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Redress for infringement of indigenous rights under international law: How fair are the remedies?

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Abstract
Indigenous rights movement under the international law has led to the emergence of some international legal instruments that directly address the protection of the rights of indigenous peoples. This paper uses the scale of fairness to evaluate some of the provisions of the leading international legal instruments for the redress of infringements of the rights of indigenous peoples. To do this, the work first examines scholarly views of fairness. The paper does not propose a particular definition of fairness but finds that the central element of fairness in all the scholarly views is the concept of equality.

Keywords: indigenous rights, indigenous peoples, international law, legal instruments

1. Introduction

Indigenous peoples across the world have suffered from historic injustices due to colonization and dispossession of lands without their free, prior and informed consent [1]. Further to the dispossession of their lands, they have also suffered violations of their values, norms, culture, religion, and beliefs. The agitations of indigenous peoples under the international law led to signing/declaration of international legal instruments for the protection of their rights. The two leading instruments that directly protect the rights of indigenous peoples are the International Labour Organization (ILO), Indigenous and Tribal Peoples Convention (ILO Convention 169) [2]. and the United Nations Declaration of the Rights of Indigenous Peoples 2007 (UNDRIP). This paper evaluates the fairness of the provisions of these instruments that address the redress for the infringements of the rights of indigenous peoples. I argue that the said provisions are not fair as they do not remedy the historic infringements of the values, norms, culture, religion, and beliefs of indigenous peoples.

The paper is divided into four parts. The major part of the work is part two, which appraises the meaning of fairness. The central element in the scholarly views of fairness is the principle of equality. However, there is also a divergence of views as regards the meaning of equality. The next part examines the role of the Aristotelian principle of corrective justice in the evaluation of fairness for the redress of the injustices that indigenous peoples have faced over the years. Although the principle of corrective justice is said to be the rationale for a reasonable remedy for wrongs, I argue that it is not the ideal principle for evaluating the fairness of the redress for the historic injustices done to the indigenous peoples. The fourth part of the work argues that the remedies in the leading international leading instruments do not meet the standard of fairness because they seem only to pay attention to land rights and do not address fairly other injustices done to indigenous peoples.

2. Theories of fairness

Like most legal concepts, fairness has no universally accepted definition. Also, it has not received the kind of comments that one may ordinarily expect. A lot of commentators tend to mention fairness as though its meaning is settled. Thus, most of the scholars focus on what they may deem to be "more important" concepts like the meaning of "law," "justice," 'equality," "the rule of law" etc. Some scholars wrongly presume fairness to be justice by using the two concepts interchangeably and while some others imply that it means equality [3]. Verba discusses what fairness might mean in a democratic society [4]. He puts forward the argument that fairness in a democratic society means political equality [5]. He further argues that political equality is far more crucial than other kinds of equalities like equality in wealth, income, or an equal treatment of cultural or social system [6]. He argues that although fairness and democracy may mean different things, they should go hand in hand [7] He seems to have been influenced by the works of Saward who defines democracy to mean a political system where citizens have equal input in the making of collective binding decisions [8]. Verba thus suggests that there is no fairness in a society where there is no equality in the political decision making. Rawls, like Verba, captures the argument that lack of equality depicts lack of fairness as follows:

[1] United Nations Declaration of the Rights of Indigenous Peoples, *UN General Assembly Resolution 61/295* (13 September 2007) Preamble.
[2] *International Labour Organization (ILO), Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.
[3] Louis Kaplow and Steven Shavell, "Fairness versus Welfare" (2001) 114:4 Harvard Law Review 967.
[4] Sidney Verba, "Fairness, Equality, and Democracy: Three Big Words" (2006) 73:2 Social Research: An International Quarterly of Social Sciences 499.
[5] *Ibid* at 500.
[6] *Ibid* at 500.
[7] *Ibid* at 501.
[8] *Ibid* at 502. See also Michael Saward, *The Terms of Democracy* (Cambridge: Polity, 1998) at 15.

> I now turn to one of the principles that apply to individuals, the principle of fairness. I shall try to use this principle to account for all requirements that are obligations as distinct from natural duties. This principle holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair) that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interest…The two principles of justice define what is a fair share in the case of institutions belonging to basic structure. So if these arrangements are just, each person receives a fair share when all (himself included) do their part [9].

Rawls' argument suggests that the fairness is a concerted effort of both the institution and the people. For there to be fairness according to Rawls, the people must obey laws. However, the laws must be just or fair. As far as Rawls is concerned, an institution or its laws are just and fair where it meets the test of his two principles of justice. Although I shall later explore Rawls' principles of justice; succinctly, his principles of justice are anchored on the concept of equality. Therefore, for Rawls and Verba, there is no fairness in a society that does not uphold equality.

Rawls' view on democratic equality supports Verba's view. Rawls argues that democratic interpretation is arrived by a fair equality of opportunity [10]. The difference between Rawls' view and that of Verba is that the latter strictly limits his equality to political equality. I shall at the latter part of this work discuss on Rawls' *Justice as Fairness* and comment on the scope of equality perceived by him. In as much as I may agree with Verba that political equality may lead to fairness, I think he has a very narrow view of what fairness might mean. He restricts fairness to political equality and excludes equality of culture or social system. Most egalitarian scholars may disagree with him as culture, values, beliefs or social systems are equally important in the determination of fairness. Temkin seems to have the kind of holistic view of fairness that I would like to pursue. He argues that there is a close connection between equality and fairness [11]. He uses an illustration where he gives A one piece of candy, and he gives B two pieces of candy. That A will naturally shout that "it is unfair [12]. He categorizes himself, Gerry Cohen, Roland Dworkin and Dick Arneson as *luck egalitarians* [13]. According to Temkin, they aim to rectify the impact of luck in the lives of people [14]. Thus, he argues that it is not fair when one person is worse off than another not as a result of his making or choice. What confuses me is how the *luck egalitarians* intend to make this work. It is not as though we live in a perfect world where everyone come equally. For instance, as regards individuals, assuming A and B are brothers in a family, and A has his five senses while B is born blind. Can we say that it is unfair that B is born blind? Should the meaning of fairness be extended that far? Still using the illustration, when the parents are buying gifts for their children, a bicycle could be bought for A and B could be bought a walking stick or a brail. Would the *luck egalitarians* argue that the parents are unfair? I think that it will be stretching the meaning of fairness more than its scope if one argues that the parents in the above illustration are unfair. In fact, they would have been unfair if they bought two bicycles. This kind of illustration can play out in a larger society where for instance a part of the society is blessed with natural resources, and another part of the same society is not. Hence, whether a situation is fair or unfair depends on the circumstances of the case because what is fair in a particular situation may be unfair in another. Further to this, a question which the arguments of Tekim and perhaps other *luck egalitarians* may not satisfactorily answer is: what happens in a situation where equality (as they interpret it) is untenable? Will fairness become equally untenable? Perhaps, a good example of such scenario would be the distribution of resources in society. What happens where the vital resources to be distributed are not enough to even get to everybody? In such a situation, in fact, everybody may not have an equal opportunity for such resources? Has fairness become impossible because of the impossibility of equality? Or will the institution in charge of distribution of resources desist from such to be fair? Scholars need to put these kinds of questions into contemplation before their theories in order not to theorize for angelic beings. We live in a world that is not perfect; sometimes there are genuine situations in which equality in distribution will not be possible. I do not think fairness fails just because equality is impossible.

Broome attempts some of the answers to my questions of course without sheepishly and slavishly following the principle of equality in distribution. Broome uses an illustration where there are sick people that need kidneys, and there is a limited number of kidneys and recommends a principle for the distribution in a fair manner [15]. In such a situation, he proposes *lottery* since the particular reason for fairness is to mediate conflicting claims [16]. Broome is not ignorant of the fact that the case could be handed over to an authority who should decide the person that deserves kidney more by a consideration of some factors like age, obligation, dependents, etc [17]. However, such authority comes with its consequences like cost, time and the risk that a fair decision may not eventually be made after all [18]. Also, he is not ignorant of the fact that there can be a static rule that could state that the youngest in such a situation should take the kidney [19]. This could solve the problem, but can a static rule to such a situation be said to be fair having discriminated against the old or even the middle age? [20] In such a situation where equal distribution is impossible, Broome recommends

[9] John Rawls, *A Theory of Justice*, Revised ed (Cambridge: Harvard University Press, 1999) at 96.
[10] John Rawls, *A Theory of Fairness*, (Cambridge: Harvard University Press, 1971) at 75.
[11] Larry Temkin, "Equality as Comparative Fairness" (2017) 3:1 Journal of Applied Philosophy 43 at 41.
[12] *Ibid* at 41.
[13] *Ibid* at 45.
[14] *Ibid* at 45.
[15] John Broome "Fairness" (1990-91) 91 Proceedings of the Aristotelian Society 87.
[16] *Ibid* at 94.
[17] *Ibid* at 88.
[18] *Ibid* at 88.
[19] *Ibid* at 88.
[20] *Ibid* at 88.

lottery as a solution that is the fairest. I agree with Broome with his apt illustration. His illustration may seem farfetched, but it happens in different circumstances in our society. The reason I agree with Broome is that he admits that lottery has its flaws and cannot be said to be fair in all situations. For instance, using a lottery to decide a football match [21]. But in situations like his illustration lottery remains the best way to ensure an impartial result. To *luck egalitarians*, Broome may be wrong. Perhaps, because they lay more emphasis on equality of distribution of goods and not equality of the people. Although a lot of scholars may disagree with me, equality in the distribution of resources may not always lead to fairness. For instance, imaging distributing the same quantity of food for an adult and a toddler. It may be unfair to both of them because while the adult is maybe underfeeding, the toddler maybe overfeeding; both situations could kill both the adult and the toddler. But if the emphasis is on the equality of people (and not necessarily distribution of resources) a fairer decision will always be achieved. Dworkin quite markedly elaborates on "equal distribution" and "treating people as equals." He states that there is a difference between treating people equally concerning sharing of resources or opportunity and treating people as equals [22]. However, the basis of Dworkin's distinction is to see the concept that produces an attractive political ideal and not necessarily fairness [23]. Thus, I would rather not pursue the view of Dworkin on this as it may not be helpful in the determination of the meaning of fairness. But I agree with him up to the point of his distinction between equality in sharing resources and treating people as equals. They mean different things and I think fairness is more tenable with the latter.

Further, some *welfarism* scholars state that legal rules should be based solely on how it affects individual well-being and they are skeptical about the consequences of fairness to the application of legal rules [24]. Kaplow and Shavel argue that in some situations fairness may reduce the wellbeing of every person in the society, hence that legal rules should not be based on fairness, rather, they should be based on the impacts to the welfare of people [25]. For them, fairness should only be taken into account where people have a taste for it [26]. They define fairness to mean principles employed in the evaluation of legal rules that is based on factors unrelated to individuals' wellbeing [27]. Perhaps this is the vaguest definition of fairness I have come across in my research. First, they erroneously presume that all legal rules are evaluated by the principles of fairness, which is incorrect. Another inaccurate aspect of the definition is that they also presume that fairness is unrelated to individual wellbeing. Farnsworth raises serious objections to Kaplow and Shavel's notion of fairness. He argues that fairness has an inevitable and legitimate role in the making of a legal policy that will improve welfare [28]. He criticizes Kaplow and Shavel's claim on the ground that they have a narrow view of fairness especially assuming that people are upset with fairness [29]. He further argues that for Kaplow and Shavel to create an exception, that the relevance of fairness is only where individuals have a taste of fairness means that fairness is not so irrelevant after al [30]. I think the biggest challenge of the claim of Kaplow and Shavel is their misconception of the principles that inform fairness. Perhaps, if they had a better understanding of the meaning of fairness, then they may have arrived at a different conclusion.

Padjen's view on fairness is quite the opposite of the claim of Kaplow and Shavel. Padjen's work is influenced by views of naturalists like Aristotle and Fuller. He argues that fairness is an essential part of the law [31]. Aristotle postulates that an unjust person is unfair or unequal; hence what is unjust is unfair or unequal [32]. Aristotle suggests that fairness means equality. Pagem while interpreting Aristotle's works implies that fairness is equity. In fact, he uses both concepts interchangeably [33]. He is of the view that fairness is holistically the nature of equity [34]. However, defining fairness with a concept such as equity may compound the issue under examination. This is because the meaning of equity is still not clear. More so, Pagem presupposes that there are degrees of equity and not all the degree equates fairness. Thus, his views lead to confusion because it is unclear the degree of equity that will amount to fairness. Also, most scholars will not agree with Aristotle, Fuller, and Pagem that fairness, equality or equity is an essential part of the law. For scholars of legal positivism, the validity of legal norms is not dependent on whether they are fair or just [35]. For instance, Hart is known for his theory that "there is no necessary connection between law and morality [36].

Suranovic develops the seven principles of fairness and divides them into two categories [37]. The two categories of fairness are; Equality Fairness and Reciprocity Fairness [38]. Suranovic's seven principles of fairness are as follows:

1. **Equality**
   - Non-Discriminatory Fairness
   - Distributional Fairness
   - Golden Rule Fairness

[21] *Ibid* at 89.
[22] Roland Dworkin "What is Equality? Part 1: Equality of Welfare" (1981) 10:3 Philosophy and Public Affairs 185.
[23] *Ibid* at 185.
[24] Louis Kaplow & Steven Shavel, "The Conflict between Notions of Fairness and the Pareto Principle" (1999) American Law and Economics Review 63.
[25] *Ibid* at 64.
[26] *Ibid* at 64.
[27] *Ibid* at 65.
[28] Ward Farnsworth, "The Taste for Fairness" (2004) Working Paper Series, Law and Economics Working Pape, No 02-01, Boston University School of Law at 1 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=305761.
[29] *Ibid* at 4.
[30] *Ibid* at 3-4.
[31] Ivan I. Padjen, "Fairness as an Essential Element of the Law" (1996) XXXIII:5 Politika Misao 108.
[32] Aristotle, *Nichomachean Ethics* in Roger Crisp, ed, *Cambridge Texts in the History of Phylosophy* (Cambridge: Cambridge University Press, 2000) 85.
[33] Padjem, *supra* note 31 at 117.
[34] *Ibid* at 117.
[35] Brian Leite, "Why Legal Positivism?" (Paper delivered at the AALS panel on Legal Positivism: For and Against with Leslie Green, Mark Greenberg, & Jeremy Waldron, New Orleans, January 9, 2010), [unpublished] at 1 available at http://ssrn.com/abstract=1521761
[36] *Ibid* at 1.
[37] Steven M Suranovic, "A Positive Analysis of Fairness with Applications to International Trade" (2000) 23:3 World Economy 283 at 286.
[38] *Ibid* at 286.

2. Reciprocity Fairness

- Positive Reciprocity Fairness
- Negative Reciprocity Fairness
- Privacy Fairness
- Maximum Benefit Fairness [39].

Suranovic, however, notes that all these principles have what he calls "the application and measurement" problem which complicates their usage [40] For instance, he submits that the major challenge with equality fairness is to define the "*equalizandum*" (the thing to be equalized) [41] Notwithstanding, he is of the view that the first two principles of equality fairness (non-discriminatory fairness and the distributional fairness) are the most important types of fairness as they cut across all the other principles of fairness [42]. Those two principles are based on the rationale that human beings and groups are equal [43]. Thus, for non-discriminatory fairness, if some groups of people are allowed to take some action, other groups should also be allowed to take those actions [44]. On the other hand, the distributional fairness recognizes the attributes of a particular group (s) that is conceptually measurable and distribute the resources available to meet those attributes equally [45]. It appears that Suranovic has already envisaged the obvious weaknesses to his theories by stating that they may have applicability challenges. First, his non-discriminatory fairness and the distributional fairness seems to be contradictory. By his definition of the non-discriminatory fairness, he gives an image of the equality of men in the sense that they would have the same needs so that whatever is done or given to one group should be done or given to another. But his distributional fairness appears to fail his non-discriminatory fairness test. Because in his distributional fairness the kind of strict equality envisaged in the non-discriminatory fairness is extinguished as special attributes are considered.

It appears that the central element of fairness in our discourse so far is *equality*. The contention, however, seems to be the conception of equality. One of the most quoted scholar on fairness is Rawls. Hence, it is pertinent to explore his theory of justice is fairness to see if his views on fairness could clarify some hazy points raised so far.

Justice as Fairness

Rawls' main idea in his theory of justice is that justice is fairness [46]. He admits that fairness and justice are two separate concepts but the principle of justice is as a result of fairness in bargain or agreement [47]. "They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association [48]. The principles of justice according to Rawls are chosen behind a veil of ignorance and gives no one an advantage or a disadvantage by the outcome of natural chance or contingency of social circumstance [49]. Thus, he imagines an "original position"; the appropriate initial status quo that ensures fairness in society [50]. He further sets out the features of his theory "justice as fairness." These features are anchored on the basic principle that the parties are in their initial situation as rational and mutually disinterested [51]. This consequently presupposes equality in the society [52]. Inequality according to him can only be fair if it is as a result of compensating benefits for everyone [53].

Rawls' focus is on justice. Hence, he does not pay so much attention to the definition of fairness, although he sees fairness as an inseparable component of justice. The theory of justice as fairness suggests that there cannot be justice without fairness. Therefore, fairness may be said to be in Rawls' view, a vehicle to justice (without fairness, one cannot get to the destination of justice). He further lays heavy reliance on equality as the principle of justice. One can infer from Rawls' theory that the principle that informs fairness is equality. Perhaps, Rawls may be said to assume fairness as equality. To understand Rawls' view on fairness, it is pertinent to pursue his theories on equality. Rawls' principle of equality does not presuppose that everybody in a society is treated equal to the same degree at all times [54]. He submits that there is equality where no one is given preferential treatment except for compelling reasons [55]. Conversely, there is no inequality where there is an impartial justification for a preferential treatment accorded to a human being in society. That said, a degrading treatment may be termed to be fair in Rawls' view once there exist a "compelling reason" for such degrading treatment. The complexity, however, will be how to determine the scope of the compelling reason.

Rawls' conception of fairness may be applauded for taking into consideration circumstances in which strict equality may not be possible. For this reason, he creates an exception for such circumstances. So circumstances, where the principles of equality are not strictly followed due to some compelling reasons, do not necessarily create an unfair situation. But who decides whether or not a circumstance that requires an exception has arisen? What principles should the person/institution take into consideration? These are plausible flaws in Rawls' theory. Also, Rawls assumes that the persons in the original position are rational and do not know their conception of *the good* [56]. Rawls theory of fairness, especially how he interprets equality is, in my opinion, the most compelling theory, but I do not quite understand his *rationality* and *original position* assumptions. Of course, I understand that Rawls' assumptions are imaginative. But are we not supposed to be imagining realistic situations instead of impossible situations to define terms like justice and fairness?

[39] *Ibid* at 286-287.
[40] *Ibid* at 287.
[41] *Ibid* at 287.
[42] *Ibid* at 287.
[43] *Ibid* at 287.
[44] *Ibid* at 288.
[45] *Ibid* at 288.
[46] John Rawls, *A Theory of Justice*, Revised ed (Cambridge: Harvard University Press, 1999) 3.
[47] *Ibid* at 11.
[48] *Ibid* at 10.
[49] *Ibid* at 11.
[50] *Ibid* at 15.
[51] *Ibid* at 12.
[52] *Ibid* at 13.
[53] *Ibid* at 13.
[54] *Ibid* at 444.
[55] *Ibid* at 444.
[56] John Rawls, *A Theory of Fairness*, *supra* note 10 at 142.

These assumptions only suggest that there could be a perfect world or society where everyone is rational. If that is the case, then, there will be no need even researching on concepts like "fairness," "justice" and "equality" as they will play out naturally. I am not against imaginative theories. However, I recommend that while scholars imagine, they should do so freely under realistic circumstances. That approach perhaps could lead to a better appreciation of legal concepts.

3. The role of corrective justice in assessing the fairness redress for the historic injustices faced by indigenous peoples

Here I shall examine the role of the principle of Aristotelian Corrective Justice in ensuring a fair compensation for a historic wrong. Although I do not boast to have developed an accepted definition of fairness, the opinions of scholars that the preceding section of this paper analyze show that equality is the central element of fairness. Rawls view on equality seems to be the most convincing and I adopt same.

The Aristotelian principle of corrective justice states that "an agent who is responsible for a wrongful loss or receives a wrongful gain has an obligation to make good that loss or restore that gain to its sufferer [57]. This has been the accepted rationale for remedies in tort, contract, and unjust enrichment [58]. The principle is also seen in the equitable doctrine of the fundamental right to a remedy: *ubi jus, ibi remedium* (where there is a right, there must be a remedy) [59]. Aristotle submits that where an injustice occurs, it creates an inequality which gives the infringer an advantage or gain of some sort and a disadvantage or loss on the victim [60]. Thus, for there to be equality (perhaps, fairness), the judge has to rectify the situation and restore equality by imposing the loss on the wrongdoer through the nullification of his gain and restoration of the victim's loss [61]. Corrective justice sees the parties as equals, and justice consists the restoration of their equality [62].

The principle of corrective justice may look simple in the law of contract where a party who breaches a contract is made to pay a quantifiable compensation to the other party. Also in negligence, where someone who due to the act of another suffers loss can receive a remedy for the loss. How would the principle work for historic injustices like the injustices that indigenous peoples around the world have faced? [63]. How is fairness going to be ensured in compensation for the infringement of rights of indigenous peoples? One major challenge of corrective justice principle in historic injustices is how to quantify the loss done. It is after a successful quantification of loss done that the extent of the remedy to be advanced by the infringer can be estimated. Some indigenous rights scholars argue that since one common feature of indigenous peoples across the world is the invasion of land, the only way to ensure equality in the redress of the wrongs done to indigenous peoples is the return of lands taken to the present day indigenous peoples [64]. On the other hand, scholars like Sanderson and Moore argue that wrong done goes beyond just the invasion of land, hence, restitution of land alone may not be enough to remedy the wrong from the perspective of corrective justice [65]. Moore argues that for progress to be made on the appropriate remedy, there should be a holistic analysis of the rights violated and the interactions between the rights violated, the interests involved and the appropriate corrective mechanism for the violation [66]. This is because, no doubts that indigenous lands were taken from indigenous peoples, but as a result, there are other infringements to them that go to the very essence of being indigenous: such as their culture, language, beliefs, religion, etc [67].

The plausible remedies for infringement of indigenous rights have been pointed out as restitution (which encompasses giving back whatever has been taken like land), compensation where restitution is not possible, also, apology, self-determination, etc [68]. Can any of or even all these remedies bring back equality in the standard of the principle of corrective justice bearing in mind that the principle strives to put parties in the position they would have been if the infringement does not happen in the first place? The principle of corrective justice may be a wrong principle for the evaluation of the fairness of remedy for the infringements of the rights of indigenous peoples. This is because of the nature of the rights. For instance, some indigenous peoples have lost their ancestral religions, languages, values, norms, and traditions. How can people that lost these possibly be brought back to the position they used to be before the invasion? Should the government open a school and start educating them on their values again? This will be ridiculous as it cannot bring them back to the position they were. Restoration of land just cures the invasion of land alone and not a violation and in some cases, extinction of culture and values. Compensation and apology cannot also cure this defect. But is it to say that there can no longer be a fair remedy for the infringement of the rights of indigenous peoples? By no means. This is why in the earlier sections of this paper I admit that there is an element of equality in fairness to the extent that there are instances that equality may be impossible due to some compelling reasons. Corrective justice is based on the principle of strict equality. The situation of indigenous peoples is such that there may not be a remedy that may meet the kind of equality that is envisaged by the principle of corrective justice. Hence, one may say that in this circumstance, "equality" in the sense of corrective justice is impossible or impracticable.

I may not know exactly what will be a fair remedy for the infringements suffered by indigenous peoples across the world. But the fact that the principles of corrective justice are not tenable for their remedy does not mean that there cannot

[57] Zoë Sine, "Concerns about Corrective Justice" (2013) XXVI: 1 Canadian Journal of Law and Jurisprudence 137.
[58] *Ibid* at 137.
[59] Tracey A Thomas, "Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process" (2004) San Diego Law Review 1633 at 1636.
[60] Thomas C Brickhouse, "Aristotle on Corrective Justice" (2014) 18 J Ethics 187 at 188.
[61] *Ibid* at 188.
[62] Douglas Sanderson, "Redressing the Right Wrong: Argument from Corrective Justice" (2012) 62:1 University of Toronto Law Journal 93 at 105.
[63] Ibid at 93.
[64] *Ibid* at 93.
[65] *Ibid* at 93.
[66] Margaret Moore, "On the Rights to Land, Expulsion and Corrective Justice" (2013) 27:4 Ethics & International Affairs 429 at 430.
[67] Sanderson, *supra* note 62 at 97.
[68] Moore, *supra* note 66 at 430.

be a fair remedy. A fair remedy in this circumstance has to take appropriate non-discriminatory steps to redress the historic injustices faced by indigenous peoples. In addition to this, there should be a total restoration of their liberty to develop their affairs by themselves. Hence restoration of their right to self-determination and self-identification by their customs and traditions should be non-negotiable. This will be a good foundation for fairness. Of course, right to their self-determination should encompass restoration of land when practicable or if not, compensation in lieu. It is worthy of note that this may not restore the indigenous peoples to the position they used to be before the infringements but one may argue that it is fair. More so, what will be fair will take into consideration the particular indigenous peoples involved and the magnitude of infringements done. I shall now proceed to analyze remedial approach adopted under the international law.

4. Approaches under the international law for the redress of infringements of the rights of indigenous peoples.

There is no universally accepted definition of indigenous peoples under the international law. While some countries like Canada, Australia, and New Zealand may not have issues as regards the definition of indigenous peoples, other countries, especially in Africa and Asia, do not have well-set principles for the identification of indigenous peoples. However, this paper does not intend to pursue the definition of indigenous peoples. Hence, I shall just for this paper adopt what I deem to be the most quoted definition of indigenous peoples under the international law. Article 1 (1) (b) of the International Labour Organization (ILO), Indigenous and Tribal Peoples Convention (ILO Convention 169) [69] provides as follows:

> This Convention applies to peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The leading legal instruments specifically designed for the protection of indigenous rights under international law are the ILO Convention 169 and the United Nations Declaration of the Rights of Indigenous Peoples 2007 (UNDRIP) [70]. These legal instruments are inhibited by different factors as regards their application. Whereas the ILO Convention No 169, has received the ratification of only about 20 countries, thus the majority of indigenous peoples are unable to rely on its legal framework; the UNDRIP that should have a general application is a non-binding soft law [71]. Notwithstanding, I shall briefly examine some of the provisions of these instruments about the remedies for the infringements of indigenous peoples. Apart from safeguarding the different rights of indigenous peoples, the provisions for remedies for infringements under the ILO Convention 169 seems to be restricted to land rights. Article 16 of the Convention reads:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

The above provision provides remedies for future infringements of land rights of indigenous peoples and does not address historic injustices, although the Convention recommends that adequate procedure be established within the national legal system to resolve claims to lands [72]. For other rights, the Convention does not specify the kind of remedies tenable both for historic and future infringements. Perhaps, the Convention envisages the kind of remedies tenable for infringement of rights generally.

It appears UNDRIP pays more attention to redress than the ILO Convention 169. UNDRIP provides that states shall provide an effective mechanism for redress of infringements to cultural values of indigenous peoples or ethnic identities [73]. Also, Article 11 of the Declaration is to the effect that states shall provide mechanisms that may include restitution developed with indigenous peoples concerning their religious and spiritual property taken without their free, prior and informed consent [74]. Further, indigenous peoples that suffer the deprivation of their means of livelihood and development are entitled to just and fair redress [75]. For land rights, Article 28 of the Declaration provides as follows:

1. Indigenous peoples have the right to redress, by means

[69] *International Labour Organization (ILO), Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

[70] UN General Assembly Resolution 61/295 (13 September 2007).

[71] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58 Int'l & Comp. L.Q. 957 at 958.

[72] ILO Convention 169, *supra* note 69 at 14 (3).

[73] UNDRIP, *supra* note 1 art 8.

[74] *Ibid* at art 11(2).

[75] *Ibid* at art 20 (2).

that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 28 of the Declaration seems to be the only Article that provides a detailed mechanism for redress. It also seems that unlike ILO Convention 169, the right to redress under the UNDRIP extends to lands previously owned or occupied during the pre-colonial era by indigenous peoples that were taken from them without their free, prior and informed consent [76]. However, the other articles generally provide that the states shall develop a mechanism for redress.

It appears that the provisions of the ILO Convention 169 and UNDRIP about the redress of the infringements of the rights of indigenous peoples do not meet both the standard of Aristotelian corrective justice and the standard for fairness argued in this paper. First, the ILO Convention 169 does not pay any attention to the redress of the historic injustices done to the indigenous peoples about their values, tradition, norms, and culture. It does not provide any mechanism for the redress of those infringements. Also, the redress for breach of land rights in the Convention is restricted to lands that are presently in the occupation of indigenous peoples and it only covers future infringements [77] UNDRIP, on the other hand, provides a clear mechanism for the redress of land rights which one can argue that it is fair. But for other rights that also define the essence of indigenous peoples, UNDRIP just makes vague mechanisms for their redress. More so, the redress for cultural values under Article 8 of UNDRIP does not extend to Historic infringements. That said, the international legal instruments seem not to make adequate attempts to fairly redress the historic injustices faced by the indigenous people. These instruments seem to be looking forward towards reconciliation of the various governments and the indigenous peoples rather than redress; forgetting the role fair redress of historic injustices may have on reconciliation.

5. Conclusion

The aim of the two-leading international instruments seems to be for the reconciliation of the indigenous peoples and the different government of states, and not necessarily to provide a fair remedy for the Historic injustices faced by indigenous peoples over the years. Fairness, as argued in this work, should not follow equality sheepishly and slavishly, but equality is still the central element of fairness until it is proven impossible. The instruments appear not to even "attempt" to restore historic equality, hence do not meet the standard of fairness. It is only the redress for infringements of land rights under UNDRIP that in my view may be argued to be fair as it covers both historic and future infringements. However, even full restoration of land may still not be fair enough for the redress of the infringements of indigenous ways of rights which in some societies have gone into extinct due to the invasion, colonization, and dispossession of lands. My argument in this work that the remedy provisions of these instruments do not meet the standard of fairness does not in any way imply that reconciliation is impossible. Reconciliation is possible, but such reconciliation does not take cognizance of the principle of equality as indigenous peoples are expected to forget their historic injustices and look into the future.

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