Self-Determination, Minorities, Human Rights: A Review of International Instruments
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Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law
Stable URL: http://www.jstor.org/stable/759918
Accessed: 02/01/2009 18:57

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SELF-DETERMINATION, MINORITIES, HUMAN RIGHTS: A REVIEW OF INTERNATIONAL INSTRUMENTS

PATRICK THORNBERRY*

I. SOME PRELIMINARY QUESTIONS

Self-determination and the rights of minorities are two sides of the same coin. When a colony or subject people accedes to independence in the name of self-determination, political unity and integral statehood will rarely be matched by national unity and ethnic homogeneity. The new State will frequently be dominated by a particular ethnic group in a majority, and there will be ethnic minorities. The consequences for the smaller groups of the transition from Empire to statehood may be severe; inter-ethnic solidarity in the face of a common alien oppressor may be ruptured and replaced by a more intimate, local and knowing oppression. This applies both when the new State is “national” in the sense of having a developed national character at the inception of statehood, and when the new State is born of a territorial concept, and nationality is still to be forged, if necessary by the plundering of small groups to achieve assimilation.

Accession to independence and defence of that independence parade under the banner of self-determination, a concept enshrined in the United Nations Charter, the International Covenants on Human Rights and other international instruments. The legal implications of this concept for minorities are, therefore, a matter of considerable moment. Self-determination is a concept of liberation. Its inscription in legal texts has coincided with an astounding transformation of political geography. States have replaced Empires. The age of colonialism becomes a historical datum, even if its long-term effects are profound.

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1. The reports of the Minority Rights Group (London) bring out the complexity of States in ethnic and religious terms. See also Capotorti, Study of the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (1979) UN Sales No.E.78.XIV. The present author is compiling “profiles” of 50 States for the UN University which examine their legal arrangements relating to minorities, and include reviews of population composition. Some results of this Study are reviewed in Minorities and Human Rights Law, Minority Rights Group Report No.73 (1987).

2. Definitions of assimilation, integration, etc., are essayed in the UN Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres, UN Sales No.71.XIV.2.

3. Discussed, infra.

4. Infra.

5. One result is that many colonies have advanced to statehood within their sometimes arbitrary colonial borders, resulting in States of great ethnic complexity.
But the facts of ethnic diversity and diverging political and moral ambitions within States require that questions be asked of self-determination. Does it liberate ethnic groups within States or even concern them? Has the phrase “All peoples have the right of self-determination” in the International Covenants on Human Rights (infra) a real function as a principle of human rights? What are “peoples”? Are minorities justified in appropriating self-determination to state their claims and aspirations? Are they wise to do so?

The connection between minorities and self-determination has been discussed in the legal literature, though the volume of writings is limited and minorities are frequently not the main focus of enquiry.6 Minorities appropriate the vocabulary of self-determination whether governments or scholars approve or not. Conflicts between State and minority demonstrate a quality of endurance. Contemporary State–minority disputes of high topicality include those involving the Basques, Corsicans, Eritreans, Kurds, Sikhs, the protagonists in the civil strife in the Sudan, and the Tamils of Sri Lanka—there are many others.7 Minorities have utilised the notion of secession, where a group would form its own State. The Biafrans wanted to secede from Nigeria; the Bengalis achieved secession from Pakistan and statehood in Bangladesh.8 Even if the demands of minorities are not so “extreme”, self-determination is part of their vocabulary.

Most recently, indigenous peoples have begun to articulate their grievances through the medium of self-determination.9 A document of the Four Directions Council “Declares that indigenous populations are ‘peoples’ within the meaning of the International Covenants of Human Rights . . . ”10 Principles drafted by the World Council of Indigenous Peoples paraphrase international instruments: “‘1. All indigenous peoples have the right of self-determination. By virtue of that right they may freely determine their political status and freely pursue their economic, social, religious and cultural development.’”11 Indigenous groups

7. See various reports of the Minority Rights Group; Day (ed.), Border and Territorial Disputes (1982); Caratini, La Force des Faibles (1986).
are mostly within the international law governing minorities, but see themselves as "more than" minorities and entitled to the rights of peoples. This conveys a sentiment that self-determination is not "for" or "about" minorities—a proposition assented to by the governments of many States. Some minorities are nonetheless convinced that self-determination is the only concept that penetrates to the heart of their claims. This implies that the potential of self-determination is not yet exhausted, that it is not "passé".12

II. TOWARDS THE UNITED NATIONS CHARTER

The United Nations Charter gave expression to a doctrine which had been maturing in international relations certainly since the American and French revolutions. These demonstrated two aspects of self-determination: casting off alien rule, and putting forward the people as the ultimate authority within the State—"external" and "internal" self-determination, respectively.13 Self-determination and rights of minorities were linked in the legal arrangements accompanying nineteenth-century examples of nations becoming States. The doctrine of the nation-State shaped these arrangements: the ideal State is the State of single nationality. Mazzini's conception of Italy included its ethnic and cultural uniformity, even if this meant denationalising "foreign" populations. Slavs, Greeks and Romanians gave expression to similar views. Political theory stressed the benefits to democracy of ethnic homogeneity.14 International law reflected a colder view. Statesmen foresaw the disruptive potential of nationalist fervour carried to excess. Legal constraints, usually in treaty form, were deployed to protect ethnic and religious minorities threatened by self-determination.15

The reciprocity of self-determination and safeguarding treaty was maintained throughout the nineteenth century. The "pattern" was flawed and betokened the existence of first- and second-class States: those which could be trusted to extend the benefits of democracy to all

13. Infra.
14. "... it is in general a necessary condition of free institutions that the boundaries of governments should coincide ... with those of nationalities", Mill, "Considerations on Representative Government", in John Stuart Mill, Three Essays (1975), pp.382 and 384. Some of the hierarchical assumptions which may lie under the surface of arguments in favour of assimilation of cultures are well expressed by Mill: "Experience proves, that it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race, the absorption is greatly to its advantage", idem, p.385.
15. Claude, National Minorities. An International Problem (1956); Fouques-Duparc, La Protection des Minorités de Race, de Langue et de Religion (1922); Laponce, The Protection of Minorities (1960); Macartney, National States and National Minorities (1934).
citizens and those which could not. The powers at the Paris Peace Conference following the First World War organised and expanded the "system" of independence coupled with a minorities guarantee into a determinate form. There was no "universal" arrangement. The powers did not threaten their own empires with self-determination. Nor were they subjected to minorities treaties. President Wilson's exhortations in favour of general acceptance of self-determination and obligations towards minorities were to little avail. While the mandate system inscribed in the Covenant promised ultimate self-government for enemy colonies, minorities were not accorded any special position therein, but were dealt with through treaties and declarations applying to specific groups, under the supervision of the League. States under this regime were obliged to grant to all their inhabitants basic human rights. Special minorities provisions were designed to ensure that nationals belonging to minorities would enjoy the same treatment in law and in fact as other nationals. Autonomy rights were granted to certain groups.

The basic premises of the system was summed up by the Permanent Court of International Justice. It was:

... to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

But the promises of "peaceful living" and "amicable co-operation" were not realised. Some States treated their minorities badly; some minorities were "disloyal" to their States. Beyond pragmatic reconciliation of States and minorities, the ultimate purposes of the League


17. At the Paris Peace Conference, "... the British and American delegations were anxious to confine self-determination to Europe, while the French and Italian delegations would have preferred to confine it to Utopia", Cobban, The Nation State and National Self-Determination (1969), p.66.

18. For a list of the States affected by the system, and its results, see De Azcárate, The League of Nations and National Minorities (1945); Robinson et al., Were the Minorities Treaties a Failure? (1943); Thornberry, op. cit. supra n.16.


21. "In order to attain this object, two things were regarded as particularly necessary ... The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority ... suitable means for the preservation of their ... peculiarities, their traditions and their national characteristics", Minority Schools in Albania (1935), PCIJ Ser. A/B. No.64, p.17.
regime were unclear.\textsuperscript{22} Latin American views implied that the regime was a staging post on the way to a complete national unity; the ideal State was a melting-pot of races and cultures, a cauldron of assimilation.\textsuperscript{23} The rights of minorities under the League system fell far short of self-determination.

\textbf{III. THE UNITED NATIONS CHARTER}

Despite its invocation in the inter-war years, self-determination was not part of positive international law.\textsuperscript{24} The “principle” is expressly mentioned in the United Nations Charter, in Articles 1(2) and 55. Article 1(2) places the principle among the purposes of the United Nations. Article 55 provides: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . ”—there follows a list of important political, social and economic goals. By Article 56, UN members pledge themselves to support the purposes in Article 55.

Notwithstanding initial equivocation, it can now be seen that real obligations were created, if imperfectly expressed, in the Charter.\textsuperscript{25} Self-determination in the Charter attaches to “peoples”. The meaning of “peoples” occasioned inconclusive discussion at the San Francisco Conference. The terms “State”, “nation” and “people” are all used in the Charter. The UN Secretariat examined the terms: “The word ‘nation’ is broad . . . enough to include colonies, mandates, protectorates and quasi-States as well as States”; and, “ . . . ‘nations’ is used in the sense of all political entities, States and non-States, whereas ‘peoples’ refers to groups of human beings who may, or may not, comprise States or nations”.\textsuperscript{26} The broad interpretation provoked a French delegate to say that the Charter appeared to sanction secession. Others disagreed.\textsuperscript{27} But the opinions of statesmen at the San Francisco Confer-

\begin{itemize}
    \item \textsuperscript{22} De Azcárate, \textit{op. cit. supra} n.18.
    \item \textsuperscript{23} Yepes, “Les Problèmes Fondamentaux du Droit des Gens en Amérique” (1934) 30(I) Rec. des Cours 14.
    \item \textsuperscript{24} The Aaland Islands Case (1920) L.N.O.J. Special Supp. No.3, p.5; Barros, \textit{The Aaland Islands Question: Its Settlement by the League of Nations} (1968); Brown, “Self-Determination in Central Europe” (1920) 14 A.J.I.L. 235.
    \item \textsuperscript{26} UNCIO DOCS, Vol.XVIII, pp.657–658.
\end{itemize}
ence towards minorities were largely negative in character. Despite the high level of interest in human rights, proposals for the protection of minorities were lacking. 28 Claude doubts whether the Charter carries any view of the minorities issue: "The United Nations Charter . . . was drafted without recognition of the minority problem as a significant item on the agenda of international relations." 29 It may be argued, however, that the Charter does have a view: the future of the "problem of minorities" merges into universal human rights. There is no lacuna: when the details of the new system of human rights were expounded, a rule for minorities would emerge. This is some distance from attributing self-determination to minorities.

The references to self-determination in Articles 1(2) and 55 are complemented by Chapters XI and XII on non-self-governing territories, and the international trusteeship system. Bowett states that it is permissible "to regard the entirety of Chapters XI and XII of the . . . Charter as reflections on the basic idea of self-determination". 30 Neither Chapter contains an express reference to self-determination, but the principle is established indirectly. Article 73 in Chapter XI describes the development of self-government in non-self-governing territories as a "sacred trust". Article 76 on the international trusteeship system refers to progressive development in the Trust Territories towards "self-government or independence". A key issue was the distinction between "self-government" and "independence". The colonial powers were unhappy about referring to "independence" in the generally applicable Article 73. In the view of the United States, however, "self-government did not rule out "independence" in appropriate cases." 31 The Philippines interpreted Article 73 to imply eventual independence for dependent territories. 32

Chapter XI of the Charter gave a tremendous impetus to the development of self-determination with a real possibility of implementation. Subsequent practice has hardened the meaning of Charter terms, but the result has been unfavourable to minorities. Chapter XI is a declaration on "Non-Self-Governing Territories". The territorial aspect is vital: the Chapter refers to "territories whose peoples have not attained a full measure of self-government"; the sacred trust is to promote "the well-being of the inhabitants of these territories". A territorial concept of self-determination appears to rule out minorities without a specific

28. The use of German minorities by Hitler to undermine the stability of their host States and the whole Versailles settlement induced an anti-minorities climate in the immediate postwar years.
29. Claude, op. cit. supra n.15, at p.113.
31. Generally, Russell and Muther, op. cit. supra n.27, at pp.813 et seq.
32. Ibid.
terrestrial base. Further, concentration on territory, in the light of the reality of mixed and inextricable populations, languages and religions, weighs heavily towards taking political demarcations as they stand, and making these the focal point of political change.

IV. THE BELGIAN THESIS

Article 73 of the Charter was utilised by the General Assembly in the promotion of self-determination through the requirement of reports on the progress made by States administering territories towards the objectives set by the Article. The main thrust of the Assembly's effort was in the direction of the colonial empires. The Belgian representatives pointed out that the Charter does not single out "colonialism", but non-self-governing territories. Belgium stated that:

... a number of States were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word.

It was not clear how such groups were excluded from the terms of Chapter XI. Groups in respect of which Chapter XI applied would include Indian tribes of Venezuela, the Nagas of India, indigenous African tribes in Liberia, Somalis in Ethiopia, tribals of the Philippines, Dyaks of Borneo, etc. The generality of the Belgian concerns was expressed in the delegate's remark that: "Similar problems [to colonialism] existed wherever there were underdeveloped groups." The thesis radicalises self-determination by insisting that it can apply to indigenous groups and minorities.

The thesis did not prevail. Latin American States and their allies did not agree that their situation could be assimilated to that of the colonies. The problems of the indigenous groups were economic rather than colonial. In the view of Iraq, the Belgian argument was based on "anger
at the criticism directed against conditions in the non-self-governing territories by less advanced States". One of the authors of the thesis, Dr Van Langenhove, effectively admitted to the thesis as a Belgian tactic.

The United Nations built a consensus on self-determination in response to the Belgian thesis to bring order to the inevitable historical movement of decolonisation. The delegate of Iraq to the Fourth Committee of the General Assembly offered the opinion that: "In the long run, colonialism must give way to self-government . . . " The thesis was rejected in favour of the theory of "salt-water" colonialism, summed up in General Assembly Resolution 1541(XV). Principle IV states that: "Prima facie there is an obligation . . . to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." The coupling of geography and the ethnic factor is important; without geography, the designation of non-colonial territories as entitled to self-determination was a possibility, though even with this factor, the definition is not perfect if the intention is to exclude all minority groups.

The restrictive view of the non-applicability of self-determination to minority groups is strengthened by a consideration of General Assembly Resolution 1514—the Colonial declaration—passed on the day before Resolution 1541. The holder of the right of self-determination is, once more, declared to be the people. The meaning of the term "people" is conditioned by repeated references to colonialism. Paragraph 6 of the Resolution states that: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations." The effect is that colonial boundaries function as the boundaries of the emerging States. Minorities, therefore, may not secede from States—at least, international law gives them no right to do

37. UNDOC A/C.4/SR.257, para.11.
39. UNDOC A/C.4/SR.257, paras.11–14. The reference of the delegate is to Chap.XI; this need not be taken to rule out a post-colonial future for self-determination as such.
40. GAOR 15th Session, Supp.16, p.29.
41. Ibid.
42. For some points on the application of the definition to aborigines, see Bennett, op. cit. supra n.33, at p.13. The physical separation of East and West Pakistan and the consequences of this for self-determination are discussed by the International Commission ofJurists in op. cit. supra n.8.
43. GAOR, op. cit. supra n.40, at p.66. For reviews of the Declaration, consult, inter alios, Pomerance, op. cit. supra n.25; Rigo-Sureda, op. cit. supra n.25; Whiteman, Digest of International Law, Vol.5 (1965); Bokor Szegő, New States and International Law (1970); Cassese, op. cit. supra n.27; Castañeda, The Legal Effects of United Nations Resolutions (1969).
The logic of the resolution is relatively simple: peoples hold the right of self-determination; a people is the whole people of a territory; a people exercises its right through the achievement of independence.

V. GENERAL ASSEMBLY RESOLUTION 2625(XXV) AND MINORITIES

Resolution 2625(XXV) appears, on one reading, to construct a link between self-determination and minorities. The text deals with the most important principles of international law, each principle to be construed in the light of the others. Three preambular paragraphs of the Declaration refer to self-determination—the third reference reiterates the prohibition on disruption of the national unity and territorial integrity of a country, etc. The principle is set out at some length in the operative part of the Declaration. There is not the same emphasis on colonialism as in Resolution 1514(XV). The preferred modes of implementing self-determination reflect more flexible options set out in Resolution 1541(XV): independence, free association or integration with an independent State, “or the emergence into any other political status freely determined by a people”.

44. The emergence of Bangladesh furnishes an example. The international community adjusted to the situation through recognition of the new State—Keesing's Contemporary Archives, 24565, 24989 and 25053. Some authorities hold the view that Bangladesh was a unit to which self-determination applied—Crawford, op. cit. supra n.6, at p.117; Int. Comm. Jurists, op. cit. supra n.8; Nanda, “Self-Determination in International Law; The Tragic Tale of Two Cities” (1972) 66 A.J.I.L. 321. The response of the UN to the whole episode of Bangladesh was muted, making it difficult to draw firm conclusions: Salzberg, “UN Prevention of Human Rights Violations—The Bangladesh Case” (1973) 27 Int. Organization 115.


47. The Declaration states: “In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles . . . Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this Declaration” (author's emphasis). This means that the self-determination principle must fit consistently with such principles as that of non-intervention in the domestic affairs of other States, the principle of the sovereign equality of States, and the principle of the non-use of force. The text of the Declaration contains a number of references to territorial integrity and political independence of States. Under the heading of “The Principle of Sovereign Equality of States”, we may note: “(d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems.” These principles clearly impinge on self-determination. The last would be just as appropriate in the context of the paragraphs on self-determination in that it states an important aspect of that concept. It may also, by implication, hint at the effective transformation of the right-holder into the State itself.

48. Nor is the Colonial Declaration expressly referred to.
Writers have given attention to the penultimate paragraph on self-determination:

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of [self-determination] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This is followed by the obligatory clause on territorial integrity.

The reference to representative government has been picked out as innovative by Rosenstock: "... a close examination of its text will reward the reader with an affirmation of the applicability of the principle to peoples within existing States and the necessity for governments to represent the governed". Thus, if "peoples within existing States" are treated in a grossly discriminatory fashion by an unrepresentative government, they can claim self-determination and not be defeated by arguments about territorial integrity. The guarantee of integrity is contingent upon the existence of representative government. There are, however, reasons to caution against this kind of claim, and Cassese doubts if the Declaration can be pressed too far. In his view, the paragraph could apply only to a few peoples living under racist regimes. He emphasises the negative wording as forbidding self-determination where there is representative government and in particular where this government is non-racist. Pomerance supports Cassese's view.

The drafts support the more cautious views. A proposal of the United States made the "internal" aspect of self-determination much clearer:

The existence of a sovereign and independent State possessing a representative government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.

A text proposed by Czechoslovakia and others made a similar point. The crucial difference between the United States draft and the final version is that, in the former, the key phrase is "all distinct peoples", whereas the final wording is "the whole people". The gaze of the international community is deflected from detailed "internal" scrutiny of

49. Rosenstock, op. cit. supra n.45; Cassese, op. cit. supra n.27.
50. As in Res.1514(XV). India expressed satisfaction that Res.2625(XXV) retained this element, UNDOC A/8018.
52. Cassese, op. cit. supra n.27, at pp.88–92.
53. Pomerance, op. cit. supra n.25, at p.39.
54. UNDOC A/AC.125/L.32.
55. UNDOC A/AC.125/L.74.
most States and the conduct of governments towards the “peoples” within their territories: only pariah States like South Africa, which oppresses its majority on racial grounds, are likely to be affected. Whether one discusses “internal” or “external” self-determination, the point is that “whole” territories or peoples are the focus of rights, rather than ethnic groups, Cassese’s analyses of “internal” self-determination should not be taken to fragment the meaning of “people”.

VI. THE COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Articles 1 and 27

The juxtaposition of self-determination in Article 1 of the Covenant on Civil and Political Rights and the rights of minorities in Article 27 provides an opportunity to compare closely what international law offers to peoples and minorities, respectively. Neither Article is particularly expansive, but there is an implementation framework, and a reasonable drafting record. Article 1 of both UN Human Rights Covenants commences with “All peoples have the right of self-determination.” The other paragraphs refer to economic self-determination (paragraph 2); and to the duty of States parties to the Covenants to promote self-determination (paragraph 3). Article 27, which still stands as the only whole and general statement of the treaty rights of minorities in modern international law provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

56. Cassese, op. cit. supra n.27, at pp. 88–92. South Africa exhibits a singular combination of racism and minority rule.

57. It seems that Cassese, op. cit. supra n.6, at pp. 134–135, does not intend such a fragmentation. He regards self-determination as, inter alia, an anti-racist postulate, and writes: “ ‘internal’ self-determination amounts to the right of an ethnic, racial or religious segment of the population in a sovereign country not to be oppressed by a discriminatory government”. “Segment” might be taken as an equivalent to “minority”, but Cassese notes also that “Self-determination . . . has not been accepted as a principle protecting national or ethnic groups . . . State sovereignty . . . has shielded States from the demands of ethnic minorities . . . ”

58. There is an extensive review of the drafting history of the Covenant(s) in Henkin (ed.), The International Bill of Rights. The Covenant on Civil and Political Rights (1981).

Neither Article ventures into further definition. The Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Professor Capotorti, offered this definition for the purposes of Article 27. A minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

A similar definition proposed to the Sub-Commission by the Canadian member in 1985 was forwarded to the UN Human Rights Commission, which is working on a draft declaration on minority rights. The Capotorti definition is not part of any UN instrument but it is doubtful if a subsequent definition would diverge greatly from it. Article 27 and the Capotorti definition may be taken as a basis for comparing self-determination and minority rights in the Covenant.

The right of self-determination in the Covenants is universal. The text and travaux support the view that the Covenants reach beyond the colonial situation, though there are indications of narrower views.

60. Capotorti, Study, ibid, Chap.1.
61. Professor Deschenes defines a minority as a “group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law”, UNDOC E/CN.4/Sub.2/1985/31, p.30. Deschenes’s definition is the result of a detailed analysis of legal issues with a full explanation of why certain categories are not included. There is not a great deal to distinguish the definition from that of Capotorti, except that the former refers to “citizens” as opposed to “nationals”, and is explicit on “equality in fact” and “equality in law”. For the UN draft declaration, see infra n.109. Both definitions exclude aliens. For a narrow view, allowing only “long-established” groups to qualify as minorities and not immigrants who have become citizens of the host State, see UNDOC A/41/40, para.307 (F.R. of Germany).
62. Art.1(3): “The States Parties to the present Covenant, including those having responsibility for . . . Non-Self-Governing and Trust territories, shall promote the realisation of the right of self-determination . . . ” (author’s emphasis). The post-colonial future of self-determination was a matter of relative unconcern to many States, though Western States insisted on a continuing function. Among other States, we may note the forthright statement of Afghanistan that self-determination “will have to be proclaimed even in a world from which colonial territories have vanished”, UNDOC A/C.3/SR.644, para.10.
63. Europe “had reached the ultimate goal where self-determination was concerned; now that European Powers were denying the right of self-determination to Asian and African peoples, there could be no doubt that the question of the inclusion of Article 1 of the Covenants was a purely colonial issue” (author’s emphasis), UNDOC A/C.3/SR.648, para.8 (Syria). Many States expressed the view that the colonies would be the first beneficiaries of self-determination. This does not rule out later beneficiaries.
Some interest in this respect attaches to the declaration made by India on Article 1: “. . . the Government of the Republic of India declares that the words ‘the right of self-determination’ . . . apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of the people or nation—which is the essence of national integrity”. Other States have objected to the declaration, which clearly curtails the scope of the Article. 64 The Netherlands objection reads, in part: “Any attempt to limit the scope of [the] . . . right or to attach conditions . . . would undermine the concept of self-determination itself and would . . . seriously weaken its universally acceptable character.” 65 The position of India has, however, been marked by inconsistency. 66 Its delegate had earlier stated in the General Assembly’s Third Committee that, “although there were good reasons to make special reference to the peoples of non-self-governing territories, it must be recognised that the field of application of the principle of self-determination was wider than that”. 67 There is little reason to doubt the view that the Covenants mean what they say: that Article 1 applies to all peoples, and is not confined to colonial territories.

The “broad” view of the applicability of Article 1 is a fundamental assumption underlying the “General Comment” issued by the Human Rights Committee: “. . . it imposes specific obligations on States Parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of their right to self-determination”. 68 This makes it clear that the right is universal, as can be expected in a document of human rights. The promotion of self-determination must be consistent with other provisions of international law: “in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right”. Self-determination in the Covenants includes internal self-determination. The Comment alludes to this: “With regard to paragraph 1 of Article 1, States Parties should describe the constitutional and political processes which in practice allow the exercise of [self-determination].” The Committee complains that many States in their reports “completely ignore Article 1, provide inadequate information in relation to it or confine themselves to a reference to election laws”. The comment makes no contribution to the elucidation of

64. UNDOC ST/HR/4/Rev.4, pp.44 et seq.
65. Idem, p.64.
67. UNDOC A/C.3/SR.399, para.4.
68. There is a useful collection of these comments by the Human Rights Committee in 9 E.H.R.R. 169. The comment on self-determination was adopted by the Committee on 12 Apr. 1984.
any people/minority distinction. The assumption appears to be that minorities are covered by Article 27. The Committee has been unable to formulate a comment on the latter Article.69

The tension between “people” and “minority” is apparent at various stages in the drafting. Afghanistan and Saudi Arabia, authors of a draft resolution on self-determination, at one time deleted the term “peoples” from their draft. This was at the suggestion of delegations who feared that the term “might encourage minorities within a State to ask for the right to self-determination”.70 On the other hand, India argued that the problem of minorities should not be raised in the context of self-determination.71 China declared that the issue “was that of national majorities and not of minorities”.72 The reference to “majorities” reflected the views of many in the debates; it may be taken as an infelicitous expression of the conviction that the right of self-determination is one for whole peoples, and not for sections of them. This view of self-determination dominates the travaux, despite occasional hesitations.73

Sections of the people—minorities—enjoy more limited rights than the people itself. The Capotorti definition refers to “non-dominant” groups in a State and Article 27 is a statement of rights essential to the defence of minority identity in the face of assimilationist pressures: it encapsulates their “right to an identity”74 (“dominant” minorities, such as the whites of South Africa, have no need of such rights). There is a qualitative difference between the two categories: the right of self-determination means full rights in the cultural, economic and political spheres. The essence is political control, accompanied by other forms of control. The rights of minorities are enumerated and finite, and do not include political control. Article 27 does not even grant the minority an unequivocal collective right: it is “persons belonging to such minorities” who are accorded rights. The collective aspect of minority rights bedevils the elaboration of a more detailed instrument on minority rights—States are reluctant to concede rights to collectivities which may

69. *Minorities and Human Rights Law*, op. cit. supra n.1. The Human Rights Committee, in its report of 1986, stated that the draft of Art.27 would be suspended pending “information gathering”, and promised that particular attention would be devoted to this article in the future, UNDOC A/41/40, para.412.
70. A/C.3/SR.310, para.3.
73. E.g. Yugoslavia professed unconcern at whether self-determination applied to minorities, dismissing this as a “legalistic” argument: A/C.3/SR.647, para.40.
74. The concept of a right to identity for minorities is implicit in Art.27 of the Covenant on Civil and Political Rights, and is strongly expressed in the definitions of Capotorti and Deschênes. See *Minorities and Human Rights Law*, op. cit. supra n.1. The present author analyses the concept in a work to be published shortly by Oxford University Press.
come to rival the State itself.\textsuperscript{75} The opening phrase of the Article, “In those States in which . . . minorities exist . . . ”, almost invites States to deny that they exist, and many States have responded to the “invitation”.\textsuperscript{76} Such denials of the presence of minority groups on State territory should not be allowed to function as an escape for States, most of which are obviously multi-ethnic: the absence of a final definition of minority has not inhibited the Human Rights Committee in its questioning of States on treatment of their minorities.

Finally, Article 27 appears to impose only a duty of toleration on States, a duty of non-interference with the cultural and religious practices of the groups. But it can also be read to impose positive duties upon the State, based on the argument that, in order to function, the Article must go beyond the rule of non-discrimination and equality in law towards equality in fact, so that the continued existence of the minority group is not placed in jeopardy in a situation in which it is inherently the weaker party.\textsuperscript{77} Tenuous as these rights are, they are vital for minority groups and represent a minimum from which there should be no derogation.\textsuperscript{78}

\textbf{B. Positive and Negative Interpretations}

In the light of the limitations of Article 27, it appears ambitious to argue for a connection between minorities and self-determination.\textsuperscript{79} There are, however, at least two possibilities of “positive” interpretation implying a connection: (a) minorities are peoples within the meaning of Article 1—a view which is not supported by the \textit{travaux}; (b) attribution of rights to whole peoples benefits minorities indirectly through “internal” self-determination. There is also a negative possibility: (c) self-determination is best understood as external, and internal self-determination is supererogatory.

In relation to (a), the practice of the Human Rights Committee is equivocal, but may be taken to buttress the view that minorities are not peoples. Questions on individual groups in a State which might imply that they are covered by Article 1 are often “fielded” by that State

\begin{itemize}
  \item \textsuperscript{75} \textit{Minorities and Human Rights Law, op. cit. supra n.1;} \textit{Ermacora, op. cit. supra n.6;} \textit{Vukas, “Le Projet de Déclaration sur les Droits des Personnes Appartenant à des Minorités Nationales, Ethniques, Religieuses, et Linguistiques” (1979) 23 A.F.D.I. 281.}
  \item \textsuperscript{76} Latin American States, in particular, have been anxious to deny the application of Art.27 to their particular situations. France has entered a reservation to the Covenant that “Article 27 is not applicable so far as the [French] Republic is concerned”.
  \item \textsuperscript{77} \textit{Capotorti, op. cit. supra n.1.}
  \item \textsuperscript{78} \textit{Minorities and Human Rights Law, op. cit. supra n.1.}
  \item \textsuperscript{79} One of the difficulties (see infra n.106) in elaborating a declaration for minority rights is precisely the collective element: the danger of attributing rights to groups as such. Yet self-determination is the supreme collective right, much more to be “feared” than anything in Art.27.
\end{itemize}
under Article 27.80 In the “communication” to the Committee by the Grand Captain of the Mikmaq Tribal Society, the applicant focused on Article 1 rather than Article 27. The communication was rejected at the admissibility stage because the author had “not proven that he is authorised to act as a representative . . . of the Mikmaq tribal society. In addition, the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of any rights contained in the Covenant.”81 The impediments to his claim may have been procedural or substantive: the Committee’s statement is not clear. This statement is hardly a basis for broad claims on the applicability of Article 1.

On the other hand, another communication involving Canadian Indians, that of Sandra Lovelace, has produced an unequivocal response from the Committee on the applicability of Article 27.82 This case demonstrates that Article 27 applies to individuals belonging to Indian groups as members of minorities; the case involved the loss by an Indian woman of the right to live on a reservation following marriage to a non-Indian. The Committee did not, in fact, trouble to discuss the application of the term “minority” to the Indian band to which Sandra Lovelace belonged, but appears to have assumed the correctness of the attribution. The applicability of Article 27 was so clear to the Committee that it considered it unnecessary to examine the case under the other articles of the Covenant. The case contrasts vividly with the uncertainty engendered by the Mikmaq case. Whatever the self-descriptive terms employed by indigenous groups,83 the text of the Covenant accommodates them better under Article 27 than under Article 1.

If minorities are not the “peoples” of the Covenants, this does not mean that self-determination has no relevance to them. Minorities are protected by international law through such instruments as the Genocide Convention 1948 and the International Convention on the Elimination of all Forms of Racial Discrimination 1966, even though the protection is indirect.84 Similarly in the present context: the “internal”

80. The reference here is to the reporting procedure under the Covenant. For a recent example, see the report of the Human Rights Committee for 1987, where a question on Art.1 of the Covenant raised the issue of the status of the Kurds: the reply of Iraq stated that the Constitution “recognised the ethnic rights of the Kurdish people as well as the legitimate rights of all minorities . . . the Kurds were part and parcel of the Iraqi people” (author’s emphasis). Iraq dealt with the Kurdish question in later paras. under Art.27: UNDOC A/42/40, paras.352, 353, 385, 386.
83. Supra text to nn.10 and 11.
84. Minorities may be described as “indirect” subjects in such cases: they are the most obvious beneficiaries of the prohibition of Genocide, etc., even though they are not named as such.
aspect of self-determination may have some incidence upon ethnic
groups, even though the formal subject of a right is the "whole people".
Internal self-determination has been much favoured as a concept by
Western States, reflecting their notions of democracy. President Wil-
son's early use of the term depended very much on American consti-
tutional tradition. From a socialist point of view, Lenin wrote that
"the recognition of the right of all nations to self-determination implies
the maximum of democracy and the minimum of nationalism". For
the States of the Third World, concerned with ridding themselves of
Western domination, self-determination is externally orientated, and, in
so far as it has an internal aspect, this is to do with majority rule (rule of
the "whole people") and the avoidance of rule by minorities, especially
white minorities. The question is, to what extent may any of these con-
ceptions be taken to govern the Covenants? The comment of the
Human Rights Committee is neither optimistic nor very illuminating.
States do not find much use for Article 1 "internally". But the Com-
mittee's comment also incorporates a view about self-determination
"underlying" human rights: "The right of self-determination is of par-
ticular importance because its realisation is an essential condition for the
effective guarantee and observance of individual human rights." This
could be read together with the reference to "political and constitutional
processes" (supra) to signify that States must organise these processes to
support the programme of human rights contained in the Covenants.
The application of internal self-determination is to be gauged with refer-
ence to human rights, and not to ideologies beyond it. Violations of self-
determination are violations of human rights. The "democracy" of the

supra* n.18.
Constitution of the USSR 1977, Article 72 provides: "Each Union Republic shall retain
the right freely to secede from the USSR." Lenin and Stalin (the Bolshevik "expert" on
the nationalities question) both warned that the exercise of self-determination by Soviet
nationalities must not prejudice the greater interests of Socialism: Stalin, *Marxism and the
National Question* (Moscow, 1950). The Soviet Union is experiencing an unprecedented
wave of ethnic unrest centred on (particularly) Estonia, Latvia, Lithuania, and Armenia.
Self-Determination is numbered among the claims advanced by nationalists. While these
nationalities are clearly accommodated under the relevant International Law on the rights
of minorities, broader claims to self-determination are of questionable validity. Some
degree of differentiation may, perhaps, be effected among the situations. For example,
some Western States (for, example, the USA), have never fully accepted the incorpo-
ration of the Baltic Republics into the USSR. There is, therefore, a tenuous measure of
international personality retained in this case which could be taken into account in assess-
ing the possible relevance of self-determination. This assessment would have to be related
to the question of when self-determination emerged as a legal right. In the more specific
context of Article I of the International Covenants (text to notes 58 ff.), questions of
"internal" self-determination might be relevant.
87. The examples of South Africa and the former Southern Rhodesia may be noted.
Covenants can be none other than the implementation of their provisions.

Such an interpretation appears to do little more than reiterate existing rights. It does, however, direct attention to the organisation of the State as a whole and how that organisation favours or disfavours human values to the benefit of all within the State, minorities included. It is probably in advance of the opinions of most States parties, which leads to possibility (c): perhaps the truth is that self-determination has little to do with human rights. The implementation of the covenant has not succeeded in showing how self-determination can be effective “internally”. Frequently, the questions of the Human Rights Committee are directed to divining the attitude of States to apartheid, Namibia and Palestine, rather than to their own peoples, who should be the primary focus of interest.

VII. OTHER INSTRUMENTS

While this article does not attempt to present a full picture of minority rights in international law, it may be noted that minorities are guaranteed a basic “right of existence” through the Genocide Convention. Further, the rule of non-discrimination in the enjoyment of human rights makes constant reference to race, colour, religion and language as impermissible grounds of distinction in human rights. Indigenous groups are given a measure of protection by the International Labour Organisation’s Convention No.107 on Indigenous and Tribal populations, as well as being entitled to whatever rights accrue to minorities, since they are mostly minorities in the States they inhabit. The Convention (Article 1(i)) applies to:

members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than . . . other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations . . . [and members of populations] regarded as indigenous on account of their descent from the populations which inha-

88. See Thornberry, op. cit. supra n.16.
89. 78 U.N.T.S. 277. The Convention prohibits a range of grave attacks on the existence of national, ethnic, racial or religious groups, including the killing of their members. Minorities are natural victims of genocide, and any new instrument on minority rights must be concerned, de minimis, with securing existence at this basic level. The draft declaration on minority rights has not committed itself to defining a right to existence, even though the original proposal by Yugoslavia made reference to it. The Draft Principles prepared by the UN Working Group on Indigenous Populations (infra) refer to a collective right to exist. The “existence” right in the Genocide Convention, unfortunately, does not reach out to “cultural” existence—cultural genocide is not proscribed except in the reference to forcible transference of children from one group to another (Art.II).
bided the country... at the time of conquest or colonisation, and which... live more in conformity with the... institutions of that time than with the institutions of the nation to which they belong.

The preferred term in the Convention, it may be noted, is not “peoples” but “populations”: connotations of self-determination are thus avoided. The rights granted to indigenous groups under this Convention encompass the protection of their way of life and range through civil and political rights to recognition of rights to land traditionally occupied, and economic, social and cultural rights.

Unfortunately, the Convention lay heavy stress on “integration” of the populations to the benefit of States rather than the populations as such: it is a Convention on “the protection and integration” of indigenous populations. Indigenous groups see the Convention as little more than a licence for States to assimilate and eradicate them under the guise of humanitarianism and have demanded its revision. In no sense does the Convention incorporate a right of self-determination: Article 2(1) provides that “Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries” (author’s emphasis). Provisions for consultation with the indigenous groups are minimal: in the application of the Convention, governments shall, according to Article 5, “seek the collaboration of these populations and their representatives”—seek, but not necessarily find. Revision of the Convention will require less stress on integration and more on the wishes of the populations concerned, though it is doubtful if self-determination by that name will figure on the agenda.91

Other instruments maintain the dichotomy between minority rights and self-determination. The Helsinki Final Act is a case in point.92 Principle VII of the “Declaration on Principles” deals with human rights, and includes the following paragraph:

The participating States on whose territories national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of Human Rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

91. The revision of ILO Convention 107 will, in all probability, adopt the term “peoples” instead of “populations”. However, a number of States contributing to the revision process have made it clear that the inclusion of “peoples” should not function as a base for an expanded range of claims by indigenous groups. Sweden commented to the ILO: “If the term ‘peoples’ is used, it should be made clear that this does not imply an extension of the principle of national self-determination to the indigenous population”: International Labour Conference, 75th Session 1988, Report VII(2), Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No.107), p.13. See infra, n.104.

92. Buergenthal and Hall, op. cit. supra n.27; (1975) 14 I.L.M. 1292.
This endorsement of minority rights is more limited than Article 27 of the Covenant on Civil and Political Rights. There is the same question of the “existence” of minorities; the different minorities are narrowed down to “national” minorities, implying a limitation of scope; there is no consideration of a “right to identity”, only to equality before the law; and the Article describes “interests”, which represent a lower logical category than “rights”. This contrasts strongly with statements on self-determination in Principle VIII, which includes:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external political interference, and to pursue as they wish their political, economic, social and cultural development.

As Cassese points out, the chief innovations here are the bold phrases on internal self-determination and the commitment to a continuing role for the principle of self-determination: peoples always have the right of self-determination, and in full freedom.93 He regards as “incontrovertible” the fact that “the Helsinki Declaration, when it discusses the principle of self-determination, extends the right only to groups identifying with sovereign States (for example, Italian, French and Soviet citizens)”. The travaux, while rather sketchy, support his propositions.94 Another commentator notes that “States with militant minorities, such as Canada and Yugoslavia, felt the need . . . for a limit to the application . . . [of self-determination] . . . to national minorities in order to avoid any implication that . . . [it] could be used to bring about the dissolution of federated States comprised of peoples of different nationalities or other minorities”.95 Rights of minorities in the Final Act are clearly of a lower order than the rights of peoples.

The African Charter on Human and Peoples’ Rights 1981 offers even less to minorities: this is unsurprising, and reflects the view of many African States that the minorities “problem” is essentially European.96

93. In idem, pp.95 et seq.
The "peoples" of the Charter are not defined, but they have important rights. Article 19 reads: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." Article 20(1) reads: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination." The rights of peoples are buttressed by the duties of individuals, which include the duty to "preserve and strengthen the national independence and the territorial integrity of . . . [their] country." 97 There is no explicit reference to "minorities", though Article 2 and the Preamble refer to discrimination based on "ethnic group", as well as "race, colour . . . language, religion . . . national and social origin". The Charter lays tremendous stress on its "African" character throughout. 98 This includes the African views on self-determination which stress the integrity of the State, even in cases of severe oppression of minorities. There is little to suggest that "peoples" are other than the "whole peoples" of the States, and not ethnic or other groups. This conclusion is strongly supported by discussions at the Nairobi Conference convened by the International Commission of Jurists in December 1985, and is likely to represent the future practice of the African Commission of Human Rights. 99

VIII. CONCLUSION

MINORITIES use the vocabulary of self-determination and States deny its relevance to them. International law gives little support to minorities in their endeavours. The right of self-determination is a right of peoples, with strict limits on application. The international system is not immutable, and States are regularly subjected to challenge by minorities, its representative argued that "It was therefore difficult to speak of the existence of ethnic minorities in Zaire and those who did so were often acting for political reasons", UNDOC A/42/40, para.289. Zaire also insisted that there were no "problems" in the implementation of Article 27 of the Covenant, idem, para.274.

97. Art.29.
98. The tone is set by the Preamble, which makes three specific references to the OAU, recalls the Charter of that organisation, and refers to the virtues of the historical tradition and "the values of African civilisation" which "should inspire and characterise" the States parties' reflections on the concept of human and peoples' rights. See also Arts.21(4), 23, 29(7), 29(8), and, particularly, Art.61 regarding the sources of law to be used by the African Commission on Human and Peoples' Rights, the body charged with the implementation of the Charter.
99. Human and Peoples' Rights in Africa and the African Charter (1986), pp.53-54. The approach of the African States to international crises is matched by the numerous references to territorial integrity (the need to defend and strengthen it) in the constitutions of many States. Thus, s.2 of the Constitution of the Federal Republic of Nigeria describes Nigeria as "one indivisible and indissoluble Sovereign State" (author's emphasis); s.15(2) provides that "national integration shall be actively encouraged"; the functions of government are to be carried out in such a way as to "reflect the federal character of Nigeria and the need to promote national unity" (s.14(3)). For other examples, see Minorities and Human Rights Law, op. cit. supra n.1. The imperative of territorial integrity does not
occasionally to the point of dismemberment.\footnote{100} It may come to pass that the legal texts will more clearly associate minorities with a right of self-determination, in terms of meaningful approaches to internal self-determination, and in cases of severe mistreatment.\footnote{101} On the other hand, existing norms on the rights of minorities are limited, and inadequate to the task of ensuring that minorities do not have assimilation or integration forced upon them as a threat to their existence and identity.

Instead of starting from the collective right of self-determination, it may, therefore, be more productive to start from the rules of basic human rights. Minority protection could also be taken to require autonomy in certain instances.\footnote{102} Many States accord a high level of self-management to ethnic groups in their constitutional law, though autonomy is not widely perceived as an obligation in general international law.\footnote{103} These remarks also apply to indigenous populations—though there is a stronger international movement in their favour than for minorities in general. The International Labour Organisation’s Convention on Indigenous and Tribal Populations is on the brink of revision, and the UN Working Group on Indigenous Populations is drafting a set of principles. A key concept in process of elaboration is that of “ethnodevelopment”: the development of ethnic groups within the larger society as a compromise between ethnic self-determination and the nation-State.\footnote{104}

always “rule” absolutely. For example, the response of African States to the Biafran case showed divisions among them—consult Harris, \textit{Cases and Materials on International Law} (3rd ed., 1983), p.127. See also the equivocal response made by the representative of Senegal to questions by the Human Rights Committee on the problem of separation in the Casamance region, UNDOC A/42/40, paras.190 and 191.

\footnote{100} See the text for nn.7 and 8.


\footnote{103} \textit{Minorities and Human Rights Law}, op. cit. supra n.1; works cited supra n.102.

For both categories, there is need to strengthen implementation procedures, to amplify and specify norms, and to press for just treatment of groups. The humane regime should attempt to convince States that maltreatment of their minorities is a primary cause of internal and international strife.\textsuperscript{105} There is need also to bring to fruition the efforts of the United Nations to draft a minorities’ instrument, and further to advance work on the rights of indigenous groups.\textsuperscript{106} To achieve this would be to build rather than dream the future, starting from what is, rather than what might be.

\textsuperscript{105} This view is strongly defended by Professor Capotorti in his important Study, \textit{op. cit. supra} n.1. The reports of the Minority Rights Group demonstrate that many States have not, regrettably, absorbed the lesson.

\textsuperscript{106} Draft articles on minorities prepared in the Working Group of the UN Human Rights Commission are innocuous and add little to Art.27. One stumbling block has been the question of individual versus collective rights for minorities. The text so far is in UNDOC E/CN.4/1988/36. The Group reports that “... the fundamental question of whether to follow an individual or collective rights approach remains unresolved”, \textit{idem}, para.16.