was accompanied by another resolution, 41/133, entitled the Right to Development. This brief text reaffirms that the achievement of the right to development requires both national and international action.<sup>218</sup> In Part II we will explore the nature and content of these obligations.

## Part II Obligations

# Considering the force of the Declaration on the Right to Development

Some commentators refer to the Declaration on the Right to Development (DRD) as providing a suitable example in law of ‘what ought to be’ as opposed to ‘what is’. They emphasize the need to distinguish between moral claims and legal assertions and conclude that the DRD provides a ‘broad framework yet to crystallize into substantive law’.<sup>219</sup> The vast majority of commentators nonetheless agree that certain General Assembly resolutions or declarations<sup>220</sup> may indeed set in motion, influence or become part of the process of custom-building,<sup>221</sup> that they play a pivotal role in the international law-making process, and that by embodying the convictions of adopting states, they may create expectations on the part of other states,<sup>222</sup> or on the part of people in the case of international human rights law. Thus it has been noted that ‘the mere recognition of a rule and the conditions for its execution in a resolution give it the beginning of legal force’.<sup>223</sup> Taken together, these views suggest that General Assembly resolutions can become a critical means of standard-setting.<sup>224</sup>

While the term ‘the right to development’ is not explicitly mentioned in the UN Charter, the Universal Declaration of Human Rights (UDHR) or the two international human rights Covenants, the principles enshrined in the DRD are rooted in the provisions of those fundamental documents. One of the objectives of the international community of states as articulated in the Charter is to ‘promote social progress and better standards of life’.<sup>225</sup> This provides the context for the purpose of the UN in which Member States are, *inter alia*, ‘to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.<sup>226</sup> The UDHR, in addition to providing for a range of fundamental human rights, recognizes the importance of ‘national effort and international cooperation’ in the realization for every individual of ‘economic, social and cultural rights indispensable for his dignity and the free development of his personality’.<sup>227</sup> This seminal declaration also refers to the entitlement of everyone ‘to a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized’.<sup>228</sup> The Covenants, in addition to codifying many human rights, also recognize

the importance of international cooperation in their realization.<sup>229</sup> Moreover, the Committee on Economic, Social and Cultural Rights has explicitly referred to the importance of, *inter alia*, the DRD and ‘the need for States parties to take full account of [it]’.<sup>230</sup> The process that moves a General Assembly declaration from perhaps ‘provid[ing] evidence of the state of the law and also the meaning of texts, and ha[ving] considerable legal significance’,<sup>231</sup> to attaining full normative maturity is typically determined by a host of factors, but the fact that the underlying logic informing the DRD is firmly established in international law can only serve to enhance its normative force.

The application of a range of criteria, applied on a case-by-case basis, tends to determine whether the principles enshrined in a given declaration are ‘law’.<sup>232</sup> A brief consideration of this subject in relation to the DRD may provide some insight into its normative value. However, the ‘comprehensive process’ referred to in the DRD as one in which all human rights and fundamental freedoms can be realized relies not only on the promotion and protection of human rights by the state in respect of the people who are found in it but equally on the international cooperation of states acting at the international level. This critical element of the DRD can be understood as providing an authoritative interpretation of the provisions, and indeed the purposes, of the UN Charter. Therefore, it is argued in subsequent sections of this report that there exists an obligation upon all states as members of the United Nations to cooperate internationally in the realization of the right to development.

## The DRD and its normative force<sup>233</sup>

International agreements may take many forms and hence the particular title given to an international agreement by itself does not determine its legal effect.<sup>234</sup> However, it has been remarked that while ‘the title alone cannot change the nature of a resolution, [but] its substantive content – whether it declares or recommends – is significant’.<sup>235</sup> Thus it is argued that the fact that the right to development was enshrined in a declaration, and further a declaration of the General Assembly, which is

representative of the world community,<sup>236</sup> ‘gives rise to reasonable expectations ... that there is an obligation on States to fulfil those obligations’.<sup>237</sup>

Among the key factors recognized as important in interpreting the effect or force of a declaration is the intent of the parties.<sup>238</sup> Intent can be determined, to provide one example, by the use of language: for instance, whether it is mandatory or hortatory.<sup>239</sup> The mandatory nature of the language of the DRD, exemplified in Article 1, which states that ‘the right to development is an inalienable human right’ and then refers to the ‘entitlement of every human person and all peoples’, is such, it has been argued, that it ‘leaves little scope for debate as to whether the intention of the General Assembly was to declare the existence of a legally guaranteed right to development’.<sup>240</sup> The degree to which a declaration is seen to enshrine basic values generally shared by the international community – ‘community values, community needs and community expectations’ – is also relevant in interpreting its effect.<sup>241</sup> The purpose of achieving international cooperation in solving international problems and in promoting respect for human rights, as found in the UN Charter among its purposes, is cited in the first preambular paragraph of the DRD, and recognition of the entitlement of everyone to a national and international order in which their human rights can be realized as per the UDHR is reaffirmed in the third preambular paragraph of the DRD. These assertions provide the framework through which the operative paragraphs of the DRD should be interpreted.<sup>242</sup> In this way, the DRD can be understood as enshrining and elaborating values of the international community. In addition to the duty of states to cooperate, the reference in the DRD to, *inter alia*, the right to self-determination, sovereignty over natural resources, and international peace and security, reflects ‘a reasonable relationship with existing principles of international law’ – another applicable criterion in determining the effect of General Assembly resolutions.<sup>243</sup>

The number of votes and the voting patterns are also considered important factors in measuring the weight of a resolution.<sup>244</sup> While abstentions have been considered by some as a negative vote and by others as an affirmative vote, the better view may be ‘to treat abstentions, as a general rule, as acquiescence’.<sup>245</sup> It is significant in this regard that the DRD was adopted in 1986 with only one state having cast a vote against it<sup>246</sup> and six abstentions. In relation to the DRD, the opposite view may be that where the declaration has the

‘intent to declare law, whether customary, general principles or instant, spontaneous or new law, and the resolution is adopted by a unanimous or nearly unanimous vote or by genuine consensus, there is a

presumption that the rules and principles embodied in the declaration are law’.<sup>247</sup>

At a minimum, ‘a vote in favour of a resolution infers that the state will act according to its terms, even if it is not legally bound to do so’.<sup>248</sup>

The degree to which implementation procedures are established, reflective of a ‘continued solidarity and determination by a large group of states to see a Resolution implemented’, can be a factor in the consideration of the effect of declarations.<sup>249</sup> Implementation procedures can include gathering of information by the UN Secretariat, or the calling of reports from Member States, as well as more elaborate machinery such as the establishment of a committee.<sup>250</sup> Commitment to the promotion and implementation of the right to development is reflected by, for example: the fact that a new Branch within the Office of the High Commissioner for Human Rights was established, ‘... the primary responsibilities of which would include the promotion and protection of the right to development’;<sup>251</sup> the establishment by the UN Commission on Human Rights of an open-ended Working Group on the Right to Development as a follow-up mechanism aimed at furthering methods by which the right to development may be implemented, and to report on the progress of said implementation;<sup>252</sup> and the appointment by the Commission of an Independent Expert on the Right to Development,<sup>253</sup>

‘in view of the urgent need to make further progress towards the realization of the right to development as elaborated in the Declaration on the Right to Development ... [and] to present to the working group on the right to development at each of its sessions, a study on the current state of progress in the implementation of the right to development’.<sup>254</sup>

These mechanisms reflect the importance placed on the right to development as provided for in the DRD. The normative status of the right to development has been reinforced in the annual resolutions of the General Assembly and the Commission on Human Rights and in declarations adopted at representative world conferences, including the 1992 Rio Conference on Environment and Development,<sup>255</sup> 1993 Vienna World Conference on Human Rights,<sup>256</sup> the 1995 World Summit for Social Development,<sup>257</sup> 1995 Fourth World Conference on Women,<sup>258</sup> 2000 Millennium Summit,<sup>259</sup> 2001 World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance,<sup>260</sup> and the 2002 World Summit on Sustainable Development.<sup>261</sup>

The fulfilment of the criteria outlined above may provide but a starting point for the consideration of the

normative force of the DRD. However, as Obiora points out, categorizing a human right as law does not depend on whether or not the level of protection of that right in many countries remains problematic, or on whether or not the machinery for its protection in most cases remains embryonic, or that there are still important areas of uncertainty about the content and application of those rights.<sup>262</sup> As we hope to have illustrated, the international community fully recognizes a right to development and one which is integrally linked to the realization of all human rights, sustainable development and international economic equity. Therefore, even widespread examples of non-compliance do not negate the existence of the norm.<sup>263</sup>

While it is perhaps premature to suggest that the DRD can be said to be binding in the strictest sense, national and international obligations that appear

throughout the DRD are also reflected in treaties and have thus been accepted as binding at a minimum, on States parties to those treaties. The process described in the DRD essentially provides a consistent method of implementing those obligations by addressing the need to have human rights reflected throughout international and national processes that respect the notion of progressive realization and are sustainable over time.

With regard specifically to the call for states to cooperate internationally in the realization of the right to development, it is the contention of this paper that it may find authority as an interpretation and elaboration of the purposes of the UN Charter. In the words of Brownlie: 'When a resolution of the General Assembly touches on a subject dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter.'<sup>264</sup>

# National and international obligations

The duty-bearers of the right to development are both the state acting at the national level and the international community of states acting individually or collectively, and a balance is to be struck between duties entailing international cooperation and those requiring domestic implementation. States acting at the international level have obligations to realize the former and the state domestically is responsible to give effect to the latter.

Part II of this report predominantly addresses the international component of the right to development, but the obligations of governments acting nationally cannot be overstated. National actions should be aimed at the implementation of each of the constituent rights of the right to development and, significantly, as part of a process of development. Both the process itself, and the outcome, form part of the human right to development and therefore condition the actions of the state as duty-bearers.<sup>265</sup>

At the national level, the right to development implies a need for an enabling environment, which includes arrangements to ensure good governance. Good governance refers to effective systems of governance by the state, including, for example, an accountable government, and one that takes action against corruption as well as ensuring respect for human rights and access to justice.<sup>266</sup> An enabling national environment also requires: a legal and regulatory framework that enables minorities and indigenous peoples to organize and to be heard, without which they cannot be assured of non-discrimination in development;<sup>267</sup> 'active, free and meaningful participation';<sup>268</sup> 'popular participation in all spheres ... of development';<sup>269</sup> and the 'fair distribution of the benefits' of development.<sup>270</sup> In fact, quite the opposite is likely unless discrimination against minorities and indigenous peoples is addressed, including in the distribution of resources, and unless participation rights are respected. Exclusion from decision-making can lead to their further marginalization in processes of national development, and increases the risk that outcomes of development violate, *inter alia*, their economic and cultural rights, such as those linked to sustainable agricultural practices and food security, as well as rights regarding minority languages in education and the expression and development of their customs.

National ownership of the development process, as well as regional plans such as the New Partnership for Africa's Development (NEPAD), only contribute to development understood as a human right within systems that mainstream and prioritize human rights, including those

of groups traditionally excluded from the collective development of (a people in) a state or region. Without good governance and the related concepts of respect for human rights and social justice, any policies and programmes aimed at development will remain unfulfilled, both in terms of incorporating a rights-based approach to development and in terms of contributing to the realization of the right to development.

In sum, it is impossible to adequately address human rights obligations without proper governance structures. Efforts at the national level, however, could be limited by the non-implementation of obligations at the international level, broadly referred to as international cooperation. In principle, international cooperation, including international assistance, refers to the requirement that all actors refrain from inhibiting the realization of human rights, and that those states in a position to assist, take measures to remove obstacles that impede the realization of human rights.<sup>271</sup>

The exact content of these obligations of international cooperation are not yet definitively drawn, but adjusting the rules of operation of the existing trading and financial institutions and intellectual property protection to address the need for an equitable international economic system of multilateral trade, finance and investment is largely accepted as essential, particularly where there is a direct correlation to the promotion and protection of human rights. The same could be said for ensuring that all bilateral and multilateral decision-making processes are fair, equitable, transparent and sensitive to the needs of developing states, including their marginalized groups; that the commercial activities for which a state has direct responsibility<sup>272</sup> conform to international human rights standards; and that states take adequate measures to ensure that overseas operations of companies headquartered in their jurisdiction do not subvert the international human rights obligations of either the home or the host state.<sup>273</sup> International cooperation could also be understood to comprise: ensuring that, in accordance with the UN target, development assistance is equal to no less than 0.7 per cent of a country's GDP; that enhanced programmes for debt relief are implemented;<sup>274</sup> and that market access is facilitated.<sup>275</sup>

The implementation of the obligation of international cooperation may include, but is not limited to, the international transfer of resources. Other methods by which this obligation could be met is through, for example, supplying technology and creating new international

mechanisms to meet the specific requirements of the developing countries.<sup>276</sup> Equally, measures that could be understood as forming part of a state's obligations of international cooperation include ensuring that the appropriate people have an understanding of, and respect for, human rights obligations and the commitments undertaken in the form of the Millennium Development Goals;<sup>277</sup> those responsible for foreign affairs; those in finance and trade who represent the state in international negotiations; and state representatives who are responsible for the policies and projects of the Bretton Woods institutions. It should also be ensured that this understanding of human rights includes those that pertain to minority and indigenous peoples as well as women<sup>278</sup> (including with regard to, for example, the triple discrimination faced by poor women as members of minority communities),<sup>279</sup> who are often excluded from development processes.

At the international level, developing states also have obligations of international cooperation and these could include: ensuring that marginalized groups have a greater voice in international fora; addressing the need to enhance the negotiating capacity of the state in relation to its dealings with transnational corporations, including through the establishment of adequate and appropriate regulatory frameworks for the private sector; adhering to international human rights obligations, with careful attention to also ensuring that international processes and outcomes of development meet the conceptions of development as articulated by minorities and indigenous peoples; and refraining from concluding any international agreement that is inconsistent with its international human rights obligations as owed to people in its jurisdiction.<sup>280</sup> So, while the primary responsibility lies with the state at the national level, states acting at the international level are to ensure that their actions do not inhibit the ability of other states to fulfil their obligations; that they enable other states to implement rights nationally and regionally; and that their actions and decisions fully respect their existing human rights obligations and do not threaten their ability to implement them domestically.

When international cooperation is considered in light of the type of human rights violations it is meant to avert, it becomes clearer why recognition and protection of the group rights of minorities and indigenous peoples within the right to development is helpful. While the beneficiary of the right to development is the individual, protecting indigenous economic production systems, recognition of lands, territories and resources, and traditional knowledge and lifestyles, as well as accessing participation rights that will ensure linguistic and religious rights in the development process, are rights of the group within the collective process of (state) development. All these rights relate to

the expression of their identities as distinct minority and indigenous communities and it is these communities that will need to exercise their rights.

Globalization has largely limited the ability of states to act effectively *ut singuli* in an era of unprecedented interdependence, and this reinforces the scope and need for effective international cooperation. Article 3(1)(2)(3), Article 4(1)(2), Article 6(1) and Article 10 of the DRD all reflect the international component of the right to development. The DRD recognizes the need for a global approach to development to complement national action, and thus international cooperation, perhaps conceived as a form of affirmative action in favour of developing countries, can be understood as an essential component of the realization of the right to development. Within the right to development, all this is intended to contribute to processes and outcomes of development which strengthen human rights protection and promotion through a rights-based application, and which aim at greater capability and freedom for people in order that they may develop in ways that are meaningful to them.

A two-tiered system of duty-bearers has been referred to by the Committee on Economic, Social and Cultural Rights when clarifying the nature of States parties' obligations as per Article 2(1) of ICESCR.<sup>281</sup> For example, the Committee notes that 'the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance'.<sup>282</sup> The Committee goes on to remind States parties that the obligation to cooperate internationally in facilitating the full realization of the relevant rights contained in ICESCR is further stressed by specific provisions in the Covenant: those contained in Article 11 on the adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions; those in Article 15 on the right to take part in cultural life and the right to enjoy the benefits of scientific progress; in Article 22 on international technical assistance; and in Article 23 on international action, which should be understood to include methods such as the conclusion of conventions and the adoption of recommendations. In a subsequent General Comment on the right to free primary education, the nature of the obligation to cooperate internationally was further elaborated when the Committee stressed that: 'Where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community had a clear obligation to assist.'<sup>283</sup>

In view of the importance of the right to development as a comprehensive right in which all human rights and freedoms can be realized, and given that its fulfilment is



integrally linked to an international system that takes into account the interdependence of nations, the implication is that all states have a legal interest in its protection. The right to development may be understood as imposing upon states an obligation *erga omnes* – an obligation owed towards all people.<sup>284</sup> While unequal international divisions have been a permanent feature over the ages, the right to development has gained in currency as interdependence moves with unprecedented speed and repercussions in an era of globalization, and the concept of universal and indivisible rights has become ever-more entrenched. As many of the causes inhibiting the exercising of the right to development are global, so too must be the solutions – and not out of charity or thoughtfulness but as a matter of meeting legal obligations, because the satisfaction of the needs of people is an inalienable right, with corresponding obligations. The UN Working Group on Indigenous Populations noted this point when they remarked that the DRD provides for a shift in development thinking from “development as charity” or “good intentions” to “development as a human right” that includes corresponding obligations. This challenges States to ensure that there is a paradigm shift from indigenous policies based on welfare models to policies based on rights.<sup>285</sup>

In the realization of the right to development, as with all human rights, the primary obligation rests with the state. In the right to development, development policies and programmes as central elements of the development process are for the state to design and implement.<sup>286</sup> The international community has obligations to cooperate to enable the state to carry out its obligations, and while it can reprimand or sanction the state (an act which often does more to punish the people in the state than the ‘state’ itself) for its failure to meet its obligations, it is far

more difficult (not to mention politically explosive) for the international community to implement a development policy for the state. However, in the event that a state fails to uphold its human rights obligations in the process of realizing the right to development – for example, those that protect and promote the rights of minorities and indigenous peoples – the international community may indeed have an obligation to step in, just as the international community has recognized the need for humanitarian intervention in the affairs of a state when there is a major violation of civil and political rights. It may be necessary to intervene with sanctions or other international measures, including ensuring that civil society actors, such as non-governmental organizations and trade unions, play key, if not primary, roles in arrangements related to international cooperation, if there is gross violation of the right to development by a state.

An intricate and multi-layered system of obligations necessary for the realization of human rights was foreseen in Article 28 of the UDHR, which established the principle that respect for human rights is not about narrowly focused obligations limited to relations between individuals and their states, but rather it is a multifaceted system of obligations which attach themselves to all societal relations at the national and international levels.<sup>287</sup> In the words of Marks, Article 28 ‘implies a holistic framework in which the cumulative effect of realizing all types of human rights is a structural change in both national societies and international society’.<sup>288</sup> And as Alston notes: ‘[I]n many respects the right to development is an endeavour to give greater operational context to [Article 28].’<sup>289</sup> In sum, the right to development has an important place in defining international relations, as well as in regulating the relationship between a state and its people.

# The legal foundations of international cooperation in the right to development

Article 3(1) of the Declaration on the Right to Development (DRD) makes clear that states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. While this includes all necessary measures at the national level for the realization of the right to development as reflected in DRD Article 8, the Declaration at Article 3(3) also recognizes the duty of all states to cooperate with each other in ensuring development and eliminating obstacles to development. This is followed by Article 4(1) which refers to the duty of all states to take steps individually and collectively to formulate international development policies. Then, at Article 4(4), the DRD unambiguously accepts that effective international cooperation is essential '[a]s a complement to the efforts of developing countries [and] in providing these countries with appropriate means and facilities to foster their comprehensive development'. The DRD also calls upon states to cooperate in promoting, encouraging and strengthening universal respect for human rights and fundamental freedoms for all.<sup>290</sup>

However, the role of international cooperation of states in facilitating the right to development is not derived uniquely from the Declaration itself but may be considered as an imperative of the UN Charter. That development falls not only to states acting nationally but also to the international community of states to address can be seen in the Charter's Preamble, Article 1(3), and Article 55. Article 1 outlines the purposes of the UN; central among these, as Article 1(3) attests, is 'international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all ...'. Article 55 is the first article in the chapter of the Charter entitled 'International Economic and Social Co-operation'. This Article recognizes that peaceful and friendly relations among nations can only be based on equal rights and self-determination and hence it outlines that the UN shall promote, *inter alia*, higher standards of living, conditions of economic and social progress and development, solutions of international economic, social and health-related problems and universal respect for, and observance of, human rights and fundamental freedoms for all.

Significantly, Article 56 then states: 'All Members *pledge* themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.<sup>291</sup> Thus, it has been remarked that '[t]he Charter itself provides ... an obligation of member states in [the] field [human rights]. It sets forth not only a "principle" but contains, in Article 56, the pledge of all members to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55'.<sup>292</sup>

There is authoritative support, including from the International Court of Justice (ICJ), resolutions of the General Assembly and the writings of scholars, for the position that the UN Charter imposes binding obligations in the area of human rights on every Member State,<sup>293</sup> reinforced by the mandatory obligation implied in Article 55 and a distinct 'element of a legal duty in the undertaking' expressed in Article 56.<sup>294</sup> Moreover, the General Assembly in its resolutions has repeatedly referred to the responsibilities and obligations which devolve upon it under Articles 55 and 56 and which place on it the duty to cooperate in the promotion of development specifically.<sup>295</sup> Citing a string of resolutions, including the DRD, Brownlie asserts that:

'The United Nations Charter, in Chapters IX and X, recognizes the urgent need to deal with economic and social problems, and certain of its provisions create binding obligations for governments to maintain human rights. There is probably also a collective duty of member states to take responsible action to create reasonable living standards both for their own peoples and for those of other states.'<sup>296</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) emphatically endorsed the existence of an obligation to cooperate internationally in the protection of human rights including in development when it stated in its General Comment No. 3:

'The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the

Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all the principles recognized herein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries ...<sup>297</sup>

Following on from the UN Charter, the normative requirements to cooperate internationally in the protection and promotion of human rights can be found in Article 28 of the UDHR, in both International Covenants,<sup>298</sup> and in the UN Convention on the Rights of the Child.<sup>299</sup> CESCR has also explicitly highlighted the obligations of States parties to people outside their jurisdiction with regard to the right to health and the right to food. In the context of the right to health, the Committee stated:

‘To comply with their international obligations in relation to article 2(1), States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential facilities, goods and services in other countries, wherever possible and provide the necessary aid when required ...<sup>300</sup>

In interpreting the term ‘the right of everyone’ in Article 12 of the ICESCR, Judge Weeramanty in his dissenting opinion in the Advisory Opinion of the International Court of Justice on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, having first quoted Article 12 by which ‘States parties to the present Covenant recognize the right of everyone to the highest attainable standard of physical and mental health’, went on to proclaim:

‘It will be noted here that the recognition by States of the right to health is ... that they recognize the right

of “everyone” and not merely of their own subjects. Consequently each state is under an obligation to respect the right to health of all members of the international community.’<sup>301</sup>

With regard to the right to food, CESCR highlighted the obligation of states to cooperate internationally, as well as the need for States parties to ensure the right to food in countries other than their own, as part of implementing that obligation. Referring to the UN Charter and the standards adopted in the Declaration of the World Food Summit of 1996 in the fulfilment of the rights enshrined in the ICESCR, the Committee affirmed:

‘In the spirit of Article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required ...<sup>302</sup>

As addressed in the previous section, while the legal force of the DRD is still the subject of debate, this paper contends that its call for international cooperation in the realization of the right to development provides an authoritative interpretation and elaboration of the principles of the UN Charter, and as such binds all states. This obligation is further strengthened and its scope elaborated by human rights jurisprudence in this and related areas.

While the Charter did not explicitly define the human rights and fundamental freedoms to which it referred, it did both outline the purposes behind its creation, including international cooperation in the solving of international problems and the promotion of human rights, and provide the structure by which the content was expected to be elaborated.<sup>303</sup> Moreover, although at one time there may have been some debate as to whether the human rights provisions of the Charter were sufficiently clear and precise to give rise to specific obligations for Member States, in the decades since the birth of the UN, universal standards have been elaborated in a range of treaties and declarations providing the Charter with subsequent normative content and hence providing additional substance to the obligations that underscore its purposes and pledges. Indeed, the ICJ has accepted that

the provisions of the Charter contain binding obligations and that they may be interpreted in light of subsequent human rights instruments adopted by the United Nations.<sup>304</sup>

Although recognition of the role that international cooperation plays in the creation of an enabling environment, in which all people can be free from want and be able to fully develop, has always been implicit in international human rights instruments, the DRD clearly recognized development as a human right, with all that that implies in terms of rights and duties. The DRD has also added scope to the normative requirements in this area of human rights, including a reiteration of the imperative of international cooperation.<sup>305</sup> Since the adoption of the DRD, the role of the international community in cooperating in the realization of the right to development has been reinforced in subsequent resolutions and declarations adopted at representative world conferences, including in the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights.<sup>306</sup> The normative status of the right to development as a right existing within an international law of cooperation should be beyond doubt.

The international system premised on co-existence has evolved as the need for cooperation has intensified as a result of interdependence. As Wolfgang Friedmann explains in his renowned work entitled *The Changing Structure of International Law*, we have shifted along the continuum from an outdated international law of co-existence of the 17th and 18th centuries, where the primary objective of international law was to impose passive obligations of abstention on sovereign states, to the international law of cooperation<sup>307</sup> of the 20th and 21st centuries, which provides the modalities of their cooperation, in the form of positive obligations, to realize common values and achieve common ends. Recognizing that core obligations must be read in conjunction with more contemporary instruments,<sup>308</sup> the sanctioning of the right to development by the international community of states has placed us clearly within the ambit of 'the international law of cooperation', a law which 'takes into consideration the specific conditions of each State and doses its rights and obligations accordingly'.<sup>309</sup>

The recognition of any human right implies the need to identify duty-bearers. In the right to development, as with any human right, states in which the right-holders are situated have the primary responsibility to deliver those rights. The state has the duty to implement policies and measures that enable the rights to be enjoyed. For some rights, the state acting at the national level may be the only duty-bearer if it can adopt measures that are sufficient to realize those rights – which assumes that other

states are refraining from acts that would impede this. However, with regard to the right to development, international cooperation, manifested in a range of ways as described in the previous section, is intimately bound up with the ability of states to fulfil the right to development of their people.

For minorities and indigenous peoples, cooperation at the international level in the realization of the right to development implies: equal and non-discriminatory participation in the global economy; assurances that decisions related to globalization and their effects, including through international trade and large-scale public or private industrial interests, do not impede or violate their particular rights; and that development takes place in a climate that fosters and does not further limit their ability to develop in line with their conception of development.

While there is no agreement among states that there exists an obligation to cooperate internationally in the realization of the right to development,<sup>310</sup> few states disagree that an international enabling environment is required to meet the requirements of a right to development. And the content of the international obligation to cooperate in relation to specific human rights, most notably with regard to economic, social and cultural rights, has been, and continues to be elaborated, not least of all by the CESCR.<sup>311</sup> It is widely accepted that human rights obligations generally, are required to be 'respected, protected and fulfilled' by states nationally. The obligation to 'respect' human rights refers to an obligation of abstention by the state and all its organs and agents from doing anything that violates human rights or undermines the realization of those rights. The obligation to 'protect' human rights requires that states and their agents take the measures necessary to prevent any individual or entity from violating human rights. The obligation to 'fulfil' requires that measures be taken to ensure the realization of human rights.<sup>312</sup> With regard to international cooperation in the realization of economic, social and cultural rights, the CESCR considers States parties to have an international obligation to *respect* and *protect* the rights of people in other countries.<sup>313</sup> A similar minimum threshold can be applied to the scope of international cooperation in relation to the right to development. States acting at the international level should ensure that their actions and decisions do not inhibit the respect for and protection of the right to development of all people. However, as the right to development is understood as requiring an international enabling environment which entails elaborating a notion of shared responsibility for its realization,<sup>314</sup> a minimum obligation also to assist in *fulfilling* this right could be said to apply equally.<sup>315</sup>

# The legal foundations of self-determination and sovereignty over natural resources and the right to development

The principles of self-determination and of permanent sovereignty over natural resources are accepted principles of *jus cogens*.<sup>316</sup> *Jus cogens* are rules that proscribe conduct that is regarded as fundamentally unacceptable by the international society of states.<sup>317</sup> They form part of a body of peremptory norms having the highest rank in international law: 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.<sup>318</sup> The right to self-determination is both a right unto itself and a constituent element of the right to development, as is the principle of permanent sovereignty over natural resources which is a right unto itself, and also forms a part of the right of self-determination, as well as to development. As affirmed in Article 1(2) of the DRD, the right to development implies the full realization of the right of peoples to self-determination, which includes the exercise of their inalienable right to full sovereignty over their natural resources.

The *principle* of self-determination was first codified in the UN Charter, followed by a reference to the *right* of self-determination in treaty form as found in the two human rights Covenants.<sup>319</sup> The right of 'peoples and nations to permanent sovereignty over their natural wealth and resources in the interest of national development' was affirmed in the 1962 General Assembly Declaration on Permanent Sovereignty over Natural Resources<sup>320</sup> and restated in the two human rights Covenants in the form of the right of peoples to 'freely dispose of their natural wealth and resources ... [and that a people not] be deprived of its own means of subsistence'.<sup>321</sup> As the voices of developing states breaking away from colonial domination gained strength within the UN, the right to self-determination was the platform on which they made their calls for freedom. The independence of the colonized states allowed for a degree of political self-determination;<sup>322</sup>

this, however, was not matched by economic self-determination of the states nor necessarily recognition or subsequent realization of the right to self-determination of peoples found within the states.<sup>323</sup> With the evolution of international human rights law, particularly as it relates to indigenous peoples, these rights can now be understood as being owed both to the state, and to peoples and groups within the state in different forms,<sup>324</sup> notwithstanding that there may have been a time when self-determination and sovereignty over natural resources were seen as being owed exclusively to the state.<sup>325</sup>

The right to development can only be realized if self-determination, an inviolable principle of international law, is realized at the same time.<sup>326</sup> The DRD correlates the two by including several direct and implied references of the right of self-determination in its Preamble and it refers to the right twice in the operative paragraphs. In the preambular paragraphs, the Declaration recalls the ICCPR and ICESCR generally<sup>327</sup> and then, in preambular paragraph 6, explicitly reaffirms the language of common Article 1(1) of the two Covenants, recalling 'the right of peoples to self-determination, by virtue of which they have the right to freely determine their political status and to pursue their economic, social and cultural development'. In the following paragraph, the DRD refers with added mindfulness, to the principle stated in common Article 1(2) of the Covenants, namely, 'the right of peoples to exercise ... full and complete sovereignty over all their natural wealth and resources'.<sup>328</sup> Among the operative paragraphs of the DRD, second only to Article 1(1) which asserts that the right to development is an inalienable human right, is the explicit reference to the relationship between the right to development and the right to self-determination. It states:

'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 their natural wealth and resources.’

Furthermore, in Article 5 of the DRD it is recognized that, *inter alia*, ‘refusal to recognize the fundamental right of peoples to self-determination’ is a bar to their ability to exercise their right to development.

The right of peoples to sovereignty over their natural wealth and resources has been shown by the Human Rights Committee to include:

‘a particular aspect of the economic content of the right to self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic 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.”’

The HRC then elaborates on the content of Article 1(2) by explaining: ‘This right entails corresponding duties for all States and for the international community.’<sup>329</sup>

Significantly, in defining the scope of the right to self-determination, including sovereignty over natural wealth and resources, the HRC has recognized that obligations States parties may have under international economic law are to be weighed against their human rights obligations related to self-determination, both at the national level and in their international affairs as members of the international community. The implication is such that multilateral and bilateral decisions, actions and agreements are not to infringe the right to self-determination of peoples. The international dimension related to this right specifically includes an obligation upon States parties to *actively* facilitate the realization of the right to self-determination of peoples found within other states, regardless of whether or not the state within which those people are found are afforded the protection of the rights under the Covenant. Notably, the Committee has adopted the view that:

‘Paragraph 3 [Article 1] ... is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination ... The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to

the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the rights of peoples to self-determination.’<sup>330</sup>

Therefore, the international community of states has a duty to cooperate, not only in *respecting* the right to self-determination of all peoples (abstaining from violative practices), and in *protecting* it (regulating the activities of third parties), but also by taking legislative, administrative, budgetary and judicial measures in order that the right is fulfilled.<sup>331</sup> The scope of the obligation in relation to self-determination and sovereignty over natural resources would apply when they are considered as rights unto themselves, and as part of the right to development.

Self-determination is a right close to the hearts of indigenous peoples, as well as minorities. Self-determination within the right to development addresses a right of ‘self-determined development’.<sup>332</sup> It is the freedom to pursue economic, social, cultural and political development, as the Covenants make clear. It is a right that facilitates the enjoyment by minorities and indigenous peoples of the right to their cultural identities, and their ability to determine their own economic, social and political system through democratic institutions and actions.<sup>333</sup> It is about sustainable and equitable use of natural resources in a manner that fully and completely integrates the range of rights provided to indigenous peoples with regard to their lands, territories and resources, their values, traditions and economic, religious and spiritual relationships to their land,<sup>334</sup> and that respects the rights of minorities to the traditional lands and territories they inhabit.<sup>335</sup> Self-determination within the right to development is thus linked to the right to be recognized as minority or indigenous community and as such to meaningfully participate as a group and thus influence any decisions that affect them or the regions in which they live.<sup>336</sup>

In line with the HRC’s elaboration of the right to self-determination under the ICCPR, and in so far as it might be concluded that its interpretation informs the scope of the *jus cogens* principle, which applies to all states, the right to self-determination can be understood as imposing obligations not only on states acting at the national level, but on all states in their interactions at the international level, with regard to all people everywhere. Moreover, the obligation imposes on states the duty not only to refrain from actions that might infringe the ability of people to realize their right to self-determination but to take positive action in seeing the right fulfilled. Here the onus ‘to act’ initially also imposes an obligation of conduct upon states at the international level. It is to the consideration of obligations of conduct and obligations of result that we will now turn.

# The right to a process and an outcome; and obligations of conduct and of result<sup>337</sup>

The right to development entails a right to a particular process of development,<sup>338</sup> which incorporates all human rights and as such expands the capabilities and freedoms of people to realize what they value.<sup>339</sup> The notion that the right to development entails a right to a particular process of development is consistent with the language employed in the DRD. The second preambular paragraph states:

*‘Recognizing that development is a comprehensive economic, social, cultural and political process which aims 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 benefits resulting therefrom, [...].’*

Similar language describing national development policies aimed at the ‘constant improvement of the well-being of the entire population ...’ is found in Article 2(3). The reference to the ‘constant improvement of the well-being’ can be understood as referring to both to the ‘progressive realization’ element of achieving the right to development while simultaneously calling for precise policy formulations that lead to a properly defined process of ‘improvement’ and a properly identified concept of ‘well-being’.<sup>340</sup>

In the work of the Independent Expert it is spelled out that ‘[t]he outcomes of development as well as the way in which the outcomes are realized constitute the process of development regarded as a human right’.<sup>341</sup> The distinction is that:

*‘the right to that process is ... a programme or plan executed over time maintaining consistency and sustainability, with phased realization of the targets, and that programme is expected, with a high probability, to lead to the realization of all those outcomes’.*<sup>342</sup>

The right to this process thus entails commitments to pursue certain policies with the aim of achieving certain results in a manner that contributes to the realization of all human rights and to the fulfilment of the right to development. Human rights law establishes a binary relationship

between right-holders and duty-bearers. As has been observed elsewhere, it is precisely this binary relation which distinguishes human rights from the general valuing of freedom that exists without a correlated obligation to help bring about that freedom.<sup>343</sup> While human rights may vary as to the degree of precision that their normative and operational content invites, the minimum entitlement has a corresponding action required of the duty-bearer, the absence of which is to be considered a violation of that right.<sup>344</sup>

The International Law Commission (ILC)<sup>345</sup> has referred in the course of its work to ‘obligations of conduct and obligations of result’ – terms which have gained currency in international law.<sup>346</sup> Obligations of conduct are referred to as ‘best efforts obligations’, whereas obligations of result are ‘tantamount to guarantees of outcome’.<sup>347</sup> The applicability of obligations of conduct and of result on states – domestically and with regard to international cooperation in the progressive realization of economic, social and cultural rights – has been recognized by the CESCR. According to the ICESCR Article 2(1), States parties are to ‘... undertake steps, individually and through international assistance and cooperation ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant ...’. In its elaboration of the content of this provision, the CESCR explicitly states that ‘[t]hose obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result’.<sup>348</sup> A similar reference can be found in the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights.<sup>349</sup> The ILC itself has also specifically recognized the applicability of the terms in relation to the provisions of ICESCR, stating:

*‘An instance of a case where the distinction was of value ... was provided by article 2, paragraph 1 [which addresses nature of States parties’ obligations] of the International Covenant on Economic, Social and Cultural Rights, which contained a delicate mix of obligations of conduct and obligations of result.’*<sup>350</sup>

Thus, as Alston and Quinn have noted, the undertaking ‘to take steps’ – language that appears throughout the

ICESCR – is akin to assuming an obligation of conduct.<sup>351</sup>

The ILC explains that the initial distinction in international law was borrowed from French law in which the obligations of result tend to be stronger than that of conduct, in that ‘the mere fact of non-materialization of the result constitutes a violation of the obligation, rather than an obligation to make a *bone fide* effort with a view to achieving the result, but without guaranteeing its materialization’.<sup>352</sup> In the work of the ILC on the subject,<sup>353</sup> however, the obligations of conduct tend to be more stringent than the obligation of result.<sup>354</sup> The obligation to put in place a process for the progressive realization of rights may therefore invite more rigorous requirements than those entailing an immediate result. In the words of CESCR with regard to economic, social and cultural rights, ‘the principal obligation [is] to take steps to achieve *progressively* the full realization of the right ... it [i]mposes an obligation to move as expeditiously as possible towards the goal’<sup>355</sup> and ‘[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations ...’.<sup>356</sup>

Since obligations of result imply obligations of conduct (of action, policy, etc.) the distinctions may be equally applicable to civil and political rights as to economic, social and cultural rights. To varying degrees the promotion and protection of rights will require conduct on the part of the state which may include the adoption and implementation of plans and policies as well as the allocation of financial resources in order to realize human rights. The conduct may entail training the police force in order to minimize the likelihood of violations of the prohibition of non-discrimination or of torture or degrading treatment in the performance of their responsibilities, or the implementation of a plan of action to reduce infant, child and maternal mortality.<sup>357</sup> Yet while civil and political rights also require conduct on the part of the state, unlike economic, social and cultural rights, they most often impose obligations that require immediate results. Thus while obligations of conduct and of result may be applied to all rights, it is the particular right being addressed that will determine whether the more stringent requirement is placed on conduct or on result.

Obligations of conduct for rights that may entail progressive realization requires action ‘reasonably calculated’ to realize the enjoyment of a particular right.<sup>358</sup> While the achievement of the result is the ultimate aim in all cases, in certain cases these policies or measures can produce the results with near certainty, in other cases with probability – which must have the maximum likelihood of producing the result. Certainly, then, with regard to the right to development, which entails a right to a process that necessarily includes different variables and agents and for which therefore there may be less control over the outcome, the obligation of conduct, aimed at the process of realizing the right, can be understood as imposing a more stringent

obligation than that of result. However, this does not suggest that states have anything less than human rights obligations of result, which include meeting internationally set targets to satisfy detailed substantive standards. Targets include, for example, those related to poverty reduction, universal primary education, reduction in child and maternal mortality rates, and strategies for sustainable development to levels agreed in the UN Millennium Declaration.<sup>359</sup> While there remains an international legal obligation to produce results, obligations of conduct show that along the way to reaching those results there are rights and hence obligations that need to be met.

With regard to the right to development, which not only entails both immediate and progressive elements in its process of realization but also imposes explicit obligations at both the national and international levels, the distinction between obligations of conduct and those of result can be a useful one, in that it prescribes certain conduct even if the outcome remains uncertain. It is through the meeting of obligations of conduct that progressive realization, where necessary, is implemented and responsibility and accountability is attributed. Culpability for the failure to achieve results can be linked to the degree to which the fulfilment of conduct has been planned and implemented. While these classifications are not a substitute for the interpretation and application of the primary norm itself,<sup>360</sup> both are important in determining whether a breach of the right to development has occurred. At the national level, obligations of conduct include: the effective allocation and utilization of resources; representative participation, including that of women, minorities and indigenous peoples; transparency in decision-making processes; the adoption of sustainable policies and programmes that reflect prior representative consultation; and the establishment of an enabling legal, political, economic and social environment. At the international level, where an enabling environment is equally important, obligations of conduct include: international cooperation in the realization of the right to development, such as ensuring participatory international multilateral trading and financial systems that are equitable and that respect existing human rights and environmental standards; meeting international development commitments; and effective regulation of multinational corporations headquartered in the jurisdiction of a given state. The importance of obligations of conduct in the realization of a right that requires action at both the national level and international level cannot be overstated. The global character of the modern world has largely limited the possibility of any single state to put in place a process for the fulfilment of the right to development. The domestic implementation of the right to development cannot be pursued in isolation, only in cooperation and, therefore, meeting obligations of conduct at the national and international levels is a prerequisite



uisite to the realization of the right to development.

In determining whether obligations have been met at the national level, various factors need to be considered, including distinguishing inability from unwillingness on the part of the state, the degree to which the rights of marginalized groups are being protected in development, and the degree to which their rights are being realized so that they may have the opportunity to develop. Other factors in determining whether states, nationally or internationally, are fulfilling their obligations include: assessing the failure of states to sufficiently regulate (acts of omission) the activities of third parties including individuals, groups or corporations; assessing the failure of states through acts of commission; and assessing the failure of states to take into account their legal obligations, including in relation to the specific rights of minorities and indigenous peoples, when entering into bilateral or multilateral agreements with other states, international organizations and other entities such as multinational corporations.<sup>361</sup>

Just as the realization of the right to development imposes duties on both the state acting at the national level and the international community of states acting singly or collectively, obligations of conduct and of result exist for both the developing state and the international community of states. The cooperation between the international community and the developing state functions in tandem, because the right to a process for the realization of the right to development imposes obligations of conduct and of result on both duty-bearers. However, the primary responsibility for the creation of conditions favourable to the development of people lies with their state. The obligation to produce results rests principally at the national level.

The methods of meeting obligations of conduct in a particular context will depend on who the specific right-holders are. Minorities and indigenous peoples are recognized in international law as having specific characteristics and rights and therefore the method of meeting obligations will be different, because the policies that are necessary to fulfil those rights will have to be designed in accordance with established international law elaborated to protect their rights. For example, the right to education is part of the right to development; however, the mere provision of physical infrastructure and an overall increase in access to education in a given country provides no guarantees that education will be accessible to minorities or indigenous peoples who suffer from discrimination and exclusion. Furthermore, if minority rights are not respected in the process of fulfilling the right to education, rights related to learning or being instructed in their mother-tongue<sup>362</sup> may not be met and thus will not contribute to the ability of minorities to 'express their characteristics and to develop their culture, language, religion, traditions and customs',<sup>363</sup> or to ensure that indigenous children 'are taught

to read and write in their own indigenous language'.<sup>364</sup>

Similarly, fulfilling the right to food as part of the particular process of the right to development would, for example, need to be consistent with the ability of indigenous peoples to secure food through traditional methods and with respect for their right to practise their own culture.<sup>365</sup> Equally, the impact of multilateral treaties, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organization, would need to be weighed against the ability of states to fulfil their obligations related to the rights of, *inter alia*, indigenous peoples within the right to development.<sup>366</sup> Generally, recognizing the existence of minority and indigenous communities, addressing discrimination against them and providing for their meaningful participation in decisions that affect them, would also be essential to fulfilling obligations of conduct. Thus, while the result of conduct is the fulfilment of the right to development, which all individuals including those belonging to minorities and indigenous communities would be entitled to enjoy, minorities and indigenous peoples are also entitled to obligations of conduct or a set of policies necessary to achieve those results. These policies may differ according to both the duty-holders – states acting nationally or internationally – and the right-holders – in this case such as for minorities and indigenous peoples.

With regard to the right to development, the fulfilment of obligations of result is directly dependent on obligations of conduct being met, however these two types of obligations cannot be separated out and there is not necessarily a clear dividing line between them. Significantly, obligations of conduct are no less binding than obligations of result and, as the ILC has clarified, a failure to exercise due diligence in meeting the legal obligations of conduct could trigger responsibility,<sup>367</sup> including a failure to take action in the protection of human rights. In fact the ILC has recognized that a failure of a state to take the necessary steps to avoid a breach is enough to be considered as breach of the obligation. Whether or not the threat was realized as a result of the inaction is not the deciding factor.<sup>368</sup> This suggests a clear endorsement of the acceptance of a right to a process whereby conduct in itself, regardless of whether or not the outcome is achieved and regardless of whether or not the conduct (or failure to act) can be determined to have had a negative impact on the fulfilment of the obligation of result, can be deemed a violation of the primary right. Likewise, in the right to development, the obligation of result is not discharged if the right to a particular process was not respected in reaching the outcome. Therefore the failure to respect, protect and fulfil the rights of, *inter alia*, minorities and indigenous peoples within the process of realizing the right to development, is a breach of the obligations related to their rights, and of the obligations that correspond to the right to development.

# The human rights obligations of multilateral institutions and of states as members of MLIs

As was previously demonstrated, states acting at the international level are individually and collectively bound by human rights obligations, including the obligation to cooperate internationally in the protection of human rights. Additionally, within the scope of operations of organizations that are made up of states, there is an obligation that rights are respected where those organizations may have an impact on them. This paper advances the position that, to these ends, states are obliged to uphold human rights when they are supporting or participating in the work undertaken by international financial institutions (IFIs), such as the World Bank and the International Monetary Fund (IMF),<sup>369</sup> and as part of the international trade regime under the auspices of the World Trade Organization (WTO),<sup>370</sup> where those activities risk violating human rights, inhibit the ability of states to meet their human rights obligations, or threaten the ability of people to realize their rights, including the rights of vulnerable groups most prone to having their rights undermined.<sup>371</sup>

Given the impact of multilateral organizations on human rights protection, the scope and nature of their human rights obligations are recognized as being of critical importance and are increasingly the subject of attention and analysis.<sup>372</sup> Although detailed consideration of this important area cannot be fully addressed here, it is nonetheless important to include a brief overview as to possible sources of applicable legal obligations, given the considerable impact of the activities of the IFIs and the international trade regime on human rights generally, and on the right to development specifically.

Today there are over 100 multilateral and bilateral treaties on the protection of human rights. As a result of the UN Charter, the Universal Declaration of Human Rights, the Vienna Declaration on Human Rights, as well as numerous other UN instruments, all 191 Member States of the UN are committed to respect fundamental and inalienable human rights as part of general international law. Additionally, most states recognize human rights in their respective national constitutional laws.<sup>373</sup> Recognition of the sanctity of human rights has

thus undoubtedly become part of the 'general principles of international law recognized by civilized nations' as per the Statute of the International Court of Justice (ICJ).<sup>374</sup> Furthermore, there is strong support for the position that respect for human rights constitutes an obligation *erga omnes* and as customary international law imposes obligations on all states towards the international community as a whole for their protection.<sup>375</sup> Recognizing the international obligation to respect human rights as *erga omnes*, the International Law Institute has emphasized that this obligation is incumbent on every state in relation to the international community as a whole and that every state has a legal interest in the protection of them, and thus that '[t]his obligation further implies a duty of solidarity among all states to ensure as rapidly as possible the effective protection of human rights throughout the world'.<sup>376</sup> Beyond agreed principles of customary international law, the shortlist of fundamental human rights required as a minimum to uphold said obligation *erga omnes* can be found in the International Bill of Human Rights. This paper contends that the obligation *erga omnes* to respect human rights would bind, at a minimum, not only states but all international legal persons, including therefore the multilateral institutions (MLIs).<sup>377</sup> This would be in addition to obligations derived of other sources.

The primacy of human rights is derived from the inalienable *jus cogens* nature of the obligation to respect core human rights. Their universal recognition in both national and international law reinforces their inalienable character and recognition of their legal primacy.<sup>378</sup> Further, in the case of conflict between the Charter obligations and the obligation of UN Member States under any other international agreements, the Charter makes clear that it shall prevail.<sup>379</sup> This of course would consist of promoting higher standards of living and conditions of economic and social progress, and solutions of international economic and social problems as well as universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.<sup>380</sup> These obligations are to be achieved through the joint and separate action of the Member States.<sup>381</sup>

## The World Bank and the International Monetary Fund

The scope of the activities of international financial institutions such as the World Bank and the IMF may have implications for the realization of all human rights for self-determination, the observance of civil and political rights, the ability of people within developing countries to realize their economic, social and cultural rights and their right to development.<sup>382</sup> The mandates of the two institutions differ, in that the World Bank is a development agency engaged in project lending and sectoral activities, whereas the IMF is a monetary agency meant to provide financial assistance to its members to overcome balance-of-payments problems, and hence any approach to ensure that human rights obligations are met in the execution of their mandates will probably invite different considerations. However, with regard to the focus of our assessment, their institutional structures are very similar and may therefore invite similar appraisal regarding the nature of their obligations under international law. A recent study on the specific sources of obligations of the World Bank and the IMF shows that their obligations derive from the international legal personality of the institution, their status as Specialized Agencies of the UN, and the fact that their members are states with human rights obligations.<sup>383</sup>

As international legal persons<sup>384</sup> IFIs are bound by the regular sources of international law – treaties to which they have acceded, customary international law,<sup>385</sup> including pre-emptory norms of *jus cogens*, and general principles of international law. With the exception of treaty-based obligations, these obligations pertain to the World Bank and the IMF without any need for their consent. While IFIs are not party to international human rights conventions (nor can they be), and therefore, as a general rule, are not directly bound,<sup>386</sup> the international organization as an international legal person is subject to the rules of international law, including conventional (where they have consented), and customary rules and principles of general international law.<sup>387</sup> This is implicit in the approach taken in the *Reparations for Injuries* case, in which the ICJ found that an international organization is ‘a subject of international law and capable of possessing international rights and duties’.<sup>388</sup> In a subsequent Advisory Opinion, the ICJ explained that:

‘International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are party.’<sup>389</sup>

Customary international law of which the ‘the principles and rules concerning basic rights of the human person’ form a part,<sup>390</sup> as well as general principles of international law derived from the UDHR and the international human rights Covenants, represent minimum standards for all people and all nations<sup>391</sup> and provide sufficient human rights standards upon which the World Bank and IMF can measure the degree to which they are adhering. While it is not uncommon for representatives of the IFIs to claim that they are bound only by the scope of their mandates as stated in their constituent instruments,<sup>392</sup> any legitimate pursuit of mandated objectives should be brought in line with international human rights norms. This might require limiting or redesigning the actions of the organization, but it is not to say that amendments of the objectives of the international organization will necessarily be required.<sup>393</sup> That international organizations, not having envisioned human rights as part of their mandates when they were founded 50 years ago,<sup>394</sup> would apply human rights standards today is to be expected.<sup>395</sup> International law is not static and is meant to be interpreted in light of contemporary circumstances.<sup>396</sup> Not least, in order to meet the changing needs and expectations of its member states, one would assume that any intergovernmental organization would have to adequately incorporate human rights into its policies where its existing methods of work or policies risk violating human rights.<sup>397</sup> In sum, as provided in *Bowett’s Law of International Institutions*:

‘What this means in practise is that the organisation should, in the conduct of its activities, be assumed to be subject to rules of customary international law, including rules of *jus cogens*, which may be relevant to the conduct of its activities. In our view this would include, for example, rules of customary law relating to matters such as the protection of fundamental human rights [and] the protection of the environment ...’<sup>398</sup>

Skogly, in her comprehensive work on the subject, concludes that at a minimum the World Bank and IMF are under an obligation to *respect* human rights through their policies, and possibly to *protect* human rights (as linked to, for example, the behaviour of sub-contractors in their charge). ‘However, the crucial point is that the two institutions are responsible for the effects of their own projects and programmes and for the actors involved in them.’<sup>399</sup> This could be understood as entailing due vigilance in order to ensure that their actions do not have a negative impact on the human rights situations in any country with which they are engaged<sup>400</sup> and to ensure that they ‘neither undermine[s] the ability of other subjects,

including [its] members, to faithfully fulfill their international obligations nor facilitate or assist violation of those obligations', this latter point having particular relevance for borrowing members of the IFIs.<sup>401</sup> As was mentioned earlier in the paper, in the section on 'The legal foundations of international cooperation in the right to development', the reference to 'respect' is to distinguish it from an obligation to 'protect' and the obligation to 'fulfil' – a triad of obligations applicable to all human rights, developed by Asbjorn Eide when he was UN Special Rapporteur on the right to adequate food<sup>402</sup> and widely endorsed since as an interpretative tool, including by CESCR<sup>403</sup> and in the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights.<sup>404</sup>

The rights and duties of the World Bank and IMF as subjects of international law are separate from and in addition to those of its Member States.<sup>405</sup> While the full range of obligations – to respect, protect and fulfil human rights – attach themselves to states, human rights standards reflected in general principles of international law should also be understood to bind the organizations, despite the position the organizations themselves may choose to defend.<sup>406</sup> The position that intergovernmental organizations as inter-state institutions are bound by the generally accepted standards of the world community, as articulated in, for example, the UDHR and the Covenants,<sup>407</sup> has received recent authoritative endorsement:

'This view appears unimpeachable. ... It has been suggested that, for example, the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds, even if it may be the case that certain bodies charged with reviewing the legality of acts of the World Bank, such as its Inspection Panel, are not permitted to have recourse to such law in determining whether the Bank is acting in compliance with its obligations.'<sup>408</sup>

It is accepted that international organizations are responsible under international law for breaches of international norms binding upon them.<sup>409</sup> As maintained, this would include fundamental human rights.

The World Bank and the IMF are Specialized Agencies of the UN, having entered into Relationship Agreements with the UN in accordance with Articles 57 and 63 of the UN Charter.<sup>410</sup> Although the agreements specifically refer to the independent status of the Bank and the Fund, it has been suggested that this status is limited to the UN's ability to direct the work of the two institutions, and does not provide for "a legal independence" in terms of not being

bound by the general principles and purposes of the Charter'.<sup>411</sup> Moreover, 'specialised agencies ... are meant to complement the action of the UN in more technical fields, while sharing the same overall objectives as the UN itself'. Article 57 states that the specialized agencies are 'brought into relationship with the United Nations in accordance with the provisions of Article 63', and hence, 'the two institutions (as all other specialized agencies) are under an obligation to operate within the principles and the purposes of the United Nations Charter, of which the respect for human rights is a fundamental part',<sup>412</sup> as is international cooperation in the realization of development.

Additionally, subsequent human rights instruments refer to the role of Specialized Agencies, as can be seen in Article 9 of the Minorities Declaration, which states: 'The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.' Similarly, the UN Draft Declaration on the Rights of Indigenous Peoples recognizes the role of Specialized Agencies and other intergovernmental organizations in the realization of the rights of indigenous peoples, including in relation to financial cooperation, technical assistance and, significantly, with regard to their right to participate in issues affecting them<sup>413</sup> – rights specifically provided for in other instruments. In the case of ICESCR,<sup>414</sup> the Committee has confirmed the role of the Specialized Agencies, in particular the international lending agencies, in relation to 'international assistance' as provided for in Articles 2(1)<sup>415</sup> and 22 with specific mention of the impact and role of UN agencies and their need to ensure protection of economic, social and cultural rights with regard to debt burden and adjustment measures.<sup>416</sup> With regard to the right to adequate food, the right to education, and the right to health, CESCR has referred specifically to the role of the World Bank and IMF and its impact on the protection of the rights in relation to lending policies and credit agreements, and in international measures to deal with debt crisis, and structural adjustment.<sup>417</sup>

The World Bank and the IMF are bound to uphold human rights as a result of their international legal personality and their status as UN Specialized Agencies, the content of the obligations being of both a substantive and a procedural nature, and of conduct and of result.<sup>418</sup> Another ground for upholding human rights within the work undertaken by the Bank and the Fund is the fact that the institutions are composed of states that have human rights obligations born of conventions, custom and general principles of international law. The majority of member states of the IFIs have ratified the major human rights conventions and are thereby bound to

respect, protect and fulfil their human rights obligations, including when entering into bilateral agreements with other states but also through their actions in international organizations. CESCR, for example, has made clear that should the state fail to take into account its legal obligations when entering into bilateral or multilateral agreements, with other states or international organizations, it is in breach of its human rights obligations under the Covenant.<sup>419</sup> Significantly, it should be noted that the terms of the Covenant do not limit the duty to cooperate internationally to cooperation with other States parties or with states in general. The duty is general and should include cooperation with international organizations as well as cooperation within international organizations. Where States parties are entering into agreements with another State party to the Covenant, there is a further duty not to induce them to breach the obligations they have undertaken under the Covenant by adopting measures inconsistent with those obligations. Furthermore, and significantly, as UN Member States, all states have pledged themselves to promote respect for human rights and fundamental freedoms, both individually and through joint action,<sup>420</sup> and to uphold the purposes of the UN, including achieving international cooperation in solving, *inter alia*, international economic problems and in the promotion of human rights.<sup>421</sup> Moreover, in accordance with Article 103 of the Charter, states' obligations under the Charter take precedence over other international law obligations.<sup>422</sup> These commitments should be reflected in their undertakings as members of IFIs. CESCR has drawn attention to this on several occasions, noting with regard to the right to health that:

‘... States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank and the regional development banks, should pay greater attention to the protection to the right to health in influencing lending policies, credit agreements and international measures of these institutions.’<sup>423</sup>

The Committee makes a similar point with regard to the right to food,<sup>424</sup> and in its Concluding Observations on states' reports.<sup>425</sup>

As has been previously indicated, the Declaration on the Right to Development places considerable emphasis on the duty of states to cooperate in the realization of the right. This specifically includes taking steps ‘individually and collectively’ to formulate international development policies with a view to facilitating the full realization of

the right to development’.<sup>426</sup> The joint action of states to cooperate in the protection of human rights is also a pledge of UN Member States as codified in the Charter.<sup>427</sup> As some of the most powerful formulations of development policies occur through the collective decisions of states as members of the World Bank and IMF, it falls to the states to uphold their human rights obligations in relation to the execution of their collective decisions as members of the IFIs – a point to which we will return.

## The World Trade Organization

Any failure to integrate human rights into the international trade regime undermines the obligations of states, *inter alia*, to progressively realize economic, social and cultural rights in accordance with the ICESCR, and engage in the process of development as per the DRD. It severely limits the extent to which people are able to shape the policies of their governments, an element central to the right to development. The argument propounded by WTO representatives, claiming that human rights and the obligations of a state to the people within its jurisdiction does not fall within the mandate of an inter-state multilateral trading system,<sup>428</sup> are highly dubious on a range of legal grounds.

Just as with the World Bank and IMF, the WTO, as an organization with international legal personality,<sup>429</sup> is bound by the regular sources of international law: treaties to which they have acceded, customary international law, including preemptory norms of *jus cogens*, and general principles of international law. Further, all WTO members are UN Member States bound by the provisions of the Charter (as elaborated in subsequent instruments), thereby having undertaken to uphold the purposes of the Charter, including international cooperation in the protection of human rights and fundamental freedoms. Also, according to Article 103 of the UN Charter, the obligations of Member States under the Charter shall prevail in the event of conflicting obligations under other international agreements. As was previously mentioned, Article 103 places obligations on its Member States to promote respect for human rights and fundamental freedoms, the elaboration of which is provided for in the UDHR, human rights treaties and general international law. Individual Member States will also be bound by their customary and conventional human rights obligations, as well as the law of treaties, both with regard to their involvement in the specialized committees, working groups and working parties dealing with individual agreements of the organization, as well as when working on other areas such as development and the environment.<sup>430</sup>

Consistent with the law of treaties,<sup>431</sup> and the view of the ICJ,<sup>432</sup> the WTO has recognized its obligations to

interpret WTO law in light of international law;<sup>433</sup> indeed, according to Article 3 of the WTO Dispute Settlement Understanding (DSU) it is required 'to clarify the existing provision of those agreements in accordance with customary rules of interpretation of public international law'.<sup>434</sup> Howse and Mutua, international legal experts on trade and human rights respectively, observe that:

'[I]t would [thus] appear, that in the event of a conflict between a human rights obligation, particularly one that is universally recognized, and a commitment ensuing from international treaty law, the former prevails or the latter must be interpreted to be consistent with the former. The GATT and other WTO agreements are treaties which would be subject to such obligations and interpretation. Human rights norms should always be taken into account when interpreting international trade and investment obligations ... [t]rade law is basically treaty law. Its interpretation must be taken into account and be consistent with the hierarchy of norms in international law, reflecting for instance the status of some human rights as pre-emptory norms, *erga omnes*.'<sup>435</sup>

As has been previously discussed, the obligation to protect human rights may form part of customary international law, and thus any interpretation of WTO law is to respect this obligation and be consistent with it. Where a particular human right is a norm of *jus cogens*, it must be given primacy, as 'rules of *jus cogens* trump all other international rules of general international law, and are therefore in the first rank in the hierarchy of the law of nations'.<sup>436</sup>

It may also be relevant to consider the international legal principle which holds that states cannot hide behind the organization when their activities cause damage to the interests of other states or organizations.<sup>437</sup> Where the interests of other states, or indeed other organizations to which they belong, such as the UN, commit them to promoting respect for human rights, general international law provides criteria according to which an organization may be held to be unlawful in conception and objects; additionally, particular acts in the law may be void if they are contrary to a principle of *jus cogens*.<sup>438</sup> While the WTO Agreement actually sets out free trade not as an end in itself but as related to the fulfilment of basic human values, including the improvement of living standards for all people and sustainable development<sup>439</sup> and therefore cannot *prima facie* be considered as being founded on basic principles that violate human rights, the question remains as to whether human rights are violated in the execution of its mandate, despite the professed scope of its objectives.

The Preamble of the WTO Agreement establishes the framework for the entire WTO system in which free trade has been proclaimed as an objective of the system of the fulfilment of basic human values. Additionally, the preambular reference to raising standards of living and ensuring full employment and a large and steadily growing volume of real income elucidates the objective that human development and well-being is a central concern of the trade regime under the WTO, a position that was accepted in full in the statement by the WTO representative at the UN Working Group on the Right to Development when he claimed that the WTO shared the same objectives for development as those set out in the UN Charter and the Universal Declaration of Human Rights.<sup>440</sup> The reference to the fulfilment of human values and related aims in the WTO Agreement begs the question as to the legitimacy of subsequent WTO treaties<sup>441</sup> (or of the organization itself) – often felt by civil society actors to undermine these founding objectives – despite the fact that they are ostensibly created with the fulfilment of human development and well-being as among their objectives.

Intergovernmental organizations such as the WTO and the Bretton Woods institutions are essentially creatures of the international legal system. They cannot therefore be deemed to be exempt from fundamental principles of international law such as the obligation to respect universal human rights. Decisions taken by organizations, as well as agreements undertaken by their Member States, including those reflected in trade law, should be interpreted and evolve in a manner consistent with the hierarchy of norms in international law generally, which would include, at a minimum and in addition to conventional obligations where they exist, many basic human rights that have the status of custom, general principles or *erga omnes* obligations. It would also include the minimum rights enumerated in the International Bill of Human Rights which may be understood as providing the content of an *erga omnes* obligation to respect human rights. These non-conventional sources of international law would bind all international legal persons, including intergovernmental organizations and states – which includes those states that have not ratified, and therefore are not bound by, a given human rights treaty.

While actual control, guarantee or agency would need to be established in order to challenge the accepted convention that the organizations themselves are the only subjects that may be held liable for the consequences of the wrongful acts of the organization to the exclusion of their Member States, the members of international organizations may be said to be under an obligation of 'due diligence' which compels them to make sure that the transfer of competences to the organization does not allow them to avoid their responsibilities under international law.<sup>442</sup> As empha-

sized on several occasions by the European Commission and European Court of Human Rights, including in the recent *Matthews* case, the Court remarked that the European Convention on Human Rights 'does not exclude the transfer of competences to international organizations provided that the Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.<sup>443</sup> Significantly, as this ruling has shown, there are situations where:

'[M]embers of international organisations may be responsible not for the consequences of the latter's illegal acts, *but for their own participation* in that act, *or for their failure to ensure* that the powers they have transferred to an organisation have been exercised in conformity with their own international obligations.'<sup>444</sup>

Such transfer of powers applied within an organization where their use is not exercised consistently with international human rights standards should also pertain to decision-making powers.<sup>445</sup> The World Bank, IMF and WTO function according to collective decision-making by their representative organs, the decisions of which are taken by weighted voting in the case of the World Bank and IMF and on the *principle* of one-country, one-vote in the WTO. Despite acceptance of the formal process of decision-making by simple majority in the WTO, in practice, decisions are taken by consensus. However, although each country in principle has a vote and a right equal to that of any other country, the vast majority of developing countries are left out of the negotiations and 'consultations', which in fact are known to determine the decisions.<sup>446</sup> This concern was voiced by certain states at the Working Group on the Right to Development in calling for developing countries to be given 'the possibility to participate in general [in a range of aspects related to international trade], and in particular to be given a more important role in discussions at the WTO'.<sup>447</sup>

As a result of these forms of decision-making, might there be different responsibilities imposed on various states depending on their degree of influence on the collective decisions of an organization? The possible attribution of weighted responsibility to match weighted votes (or other forms of allotting influence) presents a further consideration beyond the broader proposition by UN experts Oloko-Onyango and Udagama, in their recent study on globalization and human rights in which they submit:

'In the case of decisions made collectively, one cannot disaggregate such actions and attribute them to individual member States. Member States are then obliged to discharge their obligations undertaken *qua*

members pursuant to those collective decisions, and will be held individually responsible under international law for the breach thereof.'<sup>448</sup>

Multilateral institutions play a vital role in the ability to hinder, or if they so choose, positively influence, the likelihood of minorities and indigenous peoples to realize their right to development. Regardless of the fact that their mandates do not, per se, refer to human rights protection and promotion as falling within the scope of their undertakings, the fact is that the decisions and actions of states, through their membership in these organizations, have a severe impact on, and often transgress, entrenched human rights norms. Too often, the capacity of minority and indigenous peoples to shape the policies of their governments, the competence of governments to fulfil their human rights obligations and the ability of minority and indigenous peoples to live free from violations of their right to development, are directly affected by the enterprise of these organizations. States determine the policies of global actors, including the World Bank, the IMF and the WTO<sup>449</sup> and some of the most powerful formulations of development policies – and in the case of the WTO, influential agreements with an impact on development – emanate from them. This engagement triggers responsibility in the area of human rights.

At a meeting convened in 2001 by Minority Rights Group International and the UN Working Group on Minorities, representatives of minority and indigenous peoples' organizations issued a range of recommendations in relation to minority rights and development. Respecting human rights standards, including with regard to redressing discrimination and ensuring participation, were felt to be crucial to furthering the protection of the rights of minority and indigenous peoples in development. Assessing the impact of development programmes and projects to ensure that future plans do not violate their rights, strengthening their capacity to contribute to decision-making and allowing for their free, full and informed consent in matters that affect them, and ensuring the effective regulation of national and transnational corporations in order to secure respect for their identities and cultures, were all central to their demands.<sup>450</sup> In a recent 'Dialogue Paper by Indigenous Peoples' submitted to the Commission on Sustainable Development, the WTO TRIPS Agreement and the WTO Agreement on Agriculture were noted as posing a serious threat to their cultural rights and their right to health, among others.<sup>451</sup> Indigenous peoples remarked further on their grave concern that compliance with WTO agreements, combined with the trade and investment regimes promoted by the World Bank and IMF, is undermining national legislation and regulations that protect the environment.<sup>452</sup>

Recognition by multilateral institutions, and by states as members of them, of their human rights obligations is the first step to addressing and reversing violations that stem from their activities. For example, the World Bank Inspection Panel is limited to assessing project compliance with its policies and procedures,<sup>453</sup> instead of having a broader mandate to consider the degree to which the Bank's projects may violate existing human rights standards. Further, the content outlined, for example, in its Draft Operational Policy 4.10 on Indigenous Peoples and the Draft Operational Policy 4.12 on Involuntary Resettlement would seem to fall far short of accepted standards related to the rights of indigenous peoples.<sup>454</sup> After examining the scope of protection provided to indigenous peoples under a range of international and regional conventions and comparing them with the standards provided in some Bank Operational Policies, a recent study concluded that while

'the Bank may assert that its role in promoting human rights is strategically focused on poverty and is limited by its Articles, it cannot justify by reference to its Articles or any other source, adopting a policy statement that deviates from its international obliga-

tions and undermines indigenous peoples' rights by, among others, setting standards below those already binding on almost all of its members'.<sup>455</sup>

The likelihood of minimizing violations by the World Bank in the area of minority rights is even more remote than in the case of indigenous peoples, as no Operational Policy currently exists to alert the Bank as to the harm it may cause to minorities.<sup>456</sup> Furthermore, the fact that the Panel may provide 'a measure of accountability'<sup>457</sup> falls far short of international standards on remedying and redressing human rights violations.

Incorporating a rights-based approach to development in the undertakings of multilateral institutions would provide a first step in protecting human rights. It would also offer them a clearer picture as to the impact of their decisions, including in relation to the rights of minorities and indigenous peoples in the realization of the right to development. The human rights standards exist, as does the legal premise that obligations apply to states acting individually or jointly at the international level. All that is required of MLIs now is the will to ensure that they give these standards practical meaning.



# Conclusion

The international law of human rights established over half a century ago marked a shift from reciprocity-based international legal relations sustained by self-interest to a pervasive core of fundamental values, sustained by their collective recognition. The obligations derived from the widespread recognition and codification of these values defined as international minimum standards of human rights, reflect a shift from an outdated international law of co-existence to an international law of cooperation.<sup>458</sup> This has particular resonance with regard to a right such as the right to development, which exists as a result of the international system and thus it is the international community that is prescribed as sharing in the responsibility for its realization. While the state acting at the national level plays a pivotal role in the formulation and execution of policies that allow the right to development to be realized, complementary international cooperation is critical. This contemporary reality and its reflection in the evolution of international human rights law invites serious examination of the nature and content of certain rights and, significantly, of the corresponding scope of obligations.

Other rights, while finding their typical expression within each state, may require, to a greater or lesser degree, international cooperation for their furtherance and effective application as lucidly evidenced by, *inter alia*, Article 2(1) of the ICESCR and the General Comments of CESCR, on for example the right to food, the right to health and the right to education. However, while their protection and promotion may also require action at the international level, the right to development differs in that, were it not for the existence of the international community of states organized on a juridical basis, the right to development could not have emerged in its current legal conceptualization and the scope and form of violations that the DRD aim to address would not have evolved in this way.

The right to development is collective in nature, and although it aims to benefit individuals, it requires collective exercise. Within these large collectives of individual people, there are groups of individuals who are held together by common history, language, ethnicity or religion and who, without their group, would cease to exist. Minority and indigenous peoples are often among the most discriminated against and marginalized peoples on earth. International law, in recognizing specific rights attributable to them, has sought to dissolve this disparity and provide the tools to allow for their equality. The right to development, cast both as a right to an outcome and

also as a right to a process of development, requires the full integration of the rights of minorities and indigenous peoples in all aspects of the realization of the right. This can only be achieved if rights codified to allow for their collective exercise, but also to preserve the identities and existence of the group, are wholly integrated into the processes of achieving the right to development. Dworkin's metaphor of the orchestra beautifully describes how the individual and the group integrate:

[Individual members of an orchestra] are exhilarated, in the way personal triumph exhilarates, not by the quality and brilliance of their individual contributions, but by the performance of the orchestra as a whole. It is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members.<sup>459</sup>

International human rights law provides the tools required to meet these challenges, framed within a human rights system that has been accurately characterized as an evolving and dynamic system of safeguards intended to respond to our growing understanding of particular techniques of repression and of different systems of oppression.<sup>460</sup> Considering the obligations inherent in a contemporary realization of the right to development and further interpreting its application to secure the rights of minorities and indigenous peoples, is but an attempt to do what the international law of human rights is meant to do: impose obligations on actors that limit their ability to oppress through their actions or inaction and ensure their contribution to creating a reality in which human rights can be realized, for all.

In the 2001 report of the UN Working Group on Indigenous Populations, it was noted that indigenous peoples were not just affected by development policies, they were imperilled by them – indeed their very existence was threatened by development.<sup>461</sup> The scale of forcible human dislocation – affecting 40–80 million people in the case of dams alone,<sup>462</sup> a disproportionate number of whom are indigenous peoples or minorities – and the increased impoverishment and exacerbated conflict resulting from relocation, led one academic to refer to this gross transgression as ‘development cleansing’.<sup>463</sup> Grave human rights violations continue, both as a result of ‘development’ and as a result of the failure of duty-bearers to secure a process in which the right to development can be realized.

# Recommendations

MRG recommends:

1. Given that the right to development is a right of every human person and all peoples, and in order to provide the best method of securing this right for marginalized groups, states should take steps to ensure that minorities and indigenous peoples are able to exercise their right to development individually and collectively as groups.
2. International human rights obligations should be taken fully into account by states in the formulation or implementation of any policies and treaties, including when acting multilaterally. This would include the specific standards in place for the protection and promotion of the rights of minorities and indigenous peoples. The participation in this work of the relevant UN independent human rights experts and human rights Treaty-Bodies should be sought.
3. Regional and national development plans need to explicitly recognize the centrality of human rights to poverty reduction and sustainable development. Development plans must integrate the principles and objectives of human rights, minority rights and the rights of indigenous peoples into all stages of the development process. The *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* of the Office the High Commissioner for Human Rights should be used as a tool to provide instruction on the integration of human rights.
4. A legal and regulatory framework that enables minorities and indigenous peoples to organize, be heard, and manage or influence decisions on development that affect them must be established by governments and within multilateral organizations. Essential to this is fulfilment of the provisions in the Declaration on the Right to Development to combat discrimination and to ensure self-determination of peoples.
5. The UN Working Group on the Right to Development should ensure that the rights of minorities and indigenous peoples are mainstreamed into the discussions of the Working Group and its review of the implementation of the right to development. The participation and written contributions of representatives of minorities and indigenous peoples in the WG must be strongly encouraged. The current focus on issues of inter-state accountability should be balanced with analysis and review of domestic accountability, and the accountability of the international community of states acting singly or jointly, regarding the right to development in all countries.
6. The Independent Expert on the Right to Development should consider minorities and indigenous peoples in all of his work. This includes ensuring that all of their rights are mainstreamed in any elaboration of processes and outcomes of the right to development and methods by which they may be operationalized. The Independent Expert should also include minority and indigenous peoples' rights in all aspects of the proposed development compact.

# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	UN Commission on Human Rights
DRD	Declaration on the Right to Development
ECHR	European Convention on Human Rights
GAOR	UN General Assembly Official Records
GC	General Comment
GR	General Recommendation
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
IFI	international financial institution
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
MLI	multilateral institution
OHCHR	UN Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDM; Minorities Declaration	UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNDP	UN Development Programme
WB	World Bank
WTO	World Trade Organization

# A Selection of International Standards

## Charter of the United Nations (1945)

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom

### Article 1

1(3). To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion

### Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- higher standards of living, full employment, and conditions of economic and social progress and development;
- solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

### Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

## Universal Declaration of Human Rights (1948)

### Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

## International Covenant on Civil and Political Rights (1966)

### Common Article 1 (ICCPR; ICESCR)

- 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.
- 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.
- The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

### Article 27

In those States in which ethnic, religious or linguistic minori-

ties exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## Human Rights Committee, General Comment 23 on Article 27, The Rights of Minorities, Fiftieth session, 1994

### Paragraph 7

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

## International Covenant on Economic, Social and Cultural Rights (1966)

### Article 2

2(f) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

## Declaration on the Right to Development (1986)

The General Assembly,

*Bearing in mind* the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

*Recognizing* that development is a comprehensive economic, social, cultural and political process, which aims 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 benefits resulting therefrom,

*Considering* that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

*Recalling* the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

*Recalling* further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and

fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

*Recalling* the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

*Recalling* also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

*Mindful* of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Considering* that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

*Concerned* at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

*Considering* that international peace and security are essential elements for the realization of the right to development,

*Reaffirming* that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

*Recognizing* that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

*Recognizing* that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

*Aware* that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

*Confirming* that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

*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 co-operation 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 a 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 5**

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

#### **Article 6**

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
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.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

#### Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

#### 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 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on 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.

### Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (1989)

The General Conference of the International Labour Organisation,  
*Recognising* the aspirations of these 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, and

*Noting* that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded,

#### Article 1

- 1(2). Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

#### Article 5

In applying the provisions of this Convention:

- (a) The social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

#### Article 6

1. In applying the provisions of this Convention, Governments shall:
  - (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legisla-

tive or administrative measures which may affect them directly;

- (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

#### Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

### Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, The Rights of Indigenous Peoples, Fifty-first session, 1997

#### Paragraph 4

The Committee calls in particular upon States parties to:

- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent

#### Paragraph 5

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

### Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

*Inspired* by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities, *Considering* that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

*Emphasizing* that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States

#### Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for

the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.

#### **Article 2**

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

#### **Article 3**

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

#### **Article 4**

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

#### **Article 5**

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.
2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

#### **Article 6**

States should cooperate on questions relating to persons belonging to minorities, inter alia, exchanging information and experiences, in order to promote mutual understanding and confidence.

#### **Article 7**

States should cooperate in order to promote respect for the rights set forth in the present Declaration.

#### **Article 8**

1. Nothing in the present Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.
2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.
3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.
4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

#### **Article 9**

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

### **Vienna Declaration and Programme of Action, World Conference on Human Rights (1993)**

#### **Article 10**

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

### **Draft Declaration on the Rights of Indigenous Peoples**

*Concerned* that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and the 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

#### **Article 23**

Indigenous people have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous people have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions

#### **Article 30**

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories

and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreements with the indigenous peo-

ples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact



# Notes

- 1 J. O'Manique, 'Human rights and development', 14 *Human Rights Quarterly* (1992) as cited in L.A. Obiora, 'Beyond the rhetoric of a right to development', 18 *Law and Policy*, (1996), 366 at 389, Special Issue on the Right to Development, M. wa Mutua, L.A. Obiora and R.J. Krotoszynski Jr (eds).
- 2 See the overview provided by R.W. Perry, 'Rethinking the right to development: After the critique of development, after the critique of rights', 18 *Law and Policy*, op. cit., 225 at 228, and Obiora, op. cit., 366 at 387.
- 3 Questions raised in the work of some panellists at the discussion on 'Beyond rhetoric: Implementing the right to development', Annual Meeting of the Law and Society Association in Toronto, June 1995, as referred to in Perry, op. cit., 225 at 229.
- 4 J. Donnelly, 'In search of the unicorn: The jurisprudence and politics of the right to development', 15 *California Western International Law Journal*, (1985), 473 at 482.
- 5 To name but a few: Kéba Mbaye who coined the phrase, Mohammed Bedjaoui, Stephen Marks and a range of non-governmental organizations.
- 6 M. Bedjaoui, 'The right to development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), 1177 at 1183.
- 7 M. wa Mutua, 'Editor's Introduction', 18 *Law & Policy*, op. cit., 195 at 195.
- 8 The Independent Expert has drawn on the writings of Amartya Sen. See A. Sen, *Development as Freedom* (1999).
- 9 H.G. Espiell, 'Introduction: Community-oriented rights', in Bedjaoui (ed), op. cit., 1167 at 1170.
- 10 DRD, Article 2(1).
- 11 DRD, GA res. 41/128, annex, 41 UN GAOR Supp. (No. 53), at 186, UN Doc. A/41/53, (1986).
- 12 GA res. 217A (III), UN Doc. A/810, at 71 (1948).
- 13 The reference to environmental considerations as a human right is based not only on the fundamental significance of the environment to the rights of indigenous peoples, but also on the intersection between the protection of the natural environmental and human rights law. Shelton outlines four ways in which they interact: (1) the invocation of human rights norms in the context of international environmental instruments; (2) the adaptation of existing human rights guarantees in response to threats to the environment; (3) recognition of a human right to an ecologically sound and sustainable environment; and (4) a responsibilities approach to human rights which includes respect for the environment. D. Shelton, 'Environmental rights', in P. Alston (ed.) *Peoples' Rights* (2001).
- 14 DRD, Article 6(2).
- 15 *Ibid.*, 6(3).
- 16 *Ibid.*, preambular para. 2, emphasis added.
- 17 *Ibid.*, preambular para. 13, emphasis added.
- 18 Sen, (1999), op. cit.
- 19 Fourth Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2002/WG.18/4, para. 2. The holistic approach to human rights whereby all human rights are recognized as universal, indivisible, interdependent and interrelated has been repeatedly affirmed in international instruments, including the DRD, Article 6(2); the Vienna Declaration and Programme of Action (1993), para. 5; and the widely cited Maastricht Guidelines on Violations of Economic, Social and Cultural Rights adopted by experts in 1997. See 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 4', 20 *Human Rights Quarterly*, (1998), 691 at 692.
- 20 DRD, Articles 2(3), 3, 4, 5, 6, 7, 8, 10.
- 21 See, 'The rights way to development', Human Rights Council of Australia (1995) in which the case was made for placing development assistance policies within the internationally agreed human rights framework.
- 22 P. van Weerelt, 'A human-rights-based approach to development programming in UNDP – Adding the missing link', 8 August 2001, unpublished.
- 23 The distinction between the rights-based approach to development and the right to development invites some confusion. A useful explanation provided by Marks suggests that 'the right to development is broader than the rights-based approach [to development] encompassing a critical examination of the overall development process, including planning, participation, allocation of resources and priorities in international development cooperation. The human-rights based approach to development should be applied as part of the right to development, but it may also involve isolating a particular issue, such as health, and applying to that issue a clear understanding of a state's obligations under the relevant international human rights instruments. ... Thus, the right to development implies both a critical review of the development process in a given country and a program of action to integrate a human rights approach within all aspects of that process.' S. Marks, 'The human rights framework for development: Five approaches' (2001) 11, available at <[www.hsph.harvard.edu/fxbcenter](http://www.hsph.harvard.edu/fxbcenter)>.
- 24 DRD, Article 2(1).
- 25 See, generally, the reports of the Independent Expert on the concept of a 'vector' of human rights, including his elaboration on the human rights of women as not only an element of the vector of the right to development, but as an integral part of each right comprising that vector and the method of realizing each right. Third Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2001/WG.18/2, para. 27.
- 26 DRD, Article 2(1).
- 27 Donnelly, op. cit., 473 at 498–9.
- 28 See for example, the view of the Committee on Economic, Social and Cultural Rights (CESCR) with regard to the right to health (Article 12 ICESCR): 'Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both the national and international levels ... [however] [r]egardless of whether groups as such can seek remedies as distinct holders of the rights, States parties are bound by both the collective and individual dimensions of article 12.' Also, CESCR, GC No.14 The right to the highest attainable standard of health (Article 12), (22nd session 2000) UN Doc. E/C.12/2000/4 at para. 59 and footnote 30. The important point made here is that whether or not a group can seek a remedy depends on whether the domestic legal process allows for recognition of the group as a legal entity in order to claim their remedy. However, the existence of this legal process does not determine or in any way modify the existence of both a group and individual aspect of certain rights and the corresponding obligations.
- 29 A. Sen, 'Consequential evaluation and practical reason', *The Journal of Philosophy*, vol. XVII, No. 9, September 2000, as

- cited in Marks, *op. cit.*, 13. Obligations that do not easily lend themselves to specifying exact duties of particular agents ('imperfect obligations'), that is, rights for which the right-duty correspondence is not clear-cut, does not determine its status as a right. As Sen points out, 'Certainly, a perfect obligation [obligations that entail specified duties of particular agents] would help a great deal toward the realization of rights, but why cannot there be unrealized rights, even rights that are hard to realize?' Sen (2000), *op. cit.*, 477 at 496. Making 'imperfect obligations' perfect seems mostly to depend on having clear duty-bearers at all levels, a point which is of significance to the coverage in this paper of obligations of conduct and obligations of result.
- 30 Policies adopted to increase economic growth and in connection with the reallocation of existing resources must be consistent with human rights standards, so as not to negate policies aimed at the realization of rights. They must also be equitable, non-discriminatory, participatory and transparent, and pursued within a system of accountability.
- 31 Statement by Arjun Sengupta, Independent Expert on the Right to Development, at the 58th Commission on Human Rights, 22 March 2002. Available at <www.unhchr.ch>.
- 32 See, for example, studies on the inequalities reflected in key human development indicators for white people and African Americans in the United States, which reveal consistently lower levels for African Americans on health, reduction of infant mortality and educational attainment. C.V. Hamilton, L. Huntley, N. Alexander, A.S.A. Guimaraes and W. James (eds), *Beyond Racism: Race and Inequality in Brazil, South Africa and the United States* (2001).
- 33 The cases of Chile, Brazil and Kenya, for example, show that even though they have experienced high growth rates during parts of the past four decades, the benefits of economic growth are not felt by all parts of the population, particularly minority and indigenous peoples. The case of ethnic minorities in Kenya shows that they have experienced a process of impoverishment at times of overall national growth. For information on Chile and Brazil see A. Deruyttere, *BID and Indigenous Peoples*, Department of Sustainable Development, Interamerican Development Bank (1997), and H. Patrinos and G. Psacharopoulos, *Indigenous Peoples and Poverty in Latin America: An Empirical Analysis*, The World Bank (1994). For information on Kenya see M. Rutten, *Selling Wealth to Buy Poverty: The Process of Individualization of Landownership among the Maasai Pastoralists of Kajiado District, Kenya, 1890-1990* (1992) and M. Kituyi, *Becoming Kenyans: Socio-Economic Transformation of the Pastoral Maasai* (1990), African Centre for Technology Studies.
- 34 The serious implications of development for the rights of indigenous peoples and minorities is demonstrated by the fact the UN Working Group on Indigenous Populations has discussed development for two consecutive years and will examine globalization and transnational corporations in 2003. Development cooperation and its impact on minorities will be addressed at the forthcoming 9th session of the UN Working Group on Minorities. For further information, see for example, *Indigenous Peoples and Their Relationship to the Land*, Working Paper prepared by Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2001/21, 11 June 2001.
- 35 Among the bilateral and multilateral development agencies that have openly acknowledged their support for a human rights approach to development are the United Nations Development Programme, UNICEF, the UK Department for International Development and the Swedish International Development Agency. See, for example, *Human Rights and Human Development, Human Development Report 2000*, UNDP; *Realising Human Rights for Poor People*, UK Department for International Development, September 2000; *Working Together: The Human Rights Based Approach to Development Cooperation, Stockholm Workshop, 16-19 October 2000*, SIDA, 2001.
- 36 See, for example, the position of the Australian Agency for International Development (AusAid) as summarized in L.-H. Piron, *The Right to Development: A Review of the Current State of the Debate for the Department for International Development* (April 2002), Annex V. Piron explains that AusAid does not support a rights-based approach, claiming that there is no clear understanding as to what it means.
- 37 Endorsing the position of the Independent Expert during the 3rd session of the UN Working Group on the Right to Development, a state representative remarked that the 'focus on the right to development [requires] a process of participation, transparency and accountability and the requirement for decision-making to be undertaken on an equitable basis and the results of development to be distributed fairly'. Report of the open-ended Working Group on the Right to Development (3rd session, 25 February-8 March 2002), UN Doc. E/CN.4/2002/28/Rev.1 para. 49. At the 1st session of the Working Group, some delegations emphatically agreed with the Independent Expert's definition of the right to development as a right to a process through which all human rights as such were realized. Report of the open-ended Working Group on the Right to Development (1st session, 18-22 September 2000), UN Doc. E/CN.4/2001/26, para. 66. And the World Bank 'believes [the right to a process] is one of the most salient contributions of the Independent Expert. And the ideas and proposals should not end where they have been left' ('The Right to Development and the Creation of Wealth in Developing Countries', statement by A. Sfeir-Younis, Special Representative to the UN and the World Trade Organization [WTO], Geneva, 2nd session of the Working Group on the Right to Development, 30 January 2001).
- 38 Statement by the representative of Spain on behalf of the European Union (EU) and Central and Eastern European countries associated with the EU, Observations of the EU on the Fourth Report of the Independent Expert on the Right to Development. Open-ended Working Group on the Right to Development (25 February-8 March 2002); Report of the open-ended Working Group on the Right to Development (2nd session, 29 January-2 February 2001), UN Doc. E/CN.4/2001/26, Annex III Comment Submitted by States, Comments Submitted by Canada, para. 21.
- 39 International cooperation is also narrowly defined in the intergovernmental debates on the topic; this limited approach inadequately addresses issues of accountability beyond inter-state accountability. See C. Lennox and M.E. Salomon, 'Negotiating the Right to Development for Minorities', 3 *McGill International Review*, (2003).
- 40 The debate over content at the international level refers to the relevance of the right to development to the international economic order and, as such, to issues including reform of the international financial institutions (IFIs), debt relief and market access.
- 41 For a useful table depicting the Northern and Southern views on the right to development, See Piron, *op. cit.*, Table 1.
- 42 Lennox and Salomon, *op. cit.*
- 43 Obiora, *op. cit.*, 366 at 392.
- 44 For example, Alston recognizes in the introduction to *Peoples' Rights* that 'not necessarily [all] the contributors share the view that the various rights usually included within this category or class of rights actually make up a coherent group of peoples' rights which share certain fundamental characteristics ... In fact, it is clear that the peoples' dimension of each of the rights [in the volume] is very far from being consistent from one right and one context to the next.' 'Introduction', in Alston (ed) (2001), *op. cit.*, 1 at 5-6.
- 45 L.B. Sohn, 'The rights of minorities', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), 270 at 274.

- 46 ICCPR Article 18(1): 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.'
- 47 Y. Dinstein, 'Freedom of religion and the protection of religious minorities', conference paper as cited in N. Lerner, *Group Rights and Discrimination in International Law* (1991), 15.
- 48 The Convention on the Crime and Punishment of Genocide (1948), Article II and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). While extending rights to members of groups the latter Convention also refers to the racial group; see, for example, Article II(b) which addresses the 'deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part', and Article II(c) which addresses 'measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country'.
- 49 See P. Leuprecht, 'Minority rights revisited', in Alston (ed), (2001), op. cit., 111 at 123. 'Rights to a specific territory, to administrative autonomy or to special forms of participation in public decision-making are difficult to conceive as other than group rights.'
- 50 V. Van Dyke, 'Collective entities and moral rights: Problems in liberal-democratic thought', 44 *The Journal of Politics*, as cited in Lerner, op. cit., 31.
- 51 Ibid.
- 52 *Lovelace v. Canada* (1981), HRC Communication No. 24/1977 (1981–82), para. 17.
- 53 *Kitok v. Sweden* (1988), HRC Communication No. 197/1985, Report of the Human Rights Committee, GAOR 43rd session, para. 9.8.
- 54 See CESCR GC No. 14, 'The right to the highest attainable standard of health' (Article 12), (22nd session 2000) op. cit., para. 59 in which the Committee refers to the individual and collective dimensions of the right to health.
- 55 Obiora, op. cit., 366 at 392 at footnote 81.
- 56 For example, the Draft UN Declaration on the Rights of Indigenous Peoples addresses group rights (referred to as 'collective' rights), and the rights of indigenous individuals.
- 57 Where a reference to peoples is used no definition is provided: UN Charter, ICCPR, ICESCR, African Charter on Human and Peoples' Rights (1981), ILO Convention 169.
- 58 Y. Dinstein, 'Collective human rights of peoples and minorities', 25 *International and Comparative Law Quarterly* (1976), cited in Lerner, op. cit., 30; J. Crawford, 'The rights of peoples: Some conclusions', in J. Crawford (ed.), *The Rights of Peoples* (1988), 165. At 171, Crawford makes the point that certain rights may be applicable to a very broad category of groups, such as the prohibition of genocide or the right to existence, whereas the right to self-determination, for example, would apply to a smaller category of groups. This is an important point in the consideration of 'groups' such as gays and lesbians. Although their rights are linked to their affiliation to a particular group, this paper argues that this does not make them 'group rights' in the way in which this paper defines them. Their belonging to a category or group may provide grounds for persecution and for the violation of their rights, but the objective of the applicable rights is to protect the individuals and not also to ensure the survival of the group.
- 59 Lerner, op. cit., 30.
- 60 See P. Alston, 'Peoples' rights: their rise and fall', in Alston (ed), (2001), op. cit., 259 at 274, in which he makes the point that the UN Working Group on Minorities, composed of five independent experts drawn from among the Sub-Commission on the Promotion and Protection of Human Rights and established to review the implementation of the Minorities Declaration, has assiduously avoided issues of group rights and peoples' rights notwithstanding occasional attempts to the contrary by certain states.
- 61 Ibid, 259 at 269.
- 62 See HRC GC 23 on Article 27, at *inter alia* para. 1: 'The Committee observes that [Article 27] establishes and recognizes a right which is conferred on individuals belonging to minority groups ...'. Alston cites Hofmann when he provides the example that in the European context, neither the European Charter for Regional or Minority Languages (1992) nor the Framework Convention for the Protection of National Minorities (1995) 'makes even the least concession to the concept of group let alone peoples' rights'. R. Hofmann, 'Minority rights: Individual or group rights? A comparative view on European legal systems', 40 *German Yearbook of International Law* (1997) as cited in Alston, 'Peoples' rights: their rise and fall', in Alston (ed.) (2001), op. cit., 259 at 275.
- 63 *Inter alia*, common Article 1 to the ICCPR and ICESCR. As a group right, the HRC cannot adjudicate upon alleged violations of these rights under the individual petition mechanism.
- 64 Alston, 'Peoples' rights: their rise and fall', in Alston (ed.) (2001), op. cit., 259 at 274.
- 65 P. Thornberry, *International Law and the Rights of Minorities* (1991), 333.
- 66 Mbaye, former Vice-President of the International Court of Justice and one of the early proponents of peoples' rights (and especially what are commonly referred to as third generation rights or solidarity rights), calls for the tension between human rights and peoples' rights to be transcended on the basis that 'they derive from the same sources (custom and treaties) and are proclaimed on behalf of the same beneficiary – man'. K. Mbaye, 'Introduction' to (Part Four) 'Human rights and rights of peoples', in Bedjaoui (ed.), op. cit., 1041 at 1053.
- 67 E. Moglen, 'Legal fictions and common law legal theory: some historical reflections' (1989), available at <<http://emoglen.law.columbia.edu/publications/fict.html>>. For the purposes of international human rights law, the 'pretense in legal argumentation' is initiated and codified at the legislative stage by states during the drafting of international instruments. The subsequent interpretation and application of the law by international (quasi) adjudicative bodies is then limited both by the language of the provisions and by the configuration of the complaints procedure, the legal fiction being applied to the substance and the procedure of the legal system. This is exemplified by the complaints procedure and the inadmissibility of communications submitted under Article 1 of the ICCPR and their admissibility under Article 27 ICCPR. See, for example, the *Mikmaq Tribal Society v. Canada*, (1984) HRC Communication No. 78/1980, UN Doc. Supp. No. 40 (A/39/40), at 200 (1984), especially the individual opinion of Mr Roger Errera; *Chief Ominyak and the Lubicon Lake Band v. Canada*, (1990), HRC Communication No. 167/1984, UN Doc. Supp. No. 40 (A/45/40), at 1 (1990); *Kitok v. Sweden*, (1988), op. cit.
- 68 Moglen, op. cit.
- 69 L. Fuller, *Legal Fictions* (reprinted 1967, originally published in 25 *Illinois Law Review* [1930–1]) and P. Olivier, *Legal Fictions: An Analysis and Evaluation* (1975) as cited in 'Introduction', in Alston (ed.) (2001), op. cit., 1 at 6.
- 70 E. Gayim, *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, University of Lapland Press, (2001), 119–25. Gayim draws on the work of various writers to discuss whether certain minorities should also be considered as peoples. What is made clear, however, is that the aim would be to entitle them to exercise rights and freedoms that international law grants to peoples. Moreover,

- Gayim refers to T. Makkonen who 'warns us about the dangers of confusing the popular understanding of the concept of peoples with that of the international legal one as is sometimes done for the pursuance of brute self-interest'.
- 71 'Introduction', in Alston (ed.) (2001), op. cit., 1 at 6, in which he draws on, *inter alia*, the pioneering work of L. Fuller.
- 72 R. Howard, 'Dignity, community, and human rights', in A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspective* (1991), as excerpted in H.J. Steiner and P. Alston (eds), *International Human Rights in Context: Law, Politics and Morals* (2000), 399.
- 73 J. Packer, 'Problems in defining minorities', in D. Fottrell and B. Bowring (eds), *Minority and Group Rights in the New Millennium* (1999), 223 at 241.
- 74 *Ibid.*
- 75 *Lovelace v. Canada* (1981), op. cit., para. 17.
- 76 *Kitok v. Sweden* (1988), op. cit., para. 9.8.
- 77 W. Kymlicka (ed.), *The Rights of Minority Cultures* (1995), as cited in Packer, op. cit., 223 at 243.
- 78 W.F. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* (1996) as cited in Packer, op. cit., 223 at 244.
- 79 The issue of agency is an important one with regard to the exercise of group rights, and while the application of group rights is potentially problematic, it can be effectively applied. See J.W. Nickel, 'Group agency and group rights', in W. Kymlicka and I. Shapiro (eds), *Ethnicity and Group Rights* (1997), 235 at 239–241.
- 80 See the Copenhagen Declaration (1990), para. 32, Second Conference for Security and Co-operation in Europe on the Human Dimension of the CSCE; The Framework Convention for the Protection of National Minorities (1998), Article 3(1), Council of Europe.
- 81 Obiora, op. cit., 366 at 392 at footnote 81.
- 82 Crawford in Crawford (ed.) (1988), op. cit., 165.
- 83 On the point that the term 'peoples' is not limited to the entirety of a state's population see Canadian Supreme Court in *Reference re Secession of Quebec*. 2 S.C.R. 217 *Reference re Secession of Quebec* (1998), para. 124, *International Legal Materials* (1998), 1342.
- 84 DRD, Article 1(2).
- 85 R. Plant, *Issues in Indigenous Poverty and Development*, Department of Sustainable Development, Interamerican Development Bank (1999).
- 86 For the recognition of group rights see, for example, the Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2000. Available at <[www.indianlaw.org/Judgment\\_Official\\_English.doc](http://www.indianlaw.org/Judgment_Official_English.doc)>; Human Rights Committee Concluding Observations on Mexico's state report (2001), UN Doc. CCPR/CO/79/Add.123, para. 14.
- 87 On minority protection under the League of Nations, including post-war treaties which included minority provisions, see Thornberry (1991), op. cit., Chapter 3. See also Steiner and Alston, op. cit., 93–6.
- 88 See P.R. Ghandhi, 'The Universal Declaration of Human Rights at fifty years: Its origins, significance and impact', 41 *German Yearbook of International Law (GYIL)* (1998), 207 at 215. A significant aspect of these provisions was the methods put in place for their enforcement – minorities had the right to petition the League of Nations and, after several admissibility stages and the exhaustion of attempts at non-contentious reconciliation, cases could be referred to the Permanent Court of International Justice (PCIJ). The most celebrated case in which this occurred was the *Minority Schools in Albania* case (PCIJ Series A/B, No. 64, 1935), which saw the Court recognize the need for equality in fact as in law between the majority community and minorities and the necessity therefore for minorities to be able to preserve their characteristics and traditions, including through their own institutions. Another significant ruling of the PCIJ regarding minorities was in the *Greco-Bulgarian Communities* case (PCIJ 1930) in which the Court expounded on the concept of community and its importance in relation to minorities.
- 89 Adopted 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.
- 90 See P. Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations*, Minority Rights Group International (1993) 4.
- 91 Sohn in Henkin (ed.), op. cit., 270 at 271 and 275. The delegations of Denmark, Yugoslavia and the USSR did, however, propose the inclusion of articles on minorities in the UDHR (Thornberry, 1993, op. cit.), and although they failed to convince the GA, a subsequent resolution recognized that 'the United Nations cannot remain indifferent to the fate of minorities', but went on to state that 'it is difficult to adopt a uniform solution of this complex and delicate question which has special aspects in each State in which it arises'. GA res. 217 C (III), UN Doc. A/810 (1948).
- 92 J. Crawford, 'The right of self-determination in international law: Its development and future', in Alston (ed.), (2001), op. cit., 7 at 15.
- 93 Thornberry (1991), op. cit., 122.
- 94 UN Charter, *inter alia*, Article 1(3).
- 95 In addition to the grounds upon which distinction is prohibited in the Charter, Article 2 of the UDHR includes colour, political or other opinion, national or social origin, property, birth or other status. The UDHR articulates a range of civil and political, as well as economic, social and cultural rights such as the right to education which shall 'promote understanding, tolerance and friendship among all nations, racial or religious groups' (Article 26) and 'the right freely to participate in the cultural life of the community ...' (Article 27). It would seem that concern over including a reference to minorities stemmed from the perceived difficulty of finding broadly suitable language that would address the different kinds of minorities and the diversity of circumstances which lead to the emergence of minority groups in various states. See Sohn in Henkin (ed.), op. cit., 270 at 272.
- 96 The UN Charter was signed at the San Francisco Conference on 26 June 1945.
- 97 Thornberry (1991), op. cit., 122–3.
- 98 Economic and Social Council res. UN Doc. E/56/Rev.1, E/84, para.4, adopted 21 June 1946.
- 99 International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.
- 100 The scope of this article has been developed by the Human Rights Committee in recognizing, for example, the importance of effective participation to the exercise of cultural rights. See HRC GC No. 23 on Article 27 (50th session, 1994) *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 7 The UN treaty bodies by way of their General Comments or General Recommendations, interpret the content of the provisions of the treaty and are meant to guide states as to their obligations under the treaty.
- 101 Sohn in Henkin (ed.), op. cit., 270 at 282.
- 102 Thornberry (1991), op. cit., 174.
- 103 HRC GC No. 23, Article 27 (50th session 1994), op. cit., para. 1.
- 104 Although no definition of minority exists in international law, defining factors are generally accepted as including numerical inferiority, non-dominance, possession of ethnic, religious and linguistic characteristics differing from those of the rest of the population, solidarity (if only implicitly) towards preserving their culture, traditions, religion and language, aimed

- at strengthening the group identity motivated by a collective will to survive and whose aim is to achieve equality with the majority in fact as in law. See F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979), UN Doc. E/CN.4/Sub.3/1979/12; J. Deschênes, *Proposal Concerning a Definition of the Term 'Minority'* (1985), UN Doc. E/CN.4/Sub.2/1985/31; Organization for Security and Cooperation in Europe, Advisory Committee on Human Rights and Foreign Policy (1997), as cited in R. Riddell, *Minority, Minorities Rights and Development*, Minority Rights Group International (1998), 7. Being a numerical minority is not in all cases a requirement. In the context of Africa, among other characteristics, non-dominance and marginalization in terms of access to economic and political power are seen as defining factors as to who may constitute a minority.
- 105 HRC GC No. 23 on Article 27 (50th session 1994), op. cit., para 5.2.
- 106 See Steiner and Alston, op. cit., 1291; Thornberry (1991), op. cit., 165. Thornberry also makes the significant point that the subjective aspect of the group identity is fundamental to the existence of groups because, despite the presence of 'objective' characteristics distinguishing the group from other elements within the state, it is highly questionable whether a group which has no consciousness of itself as a group or community can be said to exist at all. A similar position is reflected in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169), in which Article 1(2) explicitly mentions only self-identification as a fundamental criterion for determining the indigenous and tribal groups to which the Convention applies.
- 107 GA res. 47/135, 18 Dec. 1992, annex, 47 UN GAOR Supp. (No. 49) at 210, UN Doc. A/C.3/47/L.66. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.
- 108 Thornberry (1993), op. cit., 18.
- 109 R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th edn, vol. 1, 1992). 'The preamble forms part of the context of a treaty for the purposes of interpreting its terms', at 1210; 'the context of a treaty includes not only its text, preamble and annexes, but also any agreements relating to the treaty ... the ICJ had regard to the preamble of certain treaties as showing their object and purpose', at 1273 and footnote 14.
- 110 UNDM preambular para.3.
- 111 HRC GC No. 23 on Article 27 (50th session 1994), op. cit., para 7.
- 112 Thornberry (1993), op. cit., 18.
- 113 Ibid., 20.
- 114 Crawford in Crawford (ed.) (1988), op. cit., 171.
- 115 Notably however, Tomaševski highlights the risk that development policy may facilitate genocide and provides case studies of Rwanda and Guatemala to demonstrate her point. See K. Tomaševski, *Minority Rights in Development Aid Policies*, Minority Rights Group International (2000), 6–7.
- 116 Notably, the right to adequate food is not to be interpreted 'in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'. See further, Committee on Economic, Social and Cultural Rights, GC No. 12, The right to adequate food (Art. 11), (20th session, 1999), UN Doc. E/C.12/1999/5.
- 117 Thornberry (1993), op. cit., 19.
- 118 HRC GC No. 23, Article 27 (50th session 1994), op. cit., para. 6.1.
- 119 See, for example, Articles 21 and 27 of the UDHR; Article 25 of the ICCPR; Article 15 of the ICESCR; Articles 7, 8 and 14 of CEDAW; and Articles 2, 6, 7, 15, 22 and 23 of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169).
- 120 Emphasis added.
- 121 CERD GR XXVII, para. 43; CERD GR XXIX, para. 27.
- 122 See *Minority Rights and Development: Overcoming Exclusion, Discrimination and Poverty*, Working Paper prepared by C. Lennox, and submitted by Minority Rights Group International to the UN Working Group on Minorities, 8th session, May 2002, UN Doc. E/CN/Sub.2/AC.5/2002/WP.6 at 10.
- 123 HRC GC No. 23, Article 27 (50th session 1994), op. cit., para. 7.
- 124 HRC GC No. 25 on Article 25, (57th session 1996). UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 2.
- 125 Ibid., para. 5.
- 126 DRD, preambular para. 13.
- 127 DRD, Articles 3(2), 3(3), 4(1), 4(2), and 6 refer to international cooperation, a topic that will be given further consideration in subsequent sections of this paper.
- 128 UNDM, Article 4(1).
- 129 See, for example, a summary of 'Concluding Observations related to economic and social rights of minorities and indigenous peoples', in W. Felice, 'The UN Committee on the Elimination of Racial Discrimination: Race and Economic, Social Human rights', *Human Rights Quarterly* (2002), 219–23. See also, CERD's Concluding Observations on the Republic of Moldova (2002), UN Doc. CERD/C/60/CO/9, para. 12. ICERD Article 5 provides for non-discrimination in a range of civil, political, economic, social and cultural rights.
- 130 UN Doc. E/C.12/2001/10, May 2001, para. 11. See also *Minority Rights and Development*, Working Paper prepared by C. Lennox, op. cit.
- 131 CESCR GC No. 3, (5th session 1990), para. 2, UN Doc. HRI/GEN/Rev.1 at 45 (1994). On this point see Thornberry (1993), op. cit., 25.
- 132 CESCR GC No. 3, (5th session 1990), op. cit., para 13.
- 133 See, for example, Patrinos and Psacharopoulos, op. cit.
- 134 Human development, such as freedom of being literate, numerate and educated, being free from starvation and malnutrition, escaping morbidity or premature mortality, or having a reasonable standard of living and enjoying political participation, freedom of speech and so on, related to the exercise of human rights, are substantive elements of what constitute development. They are also instrumental in that they promote human freedom and thus development. Being educated and healthy or having access to information and freedom of association is a *means* to development, such as through improved productivity and capacity of individuals and the subsequent contribution to economic progress, but its significance as a *means* to development does not reduce its importance as an *end* to development. See Sen on constitutive and instrumental roles of freedom in Sen (1999), op. cit., Ch. 2, 36–7.
- 135 See Fourth Report of the Independent Expert on the Right to Development, op. cit., para. 22.
- 136 Gayim, op. cit., 126.
- 137 E-I. Daes, *Discrimination against Indigenous Peoples: Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1993/26/Add.1 para. 7.
- 138 On this point see Gayim, op. cit., 60–1.
- 139 Although the Optional Protocol to the ICCPR provides that claims may be brought concerning 'violations of any of the rights set forth in the Covenant' (Preamble; Articles. 1, 2 and 4), one of which is the right of peoples to self-determination (ICCPR Article 1), the Optional Protocol stipulates that communications may be brought by '*individuals* ... who claim to be victims of a violations ... of any of the rights set forth in the Covenant'. Following the Rules of Procedure, the HRC only adjudicates cases brought by individuals (as well as individuals joining in a claim in which they have each had an individual right infringed) so for reasons of expediency Article 27 has been used to redress violations against indige-

- nous persons. See, *Lubicon Lake Band v. Canada* (1990), op. cit., para. 32; HRC GC No. 23, Article 27 (50th session 1994), op. cit., para. 3.2 on the aspect of the right to enjoy a culture to the application of territory and the use of its resources in relation particularly to indigenous communities constituting a minority; Art. 30 of the Convention on the Rights of the Child; See also R. Higgins, *Problems and Process: International Law and How We Use It* (1998) 126–7; Thornberry (1991), op. cit., 331–3.
- 140 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169), Article 1(2) states: ‘Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’ See also, CERD GR VIII concerning the interpretation and application of Article 1, paragraphs 1 and 4 of the Convention (38th session, 1990), which states: ‘*The Committee on the Elimination of Racial Discrimination ... Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.*’ UN Doc. HRI/GEN/1/Rev.1 at 65 (1994).
- 141 A widely accepted definition of indigenous peoples was put forth by Martínez-Cobo in his report to the UN Sub-Commission: ‘Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.’ *Study of the Problem of Discrimination Against Indigenous Populations: Final Report*, submitted by the Special Rapporteur José Martínez-Cobo E/CN.4/Sub.2/1983/21/Add.8; See also, B. Kingsbury, ‘Reconciling five competing conceptual structures of indigenous peoples’ claims in international and comparative law’, in Alston (ed.) (2001), op. cit., 69 at 107–8. Additionally, while there is no set definition in international law, bodies such as the ILO and the World Bank have adopted definitional criteria.
- 142 DRD, preambular para. 2; Article 2(3).
- 143 DRD, Article 1(2). See the section in the present paper ‘The legal foundations of self-determination and sovereignty over natural resources and the right to development’.
- 144 The references in the DRD to peoples go beyond a reaffirmation of the independence and equality of all nations, and address peoples within a given state as distinct from the individuals. For example, by recognizing that the creation of conditions favourable to the development of ‘peoples and individuals’ is the primary responsibility of their states (preambular para. 15), the term peoples is defined separately from the state.
- 145 As at August 2002: Norway (1990); Mexico (1990); Colombia (1991); Bolivia (1991); Costa Rica (1993); Paraguay (1993); Peru (1994); Honduras (1995); Denmark (1996); Guatemala (1996); The Netherlands (1998); Ecuador (1998); Fiji (1998); Argentina (1998); Venezuela (2002); Dominica (2002); Brazil (2002).
- 146 M. Tomei and L. Swepston, *Indigenous and Tribal Peoples: A Guide to Convention No. 169*, ILO and the International Centre for Human Rights and Democratic Development (1996).
- 147 See generally, P. Thornberry, *Indigenous Peoples and Human Rights* (2002), Part IV: ‘ILO treaties on indigenous peoples’.
- 148 Instruments addressing other themes also refer to or are highly relevant to indigenous peoples’ rights, such as Agenda 21, adopted at the UN Conference on Environment and Development (1992), the Convention on Biological Diversity (1992), the Framework Convention on Climate Change (1992), and the Convention on Desertification (1992). The Vienna Declaration and Programme of Action (1993), adopted at the World Conference on Human Rights, and the Durban Declaration and Programme of Action (2001), adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also address the rights of indigenous peoples; as does the Declaration and Plan of Implementation of the World Summit on Sustainable Development (2002). A UN Draft Declaration on the Rights of Indigenous Peoples is still being negotiated, as is an American Draft Declaration on the Rights of Indigenous Peoples.
- 149 Gayim, op. cit., 126.
- 150 Although Convention 169 has little to do with self-determination, and fails to address the question beyond some evasive wording, it nevertheless includes a qualifier at Article 1(3). More recently, the Durban Declaration of the World Conference Against Racism, UN Doc. A/CONF.189/12. which states at para. 24: ‘We declare that the use of the term “indigenous peoples” in the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance is in the context of, and without prejudice to the outcome of, ongoing international negotiations on texts that specifically deal with this issue, and cannot be construed as having any implications as to rights under international law.’
- 151 UN World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002. WSSD Declaration and Plan of Implementation, UN Doc. A/CONF.199/20.
- 152 ILO Convention No. 169, preambular para. 5.
- 153 Tomei and Swepston, op. cit., 9, emphasis in the original.
- 154 The use of the term ‘group rights’ as opposed to ‘collective rights’ stems not from the distinction between the two as defended in an earlier section of this paper, but rather from the reference in ILO Convention No. 169 to the application of the Convention to groups and individuals. Article 5(a) states: ‘In applying the provisions of the Convention: the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals.’
- 155 For a brief summary of the strengths of the Convention, see Thornberry (2002), op. cit., 366–7.
- 156 See *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, ILO, Rev.2/1998; C. Roy and M. Kaye, *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples*, Anti-Slavery International and Minority Rights Group International (2002).
- 157 Resolution on the Rights of Indigenous Peoples/Communities in Africa, 28th Ordinary Session of the African Commission on Human and Peoples’ Rights (Benin, 2000).
- 158 ACHPR, Article 22.
- 159 Recent concluding observations in which the Committee addressed indigenous rights were in relation to Australia, Denmark, Finland, Sweden (56th and 57th sessions in 2000), Argentina, Bangladesh, Japan and Sudan (58th session, March 2001). See further, Thornberry (2002), op. cit., 210–11.
- 160 CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997.
- 161 Ibid., para. 4(c).
- 162 Ibid., para. 4(d).
- 163 Ibid., para. 5.
- 164 Ibid.
- 165 Thornberry (2002), op. cit., 223.
- 166 UN Doc. A/52/18, para. 425.
- 167 Ibid., para. 338.
- 168 Ibid.

- 169 UN Doc. CERD/C/304/Add.191, para. 9.
- 170 CERD GR XXIII, para. 3.
- 171 ILO Convention No. 169, Article 16(2).
- 172 While Article 14 refers specifically to land rights, it also states: 'In addition measures will be taken to safeguard the right of the peoples concerned to use of lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities....' Separate from lands owned by indigenous peoples, 'lands not exclusively occupied by them' is often referred to as territories – areas over which they may exercise certain jurisdiction and rights.
- 173 In Chapter 26 of Agenda 21, Strengthening the Role of Indigenous People, this action agenda from the UN Conference on Environment and Development (Brazil, 1992) refers to lands and resources and environments.
- 174 The Rio Declaration on Environment and Development, Principle 3 states: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' UN Doc. A/CONF.151/26, 1992.
- 175 *The Lubicon Lake Band v. Canada* (1990), op. cit., para. 33, The Committee found Canada to have breached Article 27.
- 176 *Ilmari Lansman v. Finland*, (1994) UN Doc CCPR/C/52/D/5111/1992, para. 9.4. On the merits of this case the Committee did not find Finland to have breached Article 27.
- 177 Mexico (2000), UN Doc. CCPR/C/79/Add.123, para. 14.
- 178 *Jouni E. Lansman et al. v. Finland*, (1996) UN Doc. CCPR/C/58/D/6711/1995, para. 10.4 On the merits of this case the Committee did not conclude that the activities of the state constituted a denial of the authors' right to enjoy their own culture.
- 179 Sweden (2002), UN Doc. CCPR/CO/74/SWE, para. 15.
- 180 Venezuela (2001), UN Doc. CCPR/CO/71/VEN, para. 28.
- 181 Mexico (2000), UN Doc. CCPR/C/79/Add.123, para. 14.
- 182 IACHR, Report No. 27/98 (Nicaragua), para. 142, as cited in the Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001. Available at <[www.indianlaw.org/Judgment\\_Official\\_English.doc](http://www.indianlaw.org/Judgment_Official_English.doc)>.
- 183 IACHR, *Report on the Situation of Human Rights in Ecuador* (1997), Doc. OEA/Ser.L/V/II.96.Doc.10 rev.1, Ch. IX.
- 184 *Ibid.*, Ch. VIII.
- 185 *Ibid.*, Ch. VIII.
- 186 IACHR, *Report of the State of Human Rights in Colombia* (1999) OEA/SER.L/V/II.102 Doc.9 rev.1, Ch. X, section J, Rec. 5.
- 187 *Ibid.*, Ch. X, para. 9, emphasis added.
- 188 DRD, preambular para. 2; Article 2(3) refers to the 'constant improvement of the well-being of the entire population' as the aim of national development policies.
- 189 On the requirement for new human rights instruments to be consistent with the existing body of human rights law, see the GA res. 41/120 on Setting International Standards in the Field of Human Rights (4 December 1986); and GA res. 47/135, 18 December 1992, which adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities.
- 190 For recommendations on ensuring the rights of minorities and indigenous peoples in development, see *Tackling poverty and discrimination: Mainstreaming minority rights in development assistance*, Minority Rights Group International (2001), available at <[www.minorityrights.org](http://www.minorityrights.org)>.
- 191 See, for example, ICERD, Article 1(4).
- 192 As reflected in the debates on the New International Economic Order (NIEO) of the 1970s and the GA Resolutions on the Declaration and Programme of Action on the Establishment of a New International Economic Order, GA res. 3201 (S-VI) and GA res. 3202 (S-VI) of 1 May 1974 and on the Charter on the Economic Rights and Duties of States, GA res. 3281 (XXIX) of 12 December 1974.
- 193 Former Judge and President of the ICJ (1982–2001).
- 194 Bedjaoui in Bedjaoui (ed.), op. cit., 1177 at 1192; see also 1179–1180.
- 195 DRD, preambular para. 2.
- 196 *Ibid.*, preambular para. 14.
- 197 *Ibid.*, preambular para. 16; Article 1.
- 198 *Ibid.*, Article 3(3).
- 199 See, for example, *Minority Rights and Development*, Working Paper prepared by C. Lennox, op. cit.
- 200 UN Doc. A/CONF.157/24 (Part I) (1993).
- 201 The view that consensus may be a source of international law divides writers. Falk is of the view that consensus is replacing consent as a basis of international legal obligation, and Sloan states that '[t]here should be no great difficulty in recognizing a genuine consensus of States as a source of international law'. See, generally, B. Sloan, 'General Assembly resolutions revisited (forty years later)', *British Yearbook of International Law*, (1987), 39 at 91–92.
- 202 Vienna Declaration and Programme of Action (1993), Part I, para. 10.
- 203 See Bedjaoui in Bedjaoui (ed.), op. cit., 1177 at 1180.
- 204 Strictly speaking, unless and until there is a Convention on the Right to Development, any mechanism at the international level is likely be limited to reviewing progress on the realization of the right and making recommendations.
- 205 Crawford in Crawford (ed.) (1988), op. cit., 167.
- 206 Obiora, op. cit., 366 at 369. Notably, Obiora also recognizes that highlighting state actions should not be at the expense of disregarding the role of, *inter alia*, transnational corporations.
- 207 DRD, preambular para. 16.
- 208 This formulation reflects language left over from the NIEO debates of the 1970s which focused on the rights of states to a just economic and social international order. Indeed, reference to the need to promote a new international economic order is made in the DRD at preambular para. 15 and at Article 3(3).
- 209 A. Orford, 'Globalization and the right to development', in Alston (ed.) (2001), op. cit., 137.
- 210 Writing in 1985, Alston recognized the notion of the state as a 'medium' through which the rights of people could be effectively asserted against the international community, Alston, 'The Shortcomings of a "Garfield the Cat" approach to the Right to Development', 15 *California Western International Law Review* (1985) 510 at 512. Orford in Alston (ed.), op. cit., endorses this position and refers to the state as the 'agent' of the 'entire population and of all individuals'. Describing the role of the state as middleman reflects the perennial problem of law and politics regarding the relation of the individual to the state. The distinguished international lawyer, Hersch Lauterpacht, explains: 'That problem [the relation of the individual to the State] has consisted in the reconciliation of two apparently conflicting factors. The first is the State, however widely its object may be construed, has no justification and no valid claim to obedience except as an instrument for securing the welfare of the individual human being.' H. Lauterpacht, 'International law and human rights' (1950), in Steiner and Alston, op. cit., 149.
- 211 Mbaye in Bedjaoui (ed.), op. cit., 1041 at 1049.
- 212 Orford in Alston (ed.), op. cit., 137.
- 213 See *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty (2001), available at <[www.iciss.gc.ca/menu-e.asp](http://www.iciss.gc.ca/menu-e.asp)>.
- 214 See the DRD, preambular para. 14, in which the GA proclaims the Declaration by: 'Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States'.

- 215 See the Fourth Report of the Independent Expert on the Right to Development, *op. cit.*, para.43.
- 216 See, for example, CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), *op. cit.*, para. 39.
- 217 A declaration is negotiated and agreed by the Member States of the UN and then formally adopted by the GA in the form of a resolution.
- 218 GA res. on the Right to Development, UN Doc. A/Res/41/133 para. 1, 4 December 1986.
- 219 See the overview with reference to various writers provided in Obiora, *op. cit.*, 366 at 378.
- 220 GA declarations are a species of resolution. Sloan, *op. cit.*, 39 at 140.
- 221 B. Simma and P. Alston, 'The sources of human rights law: Custom, *jus cogens*, and general principles', 12 *Australian Yearbook of International Law*, (1988–9), 82 at 90.
- 222 Obiora, *op. cit.*, 366 at 379.
- 223 *Ibid.*
- 224 Obiora makes the significant point that the preference for legal bindingness reflects the view that sanctions will follow for a breach of the binding rule and that the effectiveness of the rules relies on a system of sanctioning. Obiora, *op. cit.*, 366 at 381. With regard to the right to development which addresses the protection of human rights in relation to the international public order, determining and enforcing accountability is a more complex issue. However, see the coverage in this report on obligations of conduct and result as well on the human rights obligations of multilateral institutions.
- 225 UN Charter, preambular para. 4.
- 226 *Ibid.*, Article 1(3).
- 227 UDHR, Article 22.
- 228 *Ibid.*, Article 28.
- 229 ICESCR Article 2(1); ICCPR Article 3(a) which refers to the undertaking of 'Each State party ... to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy ...' (emphasis added).
- 230 CESCR GC No. 3, The nature of states parties' obligations (Article 2, para. 1), (5th session 1990), *op. cit.*, para. 14.
- 231 I. Brownlie, *Principles of Public International Law*, 5th edn, (1998), 695.
- 232 See H. Mosler, 'The international society as a legal community', 140 *Rec. des Cours* (1974 IV) in which Judge Mosler states: 'There can be no single answer to the question [as to whether resolutions have no binding effect at all or that they have a legislative effect] – resolutions must be distinguished according to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority in favour of their adoption'; Sloan, *op. cit.*, 39 at 138 refers to: (1) terms and intent; (2) voting patterns or support; and (3) state practice as among the most important factors in determining the weight to be given to a particular resolution. According to Bedjaoui, it is generally accepted that several parameters are involved in evaluating the legal force of GA resolutions, among them 'the preciseness of the resolution's content (at the level of normative technique), the existence or otherwise of machinery for implementation and the result of the vote on the resolution ...'. Bedjaoui, in Bedjaoui (ed.), *op. cit.*, 1177 at 1194.
- 233 The terms 'effect or force' refer to effectiveness, general acceptability as an interpretation, declaratory effect or binding force.
- 234 ILC, 'Draft Articles on the Law of Treaties with Commentaries', in *United Nations Conference on the Law of Treaties, Official Records*, vol. 1 (1971), 8, in I. Sarnoff (ed.), *International Instruments of the United Nations* (1997), xii.
- 235 See Sloan, *op. cit.*, 39 at 127.
- 236 *Ibid.*, 39 at 94 where Sloan states: 'The representative capacity [of the GA] should give weight to Assembly resolutions in general.'
- 237 *Ibid.* Sloan also refers to the work of McDougal, Lasswell and Reisman, among others, in defence of the source of 'community expectation' as a jurisprudential basis underlying all obligations.
- 238 *Ibid.*, 39 at 128–9 and 138. See also Sarnoff, *op. cit.*, xii.
- 239 Sloan, *op. cit.*, 39 at 128–9. Sloan explains that terms and intent are also determined by whether the resolution 'purports to declare existing principles of law, to interpret the Charter, to affirm obligations or to make determinations of fact or law'. This significant point is addressed in subsequent sections of this paper regarding international cooperation.
- 240 W. Mansell and J. Scott, 'Why bother about the right to development?', 21 *Journal of Law and Society* (June 1994) 171 at 174. Mansell and Scott support this claim by citing Article 1 of the DRD, stating that '[Article 1] could not, in this respect, be more direct and less ambiguous....'
- 241 Sloan, *op. cit.*, 39 at 137.
- 242 The Preamble defines the object and the purpose of the instrument and provides the framework through which the operative paragraphs should be interpreted. Jennings and Watts (eds), *op. cit.*
- 243 Sloan, *op. cit.*, 39 at 128.
- 244 *Ibid.*, 39 at 130.
- 245 *Ibid.*, 39 at 131.
- 246 The USA. The right to development has since been endorsed by all states including the USA through the adoption of the Vienna Declaration and Programme of Action (1993). The USA, however, remains vocal in its rejection of economic, social and cultural rights.
- 247 Sloan, *op. cit.*, 39 at 140.
- 248 M. Dixon, *Textbook on International Law*, 3rd edn (1990), 43–44.
- 249 Sloan, *op. cit.*, 39 at 131 and 134; see also Bedjaoui in Bedjaoui (ed.), *op. cit.*, 1177 at 1194.
- 250 Sloan, *op. cit.*, 39 at 134.
- 251 GA res. A/Res/50/214, para. 37, 23 December 1995.
- 252 The Working Group on the Right to Development was set up by the Economic and Social Council decision 1998/269. It held its first session in September 2000.
- 253 UN Commission on Human Rights res. 1998/72, 22 April 1998.
- 254 Note by the Secretary-General on the Right to Development accompanying the report of the Independent Expert to the GA, UN Doc. A/55/306, 17 August 2000 at para.1.
- 255 Rio Declaration on Environment and Development, Principle 3: 'The right to development must be fulfilled so as to meet developmental and environmental needs of present and future generations', *op. cit.*
- 256 Vienna Declaration and Programme of Action, Article 10: 'The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development as a universal and inalienable right and an integral part of the fundamental human rights.'
- 257 Copenhagen Declaration on Social Development and Programme of Action: Commitment 1(f): 'at the national level we will: Reaffirm, promote and strive to ensure the realization of the rights set out in relevant international instruments and declarations, such as, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Declaration on the Right to Development ...'; Commitment 1(n): 'At the international level we will: Reaffirm and promote all human rights which are universal, indivisible, interdependent and interrelated, including development as a universal and inalienable right and an integral part of fundamental human rights, and strive to ensure that they are respected, protected and observed.' UN Doc. A/CONF.166/9, 19 April 1995.



- 258 Beijing Declaration and Platform of Action; the Declaration at Article 8 states: 'We, the Governments, participating in the Fourth World Conference on Women, reaffirm our commitment to: The equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as the Declaration on the Elimination of Violence against Women and the Declaration on the Right to Development'. UN Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
- 259 Millennium Declaration Article 11 states: 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want'; and Article 24 states: 'We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.' UN Doc. A/55/L.
- 260 Durban Declaration and Programme of Action; the Declaration at Article 78 states: We affirm the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance.' UN Doc. A/CONF.189/12.
- 261 The Plan of Implementation of the WSSD refers to the right to development several times: para. 5 Peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all; para. 62 (a) Create an enabling environment at the regional, subregional, national and local levels in order to achieve sustained economic growth and sustainable development and support African efforts for peace, stability and security, the resolution and prevention of conflicts, democracy, good governance, respect for human rights and fundamental freedoms, including the right to development and gender equality; para 138. Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication, and employment creation. Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing. para 169 Acknowledge the consideration being given to the possible relationship between environment and human rights, including the right to development, with full and transparent participation of Member States of the United Nations and observer States. UN Doc A/CONF.199/20
- 262 Obiora, op. cit., 366 at 380.
- 263 See Higgins, op. cit., 20; *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (*Nicaragua v. the United States of America* (Merits), 1986), 14 at para. 186.
- 264 Brownlie, op. cit., 694. See the section of this paper 'The legal foundations of international cooperation in the right to development'.
- 265 Fourth Report of the Independent Expert on the Right to Development, op. cit., para 19.
- 266 For discussions on good governance by development agencies, see for example *Eliminating World Poverty: Making Globalisation Work for the Poor*, 2000 White Paper, UK DFID, August 2000; *Governance: The World Bank's Experience*, the World Bank, 1994. On the relevance of the policies and programmes of development agencies as instruments of democratization and the empowerment of civil society, see Marks, op. cit., 11, available at <www.hsph.harvard.edu/fxbcenter/>.
- 267 DRD, Articles 6(1) and 8(1).
- 268 Ibid., Article 2(3).
- 269 Ibid., Article 8(2).
- 270 Ibid., Article 2(3).
- 271 *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies* (2002), para. 216, prepared for the UN Office of the High Commissioner for Human Rights by P. Hunt, M. Nowak and S. Osmani. Available at <www.unhchr.ch >.
- 272 Such as export credit agencies – government agencies that give financial guarantees to companies operating abroad.
- 273 *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies* (2002), op. cit., para. 218, available at <www.unhchr.ch>.
- 274 The aid effectiveness debate has the World Bank, OECD, DAC and others argue that, even if resources are increased, there will not be much progress without a sound policy environment. The right to development, however, links acceptance of any benefits to a corresponding obligation on developing countries to respect and advance the human rights of its people. See, generally, the coverage on the uses and abuses of aid in Obiora, op. cit., 366 at 368–70. See also the principles behind the 'development compact' as elaborated by the Independent Expert, Fourth Report of the Independent Expert on the Right to Development, op. cit., paras. 56–74.
- 275 It is beyond the scope of this report to address alternatives to the neoliberal capitalist market structure that drives the global economy. The suggestion that conforming to human rights includes international cooperation which would facilitate equitable market access does not imply the authors' support for the current global economic system.
- 276 For example, CESCR GC 3 on the nature of States parties' obligations under Article 2 relates the provision to other Covenant articles that refer to the furnishing of technical assistance. See also Third Report of the Independent Expert on the Right to Development, op. cit., para. 34.
- 277 The Millennium Development Goals adopted by the GA in the form of a the UN Millennium Declaration (A/55/2 8 September 2000) are global targets that the world's leaders set at the Millennium Summit in September 2000 for reducing poverty and its causes and manifestations. The goals include: halving extreme poverty and hunger; achieving universal primary education and gender equity; reducing under-five mortality and maternal mortality by two-thirds and three-quarters respectively; reversing the spread of HIV/AIDS; halving the proportion of people without access to safe drinking water; and ensuring environmental sustainability. They also include the goal of developing a global partnership for development, with targets for aid, trade and debt relief. See <www.undp.org/mdg>.
- 278 See, for example, CEDAW (1979), Article 14.
- 279 See, *UNDP Policy Note, 'UNDP and Indigenous Peoples: A Policy of Engagement'*, UNDP (August 2001) para. 61.
- 280 *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies* (2002), op. cit., paras. 219–23, available at <www.unhchr.ch >.
- 281 The ICESCR Article 2(1) states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present

- Covenant by all appropriate means, including particularly the adoption of legislative measures.'
- 282 CESCR GC No. 3, The nature of States parties' obligations (Article 2, para. 1), (5th session 1990), op. cit., para. 13.
- 283 CESCR GC No. 11, Plans of action for primary education (Article 14), (20th session 1999), UN Doc. E/C.12/1999/4, para. 9.
- 284 On obligations *erga omnes*, see *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, ICJ Reports (1970), 3 at paras 33–4; for consideration of 'the right to develop *erga omnes*', see Bedjaoui, in Bedjaoui (ed.), op. cit., 1177 at 1188.
- 285 *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Peoples: Indigenous peoples and their right to development including their right to participate in development affecting them*. UN Doc. E/CN.4/Sub.2/AC.4/2001/2, para. 4.
- 286 For example, the World Bank/IMF Poverty Reduction Strategy Papers reflect the priorities of, *inter alia*, country leadership and country ownership.
- 287 See Alston (1985), op. cit., 510 at 515.
- 288 Marks, op. cit., 3, available at <www.hsph.harvard.edu/fxbcenter/>.
- 289 Alston (1985), op. cit., 510 at 515.
- 290 DRD, Article 6(1).
- 291 Emphasis added.
- 292 E. Schwelb, 'The law of treaties and human rights', in W.M. Reisman and B.H. Weston (eds), *Towards World Order and Human Dignity: Essays in Honour of Myres S. McDougal* (1976), 262 at 265.
- 293 See H. Lauterpacht, *International Law and Human Rights* (1950), esp. Ch. 9; Ghandi, op. cit., 206 at 229–231; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SW Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), 16 at para. 131; *Case Concerning United States Diplomatic and Consular Staff in Teheran (USA v. Iran)*, ICJ Reports (1980), 3 at para. 91. 42; GA res. 616 A and B (VII) of 5 December 1952 on 'The question of race conflict in South Africa resulting from the policies of *apartheid* of the government of the Union of South Africa' in which the resolution on the racial policy of *apartheid* in South Africa affirms that the governmental policies which were 'designed to perpetuate or increase discrimination, are inconsistent with the pledges of the Members under Article 56 of the Charter.' See also, M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992), at 74–7.
- 294 Lauterpacht, op. cit., Ch. 9 at 148.
- 295 Bedjaoui in Bedjaoui (ed.), op. cit., 1177 at 1186.
- 296 Brownlie, op. cit., 256.
- 297 CESCR GC No. 3, The nature of States parties' obligations (Article 2, para. 1), (5th session 1990), op. cit., para. 14.
- 298 See common preambular paras 3 and 4 to the Covenants, which state: 'Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights' and 'Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'; ICESCR Article 2(1); all articles which state that: 'The State Parties to the present Covenant recognize the right of everyone to ...'; ICCPR Article 2(3)(a): 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'; and Articles 11(2), 15(4), 22 and 23. See also Steiner and Alston, op. cit., 1326.
- 299 CRC Articles 4, 17(b), 24(4), 28(3). GA res. 44/25, annex, 44 UN GAOR Supp. (no. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.
- 300 CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 39.
- 301 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Judge Weeramantry, diss. op. ICJ Reports (1996) 66 at 144.
- 302 CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 36.
- 303 See, for example, Article 68 which mandates the setting up of a commissions in economic and social fields and for the promotion of human rights and Article 13 in which the GA is charged with the duty to 'initiate studies and make recommendations for the purpose of: (a) promoting international co-operation in the political fields and encouraging the progressive development of international law and its codification; (b) promoting international co-operation in the economic, social, cultural, educational and health fields ... and in the realization of human rights and fundamental freedoms for all ...'.
- 304 *Case Concerning United States Diplomatic and Consular Staff in Teheran (USA v. Iran)*, ICJ Reports (1980), 3 at para. 91 in which it held: 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.' This is significant in that the ICJ interpreted the human rights provisions of the Charter on the basis of the UDHR regarding human rights that were not explicitly contained in the Charter. See further, Kamminga, op. cit., at 76.
- 305 See 'The World Summit for Social Development and beyond: Achieving social development for all in a globalizing world' (2000), paras 5 and 8. Report prepared by the Office of the High Commissioner for Human Rights for the General Assembly on the implementation of the outcome of the World Summit for Social Development.
- 306 Part I, para. 10: 'The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.'
- 307 W. Friedmann, *The Changing Structure of International Law* (1964), Ch. 6.
- 308 See, for example, CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 43.
- 309 See G. Abi-Saab, 'The legal formulation of the right to development', in R.-J. Dupuy (ed.), *The Right to Development at*

- the International Level*, Workshop of the Hague Academy of International Law 1979, (1980), 170–1.
- 310 See, for example, Report of the open-ended Working Group on the Right to Development (1st session, 18–22 September 2000), op. cit., Annex III Comments Submitted by Japan, para. 46, denying the existence of any consensus as to a duty of international cooperation for the realization of the right to development; Report of the open-ended Working Group on the Right to Development (3rd session, 25 February–8 March 2002), op. cit., para. 31, which cites some states as endorsing international cooperation ‘not only as an act of solidarity but as an obligations’. See also Piron, op. cit., 3.3, in which Southern governments are found to have endorsed an obligation to cooperate internationally, linking it to globalization, international trade, foreign debt and intellectual property.
- 311 See the section of this paper on ‘The human rights obligations of multilateral institutions and of states as members of MLI’s’.
- 312 A. Eide, ‘Realization of social and economic rights and the minimum threshold approach’, 10 *Human Rights Law Journal*, nos 1–2 (1989), 35 at 37.
- 313 See, for example, CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 39; CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 36.
- 314 R.L. Barsch, ‘The right to development as a human right: Results of the global consultation’, 13 *Human Rights Quarterly*, (1991), 322, reproduced at <www.ciesin.org>.
- 315 Notably, the obligations of states acting at the international level to fulfil the right to self-determination has been explicitly recognized by the Human Rights Committee. See the section in this paper on ‘The legal foundations of self-determination and sovereignty over natural resources and the right to development’.
- 316 Brownlie, op. cit., 515; and further on the principle of self-determination, see Judge Ammoun, sep. op., *Barcelona Traction Case (Second Phase)*, *ICJ Reports* (1970), 3 at p. 304. Other principles of *jus cogens* include: the prohibition of genocide; prohibition on the use of force, slavery and the slave trade; the principle of racial non-discrimination; crimes against humanity; and principles and rules concerning the basic rights of the human person. See Brownlie, op. cit., 515; D.J. Harris, *Cases and Materials on International Law*, 5th edn (1998), 837; *Barcelona Traction, Light and Power Co. Case*, *ICJ Reports* (1970), 3 at para 34.
- 317 Harris, op. cit., 837.
- 318 Vienna Convention on the Law of Treaties (1969), Article 53.
- 319 UN Charter, Article 1(3); common Article 1 of the ICCPR and ICESCR. Prior to the adoption of the Covenants, explicit reference to the *right* to self-determination appeared in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples, GA res. 1514 (XV), 14 December 1960, and subsequently in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA res. 2625, 24 October 1970.
- 320 GA res. 1803 (XVII), 14 December 1962.
- 321 Common Article 1(2) of the ICCPR and ICESCR.
- 322 The Cold War proxy system saw a continued struggle for political control over many developing countries.
- 323 The term ‘peoples’ to which the principles of self-determination apply has undergone a transition throughout the decades. The right of ‘peoples’ to self-determination in the context of decolonization had in mind the state, whereas it is now understood equally as a right of peoples within a state. It is therefore understood as having both an external and internal dimension. For an overview of the phases and evolution of peoples’ rights, see Alston, ‘Peoples’ rights: their rise and fall’, in Alston (ed.), (2001), op. cit., 259. See also Crawford in Alston (ed.) (2001), op. cit., 7.
- 324 See, for example, the Canadian Supreme Court in *Reference re Secession of Quebec*: ‘It is clear that a “people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population.’ 2 S.C.R. 217 *Reference re Secession of Quebec* (1998), at para. 124, *International Legal Materials* (1998), 1342. The implication is also that self-determination applies to minorities that do not qualify as ‘peoples’. See, further, P. Thornberry, ‘Self-determination, minorities, human rights: A review of international instruments’, *International and Comparative Law Quarterly* (1989), 867 at 882–3; I. Brownlie, ‘International law and the fiftieth anniversary of the United Nations’, *Recueil des Cours* (1995), 62.
- 325 Alston, ‘Peoples’ rights: their rise and fall’, in Alston (ed.) (2001), op. cit., 259 at 260–2, where he explains that with regard to the right of peoples of self-determination, ‘neither the drafting history nor the formulation of the phrase finally adopted [in the UN Charter] support any extensive understanding of the phrase’. Crawford, in Alston (ed.) (2001), op. cit., 7 at 22, explains that it remains unclear as to whether the beneficiary was meant to be the people or the state, while noting that the 1962 Resolution on Permanent Sovereignty over Natural Resources refers mostly to ‘peoples and nations’ but treats them as if they were states.
- 326 Bedjaoui in Bedjaoui (ed.), op. cit., 1177 at 1184. While the right to self-determination and the right to development are undoubtedly interrelated this is not to suggest they comprise identical international legal dimensions. For example, while self-determination may be invoked when a ‘people’ (as a state) is denied or prevented from achieving or joining statehood (as in the case of decolonization), or when peoples within a plural state invoke the right as a result of systematic discrimination, the right to development presupposes, and has as a prerequisite, the existence of a state.
- 327 DRD, preambular para. 4.
- 328 *Ibid.*, preambular para. 7. This Declaration, which was adopted 10 years after the Covenants entered into force, applies stronger language than that of common Article 1(2) of the Covenants which begins by stating that: ‘All peoples may, for their own ends, freely dispose of their natural wealth and resources ...’.
- 329 HRC GC No. 12 (21st session 1984), para. 5 regarding Article 1(2), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 12 (1994).
- 330 *Ibid.*, para 6.
- 331 For a definition of the obligations to respect, protect and fulfil, see Eide, op. cit., 35 at 37. While it is beyond the scope of this paper it would be interesting to consider how the measures outlined by Eide, which were conceived in relation to the obligation to fulfil human rights by a state at the national level, would translate to the international level. For example, ‘judicial’ measures in light of the HRC’s elaboration of the right to self-determination as imposing an obligation upon States parties ‘not only in relation to their own peoples but vis-à-vis all peoples’ might thus justify the application of universal jurisdiction for a violation of the right of, for example, indigenous peoples, to self-determination.
- 332 *UNDP Policy Note, UNDP and Indigenous Peoples: A Policy of Engagement*, UNDP (August 2001), 8.
- 333 See the Report of the Global Consultation on the Right to Development as a Human Right (1990), para. 151, as cited in Barsch, op. cit., 322, available at <www.ciesin.org>.

- 334 For example, rights of ownership and possession, participation in the use, management and conservation of resources pertaining to their lands, access to benefits derived from the land; free, informed and prior consent in relation to the use of their land; just compensation for the effects of any violations. See, generally, the section in this paper on 'Rights of indigenous peoples in light of the right to development'.
- 335 Traditional land rights of minorities are far weaker in international, as well as national, law than the rights of indigenous peoples. Displacement of minorities in the name of development is, however, a recurring problem that can threaten the livelihoods of minorities and the preservation of their cultures. See, *Minority Rights and Development*, Working Paper prepared by C. Lennox, op. cit., 19.
- 336 For coverage pertaining to the rights of minorities and indigenous peoples, including with regard to the right to self-identification, see the section in this paper on 'Rights of minorities in light of the right to development' and the section on 'Rights of indigenous peoples in light of the right to development'.
- 337 For consideration of this issue see also, M.E. Salomon, 'The nature of a right: The right to a process in the right to development', in *The Right to Development: Reflections on the First Four Reports of the Independent Expert, Dr. Arjun Sengupta* (Franciscans International 2003).
- 338 See also the Second Report of the Independent Expert on the Right to Development, UN Doc. A.55/306, August 2000, paras 15–26.
- 339 *Ibid.*, para. 22; on development understood as the enhanced freedom to choose to lead the kind of life one values and not the acquisition of more goods and services, see Sen (1999), op. cit., 87–110.
- 340 Third Report of the Independent Expert on the Right to Development, op. cit., para. 6. Further, the Independent Expert felt it necessary to analyse the notions of 'improvement' and 'well-being' in order to allow for the design of mechanisms or policies for realizing the right to development. See para. 7.
- 341 Fourth Report of the Independent Expert on the Right to Development, op. cit., para. 2.
- 342 *Ibid.*, para. 16.
- 343 Sen (2000), op. cit., 477 at 495.
- 344 P. Alston and G. Quinn, 'The nature and scope of the States parties' obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987). This is borne out by the interpretation of the CESCR with regard to the obligations of States parties to progressively realize the Covenant rights. In its GC 3 on the nature of States parties' obligations, the Committee has stated: 'while the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted, as clearly as possible towards meeting the obligations recognized in the Covenant.' CESCR GC No. 3, The nature of States parties' obligations (Article 2, para. 1), (5th session, 1990), op. cit., para. 2.
- 345 The ILC was established by the General Assembly in 1947 to promote the progressive development of international law and its codification. It is composed of 34 independent members elected by the GA.
- 346 Report of the ILC on the Work of its 51st session 3 May–23 July 1999. UN Doc. A/54/10, para. 132. At para. 146 the ILC observes that 'the distinction between obligations of result and obligations of conduct had become commonplace in international legal discourse, not only at the academic level but also at that of inter-State relations', para. 146.
- 347 *Ibid.*, para. 132.
- 348 CESCR GC No. 3, The nature of States parties' Obligations (Article 2, para. 1), (5th session 1990), op. cit., para. 1.
- 349 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', op. cit., 691 at 694. The Maastricht Guidelines were drawn up by a group of experts in 1997 and build on the Limburg Principles on the Implementation of the ICESCR (1986) which is also the work of a group of experts.
- 350 Report of the ILC on the Work of its 51st session, 3 May–23 July 1999. op. cit., para. 152.
- 351 Alston and Quinn, op. cit., 156 at 167.
- 352 See Abi-Saab in Dupuy (ed.), op. cit., 173–4.
- 353 The work of the ILC on the subject is in relation to their Draft Articles on State Responsibility.
- 354 Report of the ILC on the Work of its 51st session, 3 May–23 July 1999. op. cit., para. 133. The ILC explains that in French law the obligation of result was considered more stringent because it was concerned with risk, whereas under the work of the ILC the obligation of conduct is the more stringent of the two because the emphasis is on the determinacy of the conduct. Explicit reference to obligations of conduct and obligations of result does not appear, however, in the current ILC Draft Articles on State Responsibility. An authoritative explanation provided is that the Draft Articles are concerned with the codification and progressive development of secondary rules and the reference to obligations of conduct and of result as applied to the question of a breach, the existence of which relies upon the specific content of the primary rule, thus 'lacked consequence within the framework of the Draft articles'. Despite the decided inapplicability of the terms in this context, the ILC Draft Articles still refer to the 'character of an obligation'. The reference to 'character' is to ensure recognition of the continued value of the terms as they relate to obligations. An overview of the second reading further recognizes their 'currency in international law', despite the explicit reference being dropped. J. Crawford and P. Bodeau, *Second Reading of the ILC Draft Articles on State Responsibility: Further Progress*, available at <www.law.cam.ac.uk>. The ILC has also specifically referred to the dependence on the terms obligations of conduct and of result with regard to the effects of reservations under the Vienna Convention on the Law of Treaties and with regard to the nature of States parties' obligations under the ICESCR. It was further remarked that obligations had also found the distinction useful. See Report of the ILC on the Work of its 51st session 3 May–23 July 1999. op. cit., para. 152–3.
- 355 CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 14.
- 356 CESCR GC No. 3, The nature of States parties' obligations (Article 2, para. 1), (5th session, 1990), op. cit., para. 2.
- 357 A plan of action to reduce infant, child and maternal mortality would seek to address, *inter alia*, the right to the highest attainable standard of health (ICESCR Article 12), the right to special services in connection with pregnancy and family planning (CEDAW, Article 12), and the obligation upon states to reduce infant and child mortality (Convention on the Rights of the Child, Article 24(2)(a)).
- 358 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', op. cit., at 694.
- 359 UN Doc. A/55/2, 8 September 2000. On the importance of considering the impact of discrimination against minorities and indigenous peoples in the strategies for reaching the Millennium Development Goals, see C. Lennox, *Minority and indigenous rights in the international development goals*, op. cit., available at <www.minorityrights.org>.
- 360 Report of the ILC on the Work of its 51st session, 3 May–23 July 1999, op. cit., para. 148.
- 361 See CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., paras 43–52. See also, CESCR GC No. 12, The right to ade-

- quate food (Article 11), (20th session 1999), op. cit., paras 14–20.
- 362 UNDM, Article 4.3.
- 363 *Ibid.*, Article 4.2.
- 364 ILO Convention No. 169, Article 28(1).
- 365 HRC GC No. 23, Article 27 (50th session), op. cit., para. 3.2.
- 366 On TRIPS and its potential to contravene the right to development on a range of fronts, including with regard to participation in decision-making, the protection of cultural rights and traditional knowledge, as well as with regard to its ability to further entrench the unaccountability of transnational corporations, see Orford in Alston (ed.) (2001), op. cit.
- 367 Report of the ILC on the Work of its 51st session, 3 May–23 July 1999, op. cit., para. 154.
- 368 *Ibid.*, para. 162.
- 369 Collectively referred to as International Financial Institutions (IFIs). The Bretton Woods agencies comprise the International Monetary Fund and the World Bank family, made up of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Agency (IDA) and affiliated organizations such as the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID).
- 370 Agreement establishing the WTO signed at Marrakesh, Morocco, 15 April 1994.
- 371 See, for example, CESCR's Concluding Observations on Morocco, UN Doc. E/C.12/1/Add.55, December 2000, para. 38.
- 372 M. Lucas, 'The International Monetary Fund's conditionality and the International Covenant on Economic, Social and Cultural Rights: An attempt to define the relations', *Revue Belge de Droit International* 1 (1992), 104; S. Skogly, *The Human Rights Obligations of the World Bank and International Monetary Fund* (2001); R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development, available at <www.ichrdd.ca>; *Intellectual Property Rights and Human Rights*, the Report of the Secretary-General, UN Doc. E/CN.4/Sub.2/2001/12; *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, Report of the High Commissioner on Human Rights, UN Doc. E/CN.4/Sub.2/2001/13.
- 373 See E.-U. Petersmann, 'Time for integrating human rights into the law of worldwide organizations: Lessons from European integration law for global interpretation law', paper submitted to the Jean Monnet Center at New York University (2001), in which it is also pointed out that human rights in national constitutional laws provide constitutional restraints on government powers, sometimes with explicit reference to human rights on the collective exercise of government powers in international organizations, for example Article 23 of the German Basic Law as well as Article 11 of the European Union Treaty. Available at <www.jeanmonnetprogram.org/papers/>.
- 374 Statute of the International Court of Justice (1945), Article 38(1)(c).
- 375 *Barcelona Traction, Light and Power Company Co. Case*, ICJ Reports (1970), 3 at paras 33–4; See Howse and Mutua, op. cit., available at <www.ichrdd.ca>. See also Delbruck who refers to the 'objective legal order' of international law which binds all states (and other actors) that did not consent to the recognition of certain rules for the protection of international community interests (*erga omnes* effect of public interest norms). The legitimacy of such law, he explains, rests on the fact that it results from a public discourse in various universal fora open to all states. J. Delbruck, 'Prospects for a "world (internal) law?": Legal developments in a changing international system', 9 *Indiana Journal of Global Legal Studies* (2002), available at <http://ijgls.indiana.edu>.
- 376 Article 1, Resolution adopted by the International Law Institute on 'The protection of human rights and the principle of non-intervention in the internal affairs of states', 63 *Institut de Droit International Annuaire* (1989), 339 at 341.
- 377 But not limited to MLIs. International legal persons include, for example, corporations.
- 378 For interesting consideration of this matter, also in relation to European Law, see Petersmann, op. cit., available at <www.jeanmonnetprogram.org/papers/>.
- 379 UN Charter, Article 103.
- 380 *Ibid.*, Article 55.
- 381 *Ibid.*, Article 56.
- 382 See J. Oloka-Onyango and D. Udagama, *Globalization and its Impact on the Full Enjoyment of Human Rights*, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, paras 20 and 48.
- 383 See, generally, Skogly (2001), op. cit.; for a summary, see S. Skogly, *The World Bank, the International Monetary Fund and Human Rights*, at <www.nutrition.uio.no>.
- 384 Although neither the World Bank nor the IMF has been granted explicit international personality through their Articles of Agreement, based on their purposes, powers and functions, there is widespread agreement that they possess international legal personality. See P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn (2001), 456–60; Skogly (2001), op. cit., 64–71; and F. MacKay, 'Universal rights or a universe unto itself: Indigenous peoples' human rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples', 17 *American University International Law Review*, (2002), 527 at 560.
- 385 For a widely accepted albeit not exhaustive list of customary international law and *jus cogens* principles, see the Third Restatement on the Foreign Relations Law (American Law Institute, *Restatement on Foreign Relations Law*, 1987). See further, H. Hannum, 'The status of the Universal Declaration of Human Rights in national and international law', 12 *Interights Bulletin* (1998/9) at 6; Simma and Alston, op. cit., 82 at 94–5; on self-determination as *jus cogens*, Judge Ammoun, sep. op., *Barcelona Traction Case* [Second Phase], ICJ Rep. (1970), 304; on crimes against humanity, Case of *Roach v. Pinkerton*, Inter-American Commission of Human Rights Decision of 27 March 1987 (OAS General Secretariat), at 33–6 and regarding permanent sovereignty over natural resources, GA res. 1803 (XVII) of 14 December 1962 Permanent Sovereignty over Natural Resources. On this final point see Brownlie, op. cit., at 514–15.
- 386 The general rule of international law being that third parties are not bound by treaties without having given their expressed consent. Article 34 Vienna Convention on the Law of Treaties (1969); Article 35 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986).
- 387 Sands and Klein, op. cit., 456 and 458.
- 388 *Reparations for Injuries Suffered in the Service of the United Nations Case*, ICJ Reports (1949), 174 at 179.
- 389 *Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt*, ICJ Reports (1980), 73 at 89–90.
- 390 *Barcelona Traction, Light and Power Company Co. Case*, ICJ Reports (1970), 3 at para. 34.
- 391 M. Cogen, 'Human rights, prohibition of political activities and the lending policies of the World Bank and the International Monetary Fund', in S.R. Chowdhury et al. (eds), *The Right to Development in International Law* (1992), as cited in Sands and Klein, op. cit., 458.
- 392 In a speech to the International Law Association (69th Conference, 2000) on foreign investment, human rights and development, Dr Ibrahim Shihata, former General Counsel of the World Bank, endorsed the view that the World Bank was

- constrained by the scope of its Charter which explicitly limits its involvement to economic considerations and not to politics. Notes on file with author. At the 53rd session of the Sub-Commission on the Promotion and Protection of Human Rights, the IMF representative to the UN did not address the key issues related to the Fund's human rights obligations when he stated that: '[the] IMF did not have a mandate to promote human rights and was not bound by international human rights instruments ...'. Summary Records of the 12th meetings of the Sub-Commission's 53rd session, E/CN.4/Sub.2/2001/SR.12, para. 34. See also Cogen in Chowdhury et al. (eds), op. cit., 379.
- 393 P. Klein, 'La responsabilité des organisations financières internationales et les droits de personnes', *Revue Belge de Droit International* (1999), 97 at 113.
- 394 The World Bank and the IMF were both established in 1946, having originated from the 1944 Bretton Woods Conference.
- 395 It might be noted however that the representative of the IMF to the UN Working Group on the Right to Development remarked at the Working Group session in 2002 that the Fund's Articles had been amended three times and a fourth amendment was pending ratification, and human rights had never surfaced during any of these changes. Report of the open-ended Working Group on the Right to Development (3rd session, 25 February–8 March 2002), op. cit., para. 26.
- 396 See, for example, the European Court of Human Rights (ECHR) in the case of *Tyler v. UK* (1978) related to corporal punishment under Article 3 of the Convention in which, having found a violation, the Court stated: 'The Court must also recall that the Convention is a living instrument which ... must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards ... of the member States ... in this field.' ECHR application No. 5856/72, at para. 31.
- 397 Although beyond the scope of this paper, it may be interesting to consider the implications of 'implied powers' to the points raised above. The attribution of implied powers as a result of an interpretation of the purposes and functions of an organization treats the organization as 'a dynamic institution evolving to meet changing needs and circumstances ...'. See Sands and Klein, op. cit., 474.
- 398 *Ibid.*, 458–9.
- 399 Skogly, *The World Bank ...*, op. cit., available at <www.nutrition.uio.no>.
- 400 Lucas, op. cit., 104 at 122.
- 401 See MacKay, op. cit., 527 at 568 and 575.
- 402 A. Eide, *Report on the Right to Adequate Food*, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987; Eide is currently the Chair of the UN Working Group on Minorities.
- 403 See, for example, CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 33; CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 15.
- 404 For the Guidelines, see *20 Human Rights Quarterly* (1998), 705.
- 405 See, for example, MacKay, op. cit., 527 at 561.
- 406 Sands and Klein, op. cit., 459. See, generally, F. Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund* (2001). On file with author.
- 407 Cogen in Chowdhury et al (eds), op. cit., 379 at 387.
- 408 Sands and Klein, op. cit., 459.
- 409 *Ibid.*, 519.
- 410 UN Charter, Articles 62–66 explain the functions and powers of the UN Economic and Social Council. Article 63 states: 'The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the GA.'
- 411 Skogly (2001), op. cit., 109.
- 412 Skogly, *The World Bank ...*, op. cit., <www.nutrition.uio.no>. Elsewhere Skogly observes that 'part of the reasoning behind bringing these organizations into formalized relationship to the UN must have been to grant them, both legally and practically, rights and obligations in relationship to the UN ...'. Skogly (2001), op. cit., 100.
- 413 The Draft Declaration on the Rights of Indigenous Peoples, Article 40.
- 414 While the ICESCR contains a provision that states: 'Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant' (Article 24), respect for fundamental human rights can hardly be understood as constituting an impairment to the functioning of an organization. If it did, the constitution (or activities) of the organization might need to be reconsidered so as not to be stipulated or implemented in such a way that allows for the provisions of the Covenant to be seen as 'impairing' its functioning. Moreover, the language of ICESCR refers specifically to the interpretation of the provisions of the Covenant, which addresses its *misinterpretation* as having the potential to impair the provisions of other charters, and not its legitimate interpretation which can be found in the considerable observations and comments of the Committee, as they relate to the Specialized Agencies in ensuring the protection of economic, social and cultural rights.
- 415 CESCR GC No. 3 on Article 2(1) (The nature of States parties' obligations) (5th session 1990), op. cit., para. 13.
- 416 CESCR GC No. 2 on Article 22 (International technical assistance measures) (4th session 1990) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 45 (1994), para. 9.
- 417 CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 41; CESCR GC No. 13, The right to education (Article 13), (21st session 1999), op. cit., para. 60; CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session, 2000) op. cit., para. 39.
- 418 See Skogly (2001), op. cit., Ch. 7.
- 419 CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 50; CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 19.
- 420 UN Charter, Article 56.
- 421 *Ibid.*, Article 1(3).
- 422 UN Charter, Article 103 states: 'In the event of a conflict between the obligations of the Member of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Article 30(6) of the Vienna Convention on the Law of Treaties between states and international organizations and between international organizations likewise confirms that: 'The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.'
- 423 CESCR GC No. 14, The right to the highest attainable standard of health (Article 12), (22nd session 2000), op. cit., para. 39.
- 424 CESCR GC No. 12, The right to adequate food (Article 11), (20th session 1999), op. cit., para. 41.

- 425 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan, Sept. 2001, UN Doc. E/C.12/1/Add.67, para. 37; Morocco, Dec. 2000, UN Doc. E/C.12/1/Add.55, para 38; Belgium, Dec. 2000, UN Doc. E/C.12/1/Add.54, para 31; Italy, May 2000, UN Doc. E/C.12/1/Add.43, para 20.
- 426 DRD, Article 4(1), emphasis added.
- 427 UN Charter, Article 56.
- 428 Response provided by the WTO Secretariat to a questionnaire from the Special Rapporteurs, see Oloka-Onyango and Udagama, *op. cit.*, para 57.
- 429 Article VIII of the WTO Agreement confers the organization with legal personality.
- 430 For an overview of the organization, see Sands and Klein, *op. cit.*, 116–18.
- 431 Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that treaty interpretation shall take into account ‘any relevant rules of international law applicable in relations between the parties’.
- 432 *Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Rep.* 16 (1971), 16 at para. 53 in which the Court confirmed that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation’.
- 433 Statement by Gabrielle Marceau, WTO legal counsel, at Policy Seminar on Globalization and Human Rights, International Centre for Human Rights and Democratic Development, Montreal, October 2000, available at <[www.ichrdd.ca](http://www.ichrdd.ca)>.
- 434 See Petersmann, *op. cit.*, available at <[www.jeanmonnetprogram.org/papers](http://www.jeanmonnetprogram.org/papers)>.
- 435 Howse and Mutua, *op. cit.*, available at <[www.ichrdd.ca](http://www.ichrdd.ca)>.
- 436 *Ibid.*
- 437 Brownlie, *op. cit.*, 696.
- 438 *Ibid.*, 696–7.
- 439 WTO Agreement preambular para. 1; see also Howse and Mutua, *op. cit.*, available at <[www.ichrdd.ca](http://www.ichrdd.ca)>.
- 440 Report of the open-ended Working Group on the Right to Development (1st session, 18–22 September 2000), *op. cit.*, para. 112; see also Oloka-Onyango and Udagama, *op. cit.*, para. 60.
- 441 See, for example, Orford in Alston (ed.) (2001), *op. cit.*, 127 at 157–70 in which she considers the deficiencies in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) developed under the auspices of the WTO, and points to them as an example of the failure of the WTO, and the States parties to the TRIPS Convention, to protect and promote the right to development.
- 442 Sands and Klein, *op. cit.*, 521–6.
- 443 *Matthews v. the United Kingdom* (1999), ECHR Application No. 24833/94 at para. 32.
- 444 Sands and Klein, *op. cit.*, 525, emphasis added.
- 445 See, for example, CESCR’s Concluding Observations on Morocco: ‘The Committee strongly recommends that Morocco’s obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, like the International Monetary Fund, the World Bank and the World Trade Organization, to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined’, *op. cit.*, (2000), para. 38; on Belgium: ‘The Committee encourages the Government of Belgium, as a member of international organizations, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in article 2.1 concerning international assistance and cooperation’, *op. cit.*, (2000) at para. 31; the same latter recommendation was made in the Committee’s Concluding Observations on Italy, *op. cit.*, (2000), para. 20.
- 446 B.L. Das, ‘Why the WTO decision-making system of “consensus” works against the South’, available at <<http://www.twinside.org.sg/title/bgl3-cn.htm>>. The author was formerly India’s Ambassador and Permanent Representative to the General Agreement on Tariffs and Trade (GATT).
- 447 Report of the open-ended Working Group on the Right to Development (1st session, 18–22 September 2000), *op. cit.*, para. 148.
- 448 Oloka-Onyango and Udagama, *op. cit.*, para 58.
- 449 See *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies* (2002), *op. cit.*, para. 244, available at <[www.unhchr.ch](http://www.unhchr.ch)>.
- 450 *Tackling poverty and discrimination: Mainstreaming minority rights in development assistance*, Minority Rights Group International, 26–7 July 2001, London. Available at <[www.minorityrights.org](http://www.minorityrights.org)>.
- 451 For detailed coverage of the impact of TRIPS on the right to development, see Orford in Alston (ed.) (2001), *op. cit.*, 127.
- 452 Dialogue Paper by Indigenous Peoples to the Commission on Sustainable Development (Preparatory Committee), Multi-Stake Holder Dialogue of the Second Preparatory Committee for the World Summit on Sustainable Development, UN Doc. E/CN.17/2002/PC.2/6.Add.4, January 2002.
- 453 *A Citizen’s Guide to the World Bank Inspection Panel*, part 2, D.L. Clark, Center for International Law and Environment (1999).
- 454 MacKay, *op. cit.* 527 at 582 and 619.
- 455 *Ibid.* 527 at 582.
- 456 In country situations where a government does not recognize indigenous peoples as indigenous peoples, but instead as distinct ethnic minorities, the World Bank has in practice applied the Operational Directive on Indigenous Peoples to minorities. It is also the case in some Latin American countries that World Bank staff have used the Operational Directive on Indigenous Peoples to guide their work with some Afro-descendant communities.
- 457 *A Citizen’s Guide to the World Bank Inspection Panel*, part 2, *op. cit.*
- 458 W. Friedmann, ‘Human welfare and international law: Reordering priorities’, in W. Friedmann, L. Henkin and O. Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (1972), 113 at 114.
- 459 R. Dworkin, ‘Liberal community’, 77 *California Law Review* (1989), 479 at 493.
- 460 M. Winston, ‘On the indivisibility and interdependence of human rights’, available at <[www.bu.edu/wcp/Papers/Huma/HumaWins.htm](http://www.bu.edu/wcp/Papers/Huma/HumaWins.htm)>.
- 461 E.-I. Daes, ‘Prevention of discrimination and protection of indigenous peoples’, *Report of the Working Group on Indigenous Populations*, UN Doc. E/CN.4/Sub.2/2001/17, para 26. A representative of the Kanaky People of New Caledonia, as just one of many illustrations, remarked that a Western interpretation of development was being forced upon them which was premised on Western values and way of life, and which was alien to Kanaky culture and identity, needs and values, at para. 20.
- 462 Report of the World Commission on Dams (2000), 104, available at <[www.dams.org](http://www.dams.org)>.
- 463 B. Rajagopal, ‘The violence of development’, *Washington Post*, 8 August 2001. The writer is a professor of law and development at the Massachusetts Institute of Technology. In his insightful article he refers to the bias of the international criminal justice system, by comparing ethnic cleansing, defined as the forcible dislocation of a large number of people belonging to a particular ethnic group, which is an outlawed practice, to the impact of development policies which, despite its scale and gravity, is not condemned as an international crime.

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# working to secure the rights of minorities and indigenous peoples

minority  
rights  
group  
international

The United Nations adopted the Declaration on the Right to Development in 1986. The Declaration recognizes that development is an inalienable human right, and describes development as a comprehensive process leading to the well-being of all people. All states are called upon to cooperate internationally and work nationally to ensure that this comprehensive process in which all human rights can be realized is undertaken without discrimination, and that all people may participate fully and equally in this process.

This paper provides an elaboration of the content of the right to development by drawing on international law. It addresses the obligations of states, particularly with regard to international cooperation, and considers the application of obligations of conduct, as well as those of result, in giving this right meaning.

This paper also details the rights of minorities and indigenous peoples and how they relate to the right to development. The creation of conditions that enable a state to develop will not necessarily lead to

the realization of the right to development by the individuals within that state. Traditionally marginalized groups – notably, minorities and indigenous peoples – may not benefit from this development or may be harmed by it. Even where the right to development is being realized by the majority, the rights of minorities and indigenous peoples could be violated if the process undertaken does not take account of their rights. The authors discuss the need to have in place the standards to ensure that the protection and promotion of minority and indigenous rights are fully integrated into policies designed to fulfil the right to development.

Written in cooperation with the UN Independent Expert on the right to development, this work builds on his contribution to the mandated objectives of the inter-state UN Working Group on the Right to Development. It provides an important contribution to the scope of rights and obligations in this area, and the implications that stem from them, particularly for minorities and indigenous peoples.