

The Protection of Indigenous Peoples in International Law

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I. Introduction

Indigenous peoples are “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.”¹ This definition, although not consented to, gives a preliminary indication of the group of individuals international protection is sought for. The reason why indigenous peoples are considered to need particular protection, that is to say a protection which exceeds the protection under international human rights regimes, is the fact that these peoples have been deprived by the immigration of other peoples of their rights. In particular, they have lost rights concerning the land they traditionally occupied, and the possibility to develop and sustain a community reflecting their particular values. Apart from that, these peoples face the danger of losing their identity or, at least, they face difficulties adjusting their traditional values or customs to new conditions of life. Although the endeavors to establish a regime for the protection of indigenous peoples are part of the ongoing process of a progressive development of international human rights, such a regime will, if accepted and implemented, add a new dimension thereto.

Attempts to provide for an adequate protection of indigenous peoples date back to the 16th century when Francisco de Vitoria² suggested that legal principles of indigenous peoples had to be respected. Despite the development of international human rights under the aegis of the United Nations, international law has, so far, not been successful in finalizing a regime designed for the protection of indigenous peoples. It took nine years to elaborate a Draft Declaration on the Rights of Indigenous Peoples.³ The final adoption of a declaration on indigenous

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¹ Commission on Human Rights, Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations (UN Doc. E/CN.4/Sub. 2/L.566 [1972], Chapter II, paragraph 34).

² Francisco de Vitoria, *Reflecciones sobre los Indios y el derecho de la guerra*, Buenos Aires: Espasa-Calpe, 1946.

³ UN Docs. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, reprinted in ILM 34 (1995), 541. Compare also Annex, II., in this issue. For the history of the Draft Declaration see Russel L. B a r s h, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, Harvard Human Rights Journal 7 (1994), 33.

The Draft is essentially the product of a dialogue between representatives from indigenous peoples, States and experts which formed the Working Group on Indigenous Populations of the

peoples is one of the goals of the International Decade of the World's Indigenous Peoples declared by the UN General Assembly.⁴ The General Assembly of the United Nations also emphasized the commitment of Member States to promote and protect the rights of indigenous peoples in its declaration on the occasion of the 50th anniversary of the United Nations.⁵ The fact that no comprehensive international regime exists for the protection of indigenous peoples does not mean that international law has left the individuals involved without protection. They benefit from international human rights standards and, in particular, from the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO Convention No. 169)⁶ – up to now the most complete international agreement regarding the preservation of indigenous rights. The nevertheless unsatisfactory state of affairs with respect to indigenous peoples has prompted the UN General Assembly to foster the attempts of the Human Rights Commission to finalize its work on a declaration on indigenous peoples. Such a declaration, although it will have no binding force, may serve as a starting point for a development that ultimately leads to the elaboration of a legally binding regime concerning the rights of indigenous peoples and members thereof.

The following article will outline the protection of indigenous peoples under international law and the attempts to improve such protection. It will also indicate the areas of disagreement between States as well as between States and representatives of indigenous peoples as to which rights should be accorded to indigenous peoples and their members individually.

II. The Protection of Indigenous Peoples Under International Law

Neither the Charter of the United Nations nor the Universal Declaration of Human Rights of 1948 contain a direct reference to indigenous peoples. Nevertheless, these instruments are of relevance for the rights of members of indigenous peoples although not directly for the rights of indigenous peoples as such. Apart from internationalizing the protection of human rights, thus exempting them from the internal affairs of States, the Charter of the United Nations obliges States to protect the fundamental freedoms of every human being, regardless of race, gender, religion, or language.⁷ The thus established prohibition of racial discrimination, if implemented effectively, at least ensures that members of indigenous peoples would have the same rights, including the right to participate in the public

Sub-Commission. This Draft is presently being considered by a Working Group established by the Commission on Human Rights. On the working method of this group and on the objections raised by several States see Russel L. Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force*, *Human Rights Quarterly* 18 (1996), 782 (at 783 et seq.).

⁴ G.A. Res. 50/157 of 21 December 1995, U.N. GAOR 50th Sess. (1995), Vol. I, Supp. 49, at 217.

⁵ G.A. Res. 50/6 of 24 October 1995, U.N. GAOR 50th Sess. (1995), Vol. I, Supp. 49, at 13.

⁶ ILM 28 (1989), 1382. Compare also Annex, I., in this issue.

⁷ Article 1, paragraph 3.

affairs, as other members of the population of the given State. The prohibition of racial discrimination has been further elaborated upon in the International Convention on the Elimination of All Forms of Racial Discrimination, 1966.⁸ The treaty-body of this Convention, the Committee on the Elimination of Racial Discrimination (CERD), has always taken a particular interest in the protection of indigenous peoples. In consequence thereof it has adopted a General Recommendation⁹ on the rights of indigenous peoples in which it has emphasized, *inter alia*, that discrimination against indigenous peoples constitutes racial discrimination in the meaning of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

Similarly, none of the provisions of the International Covenant on Civil and Political Rights, 1966,¹⁰ deals specifically with indigenous peoples' rights but rather with individual rights of human beings. However, the Covenant provides for a protection of persons belonging to ethnic, religious and linguistic minorities. Such persons shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. Although article 27 of the Covenant is primarily concerned with the rights of members of minority groups, the guarantee to exercise certain rights "in community with other members of their group" indicates that it provides at least some indirect protection for the group as such. Indigenous peoples do not consider themselves as minorities since they believe this status is inappropriate and does not provide the status and protection they deserve. Nevertheless, the Human Rights Committee protects individuals from indigenous peoples under article 27 of the Covenant.¹¹ Apart from article 27 of the Covenant, other rights recognized therein may be invoked by members of indigenous peoples such as the right not to be deprived of their means of existence (article 1, paragraph 2, of the Covenant), to receive equal treatment and to be free from discrimination (article 2, paragraph 2 and 26, of the Covenant), to freedom of thought, conscience and religion (article 18 of the Covenant) and to equally take part in the conduct of public affairs (article 25 of the Covenant).

As mentioned before, the most comprehensive international agreement on indigenous peoples is the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO Convention 169).¹² It revised the preceding ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957

⁸ BGBl. 1969 II, 962.

⁹ General Recommendation XXIII (51) concerning Indigenous Peoples of 18 August 1997, CERD/C/51/Misc.13/Rev.4. Compare also Annex, IV., in this issue.

¹⁰ ILM 6 (1967), 368.

¹¹ See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, UN Doc. A/45/40, Vol. II, App. A.; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, Art. 27, 492 et seq.

¹² See note 6, on the ILO Convention 169, see in particular Lee Swepston, A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989, Oklahoma City University Law Review 15 (1990), 677.

(ILO Convention 107). In particular, it fundamentally changed the paternalistic approach of ILO Convention 107 towards indigenous peoples. Whereas the ILO Convention 107 tried to integrate indigenous peoples in the non-indigenous community, ILO Convention 169 is based on the principle of preserving multiculturalism.¹³

According to article 1, paragraph 1 (a), of ILO Convention 169, its scope embraces tribal¹⁴ as well as indigenous peoples. The latter are defined as those peoples which are descended from populations which inhabited the country, or the geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. The primary criterion for determining whether a particular group is to be regarded as indigenous is, according to the Convention, self-identification. The commitments States Parties to the Convention have entered into can be classified as belonging to one of three categories, namely prohibition of discrimination or, respectively, the obligation to ensure equal treatment of members of indigenous peoples, re-emphasis of particular human rights and obligations to protect the identity of indigenous peoples which may amount to affirmative action to improve their situation. Apart from that, States Parties are committed to formulate or reformulate certain policies.

States Parties are under the obligation to ensure that members of indigenous peoples are not discriminated against in the enjoyment of their human rights¹⁵ or the rights they have as citizens.¹⁶ The Convention does not only strive for the abolition of discrimination of members of indigenous peoples in public life, in respect to employment or social security, but equally obliges States Parties to overcome any factual discrimination of members of indigenous peoples.¹⁷ The obligation of States Parties to ensure that members of indigenous peoples benefit on an equal footing from the rights and opportunities national law offers¹⁸ is the corollary to the prohibition of discrimination. This obligation has received further specification particularly in respect of recruitment and conditions of employment. Article 20 of ILO Convention 169 obliges States Parties to ensure that workers from indigenous peoples are not discriminated against with regard to admission to employment, that they receive equal remuneration for work of equal value, and that they have equal access to trade unions and receive equal treatment in respect of employment-related benefits. In particular, measures are to be taken to ensure

¹³ Swebston (note 12), at 681.

¹⁴ They are defined as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs and traditions.

¹⁵ Article 3, paragraph 1; Article 20, paragraph 2 (discrimination in employment); Article 24 of ILO Convention 169 (social security).

¹⁶ Article 4, paragraph 3, of ILO Convention 169.

¹⁷ Article 2, paragraph 2 (c), of ILO Convention 169 speaks of the obligation to "eliminate socio-economic gaps that may exist between indigenous and other members of the national community".

¹⁸ Article 2, paragraph 2 (a), of ILO Convention 169.

that seasonal, casual and migrant workers are not faced with inferior labor standards. The Convention further obliges States Parties to ensure that members of indigenous peoples receive equal treatment in respect of vocational training¹⁹ and education.²⁰ The latter provision touches upon an important issue. Members of indigenous peoples have an interest that their children have access to education in their own language. However, they also have to learn the national language to avoid economic and social marginalization. The Convention addresses this issue adequately.²¹

A reference to the equal enjoyment of human rights of members of indigenous peoples as compared to members of the other parts of the population is contained in article 3 of ILO Convention 169. This establishes a connection between the ILO Convention 169 and the Covenant on Civil and Political Rights as well as the Covenant on Economic, Social and Cultural Rights²², although many of the commitments under the Covenants are superseded by the ILO Convention 169 due to its more specific nature.

Most of the provisions of ILO Convention 169 strive for the preservation of the identity of indigenous peoples either by explicitly referring to customs, traditions and values of indigenous peoples or by providing that decisions which might have an impact upon them are not taken without their consent. Article 5 of ILO Convention 169, which is crucial in this respect, emphasizes that the social, cultural, religious and spiritual values and practices of these peoples are to be recognized and protected. It is in the same vein that article 8 of ILO Convention 169 provides that in applying national laws and regulations to indigenous peoples due regard shall be paid to their customs or customary laws. This even applies to criminal law.²³ The Convention stresses the importance of land or land use for sustaining the identity of indigenous peoples: "... governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories ...".²⁴ Consequently, States are obliged to recognize the ownership or possession of land of the indigenous peoples concerned and to safeguard the rights of indigenous peoples to natural resources pertaining to their lands.²⁵ The Convention provides for the right of indigenous peoples to return to their traditional land and, if that is impossible, to receive compensation in land. The General Recommendation of CERD follows the same approach.²⁶

¹⁹ Article 21 of ILO Convention 169.

²⁰ Article 26 of ILO Convention 169.

²¹ See Article 28 of ILO Convention 169.

²² BGBl. 1973 II, 1569.

²³ See Articles 9 and 10 of the ILO Convention 169.

²⁴ Article 13, paragraph 1 of the ILO Convention 169.

²⁵ Articles 14 and 15 of the ILO Convention 169. Article 16 prohibits the removal of indigenous peoples from the lands they occupy and Article 18 obliges States Parties to penalize the intrusion upon or use of the lands of the peoples concerned.

²⁶ See at note 9; paragraph 5 of the General Recommendation reads: "The Committee especially calls upon States parties to recognize and protect the right of indigenous peoples to own, develop,

In accordance with its overall objective to secure the respect and preservation of the identity of indigenous peoples, ILO Convention 169 elaborately provides for procedures which ensure the participation of indigenous peoples in decisions on issues that affect them. The general rule is formulated in article 6 of ILO Convention 169. According to it, governments shall consult the peoples concerned through appropriate procedures whenever consideration is to be given to legislative or administrative measures which may affect them directly. More specifically, the Convention provides that the formulation of programs for mitigating the difficulties indigenous peoples face adjusting to the new conditions of life and work shall take place with the participation and cooperation of the indigenous peoples affected;²⁷ any relocation of indigenous peoples may only take place with their free and informed consent;²⁸ the provision of special vocational training programs for indigenous peoples shall be undertaken with their participation;²⁹ and they shall be involved in the formulation of special educational programs.³⁰ The General Recommendation of CERD already referred to follows this approach as far as the land rights of indigenous peoples are concerned.³¹

For the same reason, namely to protect the identity of indigenous peoples and to provide them with the opportunity to develop freely, taking into consideration their values and customs, the Convention obliges States Parties to offer them some autonomy. Indigenous peoples shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, spiritual well-being and the lands they occupy or use³², and to establish their own educational institutions.³³

In respect of affirmative action, ILO Convention 169 is cautious. States Parties are only under an obligation to provide for special measures to ensure the effective protection of members of indigenous peoples as far as recruitment and conditions of employment are concerned³⁴ and to provide their traditional economic activities with special assistance.³⁵ This is in keeping with the approach followed by other international human rights instruments. Also, the International Convention on the Elimination of All Forms of Racial Discrimination only opens the pos-

control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”

²⁷ Article 5 (c) of ILO Convention 169.

²⁸ Article 16, paragraph 2, of ILO Convention 169.

²⁹ Article 22, paragraphs 2 and 3, of ILO Convention 169.

³⁰ Article 27, paragraph 2, and Article 28, paragraph 1, of ILO Convention 169.

³¹ Note 9, at paragraph 5 and 4 (d).

³² Article 7, paragraph 1, of ILO Convention 169.

³³ Article 27, paragraph 3, of ILO Convention 169.

³⁴ Article 20, paragraph 1, of ILO Convention 169.

³⁵ Article 23, paragraph 2, of ILO Convention 169.

sibility of affirmative action as long as it is needed and does not constitute discrimination in itself.

Indigenous peoples are referred to in the Convention on Biological Diversity of 1992.³⁶ The Convention embraces the notion that traditional indigenous techniques and knowledge are essential to the preservation of biological diversity and the sustainable use of its components. States Parties also must respect, preserve and maintain knowledge, innovations and practices of individuals and local communities embodying traditional lifestyles. Finally, the Convention provides that indigenous peoples participate in the economic benefits deriving from the utilization of their knowledge or practices.³⁷ Some agreements have been concluded with indigenous peoples which provide their knowledge in exchange for a share in the economic benefits deriving from further research and developments based upon their contribution³⁸.

The World Bank has also undertaken to provide protection for indigenous peoples within the framework of the assistance it gives to economic development.³⁹ By fostering indigenous peoples' interests the World Bank pursues, broadly speaking, two different although interrelated objectives: to ensure that indigenous peoples benefit from development projects and to avoid or mitigate potentially adverse effects on indigenous peoples caused by Bank-assisted activities. The most controversial issue is whether indigenous peoples are adversely affected by development projects. The Bank takes a procedural approach to balance the interest in preserving indigenous identity without economically marginalizing a particular indigenous people. It is the policy of the Bank that the strategy addressing the issues pertaining to indigenous peoples must be based on the informed participation of the indigenous peoples themselves. It is up to them to identify their preferences.

III. International Attempts to Improve the Status of Indigenous Peoples, in Particular the Draft Declaration on the Rights of Indigenous Peoples

The ILO Convention 169 as well as the Draft Declaration provide for the application of international human rights and freedoms to members of indigenous

³⁶ ILM 31 (1992), 818.

³⁷ See Article 8 (j) of the Convention on Biodiversity.

³⁸ There are already some international guidelines which include provisions with respect to the rights and interests of indigenous peoples in bioprospecting and utilizing genetic resources, e.g. Guidelines for Standards of Practice of the International Society of Ethnobiology (ISE), International Code of Conduct for Plant Germplasm Collecting and Transfer (FAO), the Global Coalition for Biocultural Diversity Covenant on Intellectual, Cultural and Scientific Resources: A basic code of ethics and conduct for equitable partnerships between responsible corporations, scientists or institutions, and indigenous groups, Decision 391 of the Andean Pact Countries, and the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. Some of these guidelines are very accurate and contain explicit rules with respect to the execution of projects which touch upon indigenous peoples and/or local community rights and interests.

³⁹ See Operational Directive: Indigenous Peoples, The World Bank Operational Manual, September 1991, OD 4.20. Compare also Annex, VI., in this issue.

peoples, the prohibition of their discrimination and the protection of specific new rights of indigenous peoples and their members. The Draft Declaration is distinguished from other international human rights instruments by the following four elements: the recognition of the legal personality of indigenous peoples, their territorial security, the international responsibility in ensuring their respect⁴⁰ and, in particular, the enjoyment of collective rights or the rights of peoples as such.

According to the Draft Declaration, indigenous individuals are free and equal to all other individuals and they shall have the right to be free of adverse discrimination.⁴¹ The term “adverse discrimination” signals a deviation from the terminology used in the International Convention on the Elimination of All Forms of Racial Discrimination, which classifies adverse as well as preferential treatment as discrimination. Members of indigenous peoples have the right to life, physical and mental integrity, liberty and security of person,⁴² the right not to be subjected to ethnocide and cultural genocide,⁴³ the right to nationality,⁴⁴ the right to develop and maintain their own identity – which includes the right to freely identify themselves as indigenous,⁴⁵ the right to belong to an indigenous community or nation⁴⁶ and the right to all levels of education.⁴⁷ This last right – to the extent it is formulated as an individual one – only applies to children. It does not provide that members of indigenous peoples learn the language which is generally spoken in the State concerned.

All the rights referred to so far are equally formulated as collective rights or rights of indigenous peoples as such,⁴⁸ including the right to education. This emphasis on collective rights and rights of peoples is a dominant feature of the Draft Declaration. Article 1 of the Draft Declaration states as a general rule that indigenous peoples have the right to the full and effective enjoyment of human rights and freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and in international law.

The Draft Declaration emphasizes – even more than ILO Convention 169 – that indigenous peoples have the right to preserve their group identity.⁴⁹ Different aspects of this right are addressed: the right to practice and revitalize their traditions and customs, the right to manifest, practice, develop and teach their spiritual

⁴⁰ Erica-Irene D a e s, *Equality of Indigenous Peoples Under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples*, *St. Thomas Law Review* 7 (1995), 493, at 496.

⁴¹ Article 2 of the Draft Declaration.

⁴² Article 6, paragraph 2, of the Draft Declaration.

⁴³ Article 7 of the Draft Declaration.

⁴⁴ Article 5 of the Draft Declaration.

⁴⁵ Article 8 of the Draft Declaration.

⁴⁶ Article 9 of the Draft Declaration.

⁴⁷ Article 15 of the Draft Declaration.

⁴⁸ The Draft Declaration distinguishes between the rights indigenous peoples have collectively (the right to live in freedom, peace and security, not to be subject to ethnocide or cultural genocide etc.) or as peoples (to be free and equal to all other peoples, to belong to an indigenous community or nation etc.).

⁴⁹ Article 8 of the Draft Declaration.

and religious traditions, customs and ceremonies, the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions etc., the right to have the dignity and diversity of the cultures and traditions reflected in public education, the right to establish their own media, the right to maintain and develop their own political, economic and social systems, the right to determine and develop priorities and strategies for exercising the right to develop and to determine their own citizenship. The most far-reaching provision is that indigenous peoples have the right to self-determination. The Draft Declaration provides for the right to autonomy or self-government in matters relating to internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and management of resources and environment “as a specific form of exercising the right of self-determination”.⁵⁰ It remains unclear whether this latter provision is meant to cover the right to self-determination. Members of indigenous peoples also have the right to participate fully at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves, as they have the right to maintain and develop their own indigenous decision-making institutions.

Another important aspect of the preservation of the identity of indigenous peoples involves safeguarding their rights to the land they occupy – the Draft Declaration speaks of maintaining and strengthening the distinctive spiritual and material relationship with the lands, territories, waters etc.⁵¹ As is the case with ILO Convention 169, the Draft Declaration recognizes the right of indigenous peoples to a restitution of the land of which they have been depossessed. The Draft Declaration further recognizes the right to environmental protection and the recognition of traditional forms of use.

The Draft Declaration finally obliges States to take affirmative action to improve the economic and social conditions of indigenous peoples. The latter have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations.

The Organization of American States has also started to develop a declaration on the rights of indigenous peoples, the first draft having been approved in September 1995.⁵² The Inter-American Commission on Human Rights approved the final draft at the beginning of 1997⁵³ and submitted it to the General Assembly for final adoption in 1998.

Ultimately, the rights of indigenous peoples were taken up in principle 22 of the Rio Declaration on Environment and Development⁵⁴. According to it, indigenous peoples play an important role due to their particular relationship with nature in

⁵⁰ See Articles 3 and 31 of the Draft Declaration.

⁵¹ Article 25 of the Draft Declaration.

⁵² Annual Report of the Inter-American Commission on Human Rights 1995, at 203, OEA/Ser.L/V/II.91 doc.7, rev.

⁵³ Proposed American Declaration on the Rights of Indigenous Peoples, CP/doc.2878/97 corr.1.

⁵⁴ Reprinted in ILM 31 (1992), 874.

the protection of the environment. The objective of this principle is not to secure the rights of indigenous peoples, but it reinforces their rights concerning land ownership and use. The same is true in respect of the Statement of the United Nations Conference on Environment and Development of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests of 1992.⁵⁵ According to principle 5 (a), national forest policies should recognize and duly support the identity, culture and rights of indigenous peoples and their communities. States are called upon to maintain the cultural identity and social organization of indigenous peoples and to provide for adequate levels of livelihood. In addition, the value of indigenous capacity and local knowledge regarding the conservation and sustainable development of forests has been recognized.

The UN World Conference on Human Rights produced the Vienna Declaration of 1993, containing provisions related to the protection of indigenous peoples.⁵⁶ Apart from reaffirming the commitment of the participating States to the Universal Declaration of Human Rights, the Charter of the United Nations, and other international human rights instruments, the Declaration supports the new temporal dimension of human rights principles and reaffirms the importance of protecting the interests of succeeding generations as the world attempts to promote progress and better standards of life and to avoid unfair discrimination. The Declaration strongly recommends the abolition of all forms of racism; likewise, it stresses the importance of the promotion and protection of persons belonging to minorities. Finally, the value of indigenous peoples to the international community, providing a pluralistic dimension to society, is emphasized. States are called upon to ensure the full and free participation of indigenous peoples in all aspects of society, most importantly in matters of concern to them. This is considered a contribution to the political and social stability of the States in which these peoples live.⁵⁷

IV. Areas of Disagreement

One of the major problems in the attempt to establish a regime for the protection of indigenous peoples is to adequately define its scope, namely by defining the term "indigenous peoples". International law does not provide a definition.⁵⁸ In the deliberations on the Draft Declaration on the Rights of Indigenous Peoples most Latin American States as well as the representatives of indigenous peoples argued that no such definition was needed, whereas, in particular, States from Asia

⁵⁵ Reprinted in ILM 31 (1992), 881.

⁵⁶ Vienna Declaration and Program of Action, UN Doc.A/CONF.157/24 (Part I), 1993, reprinted in ILM 32 (1993), 1661.

⁵⁷ Article 20 of the Declaration.

⁵⁸ See note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples (UN Doc. E/CN.4/Sub.2/AC.4/1995/3).

and Africa considered such a definition to be necessary.⁵⁹ A definition is contained in ILO Convention 169⁶⁰ as well as in the Operational Directive of the World Bank of September 1991,⁶¹ whereas the Draft Declaration has none.

Article 1, paragraph 1(b), of the ILO Convention 169 combines objective as well as subjective elements to describe indigenous peoples: peoples in independent countries, who have inhabited the country or the geographical region at the time of conquest, colonization or the establishment of the present boundaries and who retain some of their own social, economic, cultural and political institutions. However, paragraph 2 of the same article refers to self-identification as a fundamental criterion for determining whether a people constitutes an indigenous people. Attempts have been made to limit the scope of the definition by introducing new elements.⁶² This indicates the desire to exclude certain countries or even geographical regions from an international regime on the protection of indigenous peoples.⁶³ The appropriate definition of the term indigenous people will remain one of the crucial problems waiting for solution. The most promising approach is to find a definition which reflects the objectives pursued by a regime on the protection of indigenous peoples while keeping self-identification as a fundamental criterion. One such objective is the preservation of the cultural, social and ethnic identity of such peoples. Hence, a definition of indigenous peoples should only embrace such groups which have preserved this identity. The second criterion is that the particular people has lived in the country or geographical area in question before it was colonized or conquered. It is a matter of controversy whether the definition should only cover peoples who have been the victim of European colonization.⁶⁴ This would leave indigenous peoples in Africa, Asia and Russia unprotected. For the time being the definition contained in ILO Convention 169 seems to be the most appropriate one.

Apart from the question how to identify indigenous peoples, it is necessary to address the problem how to determine who belongs to a particular people. The

⁵⁹ For details see Barsh (note 3), 782, at 791 et seq.

⁶⁰ See note 6 above.

⁶¹ See note 38. It provides for the following definition: "The terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups' and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'indigenous peoples' is the term that will be used to refer to these groups."

⁶² See, in particular, the definitions provided in the Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Peoples (UN Doc. E/CN.4/Sub.2/L.566) Chapter II, par. 19–34.

⁶³ As to the definition of Indian by US law see Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law, Charlottesville, Va.: Michie Bobbs-Merrill, 1982, 19 et seq.

⁶⁴ Martinez-Cobo defined in his study the notion indigenous peoples, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, as follows: "Indigenous communities, peoples and nations are those, which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as basis of their continued existence as peoples, in accordance with their cultural partners, social institutions and legal systems."

same problem exists with respect to the membership in minority groups. Whereas the Draft Declaration on the Rights of Indigenous Peoples is moot on the first issue, it contains some provisions on the latter. According to article 32 of the Draft, indigenous peoples have the collective right to determine their own citizenship. This approach contradicts the one taken concerning membership in minority groups. The Human Rights Committee in the case *Sandra Lovelace v. Canada*⁶⁵ emphasized that article 27 of the Covenant on Civil and Political rights has as its objective the protection of the rights of persons belonging to minorities, and that statutory restrictions affecting the right to belong to a particular minority must have a reasonable and objective justification. The Committee, in fact, considered the rights of States or indigenous peoples to establish their own rules on membership to be limited. This view was, in effect, challenged in the communication No. 358/1989, *R.L. et al. v. Canada* (members of the Whispering Pines Indian Band).⁶⁶ The applicants claimed that their freedom of association with others had been interfered with since they could not themselves determine membership in their community. The Human Rights Committee did not have to rule on the substance of the claim. Nevertheless, the claim clearly identifies the tension between the interests of the group in preserving its identity and the interests of an individual to be a member of such a group. The Draft Declaration has solved this problem in favor of the group, keeping in line with its emphasis on group rights rather than on individual rights. This is questionable; attempts should be made to find a more balanced solution.

The Draft Declaration⁶⁷ provides for the right of self-determination in the same words as article 1 of the Covenant on Civil and Political Rights and article 1 of the Covenant on Economic, Social and Cultural Rights. The right to self-determination of peoples is contained in article 1, paragraph 2, of the UN Charter. It has been reiterated frequently by the UN General Assembly, for example in the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960⁶⁸, and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970⁶⁹. The reference to a right of self-determination of indigenous peoples in the Draft Declaration met with objections from various States.⁷⁰ For the same reasons some were opposed to referring to indigenous populations as peoples.⁷¹

⁶⁵ Communication No. 24/1977, in: Yearbook of the Human Rights Committee 1981–1982, Vol. II, Annex XVIII, 320 et seq.

⁶⁶ Report of the Human Rights Committee, U.N. GAOR, 47th Sess. (1994), Supp. 40, 358.

⁶⁷ Article 3.

⁶⁸ G.A. Res. 1514 (XV) of 1960, U.N. GAOR, 15th Sess. (1960), Supp. 16, at 66.

⁶⁹ G.A. Res. 2625 (XXV) of 1970, U.N. GAOR, 25th Sess. (1970), Supp. 28, at 121.

⁷⁰ See, in particular, Barsh (note 3), at 796 et seq.

⁷¹ For that reason the name of the working group of the Human Rights Commission was changed from “working group on a draft UN declaration on the rights of indigenous peoples” to “working group established in accordance with Commission on Human Rights resolution 1995/32”.

The right of self-determination contains two aspects – self-determination within a given State's borders which leads to autonomy and the right to secession. The latter aspect collides with the right of States to have their territorial integrity preserved, a right recognized in the UN Charter as well as in the Declaration on Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Apart from that it is doubtful whether the establishment of new States in the recent past by means of secession has not created more problems concerning the protection of ethnic groups than it has solved. This, however, is not a matter to be discussed in this context.

Although indigenous populations are to be considered as peoples, that is to say as groups of individuals constituting distinct social entities which have their own identity and characteristics, there seems to exist common agreement that the protection of indigenous peoples does not make it necessary to furnish them with the right to secession. They are to develop as integral parts of the nations they presently belong to and within the framework of national unity. Article 31 of the Draft Declaration seems to reflect this approach.⁷² However, it should be reflected more clearly in the Draft Declaration; article 3 should be balanced by a reference to the territorial integrity of States.

The Draft Declaration establishes mechanisms which, if implemented, would ensure that the interests of indigenous peoples are not neglected when national policies, laws and regulations are formulated which have an impact upon them. Reference is to be made in this context to the provisions concerning the autonomy of indigenous peoples and their established right to participate in the conduct of public affairs. The Draft Declaration provides for indigenous peoples' autonomy in general⁷³ and their right to decide upon certain issues on their own.⁷⁴ Taken together, these provisions exempt indigenous peoples to a large extent from the jurisdiction of their home state. It is disputable whether such an extended autonomy is required to preserve the identity of indigenous peoples. It may even contribute to a permanent economic and social marginalization of some indigenous peoples. The identity of peoples, including indigenous peoples, is not a static one but has to accommodate and to respond to modern developments and challenges and, in particular, the aspirations of its members.

One of the main issues affecting indigenous peoples concerns their rights in respect of the land they occupy or traditionally occupied. All the instruments referred to emphasize that the identity of indigenous peoples to a large extent depends upon the safeguarding of these rights or, where they have been deprived of these, of their reinstatement. The latter aspect is addressed in the Draft Declaration and in the General Recommendation of CERD, whereas ILO Convention

⁷² See also Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples of Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993) at 4, paragraph 21. According to her reasoning, indigenous peoples would not have the right to secede as long as the State concerned continued to meet current universal human rights standards.

⁷³ See Article 31.

⁷⁴ See Article 32.

169 only safeguards the rights concerning the land indigenous peoples occupy at present. This point, as well as the right of indigenous peoples to veto State development projects on land occupied by them, was discussed controversially. It can hardly be denied that it will be impossible to return land to indigenous peoples which they lost in past centuries. However, it should be borne in mind that the process of depriving indigenous peoples of their land rights is not a historic event but one which has continued in the last decades and still takes place. In this respect an equitable solution is still to be designed. Canadian as well as New Zealand practice may serve as a model. It is to be hoped that future international efforts concentrate on improving the land rights of indigenous peoples.

Ultimately, States have objected to the establishment of collective human rights.⁷⁵ Although some of the rights recognized in the Draft Declaration may, by their very nature, be exercised only by an indigenous people as such or by the collectivity of its members, it is doubtful whether the formulation of classical individual civil, social and cultural rights as collective rights adds substance or is meant to limit the enjoyment of individual rights. Article 34 of the Draft Declaration seems to point in the direction of the latter interpretation. It provides that indigenous peoples have the collective right to determine the responsibilities of their individual members to their communities.

IV. Concluding Remarks

Although the international community, or at least the majority thereof, seems to have recognized that indigenous peoples require international protection, there is no agreement in sight over what exactly such protection entails. It is doubtful whether it will be possible to reach agreement on standards of protection and to have them effectively implemented. The fact that ILO Convention 169 has been ratified only by a few States⁷⁶ is an indication of the difficulties which still have to be overcome. Therefore, it is worth considering whether the status of indigenous peoples could be improved, apart from strengthening their rights in respect of land, through the establishment of procedures which at least guarantee that their interests are effectively taken into consideration in the formulation of policies on public affairs.⁷⁷ Particular provisions should ensure that the future of indigenous peoples within their home States is determined together with them as partners and that their rights are neither neglected nor are they treated as objects.

⁷⁵ Barsh (note 3), at 788 et seq.

⁷⁶ Until now Convention 169 has only been ratified by 13 countries: Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay and Peru; <http://ilolex.ilo.ch:1567/scripts/ratifce.pl?C169> (accessed 5 February 1999).

⁷⁷ Article 19 of the Draft Declaration does not fully meet this point. It only provides that indigenous peoples have the right to participate fully in decision-making in matters which may affect them.