

Minorities and Human Rights Law

A Minority Rights Group Report



THE MINORITY RIGHTS GROUP

is an international research and information unit registered in Britain as an educational charity under the Charities Act of 1960. Its principal aims are –

- To secure justice for minority or majority groups suffering discrimination, by investigating their situation and publicising the facts as widely as possible, to educate and alert public opinion throughout the world.
- To help prevent, through publicity about violations of human rights, such problems from developing into dangerous and destructive conflicts which, when polarised, are very difficult to resolve; and
- To foster, by its research findings, international understanding of the factors which create prejudiced treatment and group tensions, thus helping to promote the growth of a world conscience regarding human rights.

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Minorities and Human Rights Law

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UNITED NATIONS COVENANT ON CIVIL
AND POLITICAL RIGHTS 1966

ARTICLE 27

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.

DRAFT DECLARATION ON THE RIGHTS
OF PERSONS BELONGING TO NATIONAL
OR ETHNIC, RELIGIOUS AND LINGUISTIC
MINORITIES (1991 Text)

The General Assembly,

Reaffirming that one of the basic aims of the United Nations, as proclaimed in its Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion.

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

Desiring to promote the realization of the principles contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live.

Emphasizing that the constant promotion and realization of the rights of persons belonging to

national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and co-operation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments on promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Taking also into account the important work which is carried out by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the need to ensure even more effective implementation of international instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

ARTICLE 1

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) may exercise their rights including those as set forth in this Declaration individually as well as in community with other members of their group, without any discrimination.

ARTICLE 2

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities, within their respective territories, and shall encourage conditions for the promotion of that identity.

PREFACE

In 1991 the plight of over a million Kurdish refugees fleeing in terror from Iraq into the inhospitable mountains of the frontier, aroused pity and anger around the world. The UN, in an unexpected move, worked to establish a 'safe haven' for the Kurds within the borders of Iraq. While some states saw this action as interference in the internal affairs of Iraq, many more saw it as a necessary and humane response to the feared genocide of a minority people by a ruthless government. The UN resolutions and its subsequent actions raise fundamental questions about the international law and minorities.

This new edition of *Minorities and Human Rights Law* was prompted by the emergence – and convergence – of new developments in the field of international law as it affects minorities. These include new regional agreements such as the minorities provisions in the Conference on Security and Cooperation in Europe (CSCE), stronger standards within the Council of Europe and the European Community on language and cultural rights, and, at the UN, reactivation of work on the draft Declaration on the Rights of Minorities. These have been paralleled by political developments – the revolutions of 1989 in Eastern Europe, new respect and support for a strengthened role for the UN, increased international attention on the plight of persecuted minorities in the Middle East and Africa. All of these have contributed to the debate on how international institutions can best act to protect and promote the rights of minorities.

As a small international organization, MRG can play only a limited and selective role in these developments. In an effort to move minority issues beyond those of specific minorities, MRG has published a number of thematic reports. These include *Constitutional Law and Minorities*, *The International Protection of Minorities and Language, Literacy and Minorities*, as well as the first edition of this report. In addition there have been reports dealing with certain generic groups, even though these are rarely classified as minorities in conventional terminology, such as women, children, and the mentally-ill. MRG plans to produce further future reports on thematic subjects.

MRG has participated in the CSCE process on minority issues and it has made recommendations to CSCE governments, both singularly and collectively. Similarly, MRG has used its consultative status at the UN (ECOSOC) to make written and oral interventions on specific cases of abuse and to make recommendations for change. It has played an active part in the Human Rights Commission and the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, particularly in its support for the appointment of a UN Special Rapporteur on Minorities and its input into the Working Group considering the draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.

MRG has convened a special meeting of legal and human rights experts in Geneva to discuss the components of the draft Declaration and how best it could be taken forward. During the Human Rights Commission, it followed up with a paper, written by Dr Patrick Thornberry, on the background of the draft as it then stood, and specific recommendations for changes. Dr Thornberry's academic background and expertise in international minority rights issues, make him an ideal author of this complex report. Together with Dr Thornberry, MRG will continue to work in a positive way on the draft Declaration.

The shape of the future UN role in the formation of consistent and legally-binding international standards on minority rights

will be crucial. As this report illustrates, the UN provides few standards specifically relating to the rights of minorities, and, when they exist, they are often by default, rather than design. Some States derogate from articles of existing conventions which have implications for minority rights. Other States do not even fulfill their basic reporting obligations under the same conventions.

Most States (perhaps all States) include minorities within their borders, and all States defend, in varying degrees, their national sovereignty over their minority peoples. With a few honourable exceptions, States place national and political considerations over their international obligations to minorities. Yet obligations to protect minorities are not intended as threats to the territorial integrity of states; on the contrary, the accommodation of the rights of minorities within a democratic constitutional structure has the potential to decrease friction and to defuse potential conflict between States.

There are other obstacles to change. The process of proposing, drafting, accepting and ratifying new international standards is generally a painfully slow one. Often the issues are complex ones and full and open resolution of the difficulties is essential if new standards are to be achieved. Frequently however, the reasons behind the lack of resolution and urgency are political ones. States prefer to defer or suppress discussion of minority rights, to divert it into procedural matters, or to present it as an irrelevance to the 'real' issues, usually concerned with economics or national sovereignty.

The UN itself is not well-equipped to implement human rights standards. The UN budget for human rights is a very small proportion of the total. The effective implementation of standards is given little priority. Nevertheless even within the present limitations much more can be done. There is an urgent need to finalize and adopt the UN draft Declaration on Minorities, while the Working Group will need to continue to meet after its adoption to determine measures for its effective implementation.

Within the present system there is the capacity for more effective implementation. The UN Advisory Services Programme in the field of Human Rights is currently under-used and often only employed as a milder reprimand than having the UN appoint a Special Rapporteur to investigate a country's human rights record. The Advisory Services Programme has the potential to be used in a much more effective and positive way, with the aim of strengthening the implementation of international standards. Similarly there should be greater consistency within the UN system; agencies such as the UN Development Program (UNDP) could target their projects to reinforce and support good practice.

This report raises questions which are relevant to standard-setting and implementation. Which direction should the UN be moving? Should the UN Charter be amended? How can present mechanisms be made more effective? Could the UN play a more positive role in conflict prevention? How is it possible to balance the demands of national sovereignty and international human rights standards? This report cannot answer all these questions but it is MRG's hope that it can stimulate productive and creative thinking on the issue of minorities and international law.

Alan Phillips
Executive Director
June 1991

Despite the rhetoric of nationalism or official proclamations of a State as vitalized by a single religion or irreligion, the States of the world are complex entities in terms of race, culture, religion and language. Differences within a country's population may indeed reveal a startling complexity: religions can divide into sects and denominations, languages proliferate into dialects, cultures develop convolutedly diverse forms. The histories of most countries on closer examination evidence mosaic-like patterns within their communities.

The Italian State which was achieved through the efforts of Mazzini, Garibaldi and Cavour on the basis of Italianita, for example, reveals major linguistic cleavages: besides Italian, the French, German and Slovenian languages are spoken and written, as also are Albanian, Greek and Ladino. Languages with a closer relationship to Italian include Friulano and Sard, together with a number of other tongues which may be described as dialects or sub-dialects. Besides religions brought by new immigrants, long-established communities of Waldensians, Orthodox Christians and Jews are found in Italy in addition to the main Roman Catholic tradition.¹ Groups of Roma or gypsies are scattered throughout Italy, as they are throughout western and eastern Europe.²

Smaller and apparently more homogenous States also frequently reveal internal complexity. The main ethnic groups in Finland besides the Finns are the Swedes and Saami (sometimes called Lapps). The latter form part of the complex of circumpolar peoples of Eurasia and North America. Within the limited group of States bordering the Arctic, one study identified 71 different circumpolar peoples.³ On another continent, the Instituto Nacional de Estadística of Bolivia identified five principal ethnic groups within its aboriginal population.⁴ Thirty languages are known among these groups but other estimates suggest a higher figure.

Italy is a medium-sized State in terms of population; Finland and Bolivia are small. While it is not axiomatic that the larger the population, the more complex the taxonomy, the differentiation in countries with large populations such as the USSR, China, India, Indonesia, Nigeria, is on an even greater scale than in the above examples.⁵

Despite this complexity, and the clear indication it gives that minorities are found in all countries, many States deny outright the existence of minorities on their territory; in consequence, declaring that the problem of minorities is one for other nations or other continents. The denial of the existence of minorities characterizes the position of many Latin American and African States in particular. Alternatively, it may be claimed by such States before international bodies that while the States may contain minorities, there are no 'minority problems'.

The term 'minority' is not defined in the major instruments of international law. This is a matter of no great surprise to international lawyers. Many concepts in the system remain 'undefined', though the practice of States, international organizations, or legal doctrine may remedy the lack of precision through time. In practice, the system operates with ambiguities, sometimes crucial, giving an uncertain quality to legal regulation.⁶ For many years, the United Nations (UN) regarded the definition of a minority as a highly important question.⁷ This may have deflected attention from the much more significant issue of how States should treat minorities.

International law has typically concerned itself with ethnic, religious and linguistic groups under the term 'minority'; sometimes adding the terms 'national' or 'racial' minorities. Indigenous populations are frequently bracketed with minorities; there is a growing tendency to regard these groups (such as the Aborigines of Australia or the Indians of South and Central America) as a separate issue in international and constitutional law⁸, but insofar as they do not constitute a majority in most States, they partake of whatever protection is generally afforded to minorities. The law has not been concerned with every conceivable classification of minority (left-handers or redheads as possible categories), but with cohesive groups, the characteristics of which endure, and who regard themselves – or are regarded by others – as different to the mainstream of society.

Such groups are likely to constitute an issue for government: despite epochs of forced religious conformity and, later, supposed cultural homogeneity as interpreted by the theory of the nation-state, historical experience proves this true.⁹ In 20th century discourse, the implementation and denial of human rights not only concerns dissidents or political challenge, but are also the rights of minorities and the prevention of discrimination. Examples of political or class repression are paralleled by the persecution of ethnic or religious groups.

While famous cases of conflict between minorities and the State, such as the Sikhs, Basques, Tamils, Kurds, or Eritreans, make overt this focus of human rights, in other cases minorities are part of a second or hidden agenda, when factors of ethnic and religious difference underlie politics and class as engines of dispute. Is it possible to disentangle the political, the ethnic and the religious factors in, for example, Northern Ireland or areas of the Middle East such as Lebanon? The images of the individual dissident, the workers struggling for justice, religious leaders opting to support the poor against their oppressors, are valid symbols of light against darkness. But fear, discrimination, and violence also darken the lives of nations, cultures, races, tribes, castes, belief systems and speakers of prohibited languages.

In its early years, the **United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities** attempted to agree a definition, but did not succeed. Its suggested definition in 1950 was as follows:

I – the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;

II – such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and

III – such minorities must be loyal to the State of which they are nationals.¹⁰

Latterly, two other definitions have come to the fore. The first is that of Professor Capotorti, a Special Rapporteur of the Sub-Commission. He defined a minority as:

*'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.'*¹¹

A revised version of this was submitted by Canada's Jules Deschenes to the Sub-Commission in 1985:

*'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.'*¹²

The Sub-Commission as a body was not unanimous about this definition and forwarded it, unapproved together with the comments in the debate it provoked, to the UN Human Rights Commission.¹³ A working group of the Commission currently charged with the elaboration of a declaration on minority rights decided in 1986 to postpone any further questions of definition.¹⁴ The draft Declaration is discussed in detail later in this report.

There is not a striking difference between the definitions of Capotorti and Deschenes. The key is a mix of objective characteristics with a subjective determination to retain those characteristics. 'Minority' is confined to nationals (Capotorti) or citizens (Deschenes); groups such as refugees or aliens or migrant workers are not included. Both definitions insist on non-dominance since the dominant minority raises the different issue of denial of self-determination of a majority (eg. Afrikaners in South Africa). Both agree on a numerical test of some kind.

Both definitions implicitly referred to the existence of a different kind of minority: the group which does not wish to maintain itself as a distinct entity but prefers to merge into wider society. The problem with international law has been in part that the merging group is amply catered for in the texts, since what is required there is a guarantee of non-discrimination rather than a positive evaluation of its status. A pretence of lawmakers has been to treat most groups as the latter rather than the former type. This fits in very well with a philosophy of assimilation.¹⁵ The failure to formalize a definition, to give it legal status by inscription in a text, is a failure of will, born not of a failure to understand the world, but of a refusal to do so.

The lack of a binding general definition of minority is not a fatal obstacle to progress. In any case, definitions (all definitions) introduce new terms which in turn attract further explanations, including claims by States that they do not apply. A supportive attitude by States towards international instruments on minority rights is qualitatively more important than a definition. The drafts prepared by the Working Group of the UN Human Rights Commission (see especially section on *Extending the rights of minorities in international law*) now incorporate the view that the terms 'national', 'ethnic', 'religious' and 'linguistic', placed before 'minority', constitute sufficient 'definitions' in themselves.

The groups likely to be omitted from the purview of instruments on the rights of minorities – aliens, refugees, migrant workers – may be catered for by other institutions of international law. The protection of aliens (non-nationals) is part of the established tradition of inter-State relations and is now generally embraced by the general International Law of Human Rights.¹⁶ Refugees are governed by specific instruments.¹⁷ In December 1990, the UN General Assembly adopted an International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Indigenous groups have tended to distance themselves from minorities in general, regarding themselves as peoples (below, sections on *Self-Determination and Indigenous Groups*). However, they are comprehended in fact by instruments on minorities because they are minorities in most States where they exist, and the definitions or descriptions do not exclude them.

STATE POLICIES

A usefully tabulated spectrum of policies on minorities has been set out in a UN **Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres** published in 1971.¹⁸

These policies are:

(i) Assimilation¹⁹

Defined as being based on the idea of the superiority of the dominant culture, assimilation aims at the achievement of homogeneity within the State by ensuring that groups discard their cultures in favour of the dominant culture. This also implies a willingness on the part of the dominant group to accept new members.

(ii) Integration²⁰

This much favoured term in modern human rights law postulates 'a process by which diverse elements are combined into a unity while retaining their basic identity'. There is here no insistence upon uniformity or elimination of differences other than the difference of each component group 'which would disturb or inhibit the total unity,'²¹ (present author's emphasis). The UN report notes, however, that integration can easily shade into assimilation. The words emphasized also indicate that integration can generate its own restrictive characteristics for groups concerned to retain and defend their identity.

Integration seeks:

- (a) 'To eliminate all purely ethnic lines of cleavage'; and
- (b) 'To guarantee the same rights and opportunities to all citizens whatever their group membership.'

Such an 'official' State policy may, in principle, be intolerant of specific laws for particular minorities in the State – even if such laws do not amount to 'privileges'. It is plausible that both assimilation and integration may thus reflect relations of domination and subordination between majority and minority, respectively – despite the apparently more 'benign' regime for minorities implied in the latter concept. Many a modern policy – particularly in so-called 'melting-pot' States – looks forward to the integration of minorities into the society. The sacrifice of the majority in this case may be matched or exceeded by the sacrifice of the minority: who defines which characteristics of a group 'disturb or inhibit the total unity'?

(iii) Fusion

Assimilation in particular needs to be distinguished from fusion, which may be defined as the process whereby two or more cultures combine to produce another, that is significantly different from the parent cultures.²² Perhaps fusion is more of a result than a policy; in any case it suggests less hierarchy and more equality between 'fusing' cultures than does assimilation.

(iv) Pluralism

This concept has a similarly – but significantly different – egalitarian face. It is described as a policy 'which aims at uniting different ethnic groups in a relationship of mutual inter-dependence, respect and equality, while permitting them to maintain and cultivate their distinctive ways'.²³ In complex multi-ethnic societies, such a policy symbolizes both diversity and unity, or diversity within unity. Pluralism may require, depending upon circumstances, some element of separation between ethnic groups; this may be the only means of avoiding disequilibrium between the groups to the consequential disadvantage of weaker groups (minorities). Pluralism requires a large measure of freedom within the State for minorities in the interests of real, rather than

formal, equality. While practical schemes for the assuaging of group demands or antagonisms within a State may eventuate in degrees of group separation (see the Aaland Islands case, below), these must be distinguished from segregation – a highly disfavoured term in law and politics, particularly in the area of race.

(v) Segregation

This is defined as a policy 'based on the belief in the superiority of the dominant culture [which] aims at keeping certain ethnic groups separate, unmixed, and ranked in a hierarchical position'.²⁴ Clearly, this would tend to be imposed by a dominant majority (or dominant minority in South Africa), rather than chosen by groups subjected to it. The doctrine of *apartheid* exemplifies a particularly vicious form of segregation, which has been ranked by the international community as a 'crime against humanity'²⁵ – which term derives from the post-war Nuremberg proceedings against Nazi war criminals. The South African policy stands as a valid symbol of all that is condemnable in relations between races.

The difficulty for minorities is that the condemnation of *apartheid* carries over into a general condemnation of separation as a formula for inter-ethnic harmony. Such a critique fails to distinguish the racist and the dominyatory elements in the negative doctrine of *apartheid* from the non-racist, defensive postures of many minority groups anxious to ensure their survival as distinct entities.²⁶ The condemnation of *apartheid* creates a general difficulty for defenders of minority rights, particularly in international law; besides its racism, the fact that it is an example of *minority rule* adds more fuel to arguments against sound minorities provisions adopted by States (below). The dismantling of the *apartheid* system, which appears finally to be a reasonable political possibility, would contribute to an improvement in international understanding and appreciation of the minorities' case.

This spectrum of policies serves as a rough measuring device in the context of this Report which draws on data compiled for some 40 States. Reflections on the legal status of minorities in the light of human rights raises certain questions about the doctrine, or concept, of human rights itself, particularly on its source materials in international law, such as the normatively important Universal Declaration of Human Rights. International law might be expected to guide States in their treatment of groups, enabling them to choose from the various orientations such as those discussed above, favouring some, disfavouring others. Unfortunately, international law appears in this case to be very much a *lex imperfecta*, providing 'little and insufficient guidance. Sir James Fawcett has already drawn attention to problems in the implementation of international rules (see also the concluding sections of this report),²⁷ but there is also a problem of normativity. To some extent, there is a confusion of signals. International law signals very clearly against *apartheid* as a denial of human rights. But is forced assimilation of groups regarded as an equal denial of rights? – the answer is probably not.

The question of what the great post-war human rights movement portends for minorities is not solved. Insofar as one judges the evidence, human rights are not an unmixed blessing for minority groups. International law does not appear to value the identity of human groups to the extent that it purports to value their members as individuals. What may be regarded as the ideological position of the law on minorities is narrow. The law signals clearly on self-

SELF-DETERMINATION AND MINORITIES

determination – minorities are not entitled to it certainly if self-determination implies secession.²⁸ The policy spectrum is therefore a statement of the permissible and impermissible consistent with the maintenance of the territorial integrity of the State: international law is not a suicide club for States.²⁹

Human rights may be divided into collective and individual rights.³⁰ Self-determination is a collective right sometimes described as a human right. Third World statesmen and scholars in particular, claim that self-determination underlies human rights (individual) which are worthless without it, or is the greatest human right.³¹ The right-holding collective entity in this case is the ‘people’.

The term self-determination was popularized in the 20th century by Woodrow Wilson and is inscribed in the **United Nations Charter** (Articles 1 (2) and 55) as ‘the principle of equal rights and self-determination of peoples’. While it is not referred to in the **Universal Declaration of Human Rights (UDHR)**, the common Article 1 of the United Nations Covenants on Human Rights transmutes the Charter ‘principle’ into a right:

(1) *‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’*

(2) *‘All peoples may, for their own ends, freely dispose of their natural wealth and resources...’*

(3) *‘The States Parties to the present Covenant... shall promote the realization of the right of self-determination...’*

Neither the Charter nor the Covenants propose a definition of ‘peoples’, but unlike the case of ‘minority’ this has not inhibited international action. On the contrary self-determination is a pillar of international order.³² Who, then, are the peoples? Peoples, it became clear after a decade of UN practice, have turned out to be the Non Self Governing Territories referred to in Chapter XI of the UN Charter. There is no reference to self-determination in Chapter XI: the duty of UN members with responsibilities for Non Self Governing Territories was to promote the wellbeing of the inhabitants of those territories. To this end, they promised, *inter alia*,

‘... (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions...’

The heading of Chapter XI: Declaration regarding Non Self Governing Territories supplies the meaning of peoples: peoples became the inhabitants of the colonies as a whole. The term was not defined in any ethnic sense. People is a territorial concept: the territorial integrity of the colonies was to be maintained to and beyond independence. As Paragraph 6 of the most cogent document on self-determination, the **UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples**³³ states: *‘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’*. Self-determination is also a statement of majority rule. Insofar as ethnic or racial elements entered into the concept – as in the case of South Africa and Southern Rhodesia, condemnation of the situations there can be rationalized as not being ‘racial’ or anti-white but based on the denial of majority rule.

Self-determination in its modern incarnation has little to do with minorities. An attempt was made in early days of the UN to widen the scope of the doctrine, to base it firmly on ethnicity rather than mere territoriality. The so-called ‘Belgian thesis’ attempted to bring home to those agitating for the break up of the colonial empires the full consequences of their actions: self-determination had a momentum which could not be stopped.³⁴ Peoples were more numerous than States and would continue to be so. Those who proposed self-determination could not have their cake and eat it. They

would in turn be threatened by the doctrine. The thesis was decisively beaten by the consistently growing anti-colonial majority of States at the UN. Cracks in the territoriality aspect of self-determination are difficult to discern.

The **General Assembly's Declaration of Principles of International Law Concerning Friendly Relations among States** in accordance with the Charter of the United Nations³⁵ outlines a full account of the principle of self-determination including the principle of territorial unity. One paragraph however has received more attention than the others:

'nothing in the foregoing paragraphs [of the Declaration] shall be construed as authorizing 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 equal rights and self-determination of peoples – and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

One authority interprets this paragraph to qualify the principle of territorial integrity in a sweeping manner by its affirmation of self-determination to peoples within States.³⁶ Another authority interprets the paragraph as forbidding self-determination where it would result in territorial dismemberment and where there is a representative government and in particular where the government is non-racist.³⁷ The drafting record appears to bear out the latter rather than the former interpretation in any case. If 'peoples' applies within States it is to majorities; there is little in this definition for minorities.

Some States, such as India, regard self-determination as having no application beyond the colonial context: it is considered to be *passé*.³⁸ Many voices, however, do not agree with this, implying that the concept has some continuing function to play. But what functions? A concept such as 'people' is ambiguous: it can be ethnic, it can be territorial. The more ambiguous it is, the more it is quoted. Self-determination is the great slogan. It seems to the present author that one does not do great violence to its meaning by treating people as a synonym for 'State'. In a recent work, Hannum perceptively remarks that 'Africa may simply be more honest than the rest of the world in admitting that self-determination of *the State* [original emphasis] has replaced the theoretical self-determination of peoples that, if taken to its logical conclusion, could result in some instances in secession.'³⁹

The revolutionary doctrine of self-determination looks increasingly conservative in the post-colonial age, give or take a few remaining examples of its denial in a colonial or quasi-colonial context such as South Africa and Palestine. Its natural law quality gives way to positivism. It seems that minorities whatever depredations are inflicted on them must attempt to find justice within the boundaries of existing States and be reconciled with them. Self-determination is not a right of minorities.

Even in the form of 'internal' as opposed to 'external' self-determination – the internal organization of the State as opposed to the casting-off of alien rule – the right-holder remains the people; minorities can share in this form of self-determination as beneficiaries only to the same extent as other elements in the population as a whole. It may be that international law will come to associate self-determination with minority rights to, for example, autonomy rather than full independence. The present practice of States falls some

way short of such a proposition and tends rather to the contrary in trying to minimize the impact of self-determination in a post-colonial context.

However, the lack of a right to self-determination makes all the more necessary an imaginative regime of rights for minorities. Statehood gives even small national groups the full spectrum of rights in international law. It is instructive to compare the international reaction to the violation of the rights of Kuwait with the lesser reaction to the violation of human rights of the Kurds (discussed further below), a larger nation but one not possessed of its own State. The discrepancy in treatment is glaring, and while such discrepancies exist, many minority groups will find, in the remote possibility of independence, a cause worth fighting for.

MINORITIES AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

All the Reports of the Minority Rights Group carry the text of the UN Universal Declaration of Human Rights either in full or in part. It will not have escaped the notice of the attentive reader that the text nowhere mentions the word 'minority'. The Declaration is couched largely in individualistic language, 'all human beings', 'everyone', 'all', are entitled to the rights and freedoms. The Universal Declaration is not slavishly individualistic: the individual is to be understood as having rights, but also (unspecified) duties to the community; the Declaration implies duties for member States; the will of the *people* is the basis of government; the *family* is the natural and fundamental group unit of society; education shall promote understanding, tolerance and friendship among all *nations*, racial or religious *groups*.

The suppressed agenda of minorities can occasionally be glimpsed. In Article 2, for example, it is stated that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

This amplifies the formula in the United Nations Charter which would promote and encourage respect for human rights 'without distinction as to race, sex, language or religion' (Articles 1 [3], 13, 55, and 76). But minorities *as such* do not enjoy rights in the Declaration.

The individualist and universalist style of the Declaration traces back to the individualist and universalist documents of the American and French revolutions. These documents built on the social contract philosophies of Grotius, Hobbes, Locke, Rousseau and others, with their assumption that the rule of one human being over another is legitimate only if that other consents, and that we give consent as individuals rather than as communities.⁴⁰ The rights of man are the rights of men conceived as isolated units, stripped of communal characteristics – as if they spoke private languages, or had lived alone like Robinson Crusoe. Insofar as ethnic or religious communities exist between individuals and States they are elided from the grammar of rights. As Sabine wrote of Hobbes and his theory: 'there is no middle ground between humanity as a sand heap of separate organisms and the State as an outside power...'⁴¹ The other great social contract theorists described a more liberating theory of natural rights than Hobbes, but they kept his concept that: 'the commonwealth is said to be instituted when a multitude of men do agree': 'men', 'commonwealths', 'states', but not ethnic or cultural groups.⁴² And it is this terminology that has passed into the Universal Declaration of Human Rights.

The drafting papers of the Universal Declaration reveal that a number of suggestions were made to include minorities in the text. Of the various proposals submitted, the text of the Division of Human Rights was most detailed: it was proposed that:

*'in all countries inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, religious or linguistic minorities shall have the right to establish and maintain, out of an equitable proportion of public funds for the purpose, their schools and cultural institutions, and to use their language before the courts and other authorities and organs of the State, and in the press and public assembly.'*⁴³

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities also proposed an article, as did Denmark, Yugoslavia and the USSR. Introducing the draft

article submitted by the USSR to the General Assembly's Third Committee, its representative declared that the use of the native language and the right of a population to develop its own culture were fundamental human rights.⁴⁴ In effect the representative attempted to secure acceptance for the model of the Soviet State as an ideal international standard: he referred to the 'voluntary alliance' of its peoples, the right of these peoples and nationalities to cultural and national autonomy, etc. The USSR also rejected assimilation of peoples as a suitable technique for promoting harmony between groups.

The representative of Yugoslavia laid heavy emphasis on collective as well as individual rights. The Yugoslav representative stated the following order of priorities:

'In order to secure the protection of individuals who formed a community that community must first of all be recognized and protected. Thus the principle of the recognition and protection of national minorities as communities must appear in the Declaration of Human Rights. The cultural and ethnic rights of

Table 1

State parties to the International Covenant on Civil and Political Rights – 31 March 1990*

Afghanistan	Lebanon
Algeria	Libya
Argentina	Luxembourg
Australia	Madagascar
Austria	Mali
Barbados	Mauritius
Belgium	Mexico
Bolivia	Mongolia
Bulgaria	Morocco
Burundi	Netherlands
Byelorussian SSR	New Zealand
Cameroon	Nicaragua
Canada	Niger
Central African Republic	Norway
Chile	Panama
Colombia	Peru
Congo	Philippines
Costa Rica	Poland
Cyprus	Portugal
Czechoslovakia	Romania
Korea (DPR)	Rwanda
Korea (R)	Saint Vincent
Denmark	San Marino
Dominican Republic	Senegal
Ecuador	Somalia
Egypt	Spain
El Salvador	Sri Lanka
Equatorial Guinea	Sudan
Finland	Suriname
France	Sweden
Gabon	Syria
Gambia	Tanzania
Germany	Togo
Guinea	Trinidad and Tobago
Guyana	Tunisia
Hungary	Ukrainian SSR
Iceland	USSR
India	United Kingdom
Iran	Uruguay
Iraq	Yemen
Ireland	Venezuela
Italy	Vietnam
Jamaica	Yugoslavia
Japan	Zaire
Jordan	Zambia
Kenya	

Total = 91

* Except for Germany and Yemen 31 March 1991

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND TRADITION

*all persons belonging to a national minority... depended upon the recognition of the minority itself as an ethnic group.*⁴⁵

These statements were coupled with the assertion that: *'individual human rights were, in fact, dependent on the position which the community enjoyed in the State in which it lived.'*⁴⁶

Members of minorities were bound together by a national bond and were thus in a special situation with regard to the State.

The various proposals were heavily criticized. The attack was led by representatives of Latin American States arguing that minorities were not the problem there that they were in other parts of the world. Mrs. Roosevelt, for the USA, declared that the concept of minority rights was not of universal significance: 'the best solution of the problem of minorities was to encourage respect for human rights'.⁴⁷ The support of the USSR for minority rights did not enhance the case for minorities: it may very well have had the opposite effect, especially in view of the Soviet claim that it had successfully 'solved' the minorities problem and its invitation to others to follow the Soviet course. In the result, no minorities Article appeared in the Universal Declaration.

The result is a document which, in addition to explicitly describing rights, makes a powerful philosophical statement. The Declaration claims: *universality* (as its name implies): the rights therein apply to all humans. The basis of this is *equality*: all are equal before the law and are entitled without any discrimination to equal protection of the law (Article 7). A third characteristic is its emphasis on *individualism*: members of minorities had no special case within the Declaration, and minorities as collective entities have no rights at all.

The individualism of the Declaration continues to surprise. While the Declaration is more than a copy of the 18th Century instruments and incorporates some respect for the great impulse of socialist thought towards equality, economic and social rights, it is also a re-assertion of these original doctrines.⁴⁸ The oddity is that its style and content more or less ignores the long tradition of international law in protecting minority groups, a tradition that is both humanitarian and pragmatic.

International law, since the beginnings of any such system could be discerned, developed a practice of protecting particular groups by treaty – the earlier premise of protection was religious affiliation, the later was that of nationality – culminating in the general organization of such protection by the League of Nations.⁴⁹ From the 16th Century in post-Reformation Europe the pressing requirement of mechanisms to protect the partisans of one Christian sect from the depredations of their rulers affiliated to another sect, gave way to a need to support the rights of nationalities, contemporaneous with, *inter alia*, the gradual collapse of the Ottoman Empire.

The League system applied to minorities in a band of States and territories roughly along a 'faultline' from the Aaland Islands to Iraq. It promised much through its regime of international guarantees, but proved equally unable to assuage the grievances of minorities denied self-determination, and central European States apparently relegated to second class international citizenship, through a system imposed by the Great Powers. Hitler was able to use a supposed concern for minority rights against the political settlement as laid down at Versailles in 1919, employing pressures from vociferous German groups allegedly denied self-determination. This rhetoric and its political consequences poisoned the stream of concern for minorities and their rights and helped to ensure that the concept of self-determination would not in future be linked to their cause.

All of this was perhaps too hastily judged by those who drafted the Universal Declaration. They made the quantum leap into the new age of human rights for all, instead of rights only for particular groups. In so doing they apparently relegated the rights of minorities to past history: a study by the United Nations Secretariat in 1950 concluded its review of the League's system that:

*'this whole system was overthrown by the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all human beings in all countries...'*⁵⁰

The restoration of the great doctrine of the rights of man became the response of the 20th Century to totalitarianism and barbarism.

The League system and the tradition of legal protection of groups may be assessed as deficient in global human concern and flawed in operation. It was not, however, entirely without virtue. By describing individual rights in a group context it reflected multiple levels of human identity and awareness. It also purported to respect the pragmatic view that injustice to minority groups feeds instability within States and foments international tension. There is the further point that specifying with particularity the beneficiaries of rights is fundamental: the rights of all human beings may degenerate into the rights of none in particular.

THE GENERAL RIGHTS OF MINORITIES

Since the promulgation of the Universal Declaration, the protection of minorities has been more or less absorbed into the wider concept of human rights. It does not retain the status of a separate institution of international law although at least the term minority is once again described in treaty law. The first premise of the new system of human rights is that members of minority groups are promised justice in consequence of their basic humanity rather than as members of distinctive groups. They are entitled without discrimination to the full range of civil, political, economic, social and cultural rights set out in the major instruments of international law. Beyond the Universal Declaration, international law refers to rights of minorities in a number of general instruments.⁵¹ Article 27 of the Covenant 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.'

Another specific reference is contained in Article 14 of the **European Convention on Human Rights**:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as... race, colour, language, religion... national origin, association with a national minority...'

Article 5 of the **UNESCO Convention against Discrimination in Education** provides:

'It is essential to recognize the right of members of national minorities to carry on their own education activities including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: (1) that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (2) that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (3) that attendance at such schools is optional.'

These and other instruments allow some derogation for the benefit of minorities from what may be seen as a rather mechanical application of equality and non-discrimination, concepts which are part of the architecture of the new order of human rights.⁵² Article 1 para. 4 of the **International Convention on the Elimination of All Forms of Racial Discrimination** provides that:

'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals' shall not be deemed discriminatory 'provided... that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

Article 2 (2) of the Convention makes a similar point. There is not any direct reference to minorities in this Convention but the indirect reference is reasonably clear.

Minorities are also indirectly referred to in the **Convention on the Prevention and Punishment of the Crime of Genocide** 1948. While genocide of a majority by a minority is not an impossibility it remains true that minorities are the natural victims of genocide in almost all cases.⁵³ The Convention provides as a minimum standard what might be termed a 'right of existence' for human groups. The Convention does not describe the right in such terms, but

Table 2

State parties to the UNESCO Convention against Discrimination in Education – 31 March 1990*

Albania	Libya
Algeria	Luxembourg
Argentina	Madagascar
Australia	Malta
Barbados	Mauritius
Belize	Mongolia
Benin	Morocco
Brazil	Netherlands
Brunei	New Zealand
Bulgaria	Nicaragua
Byelorussian SSR	Niger
Central African Republic	Nigeria
Chile	Norway
Congo	Panama
Costa Rica	Peru
Cuba	Philippines
Cyprus	Poland
Czechoslovakia	Portugal
Denmark	Romania
Dominica	Saint Vincent
Dominican Republic	Saudi Arabia
Ecuador	Senegal
Egypt	Sierra Leone
Finland	Solomon Islands
France	Spain
Germany	Sri Lanka
Guatemala	Swaziland
Guinea	Sweden
Hungary	Tanzania
Indonesia	Tunisia
Iran	Uganda
Iraq	Ukrainian SSR
Israel	USSR
Italy	United Kingdom
Jordan	Venezuela
Kuwait	Vietnam
Lebanon	Yugoslavia
Liberia	

Total = 75

* Except for Germany and Yemen 31 March 1991

was preceded in its formulation by Resolution 96(I) of the General Assembly of the United Nations which described genocide as:

'a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'.

Article 2 of the Genocide Convention specifies a range of acts which, when committed:

'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such amount to genocide.'

The Acts specified in Article 2 are:

'(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.'

The classification of genocide here includes physical and biological genocide; cultural genocide is not included except partially in the case of forced transfer of children. 'Existence' is a somewhat circumscribed notion in this context. It is not genocide if a culture is destroyed but the carriers of culture

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 1966

ARTICLE 1

1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

ARTICLE 2

2. States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

UNESCO CONVENTION AGAINST DISCRIMINATION IN EDUCATION 1960

ARTICLE 2

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this convention:

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

ARTICLE 5

1. The States parties to this convention agree that:

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

(i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

(ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and

(iii) That attendance at such schools is optional

are spared. A forcible assimilation is therefore not proscribed by this Convention: there is no such offence in international criminal law, though the term 'ethnocide' has gained some intellectual currency as a term to capture the essence of attacks on the culture of groups, especially in the context of indigenous peoples (below, section on *Indigenous Groups*).

A number of governments have expressed their general satisfaction with the definition of genocide in the Convention.⁵⁴ Without prejudice to arguments about the prohibition of cultural genocide through broader human rights instruments, it may be said that its exclusion from the Genocide Convention shows that its valuation of groups goes only so far. The Nazi experience impelled States to support the criminalization of genocide and give some promise of protection to groups as such, but this criminalization has its limits. These limits, characteristically, are reached when the law might be seen to function as a barrier to nation-building, to the 'civilizing mission' of States.

The ensemble of instruments should, at least cumulatively, guide States and their policy towards minorities. That the instruments hardly do so is evidence that the credentials of minority rights as a concept in the new system of human rights are not conclusively accepted.

The instruments are also possibly contradictory in policy terms. Take, for example, the **United Nations Covenant on Civil and Political Rights**. Members of minorities, like all human beings, are, of course, entitled to the rights set out in the Convention on a basis of non-discrimination. In this context the exiguous nature of Article 27 – the limited set of rights it enshrines – is understandable if not wholly defensible, since this Article bears much of the burden of the traditional protection of minorities in the modern system.

The opening phrases of Article 27 are tentative: 'in those States in which ethnic, religious or linguistic minorities exist...'. This almost invites denial by States that any minorities may be found within their jurisdiction. In fact, this may very well have been the purpose of the clause, originally suggested by the representative of Chile to the UN Human Rights Commission at its 9th session.⁵⁵

A number of States parties to the Covenant have responded to the 'invitation' by denying the existence of any minorities on their territory to which the Article could apply. At various stages in the drafting of Article 27, many Latin American States (above) have made such a claim. The Article was, according to a representative of Chile: '*neither general in scope nor universal in application... and pertained only to certain regions of the world.*'⁵⁶

France has taken the matter further and has made a formal declaration that: '*Article 27 is not applicable so far as the Republic is concerned.*'⁵⁷

This startling claim is charitably interpreted by the Federal Republic of Germany in a communication to the UN Secretary General as meaning that: '*the constitution of the French Republic already fully guarantees the individual rights protected by Article 27.*'⁵⁸

It is not an encouraging sign that such an innocuous statement of a right as Article 27 can generate such a negative response. It does not commit States to any direct recognition of minorities as units. The phraseology relates to the rights of 'persons belonging to minorities' – preserving the general individualism of human rights instruments. The

Table 3

State parties to the International Convention on the Elimination of all forms of Racial Discrimination – 31 March 1990*

Afghanistan	Lebanon
Algeria	Lesotho
Antigua and Barbuda	Liberia
Argentina	Libya
Australia	Luxembourg
Austria	Madagascar
Bahamas	Maldives
Bahrain	Mali
Bangladesh	Malta
Barbados	Mauritania
Belgium	Mauritius
Bolivia	Mexico
Botswana	Mongolia
Brazil	Morocco
Bulgaria	Mozambique
Burkina Faso	Namibia
Burundi	Nepal
Byelorussian SSR	Netherlands
Cameroon	New Zealand
Canada	Nicaragua
Cape Verde	Niger
Central African Republic	Nigeria
Chad	Norway
Chile	Pakistan
China	Panama
Colombia	Papua New Guinea
Congo	Peru
Costa Rica	Philippines
Cote d'Ivoire	Poland
Cuba	Portugal
Cyprus	Qatar
Czechoslovakia	Romania
Democratic Kampuchea	Rwanda
Denmark	Saint Lucia
Dominican Republic	Saint Vincent
Ecuador	Senegal
Egypt	Seychelles
El Salvador	Sierra Leone
Ethiopia	Solomon Islands
Fiji	Somalia
Finland	Spain
France	Sri Lanka
Gabon	Sudan
Gambia	Suriname
Germany	Swaziland
Ghana	Sweden
Greece	Syria
Guatemala	Tanzania
Guinea	Togo
Guyana	Tonga
Haiti	Trinidad and Tobago
Holy See	Tunisia
Hungary	Uganda
Iceland	Ukrainian SSR
India	USSR
Iran	United Arab Emirates
Iraq	United Kingdom
Israel	Uruguay
Italy	Venezuela
Jamaica	Vietnam
Jordan	Yemen
Kampuchea (Democratic)	Yugoslavia
Korea (R)	Zaire
Kuwait	Zambia
Laos	

Total = 129

* Except for Germany and Yemen 31 March 1991

Article appears not to go much beyond the duties to tolerate minorities ('shall not be denied'), although it can admittedly be read to demand a more positive approach to the groups, favouring real rather than paper equality; this would, inevitably, be resource dependent, producing different requirements in different States. Such an interpretation flows from the general logic of the covenant rather than from Article 27 considered in isolation.

Special Rapporteur Capotorti adopts the positive interpretation of Article 27 by arguing that the Article must add something to the rest of the text in accordance with the principle of efficacy in the reading of international instruments.⁵⁹ Further, in the same way in which affirmations of a right to work or to culture or education ring hollow

Table 4

State parties to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) – 31 March 1990*

Afghanistan	Korea (R)
Albania	Laos
Algeria	Lebanon
Antigua and Barbuda	Lesotho
Argentina	Liberia
Australia	Libyan Arab Jamahiriya
Austria	Luxembourg
Bahamas	Maldives
Bahrain	Mali
Barbados	Mexico
Belgium	Monaco
Brazil	Mongolia
Bulgaria	Morocco
Burkina Faso	Mozambique
Byelorussian SSR	Myanmar
Canada	Nepal
Chile	Netherlands
China	New Zealand
Colombia	Nicaragua
Costa Rica	Norway
Cuba	Pakistan
Cyprus	Panama
Czechoslovakia,	Papua New Guinea
Denmark	Peru
Ecuador	Philippines
Egypt	Poland
El Salvador	Romania
Ethiopia	Rwanda
Fiji	Saint Vincent
Finland	Saudi Arabia
France	Senegal
Gabon	Spain
Gambia	Sri Lanka
Germany	Sweden
Ghana	Syria
Greece	Tanzania
Guatemala	Togo
Haiti	Tonga
Honduras	Tunisia
Hungary	Turkey
Iceland	Ukrainian SSR
India	USSR
Iran Iraq	United Kingdom
Ireland	USA
Israel	Uruguay
Italy	Venezuela
Jamaica	Vietnam
Jordan	Yemen
Kampuchea (Democratic)	Yugoslavia
Korea (DPR)	Zaire

Total = 100

* Except for Germany and Yemen 31 March 1991

without active and sustained intervention on the part of States towards achieving these objectives, so also can it be maintained that the special rights of minorities to their own culture, language and religion are deprived of substantive content without a level of support equivalent to that of the majority of the population. The reading is logical, but has not as yet become part of any subsequent instrument, nor does it command universal assent. The Human Rights Committee, charged with the implementation of the Covenant on Civil and Political Rights, has failed to agree on a 'general comment' to guide the interpretation of Article 27.⁶⁰

Other international instruments have generated similar confusion. The qualification on the meaning of racial discrimination set out in the two Articles of the Racial Discrimination Convention and the general policy of this treaty have occasioned heated debate in the Committee on the Elimination of Racial Discrimination. The official Convention policy is integration, but it seems clear that many States regard this as functionally equivalent to assimilation. Bulgaria has been roundly criticized in the Committee for its apparently assimilationist policy in relation to the Macedonians, Turks and other minorities. The Committee member from Yugoslavia declared in relation to his fellow socialists that:

'... slogans on the creation of a unitary socialist nation and a unitary socialist culture would serve to disguise hegemonistic, assimilationist and integrationist tendencies on the part of one or several nations vis-a-vis others.'

Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief: United Nations General Assembly, 1981

ARTICLE 6

... the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession, appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

This critic did not attract consensus support for his interpretation of the Convention; others considered the Bulgarian policy on the 'elimination of barriers' represented precisely what the Convention was designed for, although forcible assimilation was undesirable.⁶¹ The principle of not discriminating against individuals on grounds of race, religion, language, etc., is intended in part to function as a substitute for protection of minorities in contemporary international law. It figures in all the major instruments of international law very prominently, as it does in many constitutions.

Non-discrimination between individuals must be a requirement of any regime to protect minorities.⁶² They must not be relegated to an inferior standard of rights simply because they belong to a particular group. There is an assumption in this, however, that the removal of 'barriers' is all that is required; modern mobile societies do not need barriers between groups. Non-discrimination is not quite the same thing as protection of minorities and this has been recognized by at least some sections of the UN.⁶³ It does not go far enough in the direction of accepting or cherishing differences between human beings; it does not commit a State to a high valuation of its minorities. The culmination of the movement against racial discrimination may be seen in its condemnation of *apartheid* but it needs to be supplemented by more explicit affirmations of respect for diversity among ethnic and other groups present in States. There must be a positive 'right to identity' of groups as well as prohibitions of discrimination.

Inconclusive debates such as those on the policy of the Racial Discrimination Convention point to a general ideological tension between aspirations to homogeneity on the part of States (the imperative of the nation-state) and aspirations to authentic identity, selfhood and power on the part of groups (the imperative of survival). The tension is unresolved.

RIGHTS OF SPECIFIC MINORITIES

While the general issue of human rights and minorities reveals the limits of any general humanitarian formula, and while agreeing a general standard of treatment is problematic, particular groups have received better recognition of their rights through more specific instruments in the older, single instance style of pre-war treaties.

The treaties concluded since the war have an occasional, sporadic quality although they usually concern minorities in a State who can look to a nearby kin-state and who may have been denied their wish to self-determination through integration with that kin-state.⁶⁴ Examples include Austro-Italian agreements on the South Tyrol, and Finno-Swedish arrangements on the Aaland Islands.⁶⁵

A more recent example falling broadly within this category is the *Anglo-Irish Agreement* of 1985 which affirms:

'... that any change in the status of Northern Ireland would only come about with the consent of the majority of the people of Northern Ireland'

— thus conferring, effectively, an element of self-determination on Northern Ireland in that, negatively, the majority in that province are given a right of veto on political change. It is not a full right of self-determination since this would notionally imply a right to independence. The Agreement also gives the Irish Government (the kin-state of the minority) *locus standi* to:

'... put forward views and proposals on matters relating to Northern Ireland...' in defined areas. The preamble to the Agreement speaks of:

*'recognizing and respecting the identities of the two communities in Northern Ireland (majority and minority), and the right of each to pursue its aspirations by peaceful and constitutional means.'*⁶⁶

Other such treaties have related to outstanding aspects of the post-war settlement. Examples include the *Treaty of Osimo* 1975 between Italy and Yugoslavia in settlement of the Trieste question.⁶⁷

Another 'settlement' treaty is the State Treaty for the Re-establishment of an Independent and Democratic Austria 1955 which, besides general rules on non-discrimination, provides special regulation of the rights of Slovene and Croat minorities:

'Austrian nationals of the Slovene and Croat minorities in Carinthia, Burgenland and Styria shall enjoy the same rights on equal terms as all other Austrian nationals, including the right to their own organizations, meetings and press in their own language.'

(Article 7 (1)).⁶⁸

There follow detailed rules for the implementation of this general principle, including an interesting paragraph 5 of that same Article: *'the activity of organizations whose aim is to deprive the Croat and Slovene populations of their minority character or rights shall be prohibited.'*

It is not intended here to analyze the success or failure of such international arrangements. There are always dissatisfied parties who do not regard stability or peace as goals more desirable than justice for minorities and States. Some arrangements by treaty have failed on any intuitive criterion of measurement — the peace and stability of Cyprus was 'guaranteed' by a wall of inter-connected treaties.⁶⁹ On the whole, the treaties recognize groups and grant them cultural, religious, linguistic, and national political rights as well as the means by which these rights may be given substance. They constitute exceptions to the blandness of general legal standards by identifying specific beneficiaries.

AUSTRIA: The Ethnic Groups Act 1976

CHAPTER I – General Provisions

SECTION I:

(1) The ethnic groups in Austria and their members enjoy the protection of the law; the preservation of the ethnic groups and the security of their existence are guaranteed. Their languages and ethnic characteristics shall be respected.

(2) Ethnic groups within the meaning of this Act are those groups of Austrian nationals with non-German mother tongues and their own ethnic characteristics who have their residence and homes in parts of the Federal territory.

(3) Adherence to an ethnic group shall be a matter of choice. No disadvantage may arise for any member of an ethnic group on account of his exercise or non-exercise of the rights pertaining to him as a member of such a group. No one shall be obliged to prove his membership of an ethnic group.

Agreement between India and Pakistan 1950 concerning Minorities (Extract)

A. The Governments of India and Pakistan solemnly agree that each shall ensure to the Minorities throughout its territory complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality. Members of the minorities shall have equal opportunity with members of the majority community to participate in the public life of their country, to hold political or other office, and to serve in their country's civil and armed forces. Both Governments declare these rights to be fundamental and undertake to enforce them effectively. It is the policy of both Governments that the enjoyment of these democratic rights shall be assured to all their nationals without distinction.

Both Governments wish to emphasize that the allegiance and loyalty of the minorities is to the State of which they are citizens, and that it is to the Government of their own State that they should look for the redress of their grievances.

They are, however, mainly European in context and the treaty model has not been widely adopted.⁷⁰ The recrudescence of ethnic tensions in Eastern Europe may lead to the reappearance of bilateral instruments such as the *Belgrade Protocol* of February 1988 between Bulgaria and Turkey regarding the Turkish minority in Bulgaria. For minorities, these bilateral or limited multilateral arrangements are often to be welcomed, since they usually give more than general international law.

A description of relevant modern instruments on the human rights of minorities would be incomplete without detailing some aspects of the **International Labour Organization's** (ILO) two conventions⁷¹ in this area: 107 and 169, from 1957 and 1989, respectively. **Convention 107** applies to:

'(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the 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;

(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.'

Indigenous populations may or may not be minorities: as noted above, under modern conditions, they are in most States and so are within the legislation for minority groups as well as deriving general benefit from norms on human rights. The ILO Convention makes some specific provisions for these populations. For example, it recognizes a right of ownership, collective or individual of the members of the population over lands in traditional occupation – Article 11. The Convention also recognizes customary laws on land use and inheritance and the populations' right to monetary compensation for appropriation of development land.

The Convention is however paternalistic by modern standards and is devoted as much to the integration of the populations as to their protection. Its beneficiaries do not gain very much through, for example, Article 7:

'These populations shall be allowed to retain their own customs and institutions where they are not incompatible with the national legal system or the objectives of integration programmes.' The Convention is simply fearful of segregation whether or not it is desired by the indigenous group. There is little in Convention 107 to indicate that indigenous cultures are cherished: the inference is rather that they constitute temporary obstacles to modernization.⁷² In consequence, States have been quite willing to become parties to the Convention and indigenous organizations have strongly rejected it.⁷³

The defects in Convention 107 prompted interest at the ILO in a convention more in keeping with the aspirations of indigenous groups. Convention 169 differs from its predecessor in significant respects. In the first place, it is styled *The Indigenous and Tribal Peoples Convention*: 'populations' in Convention 107 becomes 'peoples' in **Convention 169**. Too much should not be made of the change in terminology. Article 1.3 of the new convention states:

'The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.'

The reference is clearly to self-determination, in case indigenous groups attempt to use the Convention to further extensive political claims.

Convention 169 applies (Article 1) to:

'a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or

partially by their own customs or traditions or by special laws or regulations;

b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'

The definition is not completely 'objective' in that Article 1.2 adds the important rider that:

'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'

Convention 169 modifies the previous convention's stress on integration, is less 'paternalistic', displays considerably greater respect for the authenticity and value of indigenous institutions than Convention 107, is in general anti-assimilationist, and provides for a greater degree of participation by the indigenous peoples in decisions affecting them. Article 5 sets out the guiding principles in this Convention:

'In applying the provisions of this Convention: a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and individuals; b) the integrity of the values, practices and institutions of these peoples shall be respected; c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted.'

In contradistinction to international instruments on minorities, there is greater commitment to the collective rights which reflect the distinctive perspective of the indigenous, as well as environmental rights. Indigenous groups have not been satisfied with the extent of the move away from the orientation of the previous convention, but a great deal will depend upon the performance of the ILO in promoting applications of Convention 169 which respect its directive principles.

In general, the protection of indigenous populations is developing along separate lines from the protection of minorities. For example, the **Working Group for Indigenous Populations** of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities is moving towards a **Draft Declaration on Indigenous Rights** to be proclaimed by the UN General Assembly.⁷⁴ The drafts of this Universal Declaration on Indigenous Rights employ the language of respect for indigenous identity and institutions, the cultural contributions of the groups to the common heritage of humankind, their collective right to existence and to be protected against genocide and ethnocide, their distinctive spiritual and cultural relationship to land, positive action by States to contribute to the maintenance of indigenous identity, self-management by the groups, and 'ethno-development'.

Indigenous peoples, as one writer puts it, are an emerging object of international law.⁷⁵ The human rights policy dilemma is however basically the same as for minorities in general: how much respect is due from the international community to the distinctive cultural identity of indigenous populations? The indigenous rights issue is a more acute version of the general question in that the cultural divide between (settlers) majority and (indigenous) minority can be, and frequently is, enormous.

UNITY, HUMAN RIGHTS AND NON-DISCRIMINATION

If there is one outstanding specific focus for indigenous groups, it is the question of land rights. Tribal societies have evolved in direct relationship to specific environment and localities which are vital for subsistence. The relationship of 'advanced' societies with a particular environment is not as marked. Traditional forms of land holding relate more to communal ownership than ownership by individuals; land is in this sense less of a commodity than in western legal systems. Contact between indigenous and non-indigenous inevitably precipitates land conflicts. As Survival International, an international non-governmental organization working for indigenous rights, communicated to the UN Working Group on Indigenous Populations:

*'land conflict underlies the majority of the problems being faced by indigenous peoples worldwide. Without ownership of their ancestral lands, deprived of access to their traditional resources, indigenous peoples' economies are undermined: they lose their autonomy and the chance of determining their own futures; their cultural demise inevitably follows.'*⁷⁶

The world of human rights also includes constitutional law, in the sense that it is typically at this immediate level of relationship to international law that the rather abstract formulae of rights language are located. It is unfortunately the case in many States that the reality of human rights remains largely theoretical and does not individuate itself in the lives of human beings. Judged by the standards of adoption or quotation verbatim in constitutions, the Universal Declaration of Human Rights has been a 'success'. Between 1948 and 1964 20 constitutions – in this case of African States – expressly referred to the Universal Declaration of Human Rights. Among these we may note with irony and sadness the 1962 Constitutions of Burundi and Rwanda, theatres of contemporary genocides, and the 1968 Constitution of the Republic of Equatorial Guinea, killing ground for the notorious dictator Macias Nguema. Between 1948 and 1972 some 25 constitutions cited the Universal Declaration.⁷⁷

It is common form for drafters of constitutions to include one or more chapters on fundamental rights and freedoms: they are as regular a feature of constitutions as descriptions of governmental and parliamentary functions within the State. Human rights are therefore an idiom of constitutional law, and advertise the fact that the State is a civilized member of the international community. The Universal Declaration of Human Rights furnishes a distinct model in this respect. The rights are given to all within the State on the basis of equality: to individuals, not communities. They cater for the spiritual freedoms and material concerns; and they describe the ideal of the homogeneous society, when vestiges of discriminatory behaviour are eliminated. Adopting the Declaration is quite compatible with the States' claim that there are no minorities within their borders. The influence of the Declaration as an ideal for States in these respects is potentially very important.

If almost all constitutions contain general human rights elements they are frequently not the whole story of rights and freedoms chapters. Constitutions may be formed on a limited number of general models, but living constitutions are more complex than mere patterns. This generally holds true in relation to the treatment of minorities, and recognition of the existence of minorities as such. Constitutions are, it seems, freer in this respect than international law. The reason is that international law sets a general standard of obligation. The laws of the States ascribing particular rights to groups have no precedent value. Other States are free to follow the arrangements or ignore them. Equally, the State constitution with generous minorities provisions is not inhibited by international law requirements; thus the freedom is retained to amend or even delete such provisions in the future, though it is a feature of some of the specific treaties for minorities that their provisions are to be inscribed in constitutional law which thus has the support of an international law instrument. For example, the minorities provisions of the Treaty of St. Germain En Laye are declared by Article 149 of the Austrian Federal Constitution to form an integral part of Austrian constitutional law. Such provisions were an integral feature of the League of Nations regime; constitutional law was backed by solemn treaties.⁷⁸

This report makes some broad generalizations based on data from over 40 states. The first point to note is that an undifferentiated human rights/non-discrimination formula is the preferred style in much of the Americas and Africa; group differentiation is more common in Europe and Asia. The 'no-minorities' homogeneity principle is carried through

fairly consistently into general Latin American legal arrangements. The **American Declaration of the Rights and Duties of Man** 1948 makes no reference whatever to minorities, though it forbids discrimination on grounds of:

'... race... language, creed or any other factor' (Article 2).

The omission recurs in the American Convention on Human Rights 1969.⁷⁹

During the drafting of the United Nations Covenant on Civil and Political Rights, the representative of **Brazil** gave powerful expression to South American sentiments, sentiments which had also been expressed during the drafting of the Universal Declaration (supra). He argued that the:

'mere co-existence of different groups in a territory under the jurisdiction of a single State did not make them minorities in the legal sense. A minority resulted in conflicts of some length between nations, or from the transfer of a territory from the jurisdiction of one State to that of another.'

Further, for a minority to exist:

'a group of people must have been transferred' en bloc, without a chance to express their will freely, to a State with a population most of whom differed from them in race, language, or religion. Thus, groups which had been gradually and deliberately formed by immigrants within a country could not be considered minorities...'

Therefore, Brazil and the other American States 'did not recognize the existence of minorities on the American continent.'⁸⁰

The 1969 constitution of Brazil bears out these points. It 'recognizes' the rights of man, equality of individuals and a rule of non-discrimination, but not specific groups. UN Special Rapporteur Capotorti noted that Brazilian internal law did not recognize any ethnic or linguistic minorities in Brazil:

'since immigrants are treated in the same manner as Brazilians'.⁸¹ Individuals who might well be treated as members of a collective with its own rights in a European constitution are instead guaranteed a full range of civil, political and other rights. Occasions for instituting a special group regime in the European context may have different effects in Brazil: for example, Article 142 of the Constitution bars from voting, inter alios: 'persons who cannot express themselves in the national language'.

Brazilian policy in general is to assimilate all populations of foreign origin in the Brazilian melting pot, the tradition of which it shares with most American States. Japanese in Brazil who have resisted the trend to assimilation are referred to as unassimilable 'ethnic cysts'.⁸²

TURKEY: Constitution, 1982

ARTICLE 24:

Everyone has the right to freedom of conscience, religious belief and convictions...

ARTICLE 14:

None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory or nations...or creating discrimination on the basis of language, race, religion or sect...

ARTICLE 26:

No language prohibited by law shall be used in the expression and dissemination of thought.

Assimilation is therefore the general policy followed in Latin America. Reports prepared for the Capotorti study indicated that, *inter alios*, Argentina, Chile and Brazil pursued such a policy in law. The monograph prepared on Mexico cited the *Ley General de Poblacion*, Article 2 of which recites Mexican priorities as:

*'fusion of the nation's ethnic groups, assimilation of foreigners and the preparation of indigenous groups for incorporation in national life through an improvement in their physical, economic and social conditions.'*⁸³

These priorities have a general significance in the region. On the Brazilian model, discrimination among citizens is universally prohibited in the constitutions and equality proclaimed: the constitutions of Argentina, Bolivia, Costa Rica, Ecuador, Mexico, Panama, Paraguay and Peru have been examined for such provisions.⁸⁴ The then Sandinista government of Nicaragua declared that:

*'Nicaragua is but one nation... all citizens of Nicaragua, regardless of race, religion, shall enjoy equal rights. The revolution will actively fight and oppose all forms of racial, linguistic and cultural discrimination in the national territory...'*⁸⁵

Equality and non-discrimination often mean that the State proclaims only one official language and that newcomers are required to learn it and their children will be educated through the medium of this language. This also applies, prima facie, to indigenous groups, though States have made important concessions to the groups in this regard, mainly at the sub-constitutional level. A significant statement in this respect is represented by **Peru's** Decree Law 21 156 (1976) which provides:

Article 1 - Quechua is hereby recognized as an official language of the republic on the same footing as Spanish;

Article 2 - from the beginning of the school year 1976, the teaching of Quechua shall be obligatory at all levels of education in the Republic.'⁸⁶ Such a provision, along with other special legal provisions on education, land, labour and legal customs of the indigenous population of Latin America opens up a potential gulf between the positions of immigrants and indigenous groups (ie. between the newest and oldest strata of Latin American society, neither of which exercises political and cultural hegemony).

The problems of the latter are more consistently addressed in the legislation. The 1972 Constitution of **Panama** also constructs a framework for bilingual education and a number of other States have bilingual education programmes.⁸⁷ The 1988 Constitution of **Brazil**, Chapter VIII of Title VIII, makes positive reference to Indian rights, including Article 266:

'The social organization, customs, and languages, beliefs and traditions of the Indians are recognized, as well as their aboriginal rights to the lands they traditionally occupy...'

The Atlantic Coast Autonomy Law, following the 1987 Constitution of Nicaragua, grants autonomy in the indigenous context. Sometimes the provisions remain a dead letter, but more often their potential value is diluted by an overall stress on integration. Despite official reassurances (the Sandinistas, for example, promised: *'... to rescue and nurture the different cultural manifestations present in the national territory...'*), integration may have very negative connotations for Indian identity, and Indian groups recognize this.⁸⁸

African States display a philosophy of minorities similar to that prevailing in Latin America. Discrimination on grounds

of race, tribe, colour or creed is typically prohibited in constitutional law. Like Latin American States, many African States have reported to international bodies that they have no minorities or no 'minority problems'.⁸⁹ Like Latin American States, African States purport to regard 'minority' as a foreign concept.

On any deductive application of the Capotorti or Deschenes definitions to African 'facts', the presence of 'objectively' identifiable minorities displaying 'subjective' willingness to retain their cultural capacity is amply demonstrable. Many African States would figure highly on any register of ethnic and religious complexity. There are more than 250 distinct ethnic groups in Nigeria's 100 million population. On Uganda, a source states that:

*'... the present day national borders of Uganda cut across ethnic and language boundaries, and place together over 40 ethnic groups which formerly had little in common, and which even today may not understand each others' languages.'*⁹⁰ Such patterns of complexity are normal in Africa. So why not minorities? Why not constitutional recognition of diversity? The reasons are not far to seek.

A cursory glance at African boundaries with the lines of longitude and latitude provides the clue that divisions

NICARAGUA: The Atlantic Coast Autonomy Law (Extracts)

WHEREAS, the Communities of the Atlantic Coast have demanded autonomy as a historical right, in order to achieve genuine national integration based on their cultural characteristics and the use of their national resources, for their own benefit and that of the nation.

WHEREAS, Our Political Constitution holds that Nicaragua is a multi-ethnic nation (Art. 8) and recognizes the right of the Atlantic Coast communities to preserve their cultural identity, their languages, art and culture, as well as the right to use and enjoy the waters, forests and communal lands for their own benefit. It also recognizes their rights to the creation of special programmes designed to contribute to their development (Art. 89 and 90), while respecting their right to live and organize themselves according to their legitimate cultural and historical traditions (Art. 180).

The Government of Nicaragua Proclaims the Following Law Concerning the Autonomous Regions of the Atlantic Coast

Title I Fundamental Principles

CHAPTER I

About the Autonomous Regions

ARTICLE 1

This law establishes an autonomous regime for the Regions where the communities of the Atlantic Coast live, in accordance with the Constitution of the Republic (Art. 89, 90, 180 and 181) and establishes specific rights and duties for their inhabitants.

ARTICLE 2

Nicaragua is a Unitary State, of which the communities of the Atlantic Coast are an integral part, being entitled and subject to all the rights and duties of Nicaraguans.

ARTICLE 3

The Communities of the Atlantic Coast have a common history, and it is a principle of Autonomy to promote unity, fraternity and solidarity among their inhabitants.

(continued)

ARTICLE 4

The regions where the Communities of the Atlantic Coast live will benefit from a regime of Autonomy which, within the framework of national unity and faithful to the principles, policies, and judicial system established in the Constitution of the Republic, will guarantee its inhabitants and the real use of their legitimate historical rights.

ARTICLE 8

The Autonomous Regions established by the present law are legal entities and as such, in accordance with national policies, plans and guidelines, will have the following general functions:

1. To participate effectively in the planning process and programmes of national development within the Region.
2. To administer in coordination with the corresponding ministries, the programmes related to health, education, culture, basic goods distribution and communal services, as well as the establishment of economic, social, and cultural projects in the Region.
3. To promote the rational use of the waters, forests, and communal lands for the benefit and enjoyment of their peoples, and the overall preservation of the ecological system.
4. To promote national culture, as well as the study, preservation, promotion, development, and dissemination of the different cultures and traditions of the Atlantic Coast's Communities, including their historical, artistic, linguistic, and cultural heritage.
5. To promote the traditional exchange with the Caribbean countries in accordance with the national laws and established procedures regulated to this matter.
6. To establish regional taxes in accordance with the established laws related to this matter.

ARTICLE 9

The rational exploitation of the mining, forestry, and fishing resources as well as other natural resources in the Autonomous Regions of the Atlantic Coast, must benefit its inhabitants in just proportions, in accordance with agreement between the Regional Government and the Central Government.

CHAPTER 3

About the rights and duties of the inhabitants of the Communities in the Autonomous Regions

ARTICLE 11

Within the territory of the Autonomous Region, all Nicaraguan citizens will benefit from the rights and guarantees granted by the Constitution and those stated in the present law.

ARTICLE 12

The inhabitants of the Atlantic Coast Communities are entitled by law:

1. To full equality of rights.
2. To promote and develop their languages, religions and cultures.
3. To use and benefit from their waters, forests, and communal lands, in accordance with national development plans.
4. To organize their social and productive activities according to their own values.
5. To be educated in their own languages, through programmes that take into account their historical heritage, their traditions and the characteristics of their environment, all within the framework of the national education system.
6. To their own forms of communal, collective, or individual ownership and transfer of land.

ARTICLE 13

The members of the Atlantic Coast communities have the right to define and to determine their own ethnic identity.

between African States may not be coterminous with population distributions; it suggests that the States are artificial, not organic. To take only a few examples, the Ewe people are divided between Ghana, Togo, Burkina Faso and Nigeria. Somalis live in the Somali Republic, Ethiopia, Kenya and Djibouti. Of Mali, a former head of the Mali government asked:

*'But do we not have Songhai, who have found their way to Niger and elsewhere... do we not have Fulbe of all colours... in Guinea... in Cameroun, and in Nigeria... if it were necessary to insist that the Republic of Mali, on the basis of a definition of a nation, should be composed essentially of Mandingo, of Fulbe, or Songhai, then we should have problems – and plenty of problems – with our neighbours.'*⁹¹

Some State boundaries do not respect the ethnic principle in any form. An All-African Peoples' Conference in 1958 passed a special resolution on Frontiers, Boundaries and Federations:

*'the Conference (a) denounces artificial frontiers drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide peoples of the same stock; (b) calls for the abolition or adjustment of such frontiers at an early date.'*⁹²

The revisionist approach to boundaries proved quite unrealistic. Realignment would be as disastrous in human terms as the original, colonial conquests, or more so. The new States chose instead to develop nationality within their colonial inheritance. Nationality has therefore to be forged; it has not come ready-made to the rulers of the new States. Arbitrary borders have been accepted as a basis for Statehood – there is often no equivalent pre-colonial polity to return to – and have been defended tenaciously.

The **Charter of the Organisation of African Unity (OAU) 1963** describes the purposes and aims of the OAU which are, *inter alia*:

'to defend the States' sovereignty, their territorial integrity and independence'. The member States proclaim their adherence to principles including:

'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'.

In the African context the principle of the intangibility of colonial frontiers is accepted as a first principle by the International Court of Justice in the 1986 border litigation between Burkina Faso and Mali.⁹³ Challenges to this principle have generally been unsuccessful.

Article 4 of the Constitution of the Republic of **Somalia** expresses a distinction between 'nation' and 'State' (the republic) declaring that:

'the Somali nation is one and Somali nationality is indivisible'.

Article 16 looks forward to the unification of Somali territories '*under colonial occupation*' – which means in this case fellow African States. Somalia has been unusual among African States in maintaining irredentist claims and has sought the unification in a State of all ethnic Somalis. But its ambitions, which have brought Somalia into conflict with neighbouring States – principally Ethiopia – have not been supported;⁹⁴ as Leopold Senghor of Senegal observed, there are: '*factionalisms – racial, linguistic, religious – of which we must rid ourselves for a start*'.⁹⁵

The OAU took its stand against irredentism by Somalia during the Ethiopia/Somalia conflict in 1977. It has taken a similar stand against separatism or secession. If the boundaries of the African States are legitimate, then they must be defended against internal as well as external subversion. The attempted secession of Biafra from Nigeria

was condemned by the OAU, though five States departed from the 'territorial integrity' line.⁹⁶ Other attempted secessions or ethnic realignments of States have been similarly unsuccessful. The separatist ambitions such as that of the Ashanti and Ewe, of the Southern Sudanese, of Katanga, of Eritrea and Tigray, of the Buganda, of the Bakongo, have not prospered despite in many cases, protracted struggles.

All of this has discouraged any pro-minority sentiments in Africa. The African experience has fed into general international law in disallowing self-determination for minorities. African nationalism is not predicated on European patterns of ethnicity but on inherited reality within given borders, however artificial. The African concept of self-determination is essentially majority rule in African States, freedom from external interference and termination of white racist rule in South Africa and Namibia. This self-determination is deemed to be the basis of all human rights, a valuation which has sometimes meant that self-determination as national consolidation displaces human rights. Minorities have inevitably been victims in the process of nation building. Unhappily, genocide has its place in recent as well as colonial African history.⁹⁷

Much African experience with human rights is summarized in that most recent of international human rights instruments which applies specifically to Africa. The **African Charter on Human and Peoples' Rights**, adopted by the 18th Assembly of Heads of State and Governments of the Organization of African Unity in Nairobi in June 1981.⁹⁸ The Charter is now in force.

The Charter is a unique statement of collective peoples' rights and individual human rights. While there is not an explicit ranking of the two classes of rights, the preamble cites the States parties' recognition that 'the reality and respect of peoples' rights should necessarily guarantee human rights', which may imply some practical priority for the former class of rights. Individual rights have only lexical priority: the first 18 Articles of the Charter are devoted to them, including civil and political rights and economic and social rights. Individuals also have duties, including the duty to:

'preserve and strengthen social and national solidarity', and even more instructively:

'to preserve and strengthen the national independence and the territorial integrity of their country'.

Peoples have rights but no duties in the Charter; the rights are essentially variations on the theme of self-determination including the right to: '*economic, social and cultural development*'.

Consistent with African attitudes, there is no reference to minorities in the Charter: the 'African' character of the Charter is asserted in the preamble which refers to '*the values of African civilization*' which should '*inspire and characterize*' the States parties 'reflections on the concept of human and peoples rights'. The Charter rights are guaranteed without distinction of any kind, including distinction based upon '*ethnic group*' as well as those based on:

'race... colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. The preamble to the Charter selects discrimination on such grounds as especially deserving of elimination from Africa.

In sum, the Charter amplifies and strengthens the legal concept of self-determination and adapts individual rights to the African context through, *inter alia*, a novel emphasis on

duties. 'Peoples' as a term is not defined in the Charter. But it is tolerably clear from the whole context and emphasis of the Charter that the 'people' is the whole State in each case and not minority tribes, ethnic groups, races or religions. The adaptations of human rights in the Charter do not go very far in the recognition of any middle terms between the State and the individual – references to duties to the family, society and 'other legally recognized communities' (Article 27) may count for little in this context. The practice of the African Commission on Human Rights should bear out these propositions in due course.⁹⁹

The legal systems of many African States accordingly devote themselves to nation building, modernization and the combatting of tribalism: the tribe may be taken as a rough equivalent of minority or ethnic group in the European context in that it represents a level of association intermediate between State and individual (or family). The nation-building process is particularly fierce in some States. Much of the constitution of the Republic of **Somalia** is devoted to the development of a progressive culture for the Somalis – the State promises as much to the people (Article 51). Article 52 promises that the State will preserve good customs and will:

'liberate society from outdated customs and those inherited from colonialism, especially tribalism, nepotism and regionalism'.

The programme of the Somali Revolutionary Socialist Party, as well as sub-constitutional legislation, continues the attack – the Party struggles, *inter alia*:

'to transform the old and reactionary traditional structures based upon tribalism and to form a democratic government belonging to all the peoples'. Tribalism is declared to be: *'the number one enemy of the Somali society and the revolution'*.¹⁰⁰

Ghana's Provisional National Defence Council Law 42 includes in its 'directive principles of State policy':

'a spirit of loyalty to Ghana overriding sectional, ethnic or other loyalties, is to be cultivated among the people of Ghana'; and, *'traditional cultural values are to be adapted and developed as an integral part of the growth and development of the society'*.¹⁰¹

Tribalism is a protean term of abuse:

'some people understand it very broadly, as the aggregate of surviving archaic institutions and organizations associated with the tribal system, ie. with the system of kinship, forms of inheritance, traditional ceremonies and customs,... bonds of blood relationship, a sense of ethnic solidarity...'

Others give tribalism a narrow sense, namely:

*'a hostile attitude to members of some other ethnic group. The word also means a policy directed to granting... favours and privileges to persons belonging to the ethnic group of a leader...'*¹⁰²

Though much of this is widely seen as deserving condemnation, the scope of social engineering involved in eradicating tribalism 'in all its forms' is momentous. Hostility to old institutions is perhaps most marked in socialist States though non-socialist States share in the architectural enterprise of a nation-building constitution. African States remain complex in their ethnicity, in religion and law and custom. The African ideology of human rights developed to date does relatively little to ensure that this aspect of African character will endure. There is a preference for homogeneity as State policy in many States, despite the complexities of experience.

South Africa, as stated before, presents a different case. Hostility to the minority concept in international law is fostered by the standing example of white minority rule in South Africa. An open-minded analysis of, say, minorities treaties or autonomy for minorities, can usually spot the

difference between the defensive necessity for minorities of such arrangements and the equality-denying form of domination known as apartheid. Protection of minorities is not a form of discrimination; *apartheid* is. Aside from its intrinsic inhumanity, the practice of apartheid deflects real questions about the future of ethnicity in African politics.

In the long term, this totemic quality of apartheid may be its greatest disservice to understanding human rights. But the causal element should not be overstated in this; the colonial era was one of great change in Africa, the effects of which continue. These deeper historical processes – rather than simple revulsion of *apartheid* (after all, in a colonial context, *apartheid* would not be egregious) – explain, if they do not fully justify, present attitudes to minorities within States.

DIVERSITY

It is abundantly clear from studies so far conducted that many States incorporate respect for the rights of minorities in a manner which departs from or moves beyond the model of the Universal Declaration. If constitutions are autobiographical, the complexity of States should be narrated therein.

The greatest variety of arrangements specific to minorities are found in Europe. Forms of autonomy (enhanced self-rule falling short of independence) or home-rule, separate representation, federalism, and separate cultural, religious and linguistic rights are distributed among many States. Forms of minority representation in the State have been systematically classified by Professor Palley¹⁰³ so that the distinctions need not be developed here, but most reflect an impulse to recognize or support diverse traditions within the State. Some are backed by international treaties to benefit specific groups; some are not. The effect is to dilute the concept of the homogenous nation-state. It is somewhat ironic that so many exceptions to this concept are found in Europe, crucible of nation-state doctrines.

A range of differential human rights is displayed in such constitutions. **Belgium** represents an extraordinary example of such differentiation in the constitution, recognizing linguistic communities and regions.¹⁰⁴ The whole intention of the division into Flemish, French and German language communities in the Belgian scheme is to maintain cultural distinctiveness even at the expense of individual choice. In Belgium, the territorial principle is dominant – the principle that an individual's rights depend not altogether on preferences but upon their geographic location. The equilibrium between the linguistic groups is maintained from the level of the Belgian cabinet down to local and communal level, and affects commerce as much as education. The effect of this complicated bifurcation of rights and responsibilities is that each linguistic community is treated as a corporate entity with its own or collective rights. The interests of individuals are mediated through the community to which they belong, and group rights exist to complement individual rights or to compete with them. This is some distance from the model of the Universal Declaration.

The **Cyprus** arrangements represented an attempt to cope with majority/ minority arrangements through the recognition of a group dimension.¹⁰⁵ In this case the constitutional arrangements were backed up by International Treaties and did not endure. The constitution was engineered on a pragmatic basis. The community principle was applied in a thorough-going way. Article 1 of the basic structure of the Republic of Cyprus initiated the community motif:

'The State of Cyprus shall be a republic with a presidential regime, the president being Greek and the vice-president Turkish elected by universal suffrage by the Greek and the Turkish communities of the island respectively.'

Universal Islamic Declaration of Human Rights, 1981

X Rights of Minorities

(a) The Qur'anic principle, 'There is no compulsion in religion' shall govern the religious rights of non-Muslim minorities.

(b) In a Muslim country, religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic law, or by their own laws.

The House of Representatives exercised:

'authority in all matters other than those expressly reserved for the communal chambers'. The communal chambers exercised authority: *'in all religious, educational, cultural and questions of personal status'*.

In the judicial system civil disputes relating to questions of personal status and religious matters which were reserved for the competence of the communal chambers were dealt with by tribunals:

'composed solely of judges belonging to the community concerned'. Voters were registered in separate Greek and Turkish electoral rolls. In the House of Representatives, separate majorities were required for measures imposing duties and taxes. Divisions extended to the level of the local commune. Rights and duties were also in this case assigned to communities as such; the Constitution prohibited discrimination against individuals unless the Constitution itself provided.

Less far reaching arrangements in other States may nonetheless involve some sacrifice on the part of individuals, in that rights may vary on territorial or personal criteria. Spain¹⁰⁶ is a nation which shows a recent development from centralism to wide-ranging recognition of minority groups. Unity and autonomy are both expressed as desiderata in the **Spanish Constitution of 1978**:

'The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards, and recognizes and guarantees the right to self-government of nationalities and regions of which it is composed and solidarity amongst them all.' (Article 2)

Article 3 (1) provides that Castilian is the official language of the State, but:

'The other languages of Spain shall also be official in the respective self-governing communities in accordance with their statutes.'

Article 3 (3) expresses a theorem which many have tried to argue in relation to minorities; that they consolidate rather than threaten the nation:

'The wealth of the different language variations of Spain is a cultural heritage which shall be the object of special respect and protection.'

Article 143 states the general framework and motivation of the Spanish system:

'In the exercise of the right to self-government recognized in Article 2 of the Constitution, bordering provinces with common historic, cultural and economic characteristics, island territories and provinces with historic regional status may accede to self-government and form self-governing communities...'

in accordance with constitutional provisions. Article 148 provides that the self-governing communities may exercise a broad range of functions within their territorial bases including cultural and linguistic matters. The State as a whole permits cultural collaboration between the communities in collaboration with them. The elaboration of these provisions rests on specific autonomy statutes including those for the Basque country (*Euskadi*) and Catalonia.

Italy is another country with a centralist tradition which since World War II has sought to effectuate constitutional requirements towards the recognition of particular groups.¹⁰⁷ Article 5 of the Constitution describes a:

'Republic... one and indivisible...' It is nonetheless a Republic which *'shall recognize and promote local autonomy'* and which: *'shall bring about the widest administrative decentralization in the services of the State, and adapt the principles and procedures of the legislation to the requirements of autonomy and decentralization'*.

It is thus in concept a unitary Republic with substantial devolution. Article 6 provides that: *'The Republic safeguards linguistic minorities by means of special provisions'*.

Article 116 recognizes regional autonomy in accordance with special statutes for Sardinia, Trentino-Alto Adige, Friuli-Venezia-Giulia, Val D'Aosta and Sicily: all regions with some claim to ethnic particularism.

The general background is, once more, a broad human rights constitution. Ethnic identity in some of the regions becomes at least as important as membership of the wider Italian community. In the case of the South Tyrol,¹⁰⁸ following some further autonomy revisions, identity governs which school a child attends, access to employment in public administration, housing, and qualifications for those standing for elections. An official declaration of ethnic group membership determines the relevance of much legislation to individuals. The homogenous nation is individuated into regional particularisms with reference to underlying ethnic factors.

The **Swedish/Finnish** agreement of 1921 relating to the Aaland Islands was a stage in elaborating a system of protection for the Swedish-speaking inhabitants of the Aaland Islands which some have considered to be – along with the general treatment of Swedes in Finland – *'the best treatment of a minority group by a host nation anywhere in the world'*.¹⁰⁹ Under the Aaland Autonomy Act the Swedish character of the islands is maintained through regulations on language, education, regional citizenship and the acquisition of property on the island. The provisions in education result in the situation that a Finnish-speaking child (and Aaland is Finland) requires the consent of the local commune before he/she may be taught Finnish. On land acquisition, five years unbroken residence in the province of Aaland gives general regional citizenship which is a pre-requisite for land acquisition and voting. Special re-purchasing rights are also given to those with regional citizenship against those who have not.

There is something more than individualism in these arrangements: in a non-European context, such provisions as are contained in the Aaland statute might well be caricatured as a form of apartheid. With respect to the general theory of human rights we may say that:

'the individual and collective rights of the islanders are balanced against the rights of other Finnish citizens to equal treatment'.¹¹⁰

The balancing metaphor is emollient; another way of stating the facts is that the equality/non-discrimination aspects of human rights give way to a pragmatic resolution which involves virtual self-determination for a minority group.

European examples of forms of separate representation of ethnic and linguistic groups can be multiplied. Little of this freedom is reflected in the provisions of the **European Convention on Human Rights**, in which the only reference to minorities is (as noted above) that contained in Article 14 which prohibits discrimination on grounds of, *inter alia*, *'... association with a national minority...'*. There is nothing in this Convention which inscribes any kind of positive recognition to minorities; efforts to insert more positive provisions which would be fully in keeping with European experience have so far come to nothing.¹¹¹ (Recent work in the Council of Europe is considered below).

In the *Belgian Linguistic Cases*,¹¹² the Belgian linguistic territorial distinctions were found mostly not to violate the article since they were:

'based on the public interest... [and] ... strike a fair balance

INDIA: Government of India replying to Special Rapporteur Capotorti

PARA 12:

The Constitution of India guarantees to any section of citizens of India having a distinct language, script or culture, the right to conserve its distinctive feature. It also guarantees to minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The relevant articles viz. Articles 29 and 30 read as follows:

ARTICLE 29:

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

ARTICLE 30:

(1) All minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

ARTICLE 350-B:

(1) There shall be a Special Officer for linguistic minorities to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct and the President shall cause such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.

The articles of the Constitution guaranteeing to all citizens certain fundamental rights such as equality before the law (Article 14), prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth (Article 15) and equality of opportunity in matters of public employment (Article 16) also operate as safeguards for all minorities.

between the protection of the interests of the community and respect for the rights and freedoms [of individuals]'.

The system was however accommodated with the European Convention with a degree of strain. Some minor violations of European Convention standards were found. Differentiation sits unhappily with the equalizing tendency of the Convention.

That most complex of all constitutions, the Constitution of **India**,¹¹³ notably recognizes the claims of communities as well as individuals on the State. The Constitution combines provisions on equality with principles designed to protect and consolidate the identity and integrity of groups. Elements of positive discrimination for certain groups are present:

'for the advancement of... socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes'.

Equality for these groups means actual and not mere formal equality – *State of Kerala v Thomas*.¹¹⁴ For group identity, Article 29 (I) of the Constitution provides that:

'any section of the citizens residing in the territory of India... having a distinct language script or culture of its own shall have the right to conserve the same'.

Whereas Article 29 refers to citizens, Article 30 (I) describes minorities:

'All minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice'.

This tolerance provision is fortified by the second paragraph of the Article which establishes in effect the minorities' rights to State support in the granting of aid to educational institutions.

Article 350 A provides that it is the goal of every State and local authority:

'to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to minority groups'.

Linguistic group rights in the Constitution are balanced against the general direction of State policy which decrees that the official language of the Union shall be Hindi in the Devanagari script; also:

'It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all elements of the composite culture of India...'

Broad guarantees are also provided in relation to religion, as well as extensive sections devoted to scheduled castes and scheduled tribes.¹¹⁵

Whereas, despite the preponderance of Hindus in India, the State is officially secular, the constitution of India's neighbour **Pakistan**¹¹⁶ proclaims the State religion as Islam – Article 2. The preamble to the constitution describes Pakistan as a:

'democratic State based on Islamic principles of social justice'.

Article 222 does not commence in a very promising way for non-Moslems:

'... all existing law should be brought into conformity with the injunctions of Islam...' However, the rest of the Article recites that *'nothing in this part shall affect the personal laws of non-Moslem citizens or their status as citizens'*.

Pakistan, like many Middle Eastern and Asian States including those within the realm of Islam – is not governed entirely by principles of legal territoriality, but also by the principle of personality.¹¹⁷ members of religious groups may be legally subject to the demands and benefits of their religion as well as to State law in general. Other Articles of the Constitution deal positively with minorities and their rights which include in this case due representation in the federal and provincial services and provincial and national assemblies. Rights are for individuals as well as religious communities who have the right to organize and establish educational institutions. Linguistic as well as religious minorities are catered for. Thus Article 28 recites the right of:

'any section of the citizens speaking in a distinct language, script or culture... to preserve and promote the same and, subject to law, establish institutions for that purpose'.

Despite a much more Draconian approach to non-Moslem religious minorities in **Bangladesh**, the validity of religious laws and customs of religious minorities has been recognized by the government in such matters as personal and family laws.¹¹⁸

A perhaps surprising example of this kind of relationship is to be found in **Israel** which retains the former Turkish *Millet* system whereby the leadership of religious communities is responsible to the government for these communities.¹¹⁹ Religious laws of members of a recognized community govern them in matters of personal status,

defined in Article 51 of the Palestine Order in Council as suits regarding:

'marriage or divorce, alimony, maintenance, guardianship, legitimation of minors, inhibition from dealing with property of persons where legally incompetent, succession, wills and legacies, and the administration of the property of absent persons'.

Israeli law reflects a certain tension between territorial law and personal law, and Israel has extended the application of territorial law to some matters of personal status.

Exhibiting another style of diversity, **Canada**¹²⁰ is an outstanding exception to the general American pattern described above. In Canada neither of the two original contending European powers – Britain and France – was able to establish complete cultural and political supremacy. The British North America Act 1867, now styled the Constitution Act 1867, and a fortiori, the Constitution Act 1982, reflect the sharing of power and influence in Canadian society.

The new Constitution reflects the triple heritage of Canada – Part One is the Canadian Charter of Rights and Freedoms which establishes the relationship between the French and English heritages of Canada, including linguistic equality between English and French; Part Two is headed Rights of the Aboriginal Peoples of Canada, and consists of one brief section:

'35: (1) the existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed. (2) in this Act, Aboriginal Peoples of Canada includes the Indian, Inuit and Metis Peoples of Canada'.

The reference to the existing rights of Aboriginal peoples introduces a feature of the colonization process in North America, the full implications of which are yet to be worked out for the benefit of the Indigenous groups. Unlike the equivalent process in Latin America, colonization was achieved in the main through treaties with Indian tribes and nations, many of which were, regrettably, broken by the colonists but which can still form the basis for land claims. The Canadian view is that the treaties, while binding, are not treaties in the international law sense.¹²¹ Whatever genuine

CANADA: The Constitution Act 1982: The Canadian Charter of Rights and Freedoms

SECTION 15

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Sub-section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

SECTION 16

(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada.

SECTION 35

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, 'aboriginal peoples of Canada', includes the Indians, Inuit and Metis peoples of Canada.

USSR: Constitution of 1977

ARTICLE 36

Citizens of the USSR of different races and nationalities have equal rights.

Exercise of these rights is ensured by a policy of all-round development and drawing together of all the nations and nationalities of the USSR.

international law character the treaties once possessed in the **United States**, there too the prevailing view is still that articulated by Chief Justice Marshall in *Cherokee Nation versus the State of Georgia 1831*.¹²² The Indian tribes are to be regarded as:

'domestic dependent nations... living in a state of pupillage. Their relationship to the United States resembles that of wards to guardian...'

International law seems to have endorsed the view that, as lawyers would have it, Indian groups are not subjects of international law: ie., they are within the legal system of States and are not independent entities of international law.¹²³ Nonetheless, within the municipal laws of States, Indian tribes may still have autonomous status. They have been described as semi-independent and a separate people – they are 'nations', even if 'dependent'. Recent US case law has demonstrated that respect for the rights of individuals must be balanced against the right of the tribes to maintain distinct identity.¹²⁴

Socialist constitutions also have a marked tendency to recognize the constituent elements of the nation. Article 36 of the 1977 Constitution of the **USSR**¹²⁵ provides that:

'citizens of the USSR of different races and nationalities have equal rights'.

The Article describes a policy for the nationalities: the exercise of their rights:

'is ensured by a policy of all round development and drawing together of all the nations and nationalities of the USSR'.

Article 72 provides the startling right of each Union Republic *'freely to secede from the USSR'*.

Soviet legal theory regards the republics as subjects of international law – they have sovereign rights (Article 81). Of course, as both Lenin and Stalin warned, the existence of a right is one thing, its exercise is another, and the exercise of self-determination may be counter-revolutionary.¹²⁶ So in practice the constituent elements of the USSR have remained in place.

The USSR has prided itself on the theoretical consistency with which it addresses the issue of minorities. Stalin wrote

'... national equality in all its forms... is an essential element in the solution of the national problem. Consequently, a State law based on complete democracy in the country is required, prohibiting all national privileges without exception and every kind of disability or restriction on the rights of national minorities'.¹²⁷

This is not inconsistent with a certain contempt for 'primitive' cultures and the fostering of progressive ones, and in practice nation-building has been implemented at a heavy cultural (and physical) cost. However, recent events in the USSR and Eastern Europe – Yugoslavia in particular – indicate that the nation-building process has not been as thorough as proclaimed or hoped by the builders of Socialism, and that the particular diversity model will need redefinition. Within the USSR, ethnic and nationalist ferment in Estonia, Latvia, Lithuania, Moldavia, Georgia, Armenia, Azerbaijan and other Union Republics have placed the structure of the State itself under strain through, *inter alia*, a

succession of declarations of independence by the Republics and claims to self-determination. In Yugoslavia, a similar process appears to be unfolding as ethnic antagonisms buried under totalitarian rule resurface to threaten the integrity of the State. The USSR and Yugoslavia may hold together as constituencies in a looser form than previously.

Leaving aside their ultimate implications, these events certainly underline the great and continuing force of ethnicity in the definition of group and individual identity. Whatever the 'objective' validity of structural models of inter-group accommodation presented in the Eastern European context, it is clear that the organic and consensual growth of accommodation is a better recipe for stability than 'reconciliations' achieved through force internal or external to the State. An international framework facilitating the definition of a just balance between the rights of groups and the rights of the State, would also contribute to the cause of internal and international peace.

The 1982 Constitution of the Peoples Republic of **China**¹²⁸ displays some diversity in features. Again, the people of all the nationalities of China are invoked as creators of a glorious revolutionary tradition (preamble). The State is not federal, like the USSR, but a: *'unitary multi-national'* State. Big-nation chauvinism and little-nation chauvinism are equally condemned. The instigation of secession in this case is prohibited (Article 41) – citizens have a duty to safeguard national unity (Article 52). There are extensive and generous provisions on official use of minority languages – though the State council is empowered to promote the official common language. Minority nationalities are entitled to appropriate representation (Article 59) in the Peoples Congress. The general State structure also affords minority representation, and general laws may, within limits, be tailored to meet local requirements (Article 99). National regional autonomy is the structural key in the Chinese case.

The constitutional provisions are given detailed implementation in the Law on Regional Autonomy for Minority Nationalities of the PRC, 1984, the Preamble of which commences:

'The PRC is a unified and multi-national country jointly founded by people of various nationalities... Regional autonomy for minority nationalities is a basic policy of the CCP (Chinese Communist Party) for solving the problems of nationalities on the basis of Marxism-Leninism...'

But the model is one of diversity, influenced by ideology, and the effort to address minority issues is conscious, not accidental. This appears to be true of other Socialist States; Yugoslavia is an outstanding example.¹²⁹

CHINA: Constitution of the People's Republic 1982

ARTICLE 4:

All nationalities of the People's Republic of China are equal. The State protects the lawful rights and interests of the minority nationalities and develops the relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The State helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.

The people of all nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own ways and customs.

EXTENDING THE RIGHTS OF MINORITIES IN INTERNATIONAL LAW

The events in Eastern Europe in 1989 have contributed to an upsurge of interest in minority rights. This has resulted in the emergence of new instruments and further progress in existing work. The major developments are associated with: a) the Council of Europe; b) the CSCE process; and c) the Working Group of the UN Human Rights Commission (above, section 2).

The Council of Europe

The **European Convention on Human Rights** does not contain a positive 'minorities article'. The *Belgian Linguistics Case* before the European Court of Human Rights in 1968 effectively brought to an end the attempted development at the Council of Europe of an additional protocol to the Convention regarding the rights of persons belonging to minorities. The Council of Europe has occasionally expressed interest in the situation of minorities in a number of countries: the Parliamentary Assembly has passed a number of recommendations and resolutions on the situation of, *inter alios*, minorities in Romania, minorities in Bulgaria, and ethnic Germans in the USSR.¹³⁰ Recommendation 1134 (1990) addresses some general principles on the rights of minorities.

In terms of general regulation, two instruments currently in preparation deserve attention. The first is the **European Charter for Regional or Minority Languages** which was adopted in 1988 by the Standing Conference of Local and Regional Authorities of Europe. The Conference decided to submit it to the Committee of Ministers of the Council of Europe; the text is presently under examination by a Committee of Experts. The 1988 draft Charter defines its terms in Article 1:

'For the purposes of this convention:

- a) "regional or minority languages" means languages belonging to the European cultural heritage that are:
 - i. traditionally spoken within a territory by nationals of the state who form a group numerically smaller than the rest of the state's population; and
 - ii. different from the language or languages spoken by the rest of the state's population;
- b) "territory in which the regional or minority language is spoken" means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective measures provided for in this convention...;
- c) "non-territorial languages" means languages belonging to the European cultural heritage...which, although traditionally spoken within the territory of the State, cannot be identified with a particular area thereof.'

The definition is an adaptation of the Capotorti/Deschenes approach outlined above. Considerable interest attaches to the concept of 'languages belonging to the European cultural heritage': will this include, for example, the Kurdish language in Turkey, or the Romany language? Article 3 proposes that

each contracting State will specify the languages to which relevant parts of the Charter apply.

Part III of the Charter is headed: '*Measures to Promote the Use of Regional or Minority Languages in Public Life...*'. It contains extensive provisions relating to the use of the languages in education, public services, the media, in cultural facilities and activities, and economic and social life, as well as trans-frontier co-operation between the Parties. The draft Charter envisages implementation through a procedure involving a Committee of Experts reporting to the Committee of Ministers. Bodies or associations legally established in the contracting States would have the right to draw the attention of the Experts to situations alleged to be contrary to the undertakings in the Charter.

The second initiative is the proposal adopted by the European Commission for Democracy Through Law (the Venice Commission) in February 1991 for a **European Convention for the Protection of Minorities**. The Commission was set up in Venice in January 1990 and established by the Committee of Ministers of the Council of Europe in May 1990 as a partial Agreement of the Council of Europe. The field of action of the Commission, which consists of experts appointed by 20 States¹³¹ of the Council of Europe, is the guarantees offered by law in the service of democracy, and this includes the protection of minorities. The Commission in its work reaches out to the States of Eastern Europe, and it is envisaged that the Convention on Minorities will be open to accession by States which are not members of the Council of Europe.

The Convention has been sent to the Committee of Ministers of the Council of Europe. In its present form, it is an ambitious document in the rights envisaged and the procedures for implementation, which will centre on a European Committee for the Protection of Minorities. While it is too early to comment on details, the overall thrust of the Convention is clearly to favour the protection and development of minority identity in cultural, religious and linguistic terms, free from attempts at forced assimilation. Minority participation in public national and regional affairs is foreseen, as well as cross-border contacts between groups. Public use of minority languages under certain limitations is also referred to, and educational linguistic rights. Like the Charter on Languages, the Convention proposes an adapted Capotorti formula to define the protected groups. The Convention is likely to undergo extensive revisions before its presentation for signature. There is also the question of overlap between the two instruments; a technical harmonization is likely to be necessary.

European Convention on Human Rights and Fundamental Freedoms 1950

ARTICLE 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Copenhagen Meeting of the Conference on the Human Dimension of the CSCE

(30) The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, political pluralism, social tolerance and the implementation of legal rules that place effective restraints on the abuse of governmental power.

They also recognize the important role of non-governmental organizations, including political parties, trade unions, human rights organizations and religious groups, in the promotion of tolerance, cultural diversity and the resolution of questions relating to national minorities.

They further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States.

(31) Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.

The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.

(32) To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice.

Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right

(32.1) – to use freely their mother tongue in private as well as in public;

(32.2) – to establish and maintain their own educational, cultural and religious institutions, organizations or associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation;

(32.3) – to profess and practise their religion, including the acquisition, possession and use of religious materials, and to conduct religious educational activities in their mother tongue;

(32.4) – to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs;

(32.5) – to disseminate, have access to and exchange information in their mother tongue;

(32.6) – to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations.

Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group. No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights.

(33) The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. They will take the necessary measures to that effect

after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each State.

Any such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned.

(34) The participating State will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.

In the context of the teaching of history and culture in educational establishments, they will also take account of the history and culture of national minorities.

(35) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.

The participating states note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

(36) The participating States recognize the particular importance of increasing constructive co-operation among themselves on questions relating to national minorities. Such co-operation seeks to promote mutual understanding and confidence, friendly and good-neighbourly relations, international peace, security and justice.

Every participating State will promote a climate of mutual respect, understanding, co-operation and solidarity among all persons living on its territory, without distinction as to ethnic or national origin or religion, and will encourage the solution of problems through dialogue based on the principles of the rule of law.

(37) None of these commitments may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the Final Act, including the principle of territorial integrity of States.

(38) The participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments and consider adhering to the relevant conventions, if they have not yet done so, including those providing for a right of complaint by individuals.

(39) The participating States will co-operate closely in the competent international organizations to which they belong, including the United Nations and, as appropriate, the Council of Europe, bearing in mind their on-going work with respect to questions relating to national minorities.

They will consider convening a meeting of experts for a thorough discussion of the issue of national minorities.

(40) The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies).

The CSCE Process

The Final Act of the **Conference on Security and Cooperation in Europe (CSCE)**, 1975 – the Helsinki Final Act – made limited reference to minorities. The most important reference is Principle X of its Declaration on Principles:

'The Participating States on whose territory 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.' The texts of the CSCE process, involving overall 34 States (formerly 35) in Europe, the USA and Canada, reflect a gradually increased interest in the question of minorities, both in the general Conference and in the meetings of the Conference on the Human Dimension of the CSCE. The **Charter of Paris** of the CSCE Summit Conference (21 November 1990) affirmed that:

'the ethnic, cultural, religious and linguistic identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law.'

The Charter of Paris expresses curtly what is expressed at greater length in the Document of the Copenhagen Meeting of the Human Dimension (5 to 29 June 1990) in 11 substantive articles with multiple subdivisions. No definition of 'minority' is attempted in the text, which confines itself to 'national' minorities. The rights are those of 'persons belonging to' the groups, rather than the groups as such, reflecting a familiar wariness about collective rights for minorities. Some articles go far in relation to existing international law: for example, in the rather peculiarly worded Article 35:

'... The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.'

However, the above reference to 'international law' conceals some of the difficulties inherent in the CSCE process: the instruments do not have the hard and fast quality of treaties and represent a set of political obligations rather inconsistently related to customary international law. They appear to represent a less demanding regime compared to that of the Council of Europe, though their immediate advantages are:

- a) 'political' agreements or not, they commit States to a broad prospectus of obligations to minorities, while the Council of Europe standards have not been finalized; and
- b) the CSCE net is cast wider than the Council of Europe which has only 25 member States.

The CSCE implementation processes have already dealt with a number of cases involving minorities.¹³²

The United Nations

In Resolution 5 (XXX), the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities recommended that the Human Rights Commission consider drafting a declaration of the rights of members of minorities within the framework of Article 27 of the Covenant on Civil and Political Rights

(sections on *Self-determination and General Rights of minorities*). At its 34th session in 1978, the Commission established an open-ended Working Group on the Declaration.¹³³ By 1986 a limited text consisting of a Preamble and Article 1 had been agreed upon. Considerable progress was made in 1990 and the text adopted at first reading incorporated a substantial Preamble, eight articles and proposed measures of implementation to be included in a resolution accompanying the Declaration.¹³⁴ The UN General Assembly decided on 18 December 1990: *'to encourage the Commission on Human Rights to complete the final text of the draft Declaration as soon as possible...'*

Despite this encouragement, rather less progress was made at the Working Group in 1991 which gave a second reading to the Preamble and worked on two substantive articles (see page 4 for text). The Working Group accordingly agreed to recommend to the Human Rights Commission that a two-week 'inter-session session' should be held at the beginning of December 1991. The major issues at the 1991 session of the Working Group were as follows:

1. Definition: none was agreed and the emergence of a definition in this context is unlikely. This has already been commented upon by this report.

2. The retention of the word 'national' in the title of the Declaration: this was agreed even though the term is open to different interpretations and perhaps signifies an unduly European-influenced document – the word 'national' is used in the CSCE documents. Reviewing various interpretations of 'national', Deschenes (above n.12, at p.16) wrote: *'...Mr. Capotorti includes national in ethnic, while the Council of Europe includes ethnic in national.'*

The addition of 'national' takes the text beyond Article 27 of the Covenant on Civil and Political Rights. The Declaration is now a Declaration on the Rights of Persons Belonging to 'National or Ethnic, Religious and Linguistic Minorities'.

France invited the Working Group to centre its preoccupations on the 'national minority', reiterating its interpretation of Article 27 of the Covenant on Civil and Political Rights – that it does not apply to the French Republic.

3. Individual and collective rights: the Declaration remains one on the rights of 'persons belonging to ... minorities.' The Declaration clearly ascribes rights to individuals; any suggestion of collective rights for groups was strongly rejected by delegations such as those of France, Greece and Bulgaria. The collective **dimension** of minority rights cannot, however, be completely excluded if a declaration is to make any sense. Accordingly, the rights in the Declaration are to be exercised *'individually as well as in community with'* the other minority group members: like Article 27 of the Covenant, the formal right-holder is the individual but the right can be exercised communally; as Wittgenstein said that there is no such thing as a private language.

4. A positive element appears expressly in Article 2.1 of the new text which is only implicit in Article 27 of the Covenant: *'States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities, within their respective territories, and shall encourage conditions for the promotion of that identity.'* Further, the tentative formula at the beginning of Article 27 (*'In those States in which...minorities exist'*) is transcended in the draft Declaration, and the new article is a clear and overdue recognition of identity and existence of minorities in a document intended for universal application. The language

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employed here is 'collective': identity and existence in this context pertain to groups.

There is still much work to be done (and no guarantee of success) on this important Declaration. The articles given a first reading only develop the substance of important rights and State obligations as well as promise measures of implementation. It may be noted that this exercise in extending the general international law on minority rights is not the only initiative under way at the United Nations. At its fortieth session, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities invited its UK member, Prof. Claire Palley, to prepare a working paper on possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national, religious and linguistic minorities.¹³⁵ This initiative has now passed to Mr. Asbjorn Eide, the Sub-Commission member from Norway.

Mr. Eide submitted a preliminary report to the Sub-Commission in July 1990.¹³⁶ The Introduction to the Report explains that it:

'focuses not on what minority rights should be adopted by the United Nations, but on constructive and peaceful solutions, or management, of situations involving minorities'.

It adds, in relation to minority conflicts that:

'It will often be impossible or undesirable to 'solve' the conflicts in the sense of making them disappear altogether. If that is sought, they tend to reappear and often in more destructive forms. The task will rather be to find peaceful and constructive ways to manage the conflicts in co-operation with members of the minority and representatives of the State.' The Rapporteur has prepared a questionnaire for States on their national experience in dealing with minority issues, including any difficulties encountered. The questionnaire distinguishes between 'settled minorities' and 'recent immigrant groups', the latter being understood to mean 'aliens in general, immigrants who have not yet become citizens, refugees and asylum seekers, and migrant workers.'¹³⁷

United Nations activity does not end there. The United Nations Research Institute on Social Development (UNRISD) has also embarked upon a major comparative study of the causes of ethnic conflict. The United Nations University has also undertaken a similar study to which the present author has contributed by preparing, in conjunction with the Minority Rights Group, reports on the situation of minorities in some 60 States.

Human Rights are an inspirational ideal of 20th Century philosophy, politics and law. They may be more honoured in the breach than the observance but they hold the promise that law and the State will work to enhance, not undermine, human dignity. Their incorporation into the texts of international and municipal law represents a qualitative, progressive transformation from a previous age of sovereignty and positivism.

In the 19th century, States could treat their own subjects as they wished, unless bridled by a specific treaty undertaking or the fear of external intervention. States continue to show such disrespect in the late 20th century but they commit themselves to act in a new spirit; they may be hypocritical but their hypocrisy may be exposed publicly and their commitments quoted against them. States are not simply there as existences, they are expected to achieve a standard of civilization to which human rights may function as the standard. The standard touches all States, heedless of political system or style.

The 'human rights' programme is offered to the States as an ideology that bridges differences; it is offered as a coherent programme encompassing civil, political, economic, social, cultural and solidarity rights, all supportive of the many possibilities of human flourishing. Minorities benefit from human rights prescriptions since they are inevitable victims. One may agree with Sieghart that all human rights exist for the benefit of minorities.¹³⁸ Law and morals are the defences of the vulnerable; the strong have their power.

It is commonly stated that human rights are sufficient in their elaboration but weak in enforcement or implementation. How true is this? To take the second point first, it is clear that barbarism endures. International law has no police force, no army, no courts with compulsory jurisdiction, little strength when States feel that their vital interests are threatened.

The crisis of the Kurds following Iraq's expulsion from Kuwait by military forces acting under the mandate of the UN Security Council bears out the enforcement limitations of international law. Article 55 of the UN Charter dedicates the UN to the promotion of:

'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

Article 56 converts this into hard legal obligation:

'All Members [of the UN] pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55.'

However, Article 2(7) of the UN Charter states:

'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...'

The 'domestic jurisdiction' principle is a key line of legal defence for any State accused of human rights violations. It is by no means an absolute defence and has been subject to a gradual erosion in the field of human rights through, *inter alia*, public criticism by UN organs of the performance of States. Nonetheless, allied to the general legal principles of non-intervention in the internal affairs of States, and the concept of respect for their national unity and territorial integrity, a 'domestic jurisdiction' is still capable of providing a formidable obstacle to international action in the face of grave human rights crises.

Even attested cases of genocide may not result in remedial action: Article 8 of the Genocide Convention provides that States parties to the Convention may 'call upon' the competent organs of the UN to prevent and suppress genocide; while this makes a plea of domestic jurisdiction inappropriate, it does not increase the powers of the UN under the terms of the Charter. Article 2(7) of the UN Charter states further that the domestic jurisdiction principle: 'shall not prejudice the application of enforcement measures under Chapter VII [of the Charter].'

Chapter VII relates to the powers of the UN Security Council and is headed:

'Action with respect to threats to the peace, breaches of the peace, and acts of aggression.'

While 'peace' in this context means 'international peace', there is no strict dividing line between breaches of 'internal' and 'international' peace. The UN Security Council can certainly authorize action where the consequences of internal repression spill out into the international arena.

In the context of a post-Cold War Security Council not permanently paralyzed by the veto, repression of minorities may attract greater UN efforts in future: (a) if the repression is on a considerable scale; and/or (b) in the case of minorities straddling national borders: the 'international' consequences of such situations are readily foreseeable.

On the other hand, 'Cold War vetoes' may be replaced by 'minority rights vetoes' (or negative votes) in the Security Council, because many States have oppressed groups in their territory. Proposals for an explicit rewriting of the Charter, qualifying the concept of domestic jurisdiction and the operation of vetoes may, in the long run, offer the best hope of countering governments intent on genocide. Unilateral forcible action by individual States (which is illegal according to most international lawyers) is no substitute for a collective approach to intervention, legalized through the UN. A rewritten Charter, incorporating, as France has suggested, 'a duty to intervene', would be of great potential benefit to minorities – as would a reconsideration and development of the best of League of Nations practice in internationally guaranteeing specific minority rights agreements.

The terrible suffering of the Kurds has stimulated fresh thinking on the implementation of international law. Law also works in other ways: it sets standards; it develops discourses of rights; it is an aspect of the self-esteem of States and codifies their understanding of principled behaviour. Human rights is the disciplinary matrix created largely by the acts of States, by which their own conduct may be condemned or praised. To deny human rights is to step outside the discourse into another moral universe, another, darker paradigm of behaviour. So the models of law are influential in this structural/structuring sense, and the optimist foresees that humanitarian discipline will be learned in the fullness of time, that content will follow form. On the other hand, the scheme of rights may be elaborate, but it is finite. Remarks made on the limits of the Universal Declaration as a structuring model are offered as a critique, not as a persuasion against the enterprise.

The relationship between human rights and minorities teaches a lesson on the limits of the present concept. International law takes the approach of lowest common denominator to minorities in the face of regional diversity of legal treatment. Minorities are tolerated and little more.¹³⁹ The logic of particular laws such as Article 27 of the

Covenant on Civil and Political Rights may require that States act positively towards minorities, but practice belies this and the structure of international legal regulation as a whole indicates that there is a gap between the claims and interests of groups and the disciplinary matrix.

Human Rights are oriented towards the rights of peoples and the rights of individuals. This polarization produces its own dynamic of difficulties, representing, as it does, a dialectic of authority and liberty, the synthesis of which is not always apparent – *vide* the African Charter on Human and Peoples' Rights. Rights of minorities may intrude upon this dialectic very little, since minorities are not 'peoples' in current usage, and they are something more than aggregates of individuals.

Accordingly, they are not regarded as 'subjects' of international law – they are not bearers of international legal rights and duties in a formal, direct sense. If they are 'subjects', this can only be understood in an informal, indirect sense, in that occasionally the 'group' dimension of human existence shows through into the instruments such as Article 27 (*supra*) and the Genocide Convention.

There is some evidence of a more complex – and welcoming – view of minorities in *statu nascendi*. The 'right to be different' enters conversations on Human Rights.¹⁴⁰ Emerging instruments have been considered in the previous section (*Extending the Rights of Minorities*). Among existing instruments, the 1978 UNESCO Declaration on Race and Racial Prejudice recites in its preamble that: 'all peoples and all human groups, whatever their composition or ethnic origin, contribute according to their own genius to the progress of civilization and cultures which, in their plurality and as a result of their interpenetration, constitute the common heritage of mankind'.

The Declaration condemns forced assimilation, adds groups to individuals as holders of the right to be different, condemns theories of racial domination, and recognizes unequivocally:

'the right of all groups to their own cultural identity and the development of a distinctive cultural life..., it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity'.¹⁴¹

It is, however, difficult to reconcile the positive and optimistic spirit of the Declaration with the negative attitudes often displayed in implementing relevant treaty law.

Further, indigenous populations, despite barbarous attacks upon their life, culture and spirituality, are a specific focus of international concern. They do not 'threaten' the State as much as other minorities and so can be accommodated. If there is a specific appropriate policy it may be that of:

'ethno-development: strengthening and consolidating a culturally distinct society's own culture by increasing its independent decision-making capacity to govern its own development'.¹⁴²

This is likely to be a mainly American development, since, as the converse of American denials of minorities, India and China have maintained that there are no indigenous peoples in Asia, only minorities! In general, State politics need to be formulated in terms of the genuine interests of indigenous populations as perceived and described by these populations.¹⁴³

Religious groups are also likely to benefit independently of minorities in general from the UN's Declaration against Religious Intolerance¹⁴⁴ (see page 16).

As a further pointer to progress, there is richness and diversity in the laws of States which is not reflected in international law. The Eide Study (see section on *Extending the rights of minorities in international law*) will perhaps contribute to a better 'fit' between the systems, a relationship of reciprocity which could result in their mutual enrichment. The world of human rights is more complex than is suggested by the limited range of international instruments. There is unity and diversity, sameness and difference in the world of States. Recognition of diversity is apparently as common as recognition of unity; the range of constitutional innovations to accommodate minorities is great, if relatively confined geopolitically. The term 'region' has here been used as a convenient generalization; too much should not be read into this – there are many qualifications and exceptions to be made. Different regional human rights instruments, however, doubtless reflect local preoccupations, and it is abundantly clear that the minority issue is perceived differently in the States of the world. As the United Nations General Assembly noted in 1960:

'... 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'.¹⁴⁵

Legal theory is in many ways as impoverished as international law. Liberal ideology has a blind spot for minorities. Where they are considered, the result is sometimes pessimistic. Ernest Barker wrote:

'if the seal of a State is stamped on a population which is not held together by the matrix of a common tradition and sentiment, there is likely to be a cracking and splitting as there was in Austria-Hungary'.

Minorities, as Vernon van Dyke points out, were simply an anomalous case for Barker's theory.¹⁴⁶

Social contract theory is, even in modern Rawlsian form, strikingly individualistic. Consociational theory, going back to Althusius, modifies the individualism of the contract and makes it a compact between 'cities, provinces and regions'.¹⁴⁷ Pluralistic theories are however few and far between in the Western academic world. Liberal theory is not completely adequate to the complexity of State reality, and its simple individualism in turn tends to relegate this complexity into a transient precursor of a less complex State.

On the other hand, Marxism has relatively little to say on ethnicity as an associative factor, though socialist States have in practice made considerable claims for their approach to minorities. The fragility of the exposed State structures of the former Marxist States seems to make such claims retrospectively suspect. However, theirs will not be the only geographical and ideological arena for redefinition in the light of Fukuyama's reading of 'the end of history'. His thesis explicitly allows for the continuance of an ethnic dimension in internal and international politics including ethnic conflict.¹⁴⁸

African ideology is less individualistic than Western ideology. Okere writes:

*'The conception of an individual who is utterly free, such as to be irresponsible and to be opposed to society is not consonant with African philosophy.'*¹⁴⁹

The 'communitarian' aspects of this philosophy surface in the African Charter, but mainly to privilege the State, heavily outweighing the claims of 'lesser' minorities.

Beyond ideology, there are some practical linkages between different factors in various continents. Minorities will have to find different strategies for survival, through varying

conceptions of the applicability of human rights instruments to their case. Assimilation appears to be the broad movement in nation-building States. The movement from status to contract, to the mobile 'dynamic' society, may have as the 'natural' corollary that of the displacement of cultures.¹⁵⁰

All of this assumes that minorities matter to society. It also assumes at least some commitment to the value of diversity in an increasingly homogeneous and sterile world.¹⁵¹ It assumes the benefits of a specific focus for the humanitarian practices of States rather than abstract proclamations of human rights. The practical value to minorities of human rights ideology cannot be quantified; their relationship to this ideology, their status within it, must as yet remain indefinite. But it is effectively the only framework we possess, and its richness is not exhausted.

Footnotes

- ¹ Monograph No. 23 prepared for the Capotorti Report, Capotorti, *Study of the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UNDOC E/CN.4/Sub.2 384.
- ² Roma: Europe's Gypsies, Minority Rights Group Report, London, 1987.
- ³ Siuruainen and Aikio, *The Lapps in Finland*, Helsinki, 1977, p.7.
- ⁴ Capotorti, *Monograph No. 51* (Bolivia).
- ⁵ Capotorti, *Monographs No. 69* (USSR); 36 (India); 3 (Nigeria): there is no monograph for China. See however, *Statistical Yearbook of China*: State Statistical Bureau of the People's Republic of China, Hong Kong, 1984.
- ⁶ Self-determination (below) is a case in point: 'peoples' have the right to self-determination in International Law, but a people can mean all the inhabitants of a State (legal/political meaning) or particular ethnic groups within a State. In practice self-determination now bears the former rather than the latter meaning as a legal concept. This has important consequences for minorities (below).
- ⁷ For a review of attempts to define, see Ermacora, *The Protection of Minorities*, before the United Nations, 182, *Recueil des Cours*, Hague Academy of International Law, p.247.
- ⁸ Bennett, *Aboriginal Rights in International Law*. Occasional Paper No.37 of the Royal Anthropological Institute of Great Britain and Ireland, London, 1978; Martinez-Cobo (Special Rapporteur), *Study of the Problem of Discrimination against Indigenous Populations* (various UN Document References, below).
- ⁹ Fouques Duparc, *La Protection des Minorites de Race, de Langue et de Religion*, Etude de Droit des gens, 1922; McCartney, *National States and National Minorities*, London, 1934.
- ¹⁰ UNDOC E/CN. 4/641 Annex I, Resolution II.
- ¹¹ Capotorti Report, Add.I, *The Concept of a Minority*; UN Sales No.E.78.XIV.1.
- ¹² UNDOC E/CN.4/ Sub.2/1985/31.
- ¹³ UNDOC E/CN.4/1986/5 (1985), p.85.
- ¹⁴ Working Group Report, UNDOC E/CN.4/1986/43 (1986).
- ¹⁵ Below.
- ¹⁶ See generally, Sohn and Buergenthal, *International Protection of Human Rights*, Indianapolis, 1973. Elles, *International Provisions Protecting the Human Rights of Non-Citizens*, UN Sales No. E. 80. XIV. 2.
- ¹⁷ Goodwin-Gill, *The Refugee in International Law*, Oxford, 1983.
- ¹⁸ UN Publication, Sales No. 71.XIV.2.
- ¹⁹ *Ibid.*, para. 370.
- ²⁰ For example ILO Convention 107 (Indigenous and Tribal Populations) is styled a Convention on the 'Protection and Integration' of these populations. The stress on integration is particularly heavy in anti-discrimination instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination.
- ²¹ Study, *supra* n.19, paras. 373-75.
- ²² *Ibid.*, para. 380.
- ²³ *Ibid.*, para. 379.
- ²⁴ *Ibid.*, paras. 366-67.
- ²⁵ See for example the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, text in Brownlie, *Basic Documentation on Human Rights* 2nd Edn., Oxford, 1981, p.164.
- ²⁶ For an exposition of the distinction, see the Dissenting Opinion of Judge Tanaka in the South West Africa Cases (2nd Phase) 1966, International Court of Justice: text in Brownlie, *op. cit.*, p.441.
- ²⁷ *The International Protection of Minorities*, Minority Rights Group Report, London, 1979; also 'Intervention to Protect Minorities,' in *Minorities: A Question of Human Rights?*, Whitaker, Ed., Pergamon Press, 1984.
- ²⁸ See for example, Gros-Espiell, 'The Right of Self-Determination: Implementation of UN Resolutions,' UNDOC E/CN.4/ Sub.2/ 405 Rev. 1; Cristescu, 'The Historical and Current Development of the International Right to Self-Determination, etc.', UNDOC E/ CN.4/Sub.2/404.
- ²⁹ Cf. Hart, *The Concept of Law*, Oxford, 1961, p.188.
- ³⁰ Dinstein, 'Collective Human Rights of Peoples and Minorities,' *International and Comparative Law Quarterly* (1976), p.102.
- ³¹ Gros-Espiell, Cristescu, *supra*, n.29, *passim*.
- ³² For a critique, see Pomerance, *Self-Determination in Law and Practice, The New Doctrine in the United Nations*, Nijhoff, The Hague, 1982; for a more sympathetic view, consult Rigo Sureda, *The Evolution of the Right of Self-Determination*, Leiden 1973.
- ³³ Resolution 1514 (XV), text in Brownlie, *op.cit.*, p.28.
- ³⁴ Van Langenhove, *The Question of Aborigines before the United Nations: The Belgian Thesis*, Brussels, 1954; also UNDOC A/ AC.67/2 (May 1953).
- ³⁵ Resolution 2625 (XXV).
- ³⁶ Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey,' *American Journal of International Law* 65, 1971, p.713.
- ³⁷ Cassese, in Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law*, Sijthoff and Noordhoff, Alphen aan den Rijn, 1979.
- ³⁸ India has made reservations to this effect to the UN Covenants on Human Rights (Common Article 1 of the Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights).
- ³⁹ Hannum, *Sovereignty, Autonomy and Self-Determination. The Accomodation of Conflicting Rights*, University of Pennsylvania Press, 1990, p.47.
- ⁴⁰ Van Dyke, *Human Rights, Ethnicity and Discrimination*, Greenwood Press, Connecticut, 1985, *passim*; Midgley, *The Natural Law Tradition and the Theory of International Relations*, Elek Books, London, 1975; Finnis, *Natural Law and Natural Rights*, Oxford, 1980.
- ⁴¹ Sabine, *A History of Political Theory*, Holt, New York, 1980, p.475, cited by Van Dyke, *op. cit.*, p.196.
- ⁴² *Ibid.*
- ⁴³ UNDOC E/CN.4/AC.4/3/ADD.1, p.409.
- ⁴⁴ UNDOC A/C.3/SR.161, p.719.
- ⁴⁵ UNDOC A/C.3/SR.161, p.270.
- ⁴⁶ *Ibid.*
- ⁴⁷ *Ibid.*, p.726.
- ⁴⁸ Morsink, 'The Philosophy of the Universal Declaration,' *Human Rights Quarterly* 6, 1984, p.309.
- ⁴⁹ For a short review of these developments (and extensive references), see Thornberry, 'Is There a Phoenix in the Ashes?: International Law and Minority Rights,' *Texas International Law Journal* 15, 1980, p.421.
- ⁵⁰ Study of the Legal Validity of the Undertakings Concerning Minorities, UNDOC E/CN.4/367. See however, Turk, *Minority Protection in Human Rights Conventions*, Conference Paper for *Minority Rights, Policies and Practices in South East Europe*, Copenhagen, 1990, for a contrary view.
- ⁵¹ For a collection of relevant texts, see *Protection of Minorities: Special Protective Measures of an International Charter for Ethnic, Religious or Linguistic Groups*, UN Publication Sales No.67.XIV.3.
- ⁵² These concepts are extensively reviewed by: McKean, *Equality and Discrimination under International Law*, Oxford, 1983; and Vierdag, *The Concept of Discrimination in International Law - with Special Reference to Human Rights*, The Hague, 1973.
- ⁵³ *International Action against Genocide*, Minority Rights Group Report, London, 1984.
- ⁵⁴ Views are canvassed in 'Study of the Question of the Prevention and Punishment of the Crime of Genocide,' Special Rapporteur N. Ruhashyankiko, UNDOC E/CN.4/ Sub. 2, 12/416 (1978).
- ⁵⁵ Capotorti, *op.cit.*, Add.2, para.95.
- ⁵⁶ UNDOC A/C.3/SR/1104, paras.2-3.
- ⁵⁷ Human Rights, International Instruments, Signatures, Ratification, Accessions, etc., ST/HR/4/REV.4.
- ⁵⁸ *Ibid.*
- ⁵⁹ Capotorti Report, *passim*; and Capotorti, 'The Protection of Minorities under Multilateral Agreement on Human Rights,' *Italian Year Book of International Law* 2, 1976, p.3.
- ⁶⁰ UNDOCS CCPR/C/SR.607, 618, 614 (1985).
- ⁶¹ CERD/C/SR.296, 297; Meron, 'The Meaning and Reach of th

- International Convention on the Elimination of All Forms of Racial Discrimination,' *American Journal of International Law* 79, 1985, p.283.
- 62 Generally McKean, *op.cit.*; Capotorti Report, *passim*. In general, non-discrimination may be described as a first requirement of minority protection, necessary but not sufficient.
- 63 The efforts of the UN Human Rights Commission and its Sub-Commission for prevention of Discrimination and Protection of Minorities are discussed in McKean, *op.cit.*, and Ermacora, *op.cit.*
- 64 Relevant texts in UN Protection of Minorities, etc., *supra*, n.51.
- 65 A study of these and other European arrangements is: *Co-Existence in some Plural European Societies*, Minority Rights Group Report, London, 1991 (various authors). Individual studies are those of Alcock, *The History of the South Tyrol Question*, London, 1970; Modeen, 'The International Protection of the National Identity of the Aaland Islands,' *Scandinavian Studies in Law*, 1973, p.177.
- 66 15 November 1985.
- 67 Udina, *Gli Accordi Di Osimo*, Trieste, 1979 includes the authentic texts of this treaty, diplomatic correspondence, etc.; also Capotorti, *Italian Year Book of International Law* 2, 1976, p.3.
- 68 UN, Protection of Minorities, etc., *supra*, n.51.
- 69 Cyprus, Minority Rights Group Report, London, 1984; Tornarities, *Cyprus and its Constitutional and Other Legal Problems*, Nicosia, 1980; Cyprus, Cmnd. 1093, 1960.
- 70 There are non-European examples such as the Agreement on Protection of Minorities, 1950, Pakistan-India, *131 United Nations Treaty Series*, p.3. Other examples are contained in UN, Protection of Minorities, *op.cit.*
- 71 Bennett, *supra*, n.8, provides an extensive analysis of Convention 107. See also, Barosh, 'Revision of ILO Convention No. 107,' *American Journal of International Law* 81 (1987), p.756.
- 72 One may argue, cynically perhaps, that herein lies the reason why so many South American States have been willing to ratify the Convention, even including Paraguay – See Arens (ed.), *Genocide in Paraguay*, Philadelphia, 1976.
- 73 The ILO Convention, 'elaborated by oppressive Governments, was meant to legalize the colonial oppression of the Indian peoples': First Congress of Indian Movements in South America, Cuzco, Peru, 1980, cited in Martinez-Cobo, *op.cit.*, UNDOC E/CN.4/ Sub.2/476/Add.5, annex V, p.13.
- 74 The establishment of the Sub-Commission's Working Group on Indigenous Populations was authorized by *Economic and Social Council Resolution 1982/34*.
- 75 Barsh, 'Indigenous Peoples: An Emerging Object of International Law,' *American Journal of International Law* 80, 1986, p.369.
- 76 UNDOC E/CN.4/ Sub.2/AE.4/1984.4, p.5
- 77 United Nations Action in the Field of Human Rights, New York, 1980, p.21.
- 78 Robinson, et.al., *Were the Minorities Treaties a Failure?*, New York, 1943.
- 79 Text in Brownlie, *Basic Documents on Human Rights*, *op.cit.*
- 80 General Assembly, Official Records, Sixteenth Session, Third Committee, 1103 Rd. meeting, paras. 8-14.
- 81 Capotorti *Monograph No. 37* (Brazil).
- 82 Capotorti Report, *op.cit.*, Add.3, p.9.
- 83 Capotorti *Monograph No. 64* (Mexico), p.8 (author's translation).
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