The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity

Dieter Kugelmann

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 233-263.

I. Introduction

There have been recent developments in international law and politics which have influenced the legal protection of groups and under the auspices of the United Nations, the protection of indigenous peoples has made some progress.

The *Declaration on the Rights of Indigenous Peoples*,[1] drafted in 1993, was adopted by the Human Rights Council in its first session in June 2006 and was forwarded to the General Assembly for adoption.[2] This may also give rise to a further strengthening of the rights of indigenous peoples in treaty law. Compared to this development, the instruments for the protection of minorities have not changed much the last decade. The *Framework Convention for the Protection of National Minorities of the Council of Europe*[3] is still the most detailed legal instrument on the international level with the most effective system of implementation and monitoring.

Another development influencing the situation of groups is the growing importance of cultural diversity in international law. The notion plays a role in the debates on migration and pluralistic societies and in the debates on the relation between culture and trade. In treaty law, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005[4] paves the way for, at least, a change of interpretation of existing rules.[5] The preamble affirms that "cultural diversity is a defining characteristic of humanity". Acknowledging cultural diversity between states or within a state encourages a different view on the protection of groups.

---

1 Docs E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, reprinted in: *ILM* 34 (1995), 541 et seq.

2 Resolution 2006/2 of 29 June 2006.

3 ETS No. 157. See also under V. 3.

4 Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005; C.B. Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?", *Journal of International Economic Law* 9 (2006), 553 et seq.; R.J. Neuwirth, "United in Divergency: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", *ZaöRV* 66 (2006), 819 et seq.

5 See G. Nolte, "Kulturelle Vielfalt als Herausforderung für das Völkerrecht", *Berichte der Deutschen Gesellschaft für Völkerrecht* 2007, These 19 (forthcoming).

II. The Framework of the Protection of Groups

When the nation state developed, the human beings living in a state were seen under political criteria as a nation. In some state traditions the term "nation" carries connotations of a community shaped by common descent, culture and history and often by a common language as well. If cultural and ethnic criteria are applied, the nation is understood as a homogenous social group shaped by solidarity and attached to a specific territorial homeland.[6] Nation can also be understood as a political community[7] especially in states where the creation of the modern state developed in parallel to the building of a nation and where, therefore, the founding myth forced people together.[8] In a nation state, different groups may exist but they are unified as a nation. The criteria of inclusion and exclusion enables the state to implement a differentiated legal order versus different persons. This view of the nation made the difference between majority and minorities possible and entailed the need to protect vulnerable groups.

As a consequence, the protection of minorities was for centuries an important challenge for domestic and international law.[9] Many international conflicts arose because different groups fought each other on behalf of ethnic or religious differences. After World War I, specific minority regimes of international law were implemented by the League of Nations. The peace treaties created new frontiers and new states and therefore new minorities. The protection of these minorities was guar-

---

6 M. Borri, "European Citizenship and National Identities", *Rechtstheorie*, 1997, Beiheft 17, *Rule of Law*, edited by W. Krawietz/ E. Pattari/ A. Erh-Soon Tay, 226 et seq.

7 E.W. Böckenförde, "Die Nation – Identität in Differenz", in: id. (ed.), *Staat – Nation – Europa*, 2. Auflage 2000, 34 et seq. (34 - 35).

8 R. Brubaker, *Citizenship and Nationhood in France and Germany*, 1992, 43 – 48. This book is reviewed by E.W. Böckenförde, "Staatsbürgerschaft und Nationalitätskonzept", in: see note 7, 59 – 67.

9 F. Capotorti, "Minorities", in: R. Bernhardt (ed.), *EPIL* Vol. 8, 1985, 386 et seq.; see already G. Jellinek, *Das Recht der Minoritäten*, 1898, 30 et seq.; O. Kimminich, "Regelungen der Minderheiten- und Volksgruppenprobleme in der Vergangenheit", in: *Volksgruppenrecht, Ein Beitrag zur Friedenssicherung,* 1980, 37 et seq.

anteed by the League of Nations but it failed because of external political developments.[10]

Within the United Nations, the protection of minorities aims at fostering peace and security as well as the protection of human rights.[11] In the last 30 years, the protection of indigenous peoples made its way onto the international agenda. As a matter of fact, the problems of indigenous peoples were part of the discussions on minority rights. Therefore, the related matter of minority rights was the starting point for a legal analysis of the rights of indigenous peoples.

From the point of view of international law, indigenous people were a phenomenon for which specific legal criteria had not yet developed. However, the status of indigenous peoples cannot be treated as part of the protection of minorities[12] because indigenous populations may even constitute the majority in a state[13] and the developments in treaty law point clearly in the direction of a specific legal regime for indigenous peoples. Nowadays, the rights of minorities and the rights of indigenous peoples should be seen as different legal subjects with overlapping aspects. Certain problems of protection are identical and some legal rules apply to both subjects. Both members of minorities or indigenous populations, may be especially vulnerable under the general human rights system, which entails specific legal regimes for the protection of children or the fight against gender discrimination.[14] But the evolution of the relevant legal instruments points in different directions as the protection of indigenous peoples seems to be more dynamic than the protection of minorities in international law. In order to identify differ-

---

10 N. Lerner, "Peoples and Minorities in International Law", in: C. Brölmann/ R. Lefeber/ M. Zieck (eds), *Peoples and Minorities in International Law*, 1993, 77, 82, 85.

11 F. Ermacora, "The Protection of Minorities before the United Nations", *RdC* 182 (1983), 250 et seq.

12 This was proposed by I. Brownlie, "The Rights of Peoples in Modern International Law", in: J. Crawford (ed.), *The Rights of Peoples,* 1988, 16 et seq.

13 As a non-dominant majority as in Bolivia or a dominant majority as in Fiji or in former times in South-Africa; S. Wiessner, "Demographic Change and the Protection of Minorities", in: E. Klein (ed.), *Globaler demographischer Wandel und Menschenrechte*, 2005, 155 et seq. (159).

14 F. Banda/ C. Chinkin, *Gender, Minorities and Indigenous Peoples*, 2004, 5-6; A. Gupta, *Human Rights of Indigenous Peoples*, 2 volumes, 2005, Vol. 1, 94 et seq.

ences in the legal instruments, some fundamental notions will be analysed.

III. Notions

1. The Lack of Definition of a Minority

First of all, it should be clear which group in a state has the status of a minority. If a treaty confers a right to a minority, other kinds of groups cannot assume this right. Because of the very different points of view of states, there is no accepted definition of minorities in international law.[15] The former Special Rapporteur of the United Nations, Francesco Capotorti, developed a definition in 1979 which is the most prominent concept and the starting point of any discussion.[16] According to his definition a minority is a group which is numerically inferior to the rest of the population of a state and in a non dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population, and who if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language. As Capotorti developed his definition for a sub-commission of the former Commission on Human Rights of the United Nations, it is linked to article 27 of the International Covenant on Civil and Political Rights (ICCPR), the most prominent provision in international law concerning minorities. The beneficiaries of the rights under article 27 are persons belonging to "ethnic, religious or linguistic minorities".

---

15 K. Doehring, *Völkerrecht*, 2nd edition, 2005, note 1017; R. Hofmann, "Die völkerrechtlichen Rahmenbedingungen des Minderheitenschutzes", in: G. Brunner/ B. Meissner (eds), *Das Recht der nationalen Minderheiten in Osteuropa*, 1999, 9 et seq. (11); R. Wolfrum, "The Emergence of 'New Minorities' as a Result of Migration", in: Brölmann/ Lefeber/ Zieck, see note 10, 153 et seq.

16 Ermacora, see note 11, 287 et seq.; P. Thornberry, *The International Law of Minorities*, 1991, 7.

2. National Minorities and New Minorities

The notion of national minorities is necessarily discussed in the context of the above mentioned Framework Convention, which is applicable only to national minorities. The government of the Federal Republic of Germany considers national minorities to be groups of the population which meet five criteria:[17] their members are German nationals; they differ from the majority population insofar as they have their own language, culture and history, meaning their own identity; they wish to maintain this identity; they are traditionally resident in Germany and they live in the traditional settlement areas. National minorities are identified by the institutions of the nation state and they are defined by citizenship. However, any national minority has ethnic or linguistic characteristics differing from the majority.

It is an open question if the so called "new" minorities can be understood as minorities and if they are protected under international law. Because of world-wide migration there are asylum seekers, refugees or people looking for work in a state. If a large number of them share tradition or religion they may try to be accepted as a minority in the state they immigrated to. There are nearly three million people from Turkey who live in the Federal Republic of Germany. In Estonia there is a large group of people with ethnic roots in Russia. If these kinds of groups were seen as a minority, they could claim minority rights versus the host state. Recent developments in the United Nations point in the direction of an application of minority rights to "new" minorities, but with restrictions and modifications concerning the concrete contents of those rights. However, state practice on a large-scale cannot yet be observed.

3. Indigenous Peoples

Indigenous peoples are peoples who inhabited a land before it was conquered by other peoples or societies during colonisation by force or by treaty and they consider themselves distinct from the society currently governing those territories.[18] More generally, indigenous peoples are,

---

17 Cf. M. Hoffmann, "The Right to Self-Determination: The Case of Germany", in: E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds*, 2005, 89 et seq. (97).

18 Gupta, see note 14, vii.

> "composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons from a different culture or ethnic origin arrived there from other parts of the world."[19]

Still there is no generally accepted definition. However, the importance of historical and cultural traditions and the crucial character of the element of distinctiveness can hardly been contested. The Indian communities in the United States of America, the Inuit in Canada or the Aborigines in Australia are seen as indigenous peoples in this sense. Those peoples often were prosecuted by the invaders and some of them still have to face prosecution and discrimination. An indigenous people may be a minority, but it is not necessarily a national minority because the territory of settlement may not be identical with state frontiers. As a consequence, an indigenous people can only rely on minority rights if its role as a minority is accepted.

4. Cultural Diversity

Cultural diversity generally means the situation where different societies or parts of a society have different cultural traditions and values.[20] In a narrow meaning it is understood as a counterpart to economic globalisation in the context of culture and trade.[21] Using the notion of "culture" implies a multi-level approach reflecting sociological, economic, historical, political and legal aspects.[22] From the legal point of view, this makes a definition and the application of the notion difficult. The maintenance of cultural differences as such is not a new phenomenon in international law. UNESCO pursues the purpose to disseminate knowledge about and among the civilisations of the world.[23] In this

---

19 Commission on Human Rights, Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations, Doc. E/CN.4/Sub. 2/L.566 [1972], Chapter II, para. 34.

20 Overview by B. Oomen/ S. Tempelman, "The Power of Definition", in: Y. Donders et. al. (ed.), *Law and Cultural Diversity*, 1999, 7 et seq.

21 C. Germann, "Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity", in: *Culture et Marché*, ERA-Forum 1 (2005), 109 et seq.

22 W. Schmale (ed.), *Human Rights and Cultural Diversity*, 1993.

23 A. Verdross/ B. Simma, *Universelles Völkerrecht*, 3rd edition 1984, para. 315.

context the organisation seeks to preserve the cultural heritage of all nations as part of its general tasks and article 1 (3) of its Constitution refers to the "fruitful diversity of the cultures".[24] According to its preamble, the *Framework Convention for the Protection of National Minorities of the Council of Europe* understands cultural diversity as a "source and a factor, not of division, but of enrichment for each society". Also on the regional level, the *European Charter for Regional or Minority Languages of the Council of Europe*[25] in its preamble mentions cultural diversity as a crucial element for Europe, but stresses in the same sentence that national sovereignty provides for the frame of this diversity.

In this general meaning, the notion of cultural diversity, having a more or less positive connotation, aims to preserve a situation and to achieve a goal; therefore the promotion of cultural diversity implies legal and political consequences. From the point of view of diversity, developments of convergence of cultures are seen from a critical perspective. Nevertheless, cultural homogeneity may also have positive aspects connected to the problem of self-determination and the question of conflicts and the reasons for them.[26] As a consequence of personal mobility and technical devices like satellite broadcasting and Internet, allowing easy access to information world-wide,[27] the wish to preserve cultural traditions as part of a certain identity entails the need to take measures for the maintaining of cultural diversity. Diversity may exist between states, because culture is part of state identity. However, cultural diversity may also exist within a state, because culture is never of a monolithic character. Legal questions especially arise if the cultural diversity within a state is linked with ethnic, linguistic or religious diversity because then cultural diversity influences the protection of minorities or indigenous peoples.[28]

---

24 Graber, see note 4, 556. As to the Constitution see under <http://www.icomos.org/unesco/unesco_constitution.html>.

25 ETS No. 148.

26 Cf. M.J. Glennon, "Self-determination and Cultural Diversity", *Fletcher Forum of World Affairs* 27 (2002), 2 et seq. (75), who defends "genuine" cultural diversity in a situation of American hegemony.

27 See in this respect the contribution of S. Schmahl in this Volume.

28 J. Firestone/ J. Lilley/ I. Torres de Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law", *Am. U. Int'l L. Rev.* 20 (2004), 219 et seq.

These questions are taken into account by article 27 ICCPR which enshrines the right of minorities to enjoy their own culture. The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005,[29] based on previous works within the organisation,[30] is the most prominent expression of the developments to promote cultural diversity on the international level. In the preamble, cultural diversity is seen as "a defining characteristic of humanity" but in the provisions of the treaty it comes down primarily to diversity in the audio-visual sector. The so-called definition in article 4 of the Convention refers to "the manifold ways in which the cultures of groups and societies find expression" and can be qualified as a general description of the problem. It is not even a definition useful for the purposes of the Convention. In the text of the Convention, the term "cultural expression" is used whereas "cultural diversity" is barely mentioned. There even seem to be differences between the states concerning the meaning and backgrounds of the notions and the relationship between culture and economy.[31]

IV. The Universal Protection of Minority Rights

In history, the protection of minorities was closely linked to the self-determination of peoples.[32] States are reluctant to acknowledge rights of minorities because they try to avoid risks for their territorial integrity. The fight of minorities for their rights has given rise to armed conflicts. These dangers and experiences made minority protection one of the most complicated subjects of international law. There have been many political discussions in different international organisations especially in the United Nations. As a result, different treaties and institutions have been created in order to organise the protection of minorities. In modern international law the protection of minorities is part of the protec-

---

29 See note 4.

30 UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Sess. of the General Conference of UNESCO, Paris, 2 November 2001, UNESCO Doc. CLT2002/WS/09, Paris 2002.

31 On the culture and trade conflict behind the Convention Neuwirth, see note 4.

32 T. Musgrave, *Self-Determination and National Minorities*, 1997.

tion of human rights.[33] The fight for individual human rights also concerns the fight for the individual rights of persons belonging to a minority. The very special approach of minority protection is linked with the more general problem of the right of groups.[34] The Permanent Court of International Justice has already identified the two crucial points of minority protection in its Advisory Opinion on minority schools in Albania,[35]

> "The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics".[36]

The second aspect can be seen nowadays as part of the discussion on autonomy and diversity in a society. The growing importance of the subject of cultural diversity is linked to the status and role of groups in a state and those groups may be minorities.[37] The law of minority protection is intertwined with the historical and sociological backgrounds of each situation. Demographic change influences as one factor the protection of minorities because a minority may become a majority or migration may be accelerated.[38] Therefore anthropological, philosophical and sociological reasons are part of the legal reasoning in cases of minority protection. An interdisciplinary approach is necessary, otherwise

---

33 D. Kugelmann, "Minderheitenschutz als Menschenrechtsschutz – Die Zuordnung kollektiver und individueller Gehalte des Minderheitenschutzes", *AVR* 39 (2001), 233 et seq.

34 E. Riedel, "Gruppenrechte und kollektive Aspekte individueller Menschenrechte", in: *Aktuelle Probleme des Menschenrechtsschutzes*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, Band 33, 1994, 49 et seq.

35 PCIJ, Minority Schools in Albania, Advisory Opinion of 6 April 1935, Series A/B, Judgements, Orders and Advisory Opinions, No. 64, 1935, 4 et seq. (17).

36 See PCIJ above, 17.

37 Cf. F. Palermo/ J. Woelk, "From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights", *European Yearbook of Minority Issues* 3 (2003/4), 5 et seq., who tend to integrate the plurality of instruments.

38 Wiessner, see note 13, 175, 178.

conflicts arising because of the diversity of cultures and nations cannot be solved.[39]

1. Specific Treaty Provisions

The core of the human rights of minorities is the principle of non-discrimination. It was strengthened by the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965 (CERD).[40] The rules of the Convention are applicable to all members of ethnic minorities. However, the Convention also admits that special measures may be necessary to secure adequate advancement of certain racial or ethnic groups.

The *International Convention on the Rights of the Child* (CRC),[41] has been ratified so far by 193 states. Its article 28 guarantees the right to education, based on the equality of chances. This may be understood in a way to enhance the position of children, who are members of a minority, namely because article 29 of this Convention stipulates that one aim of education should include the respect of cultural identity. A specific provision of minority protection is article 30 CRC which is similar to article 27 ICCPR.

2. The Declaration 47/135 and the Commentary

The General Assembly adopted the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992.[42] The Declaration puts an emphasis on state obligations versus minorities. Although the Declaration does not define a minority, it acknowledges a difference between "National or Ethnic, Religious and Linguistic Minorities". The notion of "national minority" is important in the European instruments, namely the mentioned Framework

---

39 M. Bommes/ E. Morawska, *International Migration Research, Constructions, Omissions and the Promises of Interdisciplinarity*, 2005.

40 UNTS Vol. 660 No. 9496.

41 *ILM* 28 (1989), 1448 et seq.

42 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 of 18 December 1992; see K. Dicke, "Die UN-Deklaration zum Minderheitenschutz", *EA* 1993 (48), 107 et seq.

Convention, but not in the universal instruments. As a consequence, the question of citizenship does not play a role for the rights of a person belonging to a minority under article 27 ICCPR and the Declaration.

The General Assembly stressed the relationship between minority protection and the protection of human rights. According to the Declaration, the realisation of rights, enjoyed by persons belonging to a minority, contributes to political and social stability in the state they live in. The identity of minorities should be protected. The Declaration claims active measures of a state in favour of the protection of minorities. The Declaration is not binding, but it shows that the majority of states accepts that the individual character of minority rights entails duties of the state to protect the group as a whole because the group is formed by persons entitled with minority rights. This may influence the interpretation of article 27 of the ICCPR.

As a guide to the understanding and the application of the Declaration, the Working Group on Minorities the subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights prepared a Commentary. It was adopted at its 10th session, being originally drawn up by its former Chairperson Asbjorn Eide.[43] The Commentary on the Declaration was finalised by the Secretary-General after a broad discussion and took into account the comments of governments, intergovernmental and non-governmental organisations and individual experts. Therefore it is an important document reflecting the discussions on the protection of minorities in the United Nations but also relating to the protection of indigenous peoples insofar as they may fall under the provisions on minorities. The text of the Commentary will be part of the United Nations Guide for Minorities.

The Commentary provides for a wide scope of application of the Declaration. It comprises various minorities including new minorities but the strength of the entitlements may vary.

> "Those who *live compactly* together in a part of the State territory may be entitled to rights regarding the use of language, and street and place names which are different from those who are dispersed, and may in some circumstances be entitled to some kind of autonomy. Those who have been established for a long time on the territory may have stronger rights than those who have recently arrived."(Commentary No. 10).

---

43 Doc. E/CN.4/AC.5/2001/2.

This approach paves the way for a differentiated and adequate protection of different minorities respecting culture and tradition.

Respecting the reluctance of states in recognising true collective or group rights, the Commentary holds that the right to self-determination as a group right, guaranteed by common article 1 of the two international Covenants on Human Rights, does not apply to minorities (Commentary No. 15). Minority rights are individual rights. Indigenous peoples have particular concerns (Commentary No. 16). Persons belonging to indigenous peoples may claim the individual rights of minorities, as has been done by persons submitting Communications before the Human Rights Committee. Referring to article 3 of the Declaration, according to which that persons can exercise their human rights both "individually as well as in community with other members of their group", be it through associations, cultural manifestations or educational institutions (Commentary No. 53). This does not concern the individual character of the human rights.

3. Article 27 ICCPR and the General Comment

After World War II the United Nations decided on an obligatory provision as late as 1966. Article 27 of the ICCPR is still the most important obligatory provision on the protection of minorities on an universal level.[44] Although there are some points in the provision which are not totally clear, its mere existence helps to preserve minority rights. The scope of article 27 and its consequences are the object of ongoing discussions.[45] First of all, the definition of a minority is not clear and this lack of clearness reduces the effectiveness of article 27 ICCPR. But the importance of article 27 lies in the fact that social criteria are acknowledged as being part of the concept to define a minority. The Covenant declines the concept of assimilation and grants people, belonging to a minority, individual rights. The crucial point is whether there are collective rights guaranteed by the provision.

---

44 See C. Scherer-Leyendecker, *Minderheiten und sonstige ethnische Gruppen*, 1997, 47.

45 C. Tomuschat, "The Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights", in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler*, 1983, 949 et seq.

The provision of article 27 stresses the criteria of culture, religion and language as the most important criteria for a minority. This is a success for minority protection. During the discussions on this provision in the 1960s, states like Australia, the United States of America and Chile fought for their concept of assimilation because they see themselves as immigration states. The rights of minorities cannot be accepted if a state denies the existence of a minority itself. The Australian delegate in the former Commission on Human Rights stated during the discussion on article 27 that there are no minorities in Australia. He argued,

> "There were, of course the Aborigines, but they had no separate competing culture of their own, for as a group they had only reached the level of food gatherers."

This remark reveals a discriminatory view on certain groups which is contrary to the idea of the prohibition of discrimination in human rights. Nevertheless, there are still states holding the view that there are no minorities on their territory, Turkey being such a case. It denies the character of the Kurds as a minority. Also France does not apply article 27 of the Covenant, because article 1 of the French Constitution declares France as an indivisible Republic.[46] Numerous cases were submitted by French citizens of Breton ethnic origin, but because of the French reservation to the ICCPR that article 27 is not applicable so far as the Republic is concerned, the respective Communications were rejected by the Human Rights Committee as inadmissible.[47] Other cases from Europe concerned the Sami. In Ivan Kitok v. Sweden the Committee affirmed that a traditional economic activity and way of life such as reindeer husbandry falls within the scope of article 27 since it belongs to the culture of the Sami.[48]

In the context of minority rights, a number of the most prominent individual complaints under the Optional Protocol claiming rights under article 27 came from Canada. In the well-known case Lovelace v. Canada[49] the Committee decided that the rights of a woman to access to her native culture and language "in community with the other mem-

---

46 See G. Despeux, *Die Anwendung des völkerrechtlichen Minderheitenrechts in Frankreich*, 1999.

47 G. Alfredsson/ A. de Zayas, "Minority Rights: Protection by the United Nations", *HRLJ* 14 (1993), 1 et seq. (6-7).

48 Communication No. 197/1985, Views of 1988.

49 Communication No. R 6/24 (1977), Views of 30 July 1981, reprinted in: *HRLJ* 2 (1981), 158 et seq.

bers", can only be realised in the community within the Indian reserve and the complainant was attributed a right to residence under article 27. The Communication in the case Mikmaq Tribal Society v. Canada[50] related to the right of self-determination but it was rejected as inadmissible. The Communication submitted by Chief Bernard Ominayak of the Lubicon Lake Band in the famous case Lubicon Lake Band v. Canada[51] led to a decision of the Committee, which held that the rights enshrined in article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. The threatening of the way of life of the Lubicon Lake Band constituted a violation of article 27. On behalf of the protection of culture and the traditional way of life of indigenous peoples the Committee established in the case Länsman v. Finnland No. 1[52] a combined test of meaningful consultation of the group and sustainability of the indigenous or minority economy.[53]

In 1994, the Human Rights Committee approved General Comment No. 23 (Rights of Minorities) on article 27 ICCPR.[54] First of all, the Committee held that article 27 recognises a right which is conferred to individuals belonging to minority groups (para. 1). However, the Committee did not restrict the rights of minority protection to persons possessing the citizenship of the host state (para. 5.1). Referring especially to indigenous peoples, the Committee noted that the preservation of their use of land resources could become an essential element in the right of persons belonging to such minorities to exercise their cultural rights. The enjoyment of these rights may require positive legal measures of protection (para. 7). Under the regime of article 27, the Committee strives for a wide scope of application. Relating to its jurisdic-

---

50 Communication No. R 19/78 (1980), Views of 20 July 1984.

51 Communication No. 167/1984, Views of 26 March 1990, reprinted in: *HRLJ* 11 (1990), 305 et seq.

52 Communication No. 511/1992, Views of 26 October 1994 – Ilmari Länsman et al. v. Finnland (Länsman No. 1), Report of the Human Rights Committee, Vol. II, GAOR 50th Sess., Suppl. No. 40, Doc. A/50/40, 66 et seq.

53 M. Scheinin, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights", in: J. Castellino/ N. Walsh (eds), *International Law and Indigenous Peoples*, 3 et seq. (7).

54 General Comment No. 23 (Rights of Minorities) on article 27 of the Human Rights Committee under article 40 para. 4 of the ICCPR; reprinted in: *HRLJ* 15 (1994), 234 et seq.

tion, collective aspects are closely connected with the rights of indigenous peoples.

4. Fundamental Elements of the International Protection of Minorities

The protection of minorities is part of the protection of human rights. The individual rights of persons belonging to a minority are not doubted. As with human rights in general, there is still much to do to achieve them. The uniformity of human rights protection and the principle of non-discrimination put pressure on the existing differences. Nonetheless, exactly these differences between groups in a society make the difference between majority and minorities. What is doubtful is which groups have which rights as a minority. In spite of the existing treaties on the universal and regional level the protection of minorities is not completely satisfactory. The diversity of minorities and their cultures entails a diversity of problems arising from very different situations. Each situation and each conflict needs an in depth analyse of the historical, political and social background. An interdisciplinary approach may help to find specific solutions for specific problems.

In the cases of the Human Rights Committee concerning Canada, persons belonging to an indigenous people claimed minority rights. The most prominent cases under article 27 which were decided by the Human Rights Committee related to persons specifically belonging to indigenous peoples. The complainants claimed their right of self-determination as a people and were attributed minority rights. They wished to preserve cultural diversity and autonomy. This claim could be realised within the human rights system by applying article 27. Indigenous peoples may rely on article 27 to defend their way of life and the specific characteristics of their group.

The international protection of minorities works on solid grounds. It may be influenced by the concept of "cultural diversity" insofar as the interpretations of notions like "culture" in article 27 ICCPR may undergo a progressive evolution. As the general concept of "cultural diversity" is not yet clear, the protection of minorities should not be subject to far reaching changes as long as the direction of the changes cannot be identified. The instruments on minorities have not been modified but the existing instruments at least grant a safe standard of protection under international law.

Careful modifications may refer to the application of the existing provisions. Recent international documents suggest a system of gradual protection. The Commentary to the above mentioned Declaration on Minorities[55] includes all relevant groups in the international protection of minorities but tends to grant more rights to "old" minorities. However, according to these ideas new minorities fall under the minority protection of international law. This extension of the scope of minority protection works only on the basis of an individual human rights approach. There will be a reluctance of states to accept the concept of conferring rights to further groups if these rights can be interpreted as collective rights for the group. Different minorities have different kinds of needs and claim different rights.

V. The Protection of Minorities in Europe

1. The OSCE and the High Commissioner on National Minorities

At a regional level, protection of minorities is part of the work of the Organisation for Security and Cooperation in Europe (OSCE).[56] In 1992 the OSCE installed a High Commissioner on National Minorities (HCNM).[57] His task is to prevent conflicts.[58] The HCNM is part of the system of cooperation and consultation of the OSCE Member States, dealing with the legal and political situation of national minorities as a whole. In practice the High Commissioner concentrates his work at first on the use of minority languages.[59] In 1994, the Council of the Baltic Sea States (CBSS) created a Commissioner on Democratic Institu-

---

55 See note 43.

56 C. Höhn, *Zwischen Menschenrechten und Konfliktprävention – Der Minderheitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE)*, 2005.

57 On the HCNM and his work see L.A. Thio, "Developing A 'Peace And Security' Approach Towards Minorities' Problems", *ICLQ* 52 (2003), 115 et seq.; S. Kettig, *Europäischer Minderheitenschutz im Wandel*, 2004.

58 M. van der Stoel, "The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention", *RdC* 296 (2002), 9 et seq.

59 Cf. the Report of 1999 on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area available under <www.osce.org/inst/hcnm/docs/lingri/report.html>.

tions and Human Rights including the Rights of Persons belonging to Minorities.[60] Part of his mandate is to examine cases of the violation of individual rights, whereas the HCNM is only entitled to examine the general situation of a minority.[61] The Office of Democratic Institutions and Human Rights in Warsaw (ODIHR) established a Roma Contact Point, whose work is supported for example by the Federal Republic of Germany.

2. The Council of Europe and the European Court of Human Rights

In Europe, there are different legal instruments protecting the rights of minorities and their members.[62] The European Convention on Human Rights (ECHR) is the most effective instrument for the protection of human rights in Europe. As the protection of minority rights is part of the protection of human rights, minorities may refer to human rights granted by the European Convention. A religious minority can claim a violation of the freedom of religion (article 9 ECHR). Persons belonging to a minority can put forward the right to privacy (article 8 ECHR) with the argument that national legislation restricts the use of the minority language.[63] The prohibition of discriminations in article 14 ECHR contains as forbidden criteria, among others, the fact that a person belongs to a national minority.

In 1968, the European Court of Human Rights had to decide on the use of minority languages in Belgium.[64] The Court held that different treatment was possible, but it may amount to a prohibited discrimination when there is no reasonable and objective justification for it. As

---

60 See under <http://www.cbss-commissioner.org>.

61 R. Uerpmann, "Völkerrechtliche Grundlagen des Minderheitenschutzes", in: G. Manssen/ B. Banaszak (eds), *Minderheitenschutz in Mittel- und Osteuropa*, 2001, 9 et seq. (26).

62 R. Hofmann, *Minderheitenschutz in Europa: Völker- und staatsrechtliche Lage im Überblick,* 1995; W. Rudolf, "Über Minderheitenschutz in Europa", in: *Festschrift für Walter Leisner,* 1999, 188 et seq.; R. Wolfrum, "Aspekte des Schutzes von Minderheiten unter dem Europäischen Menschenrechtsschutzsystem", in: Bröhmer et. al. (ed.), *Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress*, 2005, 1109 et seq.

63 Uerpmann, see note 61, 10-11.

64 Belgian Linguistic case, Judgment of 23 July 1968, Series A, No. 6, 298.

there was no specific provision on minorities, the Court had to tackle minority problems under different legal aspects.[65] In the case Gorzelik and Others v. Poland[66] the Court affirmed that under the ECHR group rights exist. The freedom of association guaranteed by article 11 ECHR is applicable if a group is denied registration as a minority in a state register, but the state enjoys a wide margin of appreciation in deciding if restrictions are necessary to protect national and public order.[67]

Pursuing its general goals, the Council of Europe enacted treaty law on minorities. The *European Charter for Regional or Minority Languages* of 1992 came into force 1998.[68] It has been ratified by 22 states.[69] It claims the acknowledgement of regional or minority languages and contains provisions on measures fostering the use of these languages. The implementation of provisions on language depends on state traditions and proves to be a sensitive matter which explains the small number of ratifications. The French Constitutional Court held in his decision of 15th June 1999 that some provisions of the Charter contradict the French Constitution. In article 1 of the French Constitution it is stated that the language of the Republic is French. The use of other languages in private and public life would violate the Constitution.

A complicated problem is the prohibition of political parties representing a minority.[70] The European Court of Human Rights in Strasbourg had to decide on several Turkish cases. The Turkish government defended the laicistic character of the state against Islamic groups which organised political parties. In this context, the government prohibited the so-called Welfare Party, a political party aiming at the implementation of its view of the Islam in the Turkish society by means of violence. The European Court of Human Rights held that the prohibition of this

---

65 R. Medda-Windischer, "The Jurisprudence of the European Court of Justice", *European Yearbook of Minority Issues* 3 (2003/4), 389 et seq.

66 Application No. 44158/98, Judgment of 17 February 2004.

67 R. Hofmann, "Nationale Minderheiten und der Europäische Gerichtshof für Menschenrechte", in: Bröhmer, see note 62, 1011 et seq. (1021 et seq.).

68 ETS No. 148.

69 Reference of 8 June 2007.

70 D. Kugelmann, "Die streitbare Demokratie nach der EMRK – Politische Parteien und Gottesstaat: Das Urteil des Menschenrechtsgerichtshofes zur Auflösung der Wohlfahrtspartei in der Türkei", *EuGRZ* 30 (2003), 533 et seq.

political party did not violate the ECHR.[71] This case may be the nucleus for the development of a human rights system respecting cultural diversity because it shows limitations of diversity which a state can realise in accordance with human rights.

3. The Framework Convention

The Council of Europe has agreed on a treaty which is the most important one in the protection of minorities in Europe. The *Framework Convention for the Protection of National Minorities* of 1995 came into force in 1998.[72] It was ratified by 39 states.[73] Member States are for example Estonia, Croatia, the Ukraine or the Russian Federation, but not Andorra, France and Turkey. The Member States have declared in the Convention that the protection of national minorities is part of the international protection of human rights. Persons belonging to a national minority are guaranteed individual freedoms like the freedom of opinion and the freedom of religion.[74]

States are obliged to enable persons belonging to national minorities to develop their culture and to uphold essential elements of their identity. Minority languages can be used and the right to have a name in the minority language is granted. Member States have to report on the progress they make in implementing the rights of the Convention. The Convention does not define the notion of national minority. The Member States define it themselves.[75] Germany has declared that there are only two national minorities: the Danes and the Sorbian Nation, and Germany applies the Convention to the German Frisians, Sinti and

---

71 Decision of 3 February 2003 (Grand Chamber) – Applications No. 41340/98, 41242/98, 41343/98 and 41344/98 (of 22 May 1998) – Refah Partisi (Welfare Party) versus Turkish Republic.

72 ETS No. 157.

73 Reference of 8 June 2007.

74 G. Alfredsson, "A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection for National Minorities with International Standards and Monitoring Procedures", *International Journal of Minority and Group Rights* 7 (2000), 291 et seq.; F. Steketee, "The Framework Convention: A Piece of Art or a Tool for Action?", *International Journal of Minority and Group Rights* 8 (2001), 1 et seq.

75 J.A. Frowein/ R. Bank, "The Effects of Member States' Declarations defining 'national minorities' upon Signature or Ratification of the Council of Europe's Framework Convention", *ZaöRV* 59 (1999), 649 et seq.

Roma.[76] However, the Convention tries to foster measures of states in favour of minorities and aims at an intercultural dialogue.

According to article 5 of the Framework Convention, the State Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will. The Explanatory Report to the Convention holds that this provision does not exclude measures of integration but aims at ensuring that national minorities develop their culture and preserve their identity (Explanatory Report No. 42). According to article 3 para. 2 of the Framework Convention, persons belonging to national minorities may exercise the rights individually as well as in community with others. Following the concept of article 27 ICCPR, collective rights are not expressly acknowledged. The Explanatory Report states that the possibility of joint exercise of the Conventional rights is recognised "which is distinct from the notion of collective rights" (Explanatory Report No. 37).

4. Fundamental Elements of Minority Protection in Europe

The scope of application of the Framework Convention is restricted to national minorities named by the states. The detailed protection of a specific minority depends on municipal law. Of course, the national regimes on the protection of minorities are different.[77] The state obligations flowing from the Convention are of crucial importance for minorities. The Framework Convention builds a progressive system for the protection of minorities which possesses collective elements. Nevertheless, the underlying concept of the Convention aims at the protection of individual rights. As a consequence of the prohibition of assimilation, minority protection in the Framework Convention is primarily but not exclusively understood as the protection of individuals belonging to a minority. In the monitoring system, collective aspects play an important role. With respect especially to article 5 of the Convention, the Advisory Committee refers in its remarks to the maintaining of the culture of groups. In this context, the Advisory Committee tries to pro-

---

[76] On minorities in Germany R. Hoffmann, "Rights, States, Minorities and Indigenous Peoples", in: E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds*, 2005, 9 et seq.; M. Pallek, *Der Minderheitenschutz im deutschen Verfassungsrecht*, 2001.

[77] See J.A. Frowein/ R. Hofmann/ S. Oeter (eds), *Das Minderheitenrecht europäischer Staaten*, Teil 2, 1994.

tect cultural diversity. However, the relevant remarks concern primarily the traditional way of life of indigenous peoples like the Sami.[78]

VI. The Protection of the Rights of Indigenous Peoples

The protection of indigenous peoples is a rather recent issue of international law but is a fast developing one. The legal regime of indigenous peoples has developed into a specific category, distinct from the protection of minorities.[79] According to the Commentary to the UN Declaration on Minorities, a distinction is drawn between the rights of persons belonging to minorities and those of indigenous peoples.[80] Rights of persons belonging to minorities are individual rights, whereas rights of indigenous peoples can also be collective rights. The difference to minority protection is that indigenous peoples do not primarily fight against discrimination but fight for a high degree of autonomous development. According to their interest of survival as a group, indigenous peoples must not be integrated into the majority society.

Indigenous peoples number roughly some 300 million persons but nevertheless they are vulnerable. They need protection by the international community and by the territorial states. There are many aspects influencing the protection of indigenous peoples like human rights, self-determination, activities of international organisations or the role of non-governmental organisations and of the civil society in law-making and decision-making.[81] A cross-over perspective is necessary, integrating aspects of sociology and history, religion and economy, anthropology and other sciences in order to identify the beneficiaries and addressees of rights or the content of those rights. The right to land or property rights are as fundamental for indigenous peoples as the right to economic and cultural self-determination. Each case or situation ne-

---

78 Hofmann, see note 67, 1016.

79 D. Dörr/ M. Cole, *The Mueller-Wilson Report*, 1999, 47.

80 Supra see note 43, No. 16.

81 Recent monographic works by S.J. Anaya, *Indigenous Peoples in International Law*, 2005; J. Castellino/ N. Walsh (eds), *International Law and Indigenous Peoples*, 2005; Gupta, see note 14.

cessitates a multi-perspective approach to come to concrete legal or political results.[82]

The rights of indigenous peoples have global, regional and national dimensions. In a concrete situation, the applicable rights and their scope depend on the interaction of those dimensions.[83] Specific regimes of the protection of indigenous peoples are installed by the national law of some states.[84] The United States of America relied in its last census on the self-identification of groups which are categorised as six basic races: Whites, Blacks, Asians, American Indian/Alaskan Natives, Native Hawaiians/Other Pacific Islanders and "Some Other Race", adding Hispanics as an ethnic group and conferring specific rights to specific groups.[85] In Canada, the Inuit are granted autonomy and their rights as a group are guaranteed by the Canadian government. These rights also concern the exploitation of resources like oil, gold or similar raw materials. In November 2005, the Canadian Federal Government and the provinces and territories concluded a treaty with the so called First Nations and Inuit, promising them 5 billions Canadian Dollars (about 3.65 billion Euros). The funding is intended to improve the living situation in the reserves.

1. Selected Legal Instruments

Persons belonging to indigenous peoples have the interest of enforcing individual and collective rights.[86] Apart from the general system of hu-

---

82 Exemplified by L.A. Baer, "The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi", *International Journal on Minority and Group Rights* 12 (2005), 245 et seq.

83 W. van Genugten/ C. Perez-Bustillo, "The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions", *International Journal of Minority and Group Rights* 11 (2004), 379 et seq.

84 Gupta, see note 14, Vol. 1, 5 et seq.; the reports in: Castellino/ Walsh, see note 81, 159 et seq.; the reports on the United States (Frickey), Canada (Benedict), Australia (Schillhorn), New Zealand (Ehrmann) and Latin America (Grote), in: *ZaöRV* 59 (1999), 383 et seq.

85 Wiessner, see note 13, 175.

86 H. Ketley, "Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples", *International Journal of Minority and Group Rights* 8 (2001), 331 et seq.

man rights protection of the Covenants and article 27 ICCPR,[87] various legal instruments may effect the rights of indigenous peoples. Those instruments form a body of conventional norms which is joined by developing customary law.[88] On the international law level a measure of protection for indigenous peoples was developed. An early legal instrument concerning indigenous peoples was the ILO Convention No. 107 of 1957 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.[89] The Convention was formed by a paternalistic approach which was heavily criticised and this criticism was supported by the process of decolonisation. This first Convention was replaced by ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries.[90] Convention Nr. 107 is still the main instrument on the global level relating to indigenous peoples, but it is ratified by only a small number of states.

In the special context of the fight against racial discrimination there are also documents on and guarantees for indigenous peoples.[91] CERD[92] applies to members of indigenous peoples. The treaty-body of this Convention, the Committee on the Elimination of Racial Discrimination adopted a General Recommendation on the rights of indigenous peoples.[93] In this Recommendation the Committee condemned any discrimination against indigenous peoples and called, in particular, upon states to respect the distinct culture and to ensure that indigenous peoples could exercise their rights in order to practise and revitalise their cultural traditions and customs. The focus lay on the prohibition of unequal treatment but also gave states obligations to enable indigenous peoples to preserve their own language and culture.

---

87 See above.

88 Anaya, see note 81, 289.

89 ILO Convention No. 107 of 26 June 1957, UNTS Vol. 328 No. 247.

90 Published in: *ILM* 28 (1989), 1382 et seq.

91 P. Thornberry, "The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/ Descent-Based Discrimination", in: Castellino/ Walsh, see note 81, 17 et seq.

92 See note 40

93 General Recommendation XXIII (51) concerning Indigenous Peoples of August 18, 1997, CERD/C/51/Misc.13/Rev.4, reprinted in: *ZaöRV* 59 (1999), 573 et seq.

2. UN Activities and the Draft Declaration

Within the frame of the United Nations numerous activities in favour of indigenous peoples were put into place.[94] In 1990, the General Assembly proclaimed 1993 as International Year for the World's Indigenous People and decided on a first draft of a Universal Declaration on the Rights of Indigenous Peoples.[95] An important result of this year was the awareness for the necessity of an ongoing process of discussion. By A/RES/48/163 of 20 December 1993 the General Assembly declared the Decade of the World's Indigenous People. With A/RES/50/157 of 21 December 1995 a working programme was approved. The Decade was closed in December 2004.

A Permanent Forum on Indigenous Issues was established[96] to provide for a forum for discussion where the indigenous peoples themselves could adequately present their interests.[97] Its 16 members are independent experts including eight indigenous experts.[98] In fact, the main task of the Forum is to analyse whether states live up to the Declaration on the Rights of Indigenous Peoples.[99] The General Assembly also established a Voluntary Fund for Indigenous Populations.[100] The purpose of the Fund is to assist representatives of indigenous communities and organisations to participate in the sessions and meetings of UN institutions, dealing with indigenous issues, by providing them with financial assistance, funded by means of voluntary contributions from governments, non-governmental organisations and other private or public entities. In its session in June 2005, the Board of Trustees ap-

---

94 M. Ludescher, *Menschenrechte und indigene Völker*, 2004; see also van Genugten/ Perez-Bustillo, see note 83, 388 et seq.

95 A/RES/45/164 of 18 December 1990; printed also as an Annex to the article of B.R. Howard, "Human Rights and Indigenous People: On the Relevance of International Law for Indigenous Liberation", *GYIL* 35 (1992), 105 et seq. (151).

96 As a subsidiary organ of ECOSOC, E/RES/2000/22.

97 L. Malezer, "Permanent Forum on Indigenous Issues: 'Welcome to the Family of the UN'", in: Castellino/ Walsh, see note 81, 67.

98 Baer, see note 82, 250.

99 Van Genugten/ Perez-Bustillo, see note 83, 387.

100 A/RES/40/131 of 13 December 1985; the mandate was extended by A/RES/50/156 of 21 December 1995 and A/RES/56/140 of 19 December 2001.

proved a total of 60 grants, a sum of US$ 280,100,00, to representatives of indigenous communities.[101]

The issue of indigenous peoples has been integrated in the work of organisations like WIPO or institutions like UN Habitat. There is a growing awareness of the specific problems of indigenous populations. But these results only concern the institutional frame within the UN system. In fact, the situation of the indigenous peoples themselves has not been improved. The report of the coordinator of the Decade acknowledges that indigenous peoples in many countries continue to be among the poorest and most marginalised.[102] In many countries their living conditions have not improved during the Decade.

The official evaluation of the Decade of the World's Indigenous People has not yet been concluded but in his preliminary review the Secretary-General noted advances in the UN system.[103] New institutions have been established in order to favour the rights of indigenous populations, e.g. the establishment of the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People by the former Commission on Human Rights.[104] This represented further progress for indigenous issues within the United Nations.[105]

From a legal and juridical point of view, an important goal of the Decade of the World's Indigenous People, which was not achieved, was the adoption of a Declaration on the Rights of Indigenous Peoples. The former Commission on Human Rights established already in 1995 a working group with the task of reviewing the Draft Declaration on the Rights of Indigenous Peoples,[106] proposed by the Sub-Commission. In May 2004, only two articles of forty five had been adopted at first reading and in view of the slow progress, the Commission at its 2004 ses-

---

101 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Doc. E/CN.4/Sub.2/AC.4/2005/5.

102 Report, see below, No. 66-67.

103 Report of the Secretary-General on the Preliminary Review by the Coordinator of the International Decade of the World's Indigenous People on the Activities of the United Nations System in Relation to the Decade, Doc. E/2004/82.

104 Established by Resolution 2001/57.

105 Baer, see note 82, 250.

106 Docs E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, reprinted in: *ILM* 34 (1995), 541 et seq.

sion recommended that additional meetings be held. The finalisation of the project was one part of the goals of the International Decade. However, the Decade ended in 2004 without any success in this respect.

Progress was finally achieved within the recently installed Human Rights Council, replacing the Commission on Human Rights. As mentioned the Council adopted the text of the Declaration. It contains wide-reaching guarantees for indigenous peoples which are not yet part of customary or treaty law on the international level.[107] In the meantime, single guarantees may be at least candidates for customary law, especially aspects of the right to the use of land.[108] In the Declaration, the legal personality of indigenous peoples is recognised and their territorial security is guaranteed. Various provisions refer to the protection of their cultural life and identity.[109] Although states have objected to the establishment of collective human rights, some provisions of the Declaration can only be exercised by an indigenous people collectively.[110]

3. Fundamental Elements of the Protection of Indigenous Peoples

The crucial point of the rights of indigenous peoples is their capacity for claiming the right to self-determination.[111] If they are attributed this capacity they would be entitled to put forward rights to autonomy entailing the danger of secession. The standard of protection of indigenous peoples is based on a combination of legal instruments and customary international law. Wiessner concludes this in his in-depth analysis by stating,

> "First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional way of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarca-

---

107 R. Wolfrum, "The Protection of Indigenous Peoples in International Law", *ZaöRV* 59 (1999), 372 et seq. (376).

108 See arts 24, 25 of the Draft Declaration. See also G. Ulfstein, "Indigenous Peoples' Right to Land", *Max Planck UNYB* 8 (2004), 1 et seq.

109 E.g. arts 4, 12, 14, 16.

110 Wolfrum, see note 107, 382.

111 Scheinin, see note 53, 9 et seq.

tion, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations."[112]

This far-reaching standard is not consented to as a whole in international law but it marks the crucial points of protection. As an elementary part of protection, the cultural autonomy of indigenous peoples has to be guaranteed by the state. This contributes to the cultural diversity within a state. The protection of indigenous peoples guarantees the protection of cultural diversity.

VII. Cultural Diversity of Groups

Cultural diversity is part of the framework which is necessary to guarantee the identity of groups of a distinct character in relation to other groups in a society or in other societies. To preserve the identity of a group can be an issue of international law. The rights related to cultural identity are of special importance for minorities and indigenous peoples.[113] The protection of indigenous peoples is a problem of striving for exclusion and preventing inclusion, whereas the protection of minorities is often a problem of striving for inclusion and preventing exclusion. Indigenous peoples live apart from the society in their traditional territory; as a consequence there is no discussion about integration. Minorities live in the society and contribute to its cultural richness. They form part of it, but in many cases nevertheless, want to keep their identity; as a consequence the intensity of their integration is a crucial point of discussion.

As a result of the UNESCO Convention of 2005, the concept of cultural diversity is implemented in international law. However, its content is not yet clarified.[114] The main field of application in treaty and statutory law is international economic law, in which cultural diversity

---

112 S. Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and Legal Analysis", *Harvard Human Rights Journal* 12 (1999), 57 et seq. (127).

113 Y. Donders, "The Development of the Right to Cultural Identity in International Human Rights Law", in: Y. Donders et al. (ed.), *Law and Cultural Diversity*, 1999, 65 et seq.

114 See above.

provides for a corollary of globalisation.[115] Diversity of cultures in a more sociological sense can be found in the approach of UNESCO promoting a general approach but still linked to the specific protection of cultural goods and services in international trade. This aspect of cultural diversity may be the starting-point for an influence of the notion on the situation of groups.

The idea of cultural diversity in this general meaning may collide with certain approaches of integration. There is a fundamental difference between assimilation and diversity. The government of a state may try to integrate immigrants in a way that they change their identity. In recent times, this was the way the American Indians or the old nations in Australia were treated. Concerning "new" minorities[116] the problem of integration into society leads to the question of identity.

Measures for maintaining cultural diversity may contribute to the upholding of group identity. This is also the case if the narrow concept of cultural diversity is applied because the cultural goods and services of the groups enjoy a certain protection. Understanding diversity in a wider sense leads to the protection of culture and tradition of the group in general and may amount to state obligations for the protection of groups. However, under current international law state obligations mainly arise from human rights instruments, especially from article 27 ICCPR.

Relating to the protection of indigenous peoples, economic, social and cultural rights play a central role. The preamble of the *Declaration on the Rights of Indigenous Peoples* affirms that all peoples contribute to the diversity and richness of civilisations and cultures.[117] As a consequence of the underlying approach of collective protection, indigenous peoples claim religious or cultural traditions and need access to social welfare systems or adequate housing. They want to uphold their identity as a group. Minority protection is based on the principle of non-discrimination. The focus lies on individual freedoms. In state practice, minority protection is realised in most cases by granting individual freedoms to persons belonging to a minority. The promotion of minority rights relies on the strengthening of state obligations towards minorities.

---

115 Graber, see note 4, 554.

116 Wolfrum, see note 15, 153 et seq.

117 See above.

VIII. Conclusion

The protection of minorities as a legal issue works in the frame of the general system of human rights protection, but a progress in the direction of a general improvement of the situation of minorities as a group can hardly be recognised. As part of the protection of human rights the contents of minority protection in universal international law has been individualised. This process has led to the application of the general rules of human rights protection on persons belonging to a minority without regularly taking into account the peculiarities of the protection of a group. International law will contribute to the vanishing of the protection of differences if specific legal regimes are not developed. The most effective existing regime is the European Framework Convention.

However, the advantage of this process lies in the application of the human rights enforcement system, which in spite of its weaknesses, works in favour of the realisation of minority rights. In the context of this system, the principles of non-discrimination and individual freedoms are guaranteed for persons belonging to a minority. The common enforcement of individual rights by various persons is accepted. But the exercise of rights in community with others does not mean that collective rights are acknowledged. Typical collective aspects like preserving the collective identity of a group are neglected by the focus of minority protection on subjective rights. As a consequence, the chances to maintain cultural diversity through the international law of minority protection are diminishing.

Affirmative action and the maintenance of differences between groups are acknowledged in the context of indigenous peoples. This is one of the reasons for the growing importance of indigenous issues in international law. Most of the prominent cases in which article 27 ICCPR was applied are cases concerning indigenous issues. The system of the protection of minorities in international law contains the instruments to prevent cultural diversity from disappearing, but the relevant instruments are primarily used in favour of indigenous peoples. The protection of indigenous people is about to become the decisive factor for the promotion of collective rights and group rights.

Persons belonging to a minority enjoy individual human rights which may be exercised collectively. The specific granting of collective rights to minorities can be only rarely observed in state practice or treaty law. But a collective approach is realised in favour of indigenous peoples who enjoy benefits as a group, not only as an assembly of persons realising their individual rights. Therefore, the general concept of

cultural diversity as respecting different cultural traditions and values of different groups is closer to the international protection of indigenous peoples than to the protection of minorities. Persons belonging to minorities, however, are entitled to the right to enjoy their own culture which may entail the fostering of cultural diversity. At the heart of the matter, the specific legal regime for indigenous peoples applies to the cases of group protection whereas the systems of minority protection apply to the protection of individual rights. The development and promotion of safeguards against the vanishing of cultural peculiarities of groups can result primarily from the protection of indigenous peoples.