

Same Target from Different Angles? Anti-discrimination, Protection of Minorities and the Rights of Indigenous Peoples in the UN

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In the past decades the United Nations (UN) elaborately dealt with the issues of discrimination, besides adopting many resolutions, three major documents came to life: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the 2007 Declaration on Indigenous Peoples. This paper shows the evolution of the three different angles of protection, compares the documents, analyses the differences and discusses whether the included rights could be integrated into one regime of protection.

Keywords: anti-discrimination, minorities, indigenous, United Nations

1. Historical Antecedents

At the creation of the Charter of the United Nations one of the main aims was to eliminate the deficiencies of the system of the League of Nations. Besides the many positive effects of that aim, one of the negative results was that the protection of minorities fell into the background. The peace treaties of World War I established the international protection of minorities, which was guaranteed by the League of Nations. Besides the peace treaties the legal basis for the protection was secured by bilateral agreements and declarations made at the Council of the League.² However, it would be an error to think that owing to the League of Nations this was a universal system. It was a purely Central Eastern European phenomenon.

The UN Charter does not refer to minorities, although it has provisions about the prohibition of discrimination and the protection of human rights. At the beginning of the operation of the United Nations the issue of the protection of minorities had still been on the agenda, in 1946 the UN Commission on Human Rights created - as its advisory body - the Sub-Commission on Prevention of Discrimination and

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² See, e.g.: Péter Kovács, *The Protection of Minorities under the Auspices of the League of Nations*, in Shelton Dinah (Ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford - New York, 2013, pp. 305-341.; Erzsébet Szalayné Sándor, *International law in the service of the protection of minorities between the Two World Wars*, *Minorities Research*, Vol. 6, 2004, pp. 106-128.; Erzsébet Szalayné Sándor, *The Role of the League of Nations and the UN in the Protection of Minorities under International Law*, *Minorities Research*, Vol. 1, 1999, pp. 108-122.

Protection of Minorities (hereinafter: Sub-Commission).³ Several UN organs were mentioned as the one which should clarify the status of the former system of minority protection.⁴ Finally, the “finger-pointing” of the Commission on Human Rights and the Sub-Commission at each other and at other bodies of the UN resulted in the decision of the Economic and Social Council, which requested a study of the issue from the UN Secretary-General in 1948. The study was not yet ready when - in the same year - the General Assembly adopted resolution 217/C (III), titled "Fate of minorities". It declared in a concise resolution that although the UN cannot remain indifferent to the fate of minorities, the text of the Universal Declaration of Human Rights should not specifically refer to them or provide for separate rights. According to the resolution, the justification for this is that "it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises". However, in order to minimize the effect, it requested the Sub-Commission to prepare a thorough study of the problem of minorities, in order that the UN may be able to take effective measures for their protection.⁵

This study by the Sub-Commission, the famous Capotorti Report,⁶ had only been prepared by 1979, probably owing - among others - to the study issued by the Secretary-General in 1950. The study, after the examination of several aspects, declared that the system of minority protection created between the two world wars had generally ceased to exist, it had become unnecessary in several states, furthermore, the institution backing it (that is the League of Nations) terminated as well. The Secretary-General tried to emphasize that this does not mean that minorities are entitled to no protection, since they are also protected by human rights. These declarations closed the door before the universal protection of minorities even prior to it having any chance of commencement.⁷

By the beginning of the 1950s several other phenomena occurred in the world, which also hindered the possibility of the creation of a universal legal system of minority protection. The maintenance of the colonial system often occurred via the reign of a minority, on half of the territories of the world the majority population was the one in need of protection and of their own state. An especially striking case of that was the apartheid regime in South Africa. Neither the states', nor science's representatives could unequivocally agree on the definition of minority. Owing to the unsubstantiated content of the right to self-determination several states were afraid that if any extra rights are guaranteed to the minority, then sooner or later they would claim the right to secession. During the Cold War, the Central- and Eastern European states burdened with the issue of national minorities found themselves in the sphere of influence of the Soviet Union, which also diminished the chances of a universal agreement in the topic. Furthermore, some of the concerned European states (e.g.: Romania, Finland, Hungary, Austria and Italy) had only been admitted to the United Nations in 1955, thus until then they could not participate in the discussions of minority protection at the different organs of the UN.

Thanks to these, the common denominator reachable in the protection was the declaration of the prohibition of discrimination and the adoption of universal human rights.

³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Economic and Social Council resolution 9 (II) of 21 June 1946. It operated between 1947 and 2006, its name was changed in 1999: Sub-Commission on the Promotion and Protection of Human Rights.

⁴ See, e.g.: Péter Kovács, *International law and minority protection: Rights of Minorities or Law of Minorities?* Akadémiai Kiadó, Budapest, 2000.

⁵ Fate of minorities, GA Res. 217/C (III), 16 December 1948.

⁶ Francesco Capotorti: *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384c.

⁷ Study of the Legal Validity of the Undertakings concerning Minorities, UN Doc. E/CN.4/367, 1950.

2. The Evolution of the Prohibition of Discrimination in the Resolutions of the UN General Assembly

From the beginning of the 1950s the expression of minority rarely occurs in the resolutions of the General Assembly,⁸ states deal with the issue from the viewpoint of the prohibition of discrimination. Already at the first session they cited that the UN Charter prohibits persecution and discrimination based on race, against which all governments must act.⁹ After the acceptance of the Genocide Convention and the Universal Declaration of Human Rights in 1948 the issue of racial discrimination had been touched upon mainly in connection with the colonial/trust territories. From the 1950s the relevant resolutions of the General Assembly ran on different paths: 1) ensuring the right to self-determination to the trust territories, 2) fight against racial discrimination (naturally, many resolutions parallel deal with both¹⁰), 3) the case of South Africa. The analysis of the right to self-determination and the apartheid regime in South Africa is unnecessary here, thus only those resolutions are of interest here, which are expressly about the prohibition of racial discrimination.

The actions of the General Assembly, relating to the prohibition of racial discrimination, covered on the one hand the inclusion of the ban in multilateral human rights conventions, on the other hand they elaborated a special convention, and thirdly they adopted non-compulsory resolutions. The 1948 Genocide Convention prohibits the most serious forms of racial discrimination. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, adopted in 1966, ban all forms of discrimination.

The states adopted in 1965 the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: CERD), which entered into force three years later. The preparation of this Convention started in 1962 in the General Assembly, when it requested the UN Commission on Human Rights and its Sub-Commission to prepare a draft declaration and a draft convention in the same topic.¹¹ The United Nations Declaration on the Elimination of All Forms of Racial Discrimination was ready a year later¹², and the drafting of the Convention was also rapid, compared to other UN conventions.¹³ Besides these, the General Assembly addressed the issue in several of its resolutions, and from 1960 it included in its agenda the fight against the manifestations of racial and national hatred. These resolutions urge governments to amend their discriminative legislation, to raise awareness about the dangers of hate-speeches and discriminative conduct based on race and nationality, to act against hate speech in the media, education and other platforms, as well as to cooperate with international organizations and the

⁸ An exception is the UN General Assembly resolution 730 (VIII), which mandates the UN Secretary-General to provide technical assistance and advice to any UN member state for the protection of minorities and the fight against discrimination. GA Res. 730 (VIII), 23 October 1953.

⁹ GA Res. 103 (I), 19 November 1946.

¹⁰ *E.g.*: Racial discrimination in Non-Self-Governing Territories, GA Res. 644 (VII), 10 December 1952., GA Res. 1328 (XIII), 12 December 1958.; Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories, GA Res. 2144 (XXI), 26 October 1966.

¹¹ Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, GA Res. 1780 (XVII), 7 December 1962.

¹² United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1904 (XVIII), 20 November 1963.

¹³ The convention was adopted by the UN General Assembly in 1965 in resolution 2106 (XX), and was signed in 1966.

civil sector in order to eliminate racial and national hatred and discrimination.¹⁴

The importance of the existence of the Declaration, since there's a convention as well, and despite its lack of being legally binding, is that it shows the model conduct for the members of the UN and had an influence on the development of customary international law. For the entering into effect of the 1965 Convention, ratification by 27 states was enough, and participation in it is still not universal.¹⁵ In the interest of the implementation of the Declaration the General Assembly stated that racial discrimination and apartheid endangers international peace and security, violates fundamental human rights and significantly impedes economic and social development. It highlighted that the preparation of studies, education and raising awareness are the tasks of not only governments, but the bodies of the UN, governments and the civil sector.¹⁶ These were strengthened in several subsequent resolutions, 21 March was declared the international day of the fight against racial discrimination,¹⁷ 1971 was declared the international year for that cause,¹⁸ furthermore, even an international decade was initiated¹⁹ and a world conference convened, all dedicated to this fight.²⁰

Most of the excellent-on-paper ideas have not been fully executed in practice. For example in the time frame between 1983 and 1989 no planned program was executed owing to the lack of funding for it.²¹ States offered only insignificant amount of money for the voluntary fund created for the execution of the programs.²²

Not only resolutions supporting the Declaration were adopted by the General Assembly, but from the 1960s at almost every session such resolutions were accepted which condemn intolerance based on race, ideologies that incite hatred, Nazism, fascism, totalitarian views and practices. In these documents the General Assembly recommends states to implement the rights guaranteed by the Universal Declaration of Human Rights into their domestic legal system, to ratify the human rights conventions, to remember the horror of World War II, and to punish the perpetrators of crimes based on ethnicity, such as genocide and apartheid. Furthermore, it calls upon states not to provide state support for non-governmental

¹⁴ Manifestations of racial and national hatred, GA Res. 1510 (XV), 12 December 1960; Manifestations of racial prejudice and national and religious intolerance, GA Res. 1779 (XVII), 7 December 1962; GA Res. 2019 (XX), 1 November 1965; GA Res. 2143 (XXI), 26 October 1966.

¹⁵ At present (July 2014) the convention has 176 member states, while there are 194 generally recognized states on Earth.

¹⁶ Measures to implement the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1905 (XVIII), 20 November 1963; GA Res. 2017 (XX), 1 November 1965.

¹⁷ Elimination of all forms of racial discrimination, GA Res. 2142 (XXI), 26 October 1966.

¹⁸ Measures to achieve the rapid and total elimination of all forms of racial discrimination in general and of the policy of apartheid in particular, GA Res. 2446 (XXIII), 19 December 1968; Programme for the observance of 1971 of the International Year for Action to Combat Racism and Racial Discrimination, GA Res. 2544 (XXIV), 11 December 1969. This was repeated in 2001 as well: International Year of Mobilization against Racism, Racial Discrimination, Xenophobia and Related Intolerance, GA Res. 53/132, 9 December 1998.

¹⁹ The first one commenced in 1973, then the next ones in 1983 and 1993. Decade for Action to Combat Racism and Racial Discrimination, GA Res. 2919 (XXVII), 15 November 1972; Second Decade to Combat Racism and Racial Discrimination, GA Res. 38/14, 22 November 1983; Third Decade to Combat Racism and Racial Discrimination, GA Res. 48/91, 16 February 1994.

²⁰ *E.g.*: Results of the World Conference to Combat Racism and Racial Discrimination, GA Res. 33/100, 16 December 1978.

²¹ Report of the Secretary-General to ECOSOC, UN Doc. No. E/1990/50, para. 31.

²² *About this see e.g.*: Second Decade to Combat Racism and Racial Discrimination, GA Res. 45/105, 14 December 1990, para. 23-25.

organizations which participate in such actions or commit such crimes.²³

Besides the annually recurring resolutions reporting about the programs, the General Assembly adopted individual resolutions in the topic. In the spring of 1993 it condemned all forms of ethnic cleansing and race-based hatred, stating that these represent the serious violation of international humanitarian law.²⁴ In 2003 it highlighted that racist, hatred-inciting speech is not part of the freedom of expression, that ethnic, cultural and religious diversity promotes democracy and condemned the recent phenomenon that xenophobia has gradually been increasing in the political discourse.²⁵ In 2007 it condemned the denial of the Holocaust.²⁶

The newest significant resolution in connection with the topic was adopted by the General Assembly in 2011, titled "United against racism, racial discrimination, xenophobia and related intolerance". This political declaration was adopted unanimously, states confirmed that further fight is needed against racial hatred and stated that it is the states which have the primary responsibility for that.²⁷

Besides resolutions initiated by the General Assembly itself, from the 1970s it formed part of its work to discuss and accept the report of the Committee set up in the framework of CERD.²⁸ Compared to the previously mentioned ones, these resolutions do not contain much novelty. Nevertheless, the effort of the Committee should be mentioned that the rights guaranteed by CERD shall also be applied to minorities and indigenous peoples. This resulted in the resolution of the General Assembly declaring that states should interpret the 1965 Convention in such a way so as to apply it to minorities and indigenous people as well.²⁹ The financial hardships of the 1980s and the disillusion with the UN left their mark on the work of the Committee: for the session of 1985-86 the Committee was not even convened, let alone making the annual report, because most of the member states have not paid their compulsory contribution, which would have provided the financing of it.³⁰ The financial crisis of the Committee lasted until the beginning of the 1990s, until then only shortened sessions were held, and several programs were cancelled.³¹ In the past 20 years, the General Assembly emphasized in relation to the reports of the Committee, that the early

²³ E.g.: Measures to be taken against Nazism and other totalitarian ideologies and practices based on incitement to hatred and racial intolerance, GA Res. 2839 (XXVI), 18 December 1971; Measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror, GA Res. 38/99, 16 December 1983, GA Res. 40/148, 13 December 1985, GA Res. 41/160, 4 December 1986; Measures to combat contemporary forms of racism, racial discrimination, xenophobia and related intolerance, GA Res. 50/135, 30 January 1996, GA Res. 54/153, 29 February 2000; Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance, GA Res. 64/147, 26 March 2010.

²⁴ 'Ethnic cleansing' and racial hatred, GA Res. 47/80, 15 March 1993.

²⁵ The incompatibility between democracy and racism, GA Res. 58/159, 22 December 2003.

²⁶ Holocaust denial, GA Res. 61/255, 26 January 2007.

²⁷ United against racism, racial discrimination, xenophobia and related intolerance, GA Res. 66/3, 22 September 2011.

²⁸ The first report: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 2648 (XXV), 30 November 1970.

²⁹ E.g.: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 37/46, 3 December 1982. Points 6, 11.

³⁰ Committee on the Elimination of Racial Discrimination, GA Res. 41/105, 4 December 1986.

³¹ See e.g.: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 42/57, 30 November 1987; Report of the Committee on the Elimination of Racial Discrimination, GA Res. 45/88, 14 December 1990; Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, GA Res. 47/111, 5 April 1993; Report of the Committee on the Elimination of Racial Discrimination, GA Res. 49/145, 23 December 1994.

warning mechanism elaborated by the Committee³² and the closer cooperation with other organs of the UN dealing with human rights are worthy of appraisal.³³ However, it expressed its concern for that several states are not fulfilling their reporting obligations undertaken in the convention.³⁴ Furthermore, the General Assembly requested from the states not to make any reservations to CERD,³⁵ and to regularly check the existing reservations and possibly withdraw them.³⁶ By the beginning of the 2000s the gender-based approach has also appeared in the work of the Committee, since it has become evident that racial discrimination is frequently linked to discrimination against women.³⁷ In 2008 the General Assembly expressed that the protection of human rights would be more effective if the separate organs and commissions belonging to the UN system hold joint meetings regularly, and prepare uniform requirements and standards with respect to the reports of the states, and share their experiences with each other.³⁸

3. The Appearance of the Protection of Minorities in the Resolutions of the UN General Assembly

As it has already been mentioned in the historical antecedents, the UN General Assembly has rarely dealt with the topic of traditional minority protection from the 1950s. Its attention was focused on the codification of human rights and the prohibition of discrimination. Only one exception can be found: In 1953, in resolution 730, the General Assembly requests the Secretary-General to provide technical assistance to the governments – if needed – for the elimination of racial discrimination and the protection of minorities. Such technical assistance can be the drafting of law, planning administrative and judicial procedures and preparation of educational materials.³⁹

The topic entered the agenda of the General Assembly again in 1991, when it asked the UN Commission on Human Rights to finalize the declaration about the rights of minorities, and to hand it in to the General Assembly for adoption (through ECOSOC). The preamble of the resolution declares that the UN has an important role in the protection of minorities, and apart from Article 27 of the International Covenant on Civil and Political Rights further universal-level protection is necessary.⁴⁰

A year later the General Assembly adopted the Declaration on the Rights of Persons Belonging to

³² *E.g.*: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 49/145, 23 December 1994. Point 5.

³³ *E.g.*: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 50/137, 21 December 1995. Point 3.

³⁴ *E.g.*: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 53/131, 9 December 1998. Point 4.

³⁵ *E.g.*: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 51/80, 12 December 1996. Point 18.

³⁶ *E.g.*: Report of the Committee on the Elimination of Racial Discrimination, GA Res. 55/81, 4 December 2000. Point 5.

³⁷ Report of the Committee on the Elimination of Racial Discrimination, GA Res. 57/194, 18 December 2002. Point 8.

³⁸ Report of the Committee on the Elimination of Racial Discrimination, GA Res. 63/243, 24 December 2008. Point 11.

³⁹ Technical assistance in the fields of prevention of discrimination and protection of minorities, GA Res. 730 (VIII), 23 October 1953.

⁴⁰ Non-discrimination and protection of minorities, GA Res. 46/115, 17 December 1991.

National or Ethnic, Religious and Linguistic Minorities (hereinafter Declaration on Minorities or DOM).⁴¹ Its introductory sentences, among others, emphasize that the protection of minorities promotes political and social stability in the concerned state and contributes to the friendship and peaceful relations among states. The state shall promote the preservation of the ethnic, national, linguistic and religious identity of the minority.⁴² Individuals belonging to a minority can freely practice their own culture, religion, language, participate in the life of the society, in legislation concerning them as well as the whole society, furthermore they are entitled to the freedom of association and to maintain relationship and contact with other individuals belonging to the same minority group (whether they are living in the same country or abroad).⁴³ The Declaration on Minorities does not only guarantee rights for the individual, but also for the minority as a group.⁴⁴ Members of the minority are entitled to all human rights and fundamental freedoms, without any discrimination, and in full equality before the law. States should take appropriate measures to enable the members of the minority to learn their mother tongue, history, culture, tradition and customs, except for those practices, which are in violation of international standards or national law. The state should facilitate that members of the minority participate in the economic life and development.⁴⁵ States shall cooperate in the interest of the protection of minorities, furthermore, it shall plan national policies and programs to ensure the rights.⁴⁶ Protection of the rights of minorities shall not be interpreted or understood as a violation of the requirement of equal human rights to everyone.⁴⁷ The specialized agencies and other organizations of the UN system shall also contribute to the full realization of the protection of minorities.⁴⁸

After that the General Assembly has adopted resolutions regularly about the need to promote and effectively popularize the Declaration on Minorities. It requested from the Secretary-General and the UN Commission on Human Rights to provide assistance to states in connection with the drafting of legislation related to minority protection, for the peaceful settlement of disputes and in order to prevent disputes. The General Assembly suggested that states should undertake the protection of minorities in binding bi- and multilateral agreements, and expressed its support for the civil sector and non-governmental organizations to further and promote the protection of minorities and everything that is included in the DOM.⁴⁹ The General Assembly requested from the states to include all the measures made in favour of the minorities in their country reports about the implementation of human rights conventions.⁵⁰ The General Assembly appointed the UN High Commissioner for Human Rights to cooperate with the UN programs and bodies in order to promote and popularize the rights of persons belonging to a minority and to realize more

⁴¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992.

⁴² *Ib.* Art. 1.

⁴³ *Ib.* Art. 2.

⁴⁴ *Ib.* Art. 3.

⁴⁵ *Ib.* Art. 4.

⁴⁶ *Ib.* Art. 5-7.

⁴⁷ *Ib.* Art. 8.

⁴⁸ *Ib.* Art. 9.

⁴⁹ *E.g.*: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 48/138, 20 December 1993; Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 50/180, 22 December 1995.

⁵⁰ Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 51/91, 12 December 1996.

effective protection.⁵¹ The Secretary-General regularly has to report to the General Assembly the improvement in the implementation of the resolution and the state of minority protection in education and political decision-making.⁵² The General Assembly called upon states to protect the religious and cultural places which are important for the concerned minorities.⁵³ In 2005, the UN High Commissioner for Human Rights established an expert position expressly dealing with minority protection.⁵⁴ Since 2011 the post is filled in by Ms. Rita Izsák, a member of the Hungarian Roma minority.⁵⁵ In 2007, for the even more improved implementation of the Declaration, the Human Rights Council created the Forum on Minority Issues, which annually convenes all the actors concerned in the field for a conference-like meeting.⁵⁶

4. The Protection of Indigenous and Aboriginal Peoples in the Resolutions of the UN General Assembly

Apart from two resolutions, the General Assembly had not dealt with the situation and rights of indigenous peoples until the 1980s. The first one of the above-mentioned two resolutions was adopted in 1949, and it recommended to the Economic and Social Council – together with other organs of the UN and other organizations – to study the possibilities of social and economic development of South American aboriginal populations. However, the reader starts to doubt the humanitarian aim behind the resolution already by the fourth sentence, because it states that "the material and cultural development of those populations would result in a more profitable utilization of the natural resources of America to the advantage of the world".⁵⁷ The other mentioned resolution was adopted in connection with the South West African situation: In 1956 the Union of South Africa, as the occupier of the territory, ordered the eviction of the aboriginal population belonging to the Red Nation from the Hoachanas Native Reserve. Since this action meant the violation of several international agreements, the General Assembly condemned it in a resolution and demanded the return of the evicted people to their native land and the respect for that land as a native reserve.⁵⁸

Three decades of silence followed, which was broken by two resolutions in the middle of the 1980s. In the first one a fund was founded for the support of indigenous communities,⁵⁹ while the second one

⁵¹ Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 54/162, 17 December 1999. Points 8-10.

⁵² Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 56/162, 19 December 2001. Point 16.

⁵³ Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 58/182, 22 December 2003. Point 8.

⁵⁴ Commission on Human Rights Resolution 2005/79, 21 April 2005.

⁵⁵ See: United Nations Human Rights, Office of the High Commissioner for Human Rights, Independent Expert on Minority Issues, <http://www.ohchr.org/EN/Issues/Minorities/IEExpert/Pages/IEminorityissuesIndex.aspx> (Downloaded: 17 July 2014).

⁵⁶ See: United Nations Human Rights, Office of the High Commissioner for Human Rights, Forum on Minority Issues, <http://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/ForumIndex.aspx> (Downloaded: 17 July 2014).

⁵⁷ Study of the social problems of the aboriginal populations and other under-developed social groups of the American continent, GA Res. 275 (III), 11 May 1949.

⁵⁸ The Hoachanas Native Reserve, GA Res. 1357 (XIV), 17 November 1959.

⁵⁹ United Nations Voluntary Fund for Indigenous Populations, GA Res. 40/131, 13 December 1985. The fund still exists, its task is to financially support the representatives of the indigenous groups in order to facilitate their participation in the public meetings of the relevant working groups of the UN.

acknowledged the role and significance of indigenous entrepreneurs, for whom the General Assembly requested from other UN organs and agencies (the World Bank among them as well) to establish such programs and projects, which would support and better facilitate indigenous undertakings.⁶⁰ Nevertheless, the active discussion of the topic only started at the end of the Cold War, in 1990 the General Assembly – upon the proposal of the Economic and Social Council – decided to declare 1993 the International Year of the World's Indigenous Peoples. In the focus of the international year the human rights of the indigenous and their problems relating to the environment, development, education and health were set.⁶¹ The aim of the international year was, among others, to provide technical and financial assistance for the indigenous peoples in order to further their development.⁶² Similarly to the events in connection with the prohibition of discrimination and the rights of minorities, the UN declared an international day, international decades (the first one between 1994 and 2004, the second between 2005-2015) for the protection of indigenous, it appointed goodwill ambassadors, established a fund for the realization of programs, and asked the organs of the UN to examine the relating indigenous issues during their own work.⁶³ ECOSOC established the Permanent Forum on Indigenous Issues in 2000, in order to facilitate the more effective consideration of the needs and interests of the indigenous in the decision-making of the bodies of the UN. The Forum is the advisory body of the ECOSOC, but the General Assembly also pays attention to its work.⁶⁴

Similarly to the rights of minorities, a declaration was adopted about the rights of the indigenous by the UN General Assembly in 2007. It was drafted by the Human Rights Council.⁶⁵ The Declaration on the Rights of Indigenous Peoples (hereinafter Declaration on Indigenous or DIP) closely resembles to the Declaration on Minorities, with some differences. While DOM lists the rights on 3 pages (Preamble plus 9 articles), DIP is 10 pages long (Preamble and 46 articles). The Declaration on Indigenous is more express about guaranteeing the rights not only for the person, but collective rights as well for the whole group,⁶⁶ furthermore, it reinforces that indigenous are entitled to the right to self-determination.⁶⁷ It refers to international human rights conventions,⁶⁸ stating that their scope covers the indigenous also, and expressly lists several human rights and freedoms.⁶⁹ Some of its articles are familiar from the resolutions and treaties on the prohibition of discrimination as well as on the protection of minorities, for example: prohibition of forced assimilation,⁷⁰ the right to practice their own culture,⁷¹ the right to property and to live on their own territory/land,⁷² freedom of religion,⁷³ right to their own education,⁷⁴ the right to

⁶⁰ Indigenous entrepreneurs in economic development, GA Res. 41/182, 8 December 1986.

⁶¹ International Year for the World's Indigenous People, GA Res. 45/164, 18 December 1990.

⁶² International Year for the World's Indigenous People, GA Res. 46/128, 17 December 1991; International Year for the World's Indigenous People, GA Res. 47/75, 14 December 1992.

⁶³ International Decade of the World's Indigenous People, GA Res. 48/163, 21 December 1993; International Decade of the World's Indigenous People, GA Res. 49/214, 23 December 1994; Second International Decade of the World's Indigenous People, GA Res. 59/174, 20 December 2004.

⁶⁴ *E.g.*: Indigenous people and issues, GA Res. 57/193, 18 December 2002.

⁶⁵ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

⁶⁶ *Ib.* Art. 1, 9.

⁶⁷ *Ib.* Art. 3-4.

⁶⁸ *Ib.* Art. 1.

⁶⁹ *Ib.* Art. 2, 44. Prohibition of discrimination; Art. 6. Right to citizenship, nationality; Art. 7. Right to life and freedom; Art. 15. Right to human dignity; Art. 16. Freedom of media and right to information; Art. 17. Right to work; Art. 18. Right to participate in political life (political rights).

⁷⁰ *Ib.* Art. 8.

⁷¹ *Ib.* Art. 9, 11, 13, 31, 33, 34.

⁷² *Ib.* Art. 10, 26-30.

relationship and contact with other members of the same indigenous people, whether living in the same country or abroad.⁷⁵ DIP uniquely says that states shall consult and cooperate in good faith with the representatives of the indigenous peoples.⁷⁶ Increased protection shall be provided for elders, women, children and people with disabilities.⁷⁷ It contains such rights, which only appear in relation to the protection of indigenous peoples: right to traditional medicine and health practices, including the use and conservation of their medicinal plants, animals and minerals;⁷⁸ right to have a distinctive spiritual relationship with their land and nature;⁷⁹ to have their land free from hazardous materials and military activities;⁸⁰ the right to determine the responsibilities of individuals to their communities;⁸¹ and the right to the recognition, observance and enforcement of treaties and agreements concluded with them.⁸² For the full realization of DIP indigenous peoples have the right to receive financial and other support from the state, to participate in the relevant decision-making and legislative process, as well as the UN and other intergovernmental international organizations shall contribute to that aim.⁸³

Although the regulation seems to be very detailed and specific, the Declaration underlines that it only sets the minimum standards, and its implementation and interpretation shall be in conformity with the principles of justice, democracy, human rights, equality, non-discrimination, good governance and good faith.⁸⁴

In the past few years, which passed since the adoption of the Declaration, the General Assembly has dealt with the situation of the indigenous,⁸⁵ and will hold a high-level conference in New York (Autumn 2014), with the aim of thoroughly examining the topic.⁸⁶

5. Complementing or Unnecessarily Repeating?

The three major documents, that are the 1965 Convention on the Elimination of Racial Discrimination (CERD), the 1992 Declaration on Minorities (DOM) and the 2007 Declaration on Indigenous Peoples (DIP), created by the UN General Assembly, are compared in the following tables.

The Convention is slightly different, while the other two bear great resemblance. Although anti-

⁷³ Ib. Art. 12.

⁷⁴ Ib. Art. 14.

⁷⁵ Ib. Art. 36.

⁷⁶ Ib. Art. 19, 32.

⁷⁷ Ib. Art. 22.

⁷⁸ Ib. Art. 24.

⁷⁹ Ib. Art. 25.

⁸⁰ Ib. Art. 29-30.

⁸¹ Ib. Art. 35.

⁸² Ib. Art. 37.

⁸³ Ib. Art. 38-42.

⁸⁴ Ib. Art. 43, 46.

⁸⁵ *E.g.*: Indigenous issues, GA Res. 63/161, 18 December 2008; Rights of indigenous peoples, GA Res. 66/142, 19 December 2011; Rights of indigenous peoples, GA Res. 67/153, 20 December 2012.

⁸⁶ Organization of the high-level plenary meeting of the sixty-ninth session of the General Assembly, to be known as the World Conference on Indigenous Peoples, GA Res. 66/296, 17 September 2012. For further information see the website of the event: <http://wcip2014.org/>.

discrimination was the main reason for the adoption of all three, the historical circumstances can be traced. In the case of the CERD the memories of the Holocaust, and the reality of colonialism and apartheid urged its adoption. The Declarations are the product of the post-Cold War era, while the DOM was inspired by Article 27 of the ICCPR, the DIP is motivated by the historical injustices and the development of the right to self-determination.

The bases of protection in the CERD are race, colour, descent, national, ethnic origin, while in the DOM it's the national, ethnic, religious, linguistic minority and in the DIP indigenous people. All three of them contain regulation not only at the level of individuals, but for groups as well.

When examining the subject of the obligation one finds that the CERD obliges not only the state, but persons, groups, institutions also. In the case of the two Declarations it's only the state that is addressed.

The Convention deals with the issue of positive discrimination, stating that it is allowed until equality is reached. The Declarations do not mention positive discrimination, although DOM expresses in Article 8 (3) that "measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality".

Since the Convention is a legally binding document it contains provisions for its enforcement: the Committee on the Elimination of Racial Discrimination. Understandably, the two Declarations – as lacking binding force – did not establish an organ for enforcement. Nevertheless, some UN bodies check its implementation.

	CERD 1965	DOM 1992	DIP 2007
<i>Main reasons</i>	· Holocaust (WWII) · colonialism · apartheid	· human rights for all · regional frameworks · ICCPR Art. 27.	· anti-discrimination · historic injustices · right to self-determination
<i>Bases of protection</i>	· race · colour · descent · national · ethnic origin	· national · ethnic · religious · linguistic minority	· indigenous people
<i>Subject of protection</i>	· individuals · groups · institutions	· individuals · groups	· individuals · community
<i>Subject of obligation</i>	· state · persons · groups	· state	· state
<i>Positive discrimination</i>	Allowed only until equality is reached	_____	_____
<i>International enforcement</i>	Committee	_____ (HRC Sub-Commission on the Promotion and Protection of HR)	_____ (UN Permanent Forum on Indigenous Issues)

All three documents include a wide range of actions required from the state. These can be actions at the legislative-legal level, or at social level, or in the international community. While CERD forms part of the human rights legislation, the two Declarations seem to imply that the contained rights are not part of the human rights regime, since the rights guaranteed there should be applied besides the applicable human

rights. Naturally, this also means that application of the Declarations does not relieve a state from guaranteeing human rights to the members of minorities or indigenous communities. That distinction also shows that while human rights are primarily considered to address the individual, the rights of minorities and indigenous appear also at the level of the community.

Actions Required from State	CERD 1965	DOM 1992	DIP 2007
<i>Legal Level</i>	legislation, review policy; prevent, condemn, prohibit and eradicate apartheid practices; condemn all propaganda based on racial superiority	protection of existence and identity; legislation; national programs & policy planning; secure that <i>besides</i> human rights	ensure all human rights; non-discrimination; just & fair redress; take effective measures to improve (w/involvement of the indigenous); extra attention to vulnerable groups; legal recognition & protection of land; protect their environment; respect former agreements concluded w/ them
<i>Social Level</i>	combat prejudice; encourage NGOs and movements; take measures in social, cultural, economic, educational, etc. fields	create favourable conditions (<i>to learn mother tongue, culture, history, tradition, religion; to develop and participate in economic progress</i>)	combat prejudice and discrimination; promote tolerance; consult & cooperate in good faith effectively; technical & financial assistance
<i>International Level</i>	promote UDHR and CERD	int. cooperation, promote DOM	int. cooperation

Although all three documents have a special subject, they repeat several of the human rights which are guaranteed in other human rights conventions. This does not seem to be necessary since all of them state that all human rights are applicable to the protected subjects. All three of them contain some highlighted rights; the Convention expressly prohibits genocide and apartheid, while the two Declarations underline the right to existence and to have special identity. On the first look DIP seems to guarantee a “big weapon”, that is the right to self-determination. However, on closer inspection one finds that it is even more constrained than the same right expressed in the two International Covenants of 1966. The reason for that is the second sentence of Article 3 interpreting that as the right to freely determine political status and economic, social and cultural development. This inner side of the right to self-determination is also strengthened in Article 4 (right to autonomy or self-government in matters of local affairs) and in Article 46 (1), which guarantees the territorial integrity and political unity to all states.

The documents list civil, political, economic and social human rights, furthermore the two Declarations contain some added rights, such as the right to use mother tongue and own language, to have contact with other members of the community, and the right to determine the responsibility of the individual toward the community.

All three documents contain specific exceptions from the guaranteed rights. The CERD allows differentiation between the nationals and non-nationals of the state (Art. 1). DOM states that specific practices in violation of national law or international standards can be banned and contains the vague reference of “wherever possible” in relation to taking appropriate measures to securing the possibility of

learning mother tongue (both in Art. 4). DIP allows relocation with free, prior, informed consent and just and fair compensation (Art. 10), limitation of rights is acceptable if it is in accordance with domestic law and international human rights obligations (Art. 46).

	CERD 1965	DOM 1992	DIP 2007
<i>Highlighted HR</i>	· non-discrimination · prohibition of genocide, apartheid	· right to their existence & special identity	· all HR · right to self-determination (inner!) · right to their existence & special identity
<i>1st gen.</i>	· equality before the law · political rights (<i>suffrage, participation, association</i>) · right to personal safety · civil rights (<i>nationality, marriage, property, opinion, religion</i>)	· political rights (<i>participation, suffrage, association</i>) · practice religion	· right to their own land & property · practice religion · right to personal & group-level safety
<i>2nd gen.</i>	· economic & social rights (<i>work, housing, services, education</i>) · right of free movement and access	· enjoy their culture	· economic & social rights (<i>work, education, media, services</i>)
<i>Other</i>		· use own language, (<i>both public and private</i>) · contact with other minorities · contact with own people	· autonomy, self-government, distinct institutions · practice, revitalize, teach culture, tradition, religion, language · right to own health practices · right to spiritual relationship to land & nature · right to determine the responsibility of individual toward the community · contact w/own people
<i>Exceptions</i>	· citizens & non-citizens (<i>nationality, naturalization, citizenship</i>)	· “specific practices in violation of national law or international standards” · “opportunities to learn mother tongue – wherever possible”	· “free, prior, informed consent with just and fair compensation”

Nowadays UN General Assembly resolutions include the society in the interest of the protection of rights in a wider range, reference to the civil sector and to the role of non-governmental organizations, education and media are more frequent, than it was during the Cold War. Cooperation and exchange of experiences and good practices are also more common between the organs of the UN, furthermore this can be stated about the relationship between those organs of the UN which deal with human rights and other international organizations. The international community has recognized that protection of peace does not start with the "stopping" of an aggressor, but small stirrs of the society shall be observed, dangerous trends shall be mapped, and attention should be paid to vulnerable groups (like minorities, women, children etc.).

In the past decades the UN tried to establish this protection through treaties and resolutions. Both the CERD and the Declarations on minorities and indigenous set minimum standards, however, only the first one is legally binding, the other two are of advisory, maybe soft law character. Nevertheless, the effect and significance of these resolutions should not be underestimated, since they were adopted by the representatives of all the states in the world (in the UN General Assembly), and the resolutions indicate the trend of state practice, and hopefully influences positively the development of customary international law in the field.

The social situation is different at the different corners of the world, for example significant indigenous community exists in South America, although they are in minority.⁸⁷ Furthermore, some of these states experienced a high-scale importation of slaves from Africa, who also represent a significant percentage of the population today.⁸⁸ Often the population of African countries consists of several different ethnic or national groups and none of them comprises the majority.⁸⁹ This phenomenon is also characteristic of a few Asian states.⁹⁰ In Europe, typically national minorities (less in number) exist beside the main nation of the state (forming the majority population).

In accordance with the fact that only such universal-level legislation can be accepted which covers the ethnic, national minorities, as well as the linguistic and religious minorities. Thus the realization of this protection cannot be separated from the operation of the state, it is part of the requirement of good governance.

The UN documents treat the situation of the indigenous peoples separately from minorities, however, this does not mean that the indigenous are not entitled to protection under the Declaration on Minorities or, for example, under Article 27 of the International Covenant on Civil and Political Rights. Theoretically, the difference between the protection of indigenous and minorities is that the former one has group/community-level rights, while the latter one has only at the individual level, however, the text of

⁸⁷ *E.g.*: The Mexican population consists of 65 % Mexican or Mestizo (of mixed European and Indian origin), 18 % indigenous Indian, 16 % white and 1 % other. Encyclopaedia Britannica: Mexico – Ethnic groups, <http://www.britannica.com/EBchecked/topic/379167/Mexico/27384/Ethnic-groups> (Downloaded: 17 July 2014).

⁸⁸ *E.g.*: Almost 8 % of the Brazilian population is Black, and more than 43 % Brown (of mixed European and black, or Indian origin). The percentage of indigenous does not reach half percent of the population. World Population Review, Ethnicity and race in Brazil, <http://worldpopulationreview.com/countries/brazil-population/> (Downloaded: 17 July 2014).

⁸⁹ This is spectacular in Kenya: 22 % Kikuyu, 14 % Luhya, 13 % Luo, 12 % Kalenjin, 11 % Kamba, 6 % Kisii, 6 % Meru, 15 % other African, 1 % other non-African. World Population Review, Kenya – population, <http://worldpopulationreview.com/countries/kenya-population/> (Downloaded: 17 July 2014). For a detailed analysis of indigenous and minority rights in Kenya see Korir Sing'Oei Abraham: Kenya at 50: unrealized rights of minorities and indigenous peoples. Report of the Minority Rights Group International, 2012. <http://resourcecentre.savethechildren.se/sites/default/files/documents/5773.pdf> (Downloaded: 27 September 2014)

⁹⁰ *E.g.*: It is disputed how many ethnic groups can be found in India (the numbers vary between 2 to 4), nevertheless they speak about 30 different languages (Hindi is spoken only by 41 % of the population).

the Declaration on Minorities does not mirror that theory. Further important difference is that the indigenous are entitled to the right to self-determination, while the minority is not. Nevertheless, in practice we saw the opposite of that, for example in the case of Albanians in Kosovo. Furthermore, the practice of inner self-determination very much resembles the practice of minority rights at a community level (for example participation in political decision-making and legislation, the possibility of self-government).

State practice typically uses one of the following approaches toward the minorities (as well as toward the indigenous): elimination, assimilation, toleration, protection and integration.⁹¹ International law prohibits the elimination and forced assimilation, and human rights conventions and the Declarations prescribe protection. The well-established protection creates integration in a good sense, where the ethnically, religiously and/or linguistically plural society lives together peacefully and in a healthy manner, cooperates, maintains its diversity, but has the sense of belonging together.

Protection of the indigenous is especially important in those states where they are in minority, thus their situation resembles to the situation of minorities. As it has been demonstrated the legislation covering them is also very similar. Based on that, it can be imagined that their protection would be possible under *one* international treaty. However, this idea has not yet entered the UN General Assembly.

⁹¹ See *e.g.*: Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. No. E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005. Point 21.