

# UN Standard-Setting in the Field of Minority Rights

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## 1. Introduction

In hindsight, the achievements by the UN in the field of minority rights seem to be an improbable success. In fact, at the beginning, the UN was headed in the opposite direction. After the experience with the League of Nations approach to minority protection, which was characterized by many as negative,<sup>1</sup> the protection of general human rights appeared to offer an alternative and more effective method for the protection of minorities.<sup>2</sup> However, notwithstanding the strong reservations held by many states against any repetition of the pre-War minority

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<sup>1</sup> One must, however, be careful in the overall assessment of this experience. In fact, neither the good intentions by the fathers of this experiment nor actual, albeit temporary, successes of this system can be denied. In many cases, where members of minorities were subjects of discrimination and abuses, the Minorities Questions Section of the Secretariat of the League of Nations managed to provide relief. The reasons why this system had collapsed over the years were manifold, and it would therefore be unjust to attribute the failure of this project to the unruly behaviour of some minorities and to the expansionist policy of Nazi Germany, as it can often be read in literature. In 1933, when Hitler came to power, the League of Nations minority protection system was already far beyond its heydays. Minority protection was not really accepted by the states and the state community was not yet sufficiently institutionalized to effectively intervene in the spiral between accusations and counter-accusations where the stronger part eventually prevailed. The lack of a general international human rights law that could have worked as a safety-net contributed further to the rapid degeneration of this protection system once it had come under attack. See P. de Azcárate, *League of Nations and National Minorities* (Carnegie Endowment for International Peace, Washington, 1945) and P. Hilpold, 'Minderheitenschutz im Völkerbundsystem', in C. Pan, B. S. Pfeil and P. Pernthaler (eds.), *Zur Entstehung des modernen Nationalitäten- und Minderheitenschutzes in Europa* (Springer, Vienna/New York, 2006) p. 156.

<sup>2</sup> As has been pointedly remarked by J. L. Kunz, "[a]t the end of the First World War, 'international protection of minorities' was the great fashion [. . .]. Recently this fashion has become obsolete. Today the well dressed international lawyer wears 'human rights'." Cf. J. L. Kunz, 'The Present Status of the International Law in the Protection of Minorities', 48:1 *American Journal of International Law* (1954) pp. 282–287.

protection experiment, minority protection as an idea was not dead, and even within the institutional system of the UN of the first years, the roadmap for what would later become a wide-ranging minority protection system was already present. In fact, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, established by the Commission on Human Rights at its 1st Session in 1947,<sup>3</sup> gave expression to the particular interest for minorities already in its name.<sup>4</sup> While the Sub-Commission's denomination appeared to imply that this institution had to give equivalent importance to the fight against discrimination on the one hand and to measures for the protection of minorities on the other, reality proved to be different in the end. Soon, a clear discrepancy surfaced between the way the 18 independent experts composing the Sub-Commission interpreted their mandate and the respective expectations by the Commission on Human Rights, whose members, state representatives as they were, had to give voice to their 'master's' wishes. The Sub-Commission's proposals of 1947 to insert a minority protection provision in the Universal Declaration of Human Rights<sup>5</sup> was outrightly rejected by the Commission on Human Rights. The General Assembly, mirroring a greater panoply of views, could not totally oppose the idea that some form of minority protection was necessary, but expressed, at the same time, its uncertainty on how to achieve this end. The omission of any reference to minority rights in the Universal Declaration of Human Rights should therefore not be read as a definite denial of the usefulness of such a protection, but reflects rather the need for further studies, as became evident in resolution 217 C(III) *Fate of Minorities* approved the same day as the Universal Declaration (10 December 1948).<sup>6</sup> The 'no-indifference-but-no-preparedness-to-take-steps' position has become afterwards characteristic of the overall attitude of

<sup>3</sup> The authority for this measure was given to the Human Rights Council (HRC) by the Economic and Social Council (ECOSOC) resolution 9(II) of 21 June 1946.

<sup>4</sup> As it is known, this Commission was renamed the 'Sub-Commission on the Promotion and Protection of Human Rights' by ECOSOC decision 1999/256 of 27 July 1999.

<sup>5</sup> This proposal had the following wording:

"In States inhabited by well-defined ethnic, linguistic or other groups which are clearly distinguished from the rest of the population, and which want to be accorded differential treatment, persons belonging to such groups shall have the right, as far as is compatible with public order and security, to establish and maintain their own schools and cultural or religious institutions, and to use their own language and script in the press, in public assembly and before the courts and other authorities of the State, if they so choose." See UN Doc E/CN.4/SR.52, 9 cited according to P. Thornberry, *International Law and the Rights of Minorities* (Clarendon, Oxford, 1991), p. 134.

<sup>6</sup> "The General Assembly, considering that the United Nations cannot remain indifferent to the fate of minorities,

Considering that it is difficult to adopt a uniform solution for this complex and delicate question, which has special aspects in each State in which it arises,  
Considering the universal character of the Declaration of Human Rights,

the UN in this field for years. There can be no doubt that the invitation to undertake further studies was as much an expression of a real need for more discussion and thought on this issue as it was a delaying tactic. It needs, however, also to be recognized that the many studies undertaken on this basis, neglected as they often have been at the first instance, have contributed to the construction of an enormous edifice of knowledge on an extremely complex issue.

On a whole, it can be said that this reluctance to act coupled with a request for more knowledge was a characterizing trait of the entire development of minority rights law within the UN system in over half a century. By this process, important insights were gained, but many issues were also re-elaborated over and over again an uncountable number of times. Depending on the position taken, the results can be judged differently. If a critical stance is taken, it could be argued that the results of this standard-setting process were not commensurate to its costs. For a long time, there was the impression that decades of debating and negotiating had brought about very little in view of the fact that many of the solutions that were finally achieved were on the table from the very beginning.<sup>7</sup> On the other hand, a far more optimistic perspective can also be adopted. First of all, over a period of six decades, the minority problem itself has changed considerably. New needs of traditional, established minorities have come up and they proved more difficult to tackle. At the same time, new group formations claiming a right to be protected have surfaced. The issue of 'new minorities' is becoming a main bone of contention in any discussion on international minority rights.<sup>8</sup> Secondly, and perhaps even more importantly, the long negotiating process, redundant as it may appear at first sight, has in reality fulfilled an additional role: it has transformed a (unjustly) tainted subject into a politically correct issue once again. Many of the fears surrounding the concept of minority protection at the beginning of this process have disappeared along this road. In this sense, the long standard-setting process within the UN was not only about finding technical solutions but also about rendering them politically palatable to the primary subjects of international law, the states.

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Decides not to deal in specific provisions with the question of minorities in the text of the Declaration,

Refers to the Economic and Social Council the texts submitted in document A/C.3/307/Rev.2 and requests the Council to ask the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to make a thorough study of the problem of minorities, in order that the United Nations may be able to take effective measures for the protection of racial, religious or linguistic minorities."

<sup>7</sup>) In the meantime, however, this impression is no longer there. As will be shown later on, the last years have been characterized by the development of a rich panoply of new institutes and problem solution instruments.

<sup>8</sup>) See P. Hilpold, 'Neue Minderheiten im Völkerrecht und im Europarecht', 42:1 *Archiv des Völkerrechts* (2004) pp. 80–110.

## 2. *The Sub-Commission's Contributions to the Development of Protection Standards, 1947–1989*

In the first four decades of its activity, the Sub-Commission's contributions to the standard-setting process in the field of minority rights was not a linear, steady one but proceeded rather by fits and starts. A first period of great activism and enthusiasm for minority concerns evolved to a far longer interval of neglect for this issue.<sup>9</sup> During the first years of its existence, the Sub-Commission proposed a specific minority protection clause for the Universal Declaration of Human Rights, the adoption of specific mechanisms for the solution of concrete minority rights disputes and, finally, the insertion of an apposite provision on minority protection in the draft International Covenant on Civil and Political Rights (ICCPR). Only the last endeavour was successful. All other initiatives met with clear resistance by the Commission on Human Rights and, through this body, by the states. This opposition went so far that the existence of the Sub-Commission itself came to be endangered.<sup>10</sup> At the end, the Sub-Commission survived, and it adhered to the wishes of the great majority of states to concentrate on the issue of discrimination. The fight against discrimination was conceptually neutral; it gave expression to an overarching goal of human rights law, and most of all, it fit better into a political environment that gave primary importance to the principle of sovereign equality of states as it applied equally to all states, independently from the fact whether minorities lived within a state's territory or not. While this new orientation meant that between 1953 and 1969 little was brought forward in the field of minority rights in the Sub-Commission, this period was for minorities not a lost one. In fact, in the course of this refocusing of the Sub-Commission's agenda, the perception of what discrimination meant was continuously refined, and at the end, the necessity to deal again with minority rights was apparent. With its strong record of anti-discrimination studies and activities, the Sub-Commission could approach the minority rights question from a new perspective, which was now far away from the conservative, group-oriented stance of the inter-War period and far better integrated into the individualist human rights backbone of the UN system.<sup>11</sup> A decisive step towards the full

<sup>9</sup> See, for the following in great detail, L. Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff Publishers, Leiden/Boston, 2005) pp. 121 *et seq.*

<sup>10</sup> In 1951, ECOSOC considered the liquidation of the Sub-Commission and the transferral of its functions to the Commission on Human Rights. This met, however, with the opposition by the General Assembly, which lauded the work done by the Sub-Commission both in the field of prevention of discrimination as with regard to minority protection. See Thio, *supra* note 9.

<sup>11</sup> Cf. I. Schulte-Tenckhoff, 'Minorités en Droit International', in A. Fenet *et al.* (eds.), *Le Droit et les Minorités* (Bruylant, Brussels, 2000) pp. 17–112; P. Thornberry, *International Law and the Rights of Minorities* (Clarendon, Oxford, 1992).

rehabilitation of the minority rights issue came in 1969 when the Economic and Social Council (ECOSOC) authorized the Commission on Human Rights to nominate a special rapporteur that would undertake a comprehensive study on minorities on the basis of Article 27 of the ICCPR.<sup>12</sup> Another eight years passed before Special Rapporteur Professor Francesco Capotorti, nominated in 1971, presented in 1977 the results of his comprehensive theoretical and empirical studies on the present status of minority rights law.<sup>13</sup> The entry into force of the ICCPR in 1976—with its first general ‘hard law’ provision on the rights of persons belonging to minorities—and the completion of the Capotorti study a year later marked the beginning of an entirely new era in which the most important elements of the minority rights question had been identified and were now on the table for further discussion. With this political consensus achieved, the foundations were laid for further standard-setting as a technical challenge.

Thus, it might be true that the period of gestation, during which a solid basis for further standard-setting had come into being within the UN system, was an extremely long one and that enormous energy was invested for results that did not reveal immediately their full value. On the other hand, all the patience and hard work proved to be worthwhile in the long run as the years 1976 and 1977 were something like a watershed in the development of universal minority rights. Based on an individualist approach, on comprehensive studies on anti-discrimination and on continuous dialogue with states, a framework emerged that transformed a very contentious issue into a subject suitable for constructive dialogue. All the other successes of later years would have been unthinkable without this foundational work of the first decades. The fact, however, that from then on within the relevant UN institutions an open, broad discussion on minority issues was possible did not mean, on the other hand, that a general consensus for the need of an effective protection of minorities could be presumed. The standard-setting process continues to be a difficult struggle even today. Many patterns of the recalcitrant attitude characterizing the behaviour of states in the first years continue to re-emerge. Delaying tactics, a proclaimed ‘need for further studies’ and a continuous return to questions on which previously a consensus had already been found are still characterizing these norm-creating activities.<sup>14</sup> On the other hand, there can be no doubt that continuous progress in the further refinement of the protective instruments (which are primarily of a soft law nature) and in the understanding of the underlying complex issues is taking place.

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<sup>12</sup> See ECOSOC resolution 1418 (XLVI) of 6 June 1969.

<sup>13</sup> See F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/384/Rev.1 (1979), UN Sales No. E.91.XIV.2.

<sup>14</sup> R. Letschert, ‘Will Further Progress Be Achieved this Year?: A Review of the 9th and 10th Session of the UN Working Group on Minorities’, 3 *European Yearbook of Minority Issues* (2003/4) p. 476.

### 3. *The Further Steps in the Drafting of Minority Rights Standards: Between Cautious Political Realism and Utopian Concepts and Demands*

1989 and 1990 was surely for many a period of revelation, and for some a period in which the end of ideological conflict (or even ‘the end of history’<sup>15</sup>) seemed near. This impetus propelled, in particular, those agendas that in the past had been ‘frozen’ because of ideological rifts between East and West.<sup>16</sup>

Work on an universal declaration on minority rights, although proposed already in the Capotorti report of 1977<sup>17</sup> and started in 1979, really gained momentum in 1989 and was soon after successfully concluded. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992<sup>18</sup> was a milestone in the codification process of universal minority rights. Though often criticized as too succinct and too meagre, it does not constitute merely an interpretative instrument with regard to Article 27 of the ICCPR, but it develops UN minority rights law further in many senses. The following aspects merit particular emphasis:

- The Declaration is, according to its preamble, only ‘inspired’ by Article 27 and not ‘based on’ this provision. Therefore, this Article does not limit its reach, but it builds on the whole array of universal, multilateral and even bilateral instruments touching—directly or indirectly—upon minority rights. This broad basis has to be taken into consideration in the interpretation of this Declaration, and it attributes to it an open, flexible nature.<sup>19</sup>
- The Declaration takes a decisively positive stance towards multiculturalism. It contains not only an invitation for tolerance like Article 27 (“persons belonging to minorities shall not be denied the right . . .”), but it attributes positive rights (“have the right”).<sup>20</sup>
- According to Article 1 of this Declaration, “States shall protect the national or ethnic, cultural, religious and linguistic identity of minorities [. . .] and

<sup>15</sup> Cf. F. Fukuyama, *The End of History and the Last Man* (Free Press, New York 1992).

<sup>16</sup> For a general perspective on minority protection in a changed international environment, see D. Thürer, ‘National Minorities: A Global, European and Swiss Perspective’, 19 *The Fletcher Forum of World Affairs* (1995) pp. 53–69.

<sup>17</sup> See Capotorti, *supra* note 13, para. 617.

<sup>18</sup> UN General Assembly resolution 47/135. See generally, on this Declaration, P. Hilpold, ‘Minderheitenschutz im Rahmen der Vereinten Nationen’, *Schweizerische Zeitschrift für internationales und europäisches Recht* (1994) pp. 31–54.

<sup>19</sup> Cf. P. Thornberry, ‘The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update’, in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (Abo Akademi University, Abo/Turku, 1995) p. 37.

<sup>20</sup> Cf. P. Thornberry, ‘An Unfinished Story of Minority Rights’, in A. M. Bíró and P. Kovács (eds.), *Diversity in Action* (LGI/OSI, Budapest, 2001) p. 45.

shall encourage conditions for the promotion of that identity.” While it has been contentious for a long time whether Article 27 contains positive obligations,<sup>21</sup> the Declaration leaves no doubt as to the existence of such obligations and requires even the ‘promotion of the minority identity’.

- While the language rights<sup>22</sup> and the educational rights<sup>23</sup> are somewhat weakly formulated—in particular in view of the fact that there are many examples of ‘best practice’ in these fields through which a rich panoply of valid instruments has been created and that the drafters of the Declaration could have relied on—the Declaration does invite states to “consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.”<sup>24</sup> Guaranteeing effective participation has been recognized in the meantime as one of the most valuable instruments for the promotion of minority rights, and for the achievement of this goal, a series of related rights are also furthered. Effective participation allows minorities (or, respectively, their members) to take their destiny, within the existing constitutional framework, into their own hands.<sup>25</sup>

Of considerable relevance are also Articles 2(4) and 2(5) of the Declaration that grant to persons belonging to minorities the “right to establish and maintain their own associations” and, respectively, the “right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.” Both rights are of fundamental importance for the strengthening of the group—in a cultural sense as well as with respect to their political position. Of a particularly innovative character is Article 2(5). As the redrawing of borders has often created minorities, their cultural survival depends on the

<sup>21)</sup> See, on this discussion, A. Spiliopoulou-Akermark, *Justifications of Minority Protection in International Law* (Kluwer Law International, The Hague, 1997) pp. 127–131. For an answer in the affirmative, see C. Tomuschat, ‘Protection of Minorities Under Article 27 of International Covenant on Civil and Political Rights’, in R. Bernhardt *et al.* (eds.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler* (Springer, Berlin *et al.*, 1983) pp. 949–979.

<sup>22)</sup> See Article 4(3) of the Declaration.

<sup>23)</sup> See Article 4(4) of the Declaration.

<sup>24)</sup> See Article 4(5) of the Declaration.

<sup>25)</sup> For the instruments through which such effective participation could be achieved, see, *inter alia*, M. Brems, *Die politische Integration ethnischer Minderheiten aus staats- und völkerrechtlicher Sicht* (Peter Lang, Frankfurt/Main, 1995), who refers to: autonomy schemes; federalism; regionalism; exceptions to minimum quorum provisions in the electoral legislation; the introduction of blocking vetoes in legislative areas of minority interest; and guarantees for special minority representatives in parliament.

possibility to maintain original contacts with the mother nation (the kin state)<sup>26</sup> or with other parts of the group that originally constituted a unity.

When evaluating this Declaration, one should abstain from measuring it on unrealistic pretensions or on goals the negotiating states would never have adhered to. The substantive weaknesses, its non-binding character and the total lack of implementation machinery, are, in the end, non-decisive for an overall evaluation of this document. In view of its universal nature, there is far more substance there than one could have dreamt of only a few years earlier. Also, the non-binding character of this Declaration and the lack of implementation machinery are not to be overestimated. In fact, as it is known, in international law the effectiveness of norms is not dependent in the same way on their formal qualification as this is the case for municipal law. Far more relevant is their acceptance by the states.<sup>27</sup> Also, with regard to the ways effective implementation can be assured, international law is far more variegated than national law.<sup>28</sup> As the Declaration has become the most important frame of reference within the UN system when questions regarding minorities are discussed,<sup>29</sup> this document profits from a broad set of implementation machineries created within the UN and standing formally outside this instrument.

After this achievement, two different approaches have been considered. On the one hand, there was a call for further norm creation also in the field of substantive provisions. It was thinkable, at least in the abstract, to follow the usual procedure in the field of human rights norm creation also here: after a declaration has been adopted, negotiations on a respective convention could start. Such an idea is not new; already in the early 1950s, it was proposed by the Sub-Commission.<sup>30</sup> Now and then it reappears also in the actual work of the UN,<sup>31</sup> but generally, this approach is held to be unrealistic for the moment.<sup>32</sup> Another

<sup>26</sup> On the position of the kin state in international law, see P. Hilpold and C. Perathoner, *Die Schutzfunktion des Mutterlandes im Minderheitenrecht* (Berlin-Verlag, Berlin, 2006).

<sup>27</sup> In fact, as this Declaration was accepted by consensus by the UN General Assembly, it is considered to give expression of very strong support by the state community.

<sup>28</sup> See, *inter alia*, L. Henkin, *How Nations Behave* (Columbia University Press, New York, 1979) and A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, Mass. *et al.* 1995).

<sup>29</sup> Cf. Thio, *supra* note 9.

<sup>30</sup> Cf. *UN Yearbook*, 1951, p. 496. Capotorti, *supra* note 13, p. 102, was, on the other hand, critical about such an idea and proposed a declaration that would specify the measures for the observance of the rights recognized by Article 27.

<sup>31</sup> For further details, see the paper presented by Minority Rights Group International, *Possible New United Nations Mechanism for the Protection and Promotion of the Rights of Minorities*, E/CN.4/Sub.2/AC.5/2003/WP.3 (5 May 2003), p. 7.

<sup>32</sup> Minority Rights Group International, *ibid.* pp. 7 *et seq.*, proposes rather a different way: "Given the delays that the drafting of a Convention could entail, and the likely difficulty in securing

current call—and presumably the prevailing one—asserts that the norm creating process has come to its natural end as more or less all possible options have been tested.<sup>33</sup>

This is true if a further qualification is made. Standard-setting in the area of substantive rights has surely brought about a rich set of solutions, and it would be hard to follow completely new paths. On the other hand, implementation needs standardization or to put it differently the identification of common goals, benchmarks and ‘best practice’-rules. In this field, standardization has only just begun.<sup>34</sup>

In this area, the contributions by Professor Asbjorn Eide merit particular consideration. In 1989, the Sub-Commission entrusted Professor Eide with the preparation of a report on national experience regarding peaceful and constructive solutions of problems involving minorities.<sup>35</sup> This report was completed in several stages within three years. The final report, the result of close interaction with states, was presented to the Sub-Commission in 1993.<sup>36</sup> At first sight, the approach adopted in the outline for this study is a very modest one: it is not a study of minority rights as such, and it does not claim to present a comprehensive view of approaches to minority situations worldwide.<sup>37</sup> It is a study “on ways in which majorities and minorities can find constructive ways to live together within the boundaries of sovereign States, based on principles of contemporary international law.”<sup>38</sup> Looked at more closely, however, this approach appears to be a very sensible and, at the same time, an ambitious one. It marks a clear departure from the confrontational attitude that in the past often characterized the relationship between majorities and minorities, to the detriment of both. Professor Eide, already in 1993, stated that his study can only be the beginning of a process, and this process has actually taken place in the form of

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universal political support, MRG suggests that an optional protocol to the ICCPR based on the Declaration would be the speediest way of developing a legally-binding instrument on minority rights. The crucial concern is that any new standard must strengthen minority rights protection, and not in any way undermine existing standards.”

<sup>33</sup>) Cf. Thornberry, *supra* note 19, pp. 56 *et seq.*: “There is some feeling in the international community that the age of standard-setting in human rights is over, and that attention should be directed to making the standards effective through international and domestic mechanisms.”

<sup>34</sup>) In the meantime, within the Working Group on Minorities attempts are under way to elaborate a ‘Code on Conduct’ which should give more strength to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

<sup>35</sup>) Cf. resolution 1989/44 of 1 September 1989.

<sup>36</sup>) Cf. A. Eide, *Peaceful and Constructive Approaches to Situations Involving Minorities*, E/CN.4/Sub.2/1993/34 and Add.1–4.

<sup>37</sup>) See *ibid.*, paras. 17 *et seq.*

<sup>38</sup>) *Ibid.*, para. 17.

further studies<sup>39</sup> as well as through the fact that the search for ‘peaceful and constructive approaches’ has become one of the most important goals in minority policy.

In the field of standard-setting, particular contributions have been given by the Human Rights Committee. The relative ‘jurisprudence’ will be examined in detail below as these pronouncements have led the clarification of many contentious issues in international minority law. A few words shall be said, however, in advance on General Comment No. 23 regarding the rights of minorities.<sup>40</sup> This General Comment, issued by the Human Rights Committee (HRC) in 1994, is a stocktaking of achievements in this field up to that date. The relative endeavour resulted in a very progressive, minority-friendly document. This General Comment clearly distinguishes the right of minorities (granted in Article 27 of the ICCPR) from the right to self-determination (Article 1 of the ICCPR). On the other hand, it confirms that also indigenous people are falling in the purview of minority rights protection. In this document, the HRC opens very broadly to the so-called ‘new minorities’. According to this body, individuals belonging to minorities can take recourse to Article 27 even if they are not permanent residents in the respective countries.<sup>41</sup> “Thus, migrant workers or even visitors in a State constituting such minorities are entitled not to be denied the exercise of those rights.”<sup>42</sup> Needless to say, this statement provoked harsh criticism both in academia and among governments.<sup>43</sup> The HRC has also taken a strong position with regard to the question whether claims for positive measures can be based on Article 27. The HRC affirmed that “a State party is under an obligation to ensure that the existence and the exercise of [the rights guaranteed by this provision] are protected against their denial or violation.” “Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.”<sup>44</sup> Cautiously, the

<sup>39</sup> See A. Aide, *Progress Report on the Update to the Study on Peaceful and Constructive Approaches to Situations Involving Minorities*, submitted in accordance with Sub-Commission resolution 2002/16, E/CN.4/Sub.2/2003/21.

<sup>40</sup> CCPR/C/21/Rev.1/Add.5.

<sup>41</sup> Cf. General Comment No. 23, para. 5.2.

<sup>42</sup> *Ibid.*

<sup>43</sup> This holds true, in particular, for the reference to ‘visitors’. If this term is qualified, however, it loses much of its extravagance. In fact, this term could be read as nothing more than a shorthand reference to groups such as refugees or persons recently arrived and who are culturally related to a minority already existent in the country. These groups (or, respectively, their members) often want to preserve their specific identity and are therefore in a similar situation as minorities, but for legal reasons they do not qualify as minorities, not even as ‘new minorities’. Cf. A. Spiliopoulou-Akermark, *supra* note 21, p. 177, referring, *inter alia*, to Russians in the Baltic states who arrived in recent years.

<sup>44</sup> Cf. General Comment No. 23, para 6.1.

HRC confronts also the question of minority rights as group rights as well as the issue whether positive measures can be adopted in this regard:

positive measures by States may also be necessary to protect the identity of a minority and the right of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.<sup>45</sup>

The HRC touches even upon the neuralgic issue of land rights and defines them as ‘cultural rights’, thereby bringing them into the purview of Article 27. In view of the delicate nature of this question, this happened, however, in a very prudent if not contorted way.<sup>46</sup>

On a whole, the General Comment was much more than a simple stocktaking on UN practice in the field of minority rights. Alongside the declaratory elements and the attempt to present minority issues not as a problem but as a positive challenge to any society,<sup>47</sup> the General Comment is replete with innovative traits. After more than a decade since the issuance of the General Comment, these innovations have been accepted in part. In part, they are, however, still disputed. The HRC has continued its activity, and further institutions have taken up their activity so that the General Comment has come to be seen in a much different light.<sup>48</sup> On a whole, it has proven to be an important contribution for the further development of minority rights. In the meantime, however, voices are growing ever louder that are calling for a new edition of this General Comment.<sup>49</sup>

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<sup>45</sup>) General Comment No. 23, para 6.2.

<sup>46</sup>) In fact, the HRC observed in para. 7 of the General Comment “that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.” This affirmation will meet with general consent insofar as it refers to indigenous peoples. But, they are not the only addressees of this provision as it is made clear by the expression ‘especially’. To define land rights as cultural rights for minorities in general is, however, somewhat daring.

<sup>47</sup>) This attitude can clearly be deduced from the concluding paragraph (para. 9) where the HRC describes the survival and continued development of the cultural, religious and social identity of minorities as an “enrichment of the fabric of society as a whole.”

<sup>48</sup>) Therefore, it would be difficult to distinguish between elements of the General Comment that are clearly endorsed by the state community and others that are not. The General Comment has rather been itself subject to clarification and qualification so that a present-day reading of this document has to take into consideration all the discussions of the past years.

<sup>49</sup>) See Minority Rights Group International, *supra* note 31, p. 8. Notwithstanding the clarification process that has taken place in the last years (and referred to in the preceding note), there is a clear need for more transparency as to the law actually applicable at present.

#### 4. The 'Jurisprudence' of the HRC<sup>50, 51</sup>

There can be no doubt that in the last decades the HRC has been one of the most important institutions with regard to standard-setting in the field of minority rights, a role further enhanced by the authoritative position this body of independent experts has assumed. The leading cases have been widely commented in legal doctrine. Some short remarks to these statements seems to be appropriate in this context.

A bold step towards the development of new universal standards was taken by the HRC already at the outset of its quasi-judicial activities. In *Sandra Lovelace v. Canada* (Communication No. 24/1977),<sup>52</sup> the HRC had to undertake a difficult balancing act between the rights and aspirations of the collective and those of the individual. According to the Canadian Indian Act in force at that time, an Indian woman who married a non-Indian man lost her rights and status as an Indian, and therefore also the right to reside on the land of her band's reserve. She could not regain her rights even after her marriage was annulled. The HRC accepted, in principle, the need for restrictions on the right to residence on a reserve but required, at the same time, that limitations affecting the rights of individual members of a minority must be shown to have an objective and reasonable justification, and be necessary to preserve the identity of the group. These conditions were not given in the present case and therefore the prohibition mentioned was declared as not being in conformity with Article 27. Minority protection measures are not an end in itself. The ultimate beneficiary has to be the individual. The collective dimension has to be considered insofar as it is necessary to protect the individual's identity as a group member.

At the basis of *Kitok v. Sweden* (Communication No. 197/1985)<sup>53</sup> was a similar conflict. Kitok, an ethnic Sami of Sweden, claimed the right to reindeer-breeding and to fish and to hunt, rights reserved to Sami villages (so-called 'Samebys') according to the 1971 Reindeer Husbandry Act. The relevant *Sameby*

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<sup>50)</sup> To be precise, the HRC is not a judicial organ. On the other hand, its competence to receive and to consider communications by individuals on the basis of the First Optional Protocol of the ICCPR resembles a judicial activity. See A. Amor, 'Le Comité de Droits de l'Homme des Nations-Unies: Aux Confins d'une Jurisdiction Internationale des Droits l'Homme?', in N. Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Martinus Nijhoff Publisher, Leiden/Boston, 2004) p. 53 saying: "Rien, ne distingue, du point de vue formel, les constatations des décisions juridictionnelle."

<sup>51)</sup> With regard to this 'jurisprudence', see G. Pentassuglia, *Minorities in International Law* (Council of Europe Publishing, Strasbourg, 2002) pp. 97 et seq.; A. Moucheboeuf, *Minority Rights Jurisprudence* (Council of Europe Publishing, Strasbourg, 2006); and Spiliopoulou-Akermark, *supra* note 21, pp. 154 et seq.

<sup>52)</sup> CCPR/C/OP/1 at 10 (1985).

<sup>53)</sup> CCPR/C/33/D/197/198 (1988).

denied membership to Mr. Kitok, and this denial was affirmed by the judges of appeal. The HRC recognized that there was an “apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of the minority.” It expressed even “grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with Article 27 of the Covenant.” At the end, however, this legislation and its handling was considered to be reasonable and consistent with Article 27, and all the doubts and worries about the disproportionality of these measures and about the ignoring of objective ethnic criteria in determining membership of a minority were brushed aside. Confronted with the difficult task to strike a balance between the interests of the minority as a collective and those of the single members of the groups, the HRC took position in favour of the former in view of the need to maintain the economic and ecological sustainability of the particular way of life of the Sami population. From the viewpoint of the individual, the ‘views’ expressed by the HRC in this case may be unsatisfactory, but from a general minority rights perspective, these findings represent an important step forward as they clearly evidence the criteria minority rights provisions have to fulfil in a legal order based on the protection of the individual.

In several cases (see the *Kitok*-case (Communication No. 197/1985); the *Lubicon Lake Band*-case (Communication No. 167/1984);<sup>54</sup> the *Apirana Mahuika et al.*-case (Communication No. 547/1993);<sup>55</sup> and the *Diergaardt et al.*-case (Communication No. 760/1997)), the HRC drew a clear line between minority rights according to Article 27 and the right to self-determination according to Article 1 of the Covenant. The Optional Protocol has provided for a right of individuals to advance their claims and not for groups.

The HRC has always been very perceptive towards claims according to which the culture and the way of life of a minority was threatened by activities carried out or permitted by the government. On the other hand, it was, however, also clear that some form of compromise had to be found between the right of minorities to maintain their traditional lifestyle (and thereby essential traits of their culture) and the need to allow for further development of the economy as a whole.<sup>56</sup> In several cases, the attempt to find a fair equilibrium between these

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<sup>54</sup>) CCPR/C/33/D/167/1984 (1990).

<sup>55</sup>) CCPR/C/70/D/547/1993 (2000).

<sup>56</sup>) The solution found by the HRC was, however, not uncontroversial. See the individual opinion by Mr. Ando in *Lubicon Lake Band*, Communication No. 167/1984, CCPR/C/33/D/167/1984 (1990), who stated that “outright refusal by a group to change its traditional way of life may hamper the economic development of the society as a whole.”

conflicting goals has become evident.<sup>57</sup> As was very clearly exposed, in particular in the *Apirana Mahuika et al. v. New Zealand*-case (Communication No. 547/1993),<sup>58</sup> two criteria were decisive for the HRC to solve this difficult conflict. It had to be controlled whether meaningful consultation had taken place and whether the measures planned or carried out were economically sustainable:

In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia, to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions among Maori, nevertheless, the Committee concluded that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing rights, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation [. . .] are compatible with article 27.

Questions of balancing arose also with regard to the issue of the ‘minority in the minority’. As it is known, it often happens that on the territory where the minority settles in a more or less compact form the members of the majority (or different group) constitute again a specific minority. Should they be entitled to protection on the basis of Article 27? This is a difficult question because what has to be considered a fair solution will depend on the perspective taken.<sup>59</sup> On the one hand, the ‘minority in the minority’ deserves protection like the larger minority as the basic needs are the same. It can also be argued that the needs of the former group are even more accentuated as in view of their size they are more vulnerable. On the other hand, the degree of protection granted to the larger minority should not suffer from this situation. Otherwise, the danger would be that the majority could circumvent the minority protection obligation by a planned resettlement of members of the majority to the territory of the minority. From a more political point of view, it could be said that the larger minority should demonstrate the same care and attention to the smaller one as it pretends from the majority. In *Ballantyne, Davidson and McIntyre v. Canada* (Communications Nos. 359/1989 and 385/1989),<sup>60</sup> the HRC did not seem to perceive the full complexity of this

<sup>57</sup> Among them, the following can be mentioned: *Lubicon Lake Band v. Canada* (*ibid.*); *Ilmari Lämsman et al. v. Finland* (Communication No. 511/1992); *Jouni Lämsman, Eino Lämsman and the Muotkatunturi Herdsmen Committee v. Finland* (Communication No. 1023/2001); *Apirana Mahuika et al. v. New Zealand* (Communication Co. 547/1993); and, in a larger sense, *Hopu and Bessert v. France* (Communication No. 549/1993).

<sup>58</sup> CCPR/C/70/D/547/1993 (2000).

<sup>59</sup> For more details, see P. Hilpold, ‘Der Schutz der Minderheit in der Minderheit im Völkerrecht’, in P. Hilpold and C. Perathoner (eds.), *Die Ladiner—Eine Minderheit in der Minderheit* (Neuer Wissenschaftlicher Verlag, Vienna, 2005) pp. 9–30, and A. Eisenberg and J. Spinner-Halev (eds.), *Minorities within Minorities—Equality, Rights and Diversity* (Cambridge University Press, Cambridge, 2005).

<sup>60</sup> CCPR/C/47/D/359/198 and 385/1989/Rev.1 (1993).

issue. English-speaking persons in the Province of Quebec could not take recourse to Article 27 as this provision, according to the HRC, refers to minorities in the state as a whole (to ‘ratifying states’) and not to minorities in a province.

This position met with criticism both in literature<sup>61</sup> and with some members of the HRC.<sup>62</sup> By the adoption of this provision, the HRC simply defined the minority problem away—probably for fear of opening a Pandora’s box that could not be controlled on the UN level. It has to be mentioned that within the ambit of the Framework Convention for the Protection of National Minorities (FCNM), the problem of the ‘minority-in-a-minority’ has been tackled in a far more appropriate way. In its opinion on Finland of 22 September 2000, the Advisory Committee on the FCNM clearly stated that also the ‘minority-in-a-minority’ deserves protection:

According to the Report, the Finnish-speaking population living in the province of Åland can be considered a ‘minority-in-a-minority’. Taking into account the level of autonomy enjoyed and/or the nature of the powers exercised by the Province of Åland the Advisory Committee is of the opinion that the Finnish-speaking population there could also be given the possibility to rely on the protection provided by the Framework Convention as far as the issues concerned are within the competence of the Province of Åland. The Advisory Committee is of the opinion that Finland should consider this issue in consultation with those concerned.<sup>63</sup>

It can be said that the subject of the ‘minority-in-a-minority’ is not only strictly one of minority rights. It is rather the case that it touches upon questions of democracy and human rights in general.<sup>64</sup>

In several other cases in which the HRC dealt with discrimination issues, minority rights were directly or indirectly involved.<sup>65</sup> In this context, the case

<sup>61</sup> See, *inter alia*, P. Hilpold, *Modernes Minderheitenrecht* (Manz *et al.*, Vienna *et al.*, 2001) pp. 155 *et seq.*

<sup>62</sup> See, in particular, the individual opinion by Mrs. Elizabeth Evatt *et al.*: “To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity.”

<sup>63</sup> Cf. ACFC/INF/OP/I(2001)002, para. 17.

<sup>64</sup> It is interesting to note that the particular ‘minority-in-a-minority’-problem on the Åland Islands had to be affronted also on the basis of EU anti-discrimination legislation. This has been indirectly admitted by the Government of Finland in its comments on the second opinion of the Advisory Committee (GVT/COM/II(2006)004, p. 5):

“For the purposes of the transposition of EU Council directives 2000/43/EC and 2000/78/EC, the Government of Åland has passed regional legislative acts on the prevention of discrimination in Åland (2005/66), the office of a Discrimination Ombudsman (2005/67) and a discrimination board (2005/75).”

<sup>65</sup> Cf. *Waldman v. Canada* (Communication No. 694/1996); *Ignatane v. Latvia* (Communication No. 884/1999); *Coeriel and Aurik v. Netherlands* (Communication No. 453/1991); and *Ross v. Canada* (Communication No. 736/1997).

*Waldman v. Canada* (Communication No. 694/1996)<sup>66</sup> deserves particular mention. In this case, the HRC voiced the opinion that the Canadian legislation according to which in the Province of Ontario only the Roman Catholic minority was eligible for private school funding was discriminatory in relation to other religious minorities (in particular towards the Jewish community). On the basis of these views, it can be argued that states may not be obliged to fund minority schools, but once funding is granted, this has to happen in a non-discriminatory manner.<sup>67</sup> In *Diergaardt et al. v. Namibia* (Communication No. 760/1997),<sup>68</sup> again fundamental questions of minority law were at issue. The case regarded the so-called 'Rehoboth Baster Community', a group of about 35,000 people who are descendants of indigenous Khoi and Afrikaans settlers and who have been living on a territory of 14,216 square kilometres south of Windhoek (Namibia) since 1872. They developed their own society, culture, language and economy and were granted some form of autonomy by the Government of Namibia. Subsequent to the independence of Namibia, the Government, however, withdrew this autonomy, and the Rehoboth Baster Community alleged heavy interferences into their cultural and political life and into their property rights. For example, they were expelled from the lands that they held in collective property. With regard to the encroachment on the land rights of the Community, the HRC made the following distinction in respect to its earlier jurisprudence:

As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.<sup>69</sup>

In view of its earlier attitude in similar cases, one cannot help but to find these statements somewhat incoherent. Furthermore, these views raise the question: what are the essential elements qualifying a group as a minority? As it seems, in the

<sup>66</sup>) CCPR/C/67/D/694/1996.

<sup>67</sup>) This holds true even if the views in *Waldman v. Canada* were based on Article 26 and not on Article 27 of the Covenant.

<sup>68</sup>) CCPR/C/69/D/760/1996.

<sup>69</sup>) *Ibid.*, para. 10.6.

present case, a group of people with many common traits that usually distinguish a minority (i.e. language, history and blood ties, way of life, societal bonds) were not sufficient even if the respective group had already lived together for some 125 years. The HRC did not fail, however, to confirm the existence of another serious violation of the Community's rights. The barring of the use of Afrikaans in written or oral communications with the authorities (according to a circular, civil servants were instructed not to reply to the authors' written or oral communications with the authorities in the Afrikaans language) has been qualified as a violation of Article 26 of the Covenant.<sup>70</sup>

From a European perspective, particularly interesting would have been the views on the so-called 'Breton-cases' concerning communications by French citizens of Breton origin alleging the violation of their language rights and brought forward, *inter alia*, under Article 27 of the Covenant. The HRC declared these communications, however, as inadmissible insofar as they were based on this Article. In fact, France when acceding to the Covenant in 1980 had issued the following 'declaration':

In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.

This declaration was treated by the HRC as a reservation excluding the application of Article 27 in respect to France.

On a whole, it can be said that the HRC case law with respect to Article 27 reflects all the ambiguities and uncertainties characterizing international minority law in general. In view of the far-reaching dissent cutting through the state community with regard to this issue and the extensive political reservations some states nurture against any form of minority protection and the scant wording of Article 27, the substance of the statements by the HRC seem, on the contrary, rather impressive. The most far-reaching statements have been made with regard to indigenous peoples. It seems that the speciality of indigenous rights and the fact that these groups in general pose no challenge to state sovereignty has made greater concessions possible. Of course, Article 27 does not distinguish between indigenous peoples and minorities in general, and there is the abstract possibility that these statements could one day find general application. Up to the present, the HRC has been, however, very keen in distinguishing the factual situations. Between these two groups, there is a clear difference with regard to the extent the preservation of minority culture is associated with land rights. For many protection

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<sup>70</sup> *Ibid.*, para. 12: "Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory manner. The State party is under an obligation to ensure that similar violations do not occur in the future."

standards, it does not appear that they have to be respected objectively in each and every case. The HRC has rather tried hard to take into consideration behaviour and subjective attitude of all parties involved and to assess the conditions posed by the specific circumstances. In an overall assessment, it can be said that the approach chosen by the HRC in evaluating communications that touched upon Article 27 was very much the same as the one characterizing the political activities of the relevant UN bodies: the main goal was group accommodation and not the attempt to judge ‘who is right’. This approach has, of course, its limits, and therefore many contentious issues have been simply circumvented. In particular, this regards the question of the ‘minority-in-a-minority’ and the issue when a group evolving in a non-traditional setting becomes a minority according to Article 27. These deficiencies should not, however, lead to an overall negative judgment. In fact, the activity of the HRC goes on, and important statements in this field are still to be awaited—in particular if the responsible political bodies within the UN continue to give the lead for which they have been created to provide.

### ***5. Further Institutional Developments and Their Impact on Substantive Standard-Setting***<sup>71</sup>

Without doubt, the establishment of the Working Group on Minorities by the Sub-Commission on the Promotion and the Protection of Human Rights constituted a further milestone in the UN standard-setting activities in the field of minority rights, even though this reform is more often looked at from an institutional viewpoint and as an initiative to ensure the practical implementation of minority rights. That this body will over time also give—at least indirectly—an important contribution to standard-setting was clear already from an attentive reading of its official institutional tasks:

- to review the promotion and practical realization of the Minority Declaration;
- to examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments;
- to recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.<sup>72</sup>

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<sup>71</sup>) Remarks concerning institutional elements will be kept here to a minimum. For a more detailed analysis of this aspect of UN minority protection, *see* the contributions in this issue by Asbjørn Eide and Rianne Letschert; Tom Hadden; Gay McDougall; and Clive Baldwin and William Schabas.

<sup>72</sup>) Cf. Commission on Human Rights resolution 1995/24, para. 9.

It is true that the immediate consequence resulting from this initiative was the establishment of a forum for discussion, for furthering transparency and mutual understanding and for an intense interaction between governments, UN institutions, minority representatives and civil society. All these activities, however, also evidence the many uncertainties surrounding basic aspects of international minority law, therefore highlighting the need for further studies, political discussion and norm refinement. An intense dialogue between all interested parties (and this category was defined very broadly) and between different institutional hierarchies cannot work without a clear framework for reference. On this basis, an enormous 'norm hunger' and 'thirst for knowledge' surfaced, and subsequently, the members of the Working Group and the broader public were fed more than abundantly with studies and reports. These papers were elaborated not only by the members of the Working Group but also by leading scholars in this field who came to participate in the workings of this institution with great enthusiasm.<sup>73</sup> How should the outcome be judged? There can be no single, final verdict in this respect. From an academic viewpoint, the enormous intensity by which research and studies in the field of minority rights have been carried out is only to be welcomed. While there is surely some redundancy in this work, this is a natural consequence of a heightened interest for this subject and a phenomenon academics are familiar with in their work. On the other hand, care must be taken that the discussion does not become circular, detached from the political level or even self-indulgent.<sup>74</sup> If such an aberration occurs, this may not only be the fault by the immediate participants but be further encouraged at least by some governments. The Working Group should not assume the role of a mere security valve or a place of self-mirroring for the members of the minority rights community. But, of course, it is also up to the United Nations and to governments themselves to ensure that the contact between the Working Group and practice remains strong and vibrant. The fears voiced here are not only abstract, theoretical ones but substantiated by elements hinting in this direction. In fact, it seems that governments could start retreating from the activities within the Working Group as there is a diminution of interest by official state representatives for the activities of this body. Furthermore, the recommendations made by the Working Group have become repetitive, and when they are passed upwards

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<sup>73</sup> Cf. A. Eide, 'Minorities at the United Nations: The UN Working Group on Minorities in Context', 4 *European Yearbook of Minority Issues* (2004/5) p. 624, who adds to his contribution also a list of working papers and conference room papers (pp. 635 *et seq.*).

<sup>74</sup> While there can be no doubt that the minority rights community is composed to a large degree of highly motivated, disinterested activists and academics, it can also be noticed that this subject is in some cases seen as a business; a fact which contributes to augment artificially the demand for further studies.

in the UN institutional hierarchy (Sub-Commission on the Protection and Promotion of Human Rights first and Commission on Human Rights<sup>75</sup> subsequently), enthusiasm for them is often very limited.<sup>76</sup>

Nonetheless, all these criticisms and caveats should not detract from the overall assessment of the Working Group's achievements, which in general have been seen as positive. While probably the most outstanding successes of the Working Group have been achieved in the field of dialogue and enhancement of mutual understanding, the results in the area of standard-setting are likewise impressive. In fact, working papers, conference room papers and academic studies on a vast array of issues touching upon the most pressing questions in international minority law and on possible instruments to resolve them have been presented. They regard, *inter alia*, good practice and problems at national or regional levels (for example in Russia, Hungary, Finland and Northern Ireland); the development of regional standards in Western Europe and South Asia; the relationship between minority rights, the right to self-determination and autonomy;<sup>77</sup> the relationship between the protection of minorities and development;<sup>78</sup> and the relevance of national human rights institutions for effective minority protection.<sup>79</sup> Particular attention has been devoted to the issue of effective political participation.<sup>80</sup>

All in all, it is not the Working Group that should be blamed for slow progress in the further development and implementation of minority rights standards. It is rather the case that in view of its limited possibilities, the Working Group's achievements are extraordinary. Nonetheless, the shortcomings cannot be ignored and the mere existence of this body and even less the eagerness and the zeal of its participants should not be taken as a facile excuse for the government for doing nothing. It is up to the state community to take up the initiative and to make sure that the valuable efforts undertaken in this area are not made in vain.

<sup>75</sup> Abolished and replaced by the Human Rights Council.

<sup>76</sup> Cf. R. Letschert, *supra* note 14, p. 476.

<sup>77</sup> Cf. J. Bengoa, *Minorities and Self-Determination*, E/CN.4/Sub.2/AC.5/2004/WP.1; M. Weller, *Towards a General Comment on Self-Determination and Autonomy*, E/CN.4/Sub.2/AC.5/2005/WP.5; and G. Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View', 9:4 *International Journal on Minority and Group Rights* (2002) pp. 303–324. For stocktaking on the present meaning of the concept of self-determination, see also P. Hilpold, 'Self-Determination in the 21st Century—Modern Perspective for an Old Concept', 36 *Israel Yearbook on Human Rights* (2006) pp. 247–288.

<sup>78</sup> See the working paper submitted by Minority Rights Group International, *The Millennium Development Goals: Helping or Harming Minorities*, E/CN.4/Sub.2/AC.5/2005/WP.4.

<sup>79</sup> For an overview on the various activities by the Working Group on Minorities see the working paper presented by Tom Hadden, 'International and National Action for the Protection of Minorities', E/CN.4/Sub.2/AC.5/2004/WP.3.

<sup>80</sup> *Ibid.*, p. 11. See also the same author's contribution in this issue.

## 6. *The Protection of Indigenous Peoples*

Writing on standard-setting with regard to minority rights in the UN requires one to take into consideration, both separately and in parallel, the issue of indigenous rights.<sup>81</sup> In fact, indigenous rights evolved at the one hand as a separate body of law and within an apposite institutional framework. At the same time, however, the development of both branches, minority rights and indigenous rights, was characterized by an intense mutual interaction.

Like with minorities, there is no generally accepted definition of indigenous peoples. According to the 1989 International Labour Organisation (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, they are characterized by the following:

- their social, cultural and economic conditions distinguish them from other sections of the national community;
- their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- their descendance 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;
- they retain some or all of their own social, economic, cultural and political institutions.

Notwithstanding these valuable elements, in several cases it is still disputed whether a certain group can be qualified as an indigenous people.<sup>82</sup>

The creation of the Working Group on Indigenous Populations<sup>83</sup> in 1982 has given a considerable boost to the indigenous rights agenda as it offered a forum to all interested parties to discuss indigenous rights issues in a transparent, open way and with all the publicity an UN institution can offer. There can be no doubt that the establishment of the Working Group on Minorities was very much inspired by this positive experience. Generally, it can be said that governments are far more open to the wishes of indigenous peoples than to those of

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<sup>81</sup>) See on this subject the contribution by Jeremie Gilbert in this issue.

<sup>82</sup>) As Eide, *supra* note 73, p. 620, notes the qualification as indigenous peoples is undisputed for Amerindians or Native Americans on both the North and South American Continents, for the Inuits, the Samis and other groups who have settled in Arctic regions from Alaska and Canada through Northern Scandinavia and Northern Russia (including Siberia), for the Australian Aborigines and the Maoris of New Zealand, while it is disputed whether the indigenous peoples (in an ethnological sense) in Africa and in Asia are falling also in the purview of the respective protective instruments.

<sup>83</sup>) ECOSOC resolution 1982/34.

minorities.<sup>84</sup> As demonstrated above, also the HRC—which applied Article 27 of Covenant always to indigenous peoples—was very open-minded towards the specific needs of these groups. The case law regarding indigenous peoples influenced positively also minority rights law, but it has been shown that the factual differences characterizing the cultural reality of minorities in general, on the one hand, and that of indigenous peoples, on the other, has enabled the HRC to make important distinctions, in particular in the field of land rights. It has already been stated that the main reason for this different treatment is that indigenous peoples normally pose no threat to state sovereignty, while, with regard to minorities there is often fear on the part of states to embrace strengthened minority rights because this could lead to claims for autonomy and finally to a fight for secession. As a consequence, documents on the rights of indigenous peoples are more progressive. This is in particular true with regard to the question of the right to self-determination. There was already some controversy about the inclusion of the term ‘peoples’ in the ILO Convention No. 169 as this term in international law is closely associated with the right to self-determination.<sup>85</sup> In its work on a declaration on indigenous peoples’ rights, the Working Group was prepared to go a step further and granted the indigenous peoples an express right to self-determination.<sup>86</sup>

For a long time, it seemed that the Working Group and the Sub-Commission (which adopted the Draft Declaration in 1994) passed the thin-red-line at which governments’ preparedness to compromise ends. Only after 12 years, has this Draft Declaration been approved by the HRC,<sup>87</sup> and it is now awaiting adoption by the

<sup>84</sup> Cf. S. J. Anaya, ‘Superpower Attitudes Towards Indigenous Peoples and Group Rights’, *ASIL Proceedings* (1999) p. 251: “It can hardly be disputed that indigenous peoples have been able to generate substantial sympathy for their demands among international actors.”

<sup>85</sup> Cf. P. Hilpold, *Zum Jahr der indigenen Völker—eine Bestandsaufnahme zur Rechtslage*, 97 *Zeitschrift für Vergleichende Rechtswissenschaft* (1998) pp. 30–56. This problem was, however, solved by the following qualification in Article 1(3) of ILO Convention No. 169: “The use of the term ‘people’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.” During the discussions on this new document, it was said that “there appears to be a general agreement that the term ‘peoples’ better reflects the distinctive identity that a revised Convention should aim to recognise for these population groups.” Cf. International Labour Conference, 75th Session, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI(2), Geneva 1988, pp. 12–14, cited according to the ILO Manual *ILO Convention on Indigenous and Tribal Peoples*, 1989 (No. 169), 2003.

<sup>86</sup> See Article 31 of the Draft Declaration on the Rights of Indigenous Peoples:

“Indigenous peoples, as a specific form of exercising their right to self determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.”

<sup>87</sup> Cf. resolution 2006/2 of 29 June 2006.

UN General Assembly.<sup>88</sup> In view of the ambiguities surrounding the concept of self-determination, it was feared that indigenous peoples, which often settle in a territorially compact way, could one day put forward claims that endanger state sovereignty. It remains to be seen whether the approval of this text by the HRC marks the coming into being of a new dimension of self-determination, which would join the many already in existence. The multidimensionality of the concept of self-determination has been, in many cases, a driving force for the further development of international law. The acceptance of this resolution by the UN General Assembly would mean that once again the understanding to be attributed to the concept of self-determination would need to be reinterpreted.

## 7. Conclusions

This contribution has concentrated on the most important standard-setting efforts with regard to minority rights within the UN system. Many other documents are, directly or indirectly, relevant for minority rights protection.<sup>89</sup> Over the last years, it has, however, become clear that minority protection is no longer an issue only for specialists and of secondary importance as it has been viewed at the UN level for many years. The ‘mainstreaming’ concept that signifies that human rights issues have to be taken into consideration at all levels and in all

<sup>88</sup> Also, a further reason for this long-lasting opposition has to be mentioned: the attribution of control over natural resources to the indigenous peoples. See also Eide, *supra* note 73, p. 621.

<sup>89</sup> In particular, the following documents can be mentioned:

- The *Genocide Convention* of 1948 is of pivotal importance for group protection;
- The *International Convention on the Elimination of All Forms of Discrimination* of 1965, where the concept of ‘racial discrimination’ is defined rather broadly;
- The *Convention on the Elimination of All Forms of Discrimination Against Women* of 1979, where several provisions can be found that are directly relevant for minority women (e.g. Article 14, which requires the elimination of discrimination against women in rural areas as these women are also often members of minorities);
- The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984 has been applied by the Committee Against Torture in several cases on minority issues;
- The *Convention on the Rights of Children* of 1989, where Article 30 explicitly states that a child belonging to a minority or who is indigenous “shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”
- The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* of 1990 (which entered into force in 2001) contains various provisions on the protection of minorities (e.g. Article 31).

Cf. R. M. Letschert, *The Impact of Minority Rights Mechanisms* (TMC Asser Press, The Hague, 2005) pp. 134 et seq. and *Examining Possible Solutions to Problems Involving Minorities, Including the Promotion of Mutual Understanding Between and Among Minorities and Government*, E/CN.4/Sub.2/AC.5/2006.4. See also the contributions by Kristin Henrard and Siobhan Mullally in this issue.

fields of UN activity<sup>90</sup> is highly relevant also to activities in the field of minority rights protection. Minority rights protection has been identified as a major factor for securing peace and security.

In the Millennium Declaration, states resolved “to strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights.”<sup>91</sup>

According to the *World Summit Outcome* document, the result of last year’s intense endeavours to reform the whole UN system,<sup>92</sup> “the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.”<sup>93</sup> In consideration of the very prudent wording of this document, in general, this attitude towards the minority question—which, as has been shown, is one of the most contentious in the field of human rights law—is remarkable.

The institution of an Independent Expert on Minority Issues on the basis of a special-procedure mandate in 2005 can be seen as the latest confirmation of this strengthened UN commitment for the cause of minorities.<sup>94</sup> By promoting attention to the most urgent problems afflicting minorities, by her contribution to mainstreaming the consideration of minority issues within the work of the United Nations and other important multilateral forums and by her tackling of cross-cutting themes (such as the situation of minority women and the situation of minority children),<sup>95</sup> she can play an important role in further standard-setting and in rendering the existing standards more precise.

On the regional level, in particular in Europe,<sup>96</sup> even more effective mechanisms for creating new minority standards and for their implementation have

<sup>90</sup> Cf. M. Nowak, *Einführung in das internationale Menschenrechtssystem* (Neuer Wissenschaftlicher Verlag, Vienna/Graz, 2002) p. 89.

<sup>91</sup> UN General Assembly resolution 55/L.2 of 2 September 2000, para. 25.

<sup>92</sup> See also para. 94 of the report by the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, of 2 December 2004: “The United Nations should build on the experience of regional organizations in developing frameworks for minority rights [ . . . ].” See, on this reform discussion and, in particular, on the ‘duty to protect’, P. Hilpold, ‘Reforming the United Nations: New Proposals in a Long-Lasting Endeavour’, *LII Netherlands International Law Review* (2005) pp. 389–431 and P. Hilpold, ‘The Duty to Protect and the Reform of the United Nations’, *10 Max Planck Yearbook of United Nations Law* (2006) pp. 35–69.

<sup>93</sup> UN General Assembly resolution 60/1 of 24 October 2005, para. 130.

<sup>94</sup> See, on this subject, the contribution by Gay McDougall in this issue.

<sup>95</sup> On these and other activities undertaken by the Independent Expert on Minority Issues, see *Future Activities and Cooperation with the Independent Expert on Minority Issues and United Nations Organizations*, E/CN.4/Sub.2/AC.5/2006/6.

<sup>96</sup> In this context, particular reference shall be made to the European Framework Convention on the Protection of National Minorities. For a detailed commentary on this Convention, see M. Weller (ed.), *The Rights of Minorities* (Oxford University Press, Oxford, 2005).

been created; closer cooperation between the relevant universal and regional institutions seems to be advisable. And, in fact, such cooperation has been envisaged with regard to the so-called ‘thematic issues’ on which regional level, groundbreaking work has already been done.<sup>97</sup> The ‘thematic approach’ is, of course, a very time-consuming and arduous one to give further substance to the UN General Assembly Minority Declaration of 1992, but it seems to be very well suited to the overall nature of this document as it is based on dialogue and on an evolutionary process that takes advantage of the most advanced achievements in standard-setting on the national and on the regional level. Probably less realistic for the time being is the proposal to draft an additional protocol to the ICCPR that would complement Article 27. In fact, the whole history of UN standard-setting in the field of minority rights demonstrates that new norms in this delicate field come into existence through a long discussion process and are not set abruptly. If the aim is a ‘hardening’ of standards, this aim can be better achieved by a clarification of the many concepts already on the table than by the search for new hard norms that are, on the one hand, unlikely to be agreed upon and would need, on the other, to be specified and interpreted.

It can, therefore, be concluded that standard-setting in the UN with regard to minority rights is not dead, as it is often maintained, but it is getting ever more nuanced. Care must be taken, however, that these activities do not become detached from the political reality. The authority, and therefore the intrinsic value, of these standards depends very much on the political support they receive from states, i.e. when they are to be approved by the Human Rights Council<sup>98</sup> and when they are to be thereafter implemented. It can be said that standard-setting is as much a political challenge as it is a technical one. Hence, if they want to make their efforts succeed, minority rights activists and minority rights academics are confronted with the difficult task to find the right balance between different needs and aspirations and to bring politicians and technicians together in a way that allows them to mutually reinforce their efforts.

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<sup>97)</sup> Cf. Letschert, *supra* note 14, p. 469, referring to the thematic recommendations issued by the Office of the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities. Also, within the ambit of the Framework Convention for the Protection of National Minorities, the drafting of thematic comments or recommendations is under consideration. Furthermore, it has to be recalled that the Working Group on Minorities in its latest recommendations of August 2006 has proposed the preparation of three thematic studies: on positive country experiences on self-government for minorities; on ways and means of strengthening the application of the UN General Assembly Minority Declaration of 1992; and on double discrimination against women belonging to minorities. On this last subject, *see also* the contribution by Siobhan Mullally in this issue.

<sup>98)</sup> Although the Commission on Human Rights has now been replaced by the Human Rights Council (UN General Assembly resolution 60/251 of 3 April 2006), it is rather improbable that this change will *per se* induce the governments represented in this new institution to take a friendlier attitude towards minorities than they have taken in the past in the predecessor institution.