

Chapter III Minorities and International law

3.1 Introduction

The major issue that is examined in this chapter is the treatment of the issue of ethnic minorities under international law. Accordingly, various norms and principles of international law will be interrogated with a view to highlight the historical response of international law to the problem of ethnic minorities within states. It is sought here to identify and explain the position of international law on the matter. It will also be interesting to see how this position of international law on the minorities' problem has affected the development of effective norms and mechanisms to address the issue of minorities.

It is argued in this chapter that the historical development of the protection and rights of minorities under international law is characterized by rise and fall and lacks incremental progress. Moreover the articulation of the norms on the protection and rights of minorities through the years has been fraught with deep controversies and even now the seemingly emerging consensus among the members of the international community is shaky and tenacious.¹ This has tremendously contributed to the reluctance of many states, including those in Africa, to recognize the existence of minorities in their territories let alone to ensure their protection and enjoyment of their rights.

It is also important to point out that much of the articulation of the norms on the protection and rights of minorities has been based on the experience of European states. This has seriously affected the universal appeal of the norms. That is partly the reason why there is inadequate analysis of the position of

¹ There is no comprehensive legal regime applicable to the protection and rights of minorities. There are soft laws such as the 1992 UN Declaration on Minorities and minimal legal rules specifically Art. 27 of the ICCPR.

minorities in the context of Africa and Asia. Indeed, the assertion by African states that the issue of minorities is a European problem can be attributed to this.

It is also interesting to note that part of the reason for the immaturity of the norms of minority rights under international law is their possible implication on other established norms of international law such as *uti possidetis*, the territorial integrity of states and the nation-state ideal. Minority rights manifest the tension between various values that international law seeks to uphold. They manifest the tension between the traditional state centric international system and the emerging international system focused on human security, human dignity and peace.

Despite the absence of a comprehensive legally binding regime of law on the protection and the rights of minorities, international law remains to be a point of departure in discussing the rights and protection of minorities. The normative framework of this study is based on the international law standards on the rights of minorities.² Accordingly, this chapter will examine the nature and content of the rights of minorities as articulated in diverse treaties, declarations, judicial opinions and state practices. The diversity in the nature and manifestation of the phenomenon of the issue of minorities means that various rights including both individual and collective rights would be important. As it will be seen in subsequent sections, however, the rights of minorities articulated at the international level are formulated as individual rights, another limitation on the efficacy of the norms of international law in the field.

Any discussion on minorities and international law would not be complete without analyzing the question of the definition of the term 'minorities'. It is important to point out from the outset that the level of consensus achieved around the rights and protection of minorities under international law is not paralleled by the same

² Part of the reason for this is that the concern for the rights of minorities is first articulated at the international level and brought to the domestic level from that. Asbjorn Eide *Minority situations: In search of peaceful and constructive solutions* 66 *Notre Dame L. Rev.* (1991) 1313.

level of consensus on the articulation of the essence of the concept of 'minorities'. Indeed, this is one area of the norms of international law on minority rights and protection that is at best murky. Despite the absence of a universally agreed upon definition that this situation engendered, the efforts made so far at various forums and by various international lawyers offers good insights as to the factors to be considered that it is possible to develop a definition suitable to the required context, for the purpose of this study Africa.

3.2 The issue of minorities and International law: Historical overview

A detailed and exhaustive historical survey of the response of international law to the issue of minorities is beyond the scope of this study. The present chapter, therefore, seeks to analyze briefly the evolution of the norms of international law on the rights and protection of minorities, and to draw out some of the difficulties which have been apparent in the articulation of the norms on the protection and rights of minorities.

3.2.1 Early developments

The historical root of the protection of minorities is often traced back to the 15th, 16th and 17th centuries of non-systematic attempts of European sovereigns to afford protection to religious minorities. At that period religion was the major factor along which groups were divided and thus that was the major source of strife between groups.³ The earliest protection attempt was the millet system introduced in the Ottoman Empire during the 15th century to guarantee certain rights for non-Muslim religions and ethnic minorities.⁴ This system empowered each millet (nation) to have its own separate religious laws, run their own

³ See Hurst Hannum *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (1990) 50.

⁴ See Jay A Sigler *Minority rights: A comparative analysis* (Westport, Connecticut: Greenwood Press, 1983) 70-71.

institutions including education, religion, justice and security.⁵ The interest of this system was however not so much the protection of non-Muslim religious and ethnic groups than serving as a mechanism 'to maintain their [the Ottomans] hold on territories populated by non-Muslims.'⁶ Although these practices of the Ottomans were acceptable to other states, they were not supported by international treaties.⁷

Internationally, however, the protection of minorities began in the 17th century with the conclusion of bilateral treaties aimed at protecting religious minorities. As religious conflicts became bitter in many parts of Europe, the protection of religious groups has become the concern of European powers. It thus constituted a major subject matter of many, and mostly bilateral, treaties among European powers during the 17th and 18th centuries. Examples of treaties providing for the protection of religious minorities include the Treaty of Vienna (1606) between Hungary and Transylvania, the Treaty of Westphalia (1648) between France and the Holy Roman Empire and their respective allies, the Treaty of Oliva (1660) between Sweden and Poland, the Treaty of Nijmegen (1678) between France and Holland, the Treaty of Ryswick (1697) between France and Holland and the treaty of Paris of (1763) between France, Spain and Great Britain.

It was only in the 19th century that developments relating to the protection of minorities expanded beyond religious groups. With the rise of nationalism in the 19th century the protection of ethnic minorities soon became a concern of European. Minority consciousness vis-à-vis the emergence of nationalism endangered the survival of established states and laid the foundation for subsequent ethnic conflicts in Europe and much later in time in other parts of the world.⁸ During this period, the protection of ethnic minorities became a subject matter of multilateral treaties concluded among various European powers. The

⁵ Sigler (1983) 70.

⁶ As above.

⁷ Sigler 71.

⁸ According to Sigler '[N]ationalism was the seedbed of modern minority rights, and minority discontent was one of the most unsettling forces in international relations.' Sigler (1983) 72.

first international instrument to provide protection to ethnic minorities was the Final Act of the Congress of Vienna of 1815.⁹

During this early period of the development of the norms of international law on minorities, colonial powers were competing for territorial acquisition in Africa. The rivalry of European powers for controlling Africa culminated in the Berlin Conference of 1885 in which they scrambled and portioned Africa among themselves. At the time when minority rights and nationalism was on the rise in Europe, the seeds for the minority problem and ethnic discontent were sown in Africa with the introduction of the nation state system. As Hannum rightly observed

[I]t was primarily in the European arena that concepts of minority rights and nationalism developed in the nineteenth and early twentieth centuries. The colonial powers of Africa were notorious for ignoring ethnic, linguistic or other national considerations, leaving such complexities to be dealt by the independent states that emerged from decolonization.¹⁰

There was no interest at all to end the colonial control of Africa nor to institute any system of protection for minorities in Africa.¹¹ The colonial state, which it self came about as a result of traditional international law's encouragement of territorial conquest and denial of the statehood of African polities,¹² have set

⁹ See Patrick Thornberry 'Is there a phoenix in the Ashes? – International Law and Minority Rights' 15 *Texas Int'l L. J.* (1980) 426.

¹⁰ Hurst Hannum *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (Philadelphia: University of Pennsylvania press, 1990) 55-56.

¹¹ African ethnic groups have been known by the derogatory term 'tribes' and hence were seen as lacking the quality of a nation unlike their counter part in Europe. Thus Lewis rightly observed that 'little further reflection is needed to show that those units which we, in common with our colonizing ancestors, regard as 'nations' are the analogous of those that in Africa became known as tribes.' I M Lewis 'The tribal factor in contemporary Africa' in Colin Legum and John Drysdal (eds.) *Africa Contemporary Record* - (Annual Survey and Documents, 1969-1970) A12. In international law, the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples makes a direct reference to tribes. Pursuant to Article 1(1)(a) the Convention applies to '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.' In discussions on the rights of groups, tribal peoples rarely constitute an item of a discussion. The only category of collectivities that are often discussed are 'peoples', 'minorities' and 'indigenous peoples'.

¹² This point is vividly spelt out by Ayana when he said that international legal process hardly questions whether the territory was acquired by lawful means to validate the acquisition of

African ethnic groups against one another through its divide and rule. This has laid down the foundation for ethnic animosity and conflicts that have dominated the political scene of many African states since independence.¹³

3.2.2 The minority treaties system of the League of Nations

The issue of minorities was also in the agenda during the post World War I period. The application of national self-determination, expounded by Woodrow Wilson, as a basis for redrawing the map of Europe necessitated the creation of new states with the disintegration of the Ottoman and The Austro-Hungarian Empires. These territorial readjustments made it imperative that the issue of minorities should be attended to in the interest of lasting peace in Europe. It was within this political context that the minorities' treaty system of the League of Nations was instituted.

The system adopted under the League was based on individual treaties dealing with selected situations in Europe. According to Hannum these treaties fell within three categories based on the parties involved.¹⁴ The first group of treaties included those imposed on the defeated states of Austria, Hungary, Bulgaria and Turkey. The second category included either new states created out of the dissolution of the Ottoman Empire or states whose boundaries were altered specifically to respond to the principle of national self-determination; in this group were Czechoslovakia, Greece, Poland, Romania, and Yugoslavia. The last category involves the special provisions to minorities included in the regimes established in Aland, Danzing, the Memel Territory, and Upper Silesia. It is notable that the system was designed to apply only to the new states and those

territories by states. James Anaya 323. See also O C Okafor *Re-defining legitimate statehood: International law and state fragmentation in Africa* (2002) 57.

¹³ The ethnic problem that has led to the 1994 Rwandan Genocide is explained in part by reference to the Belgian system of divide and rule. See *The Prosecutor v. Jean-Paul Akayesu* Case No. ICTR-96-4-T paras. 82-91.

¹⁴ Hannum (1990) 52.

affected by the territorial changes, which are largely states of Eastern and Central Europe.¹⁵

Clearly, the system of minority protection established based on those specific instruments was not universal. It was not meant to evolve into a system of international law for the protection and rights of minorities in the world. This conclusion is further strengthened by the rejection of the inclusion of provisions for the protection of minorities into the Covenant of the League of Nations. US President Wilson proposed a stipulation under which all states seeking admission to the League would bind themselves to accord equal treatment to their minorities. In his proposal Wilson pointed out that

The League of Nations shall require all new states to bind themselves as condition precedent to their recognition as independent or autonomous states, and the Executive Council shall exact of all states seeking admission to the League of nations the promise, to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of their people.¹⁶

Even after the signing of the Covenant, the efforts of other states such as Lithuania and later on Finland to make minority regime applicable to all members of the League, including non-Europeans, were not accepted by the League Assembly. The delegate of South Africa, one of the few African member states of the League,¹⁷ Professor Gilbert Murray expressed the opinion that 'the states which are not bound by any legal obligation to the League with respect to minorities will, nevertheless, observe in the treatment of their own racial, religious, or linguistic minorities, at least as high a standard of justice and toleration as is required by any of the treaties.'¹⁸ Nevertheless, these efforts were

¹⁵ As Hannum observed the minority protections envisaged in the League treaties were imposed only on a few selected states and there was no suggestion that the Great Powers should be bound by similar obligations. Hannum (1990) 55.

¹⁶ D H Miller *The drafting of the Covenant* (New York, G.P. Putnam's and Sons, 1928) vol. ii, 91 as quoted in Javaid Rehman *The weaknesses in the international protection of minorities* (the Hague: Kluwer Law International, 2000) 37-38.

¹⁷ Ethiopia and Liberia were the other member states of the League from Africa.

¹⁸ Gnanapala Welhengama *Minorities' claims: From autonomy to secession* (2000) 89.

successfully resisted and the minority treaties system remained to be a largely European project. It would therefore be inaccurate to treat that system as constituting part of positive norms of international law.¹⁹

There are many factors that could explain the resistance of states to the expansion of the scope of application of the minority treaties system to all member states of the League. One such factor was the fear of states that the system would constrain their jealously guarded sovereignty as it would subject them to external scrutiny. This can be gathered from the complaint of some of the states bound by the minority treaties system. These states complained that the system allows 'any one who cares to send in a petition to attack our good name publicly, it drags out our dirty linen and washes it publicly, and puts us in the odious position of having to appear in public court as defendants against our own citizens.'²⁰ Incidentally, this expresses the sense of injustice felt by these states for having been separately targeted to be placed under the scrutiny of an external body.

The expansion of the system of minority protection outside of Europe would also have questioned the colonial possession of the major European powers of the time. Such would have obliged the colonial powers in Africa and Asia to accord rights and even independence to the colonial peoples. The right to self-determination as articulated by Woodrow Wilson was limited in its scope and application to the situation in Europe and there was no interest to extend it to other parts of the world such as in Africa.²¹ As Hannum pointed out 'Self-determination was considered only for 'nations' which were within the territory of the defeated empires (Austro-Hungarian and Ottoman empires); it was never thought to apply to overseas colonies.'²² The system was not therefore

¹⁹ Hannum aired the same view when he said that it is difficult to conclude that the system was relevant to much of the world outside Europe. Hannum (1990) 56.

²⁰ Welhengama (2000) 9.

²¹ See Asbjorn Eide 'In search of constructive alternatives to secession' in Tomschout Modern law of self-determination 149-150.

²² Hannum (1990) 28.

conceived to address similar problems in the colonial territories such as those in Africa.

Another reason can also be that the system was essentially politically motivated and designed to address the exigencies that the post-World War I situation created in Central and Eastern Europe. Since its driving motives were not considerations of humanitarian concerns for the plights of minorities,²³ it was unnecessary to give the system of minority protection a universal application.

The perceived tension between the phenomenon of minorities and the ideology of the nation-state system that was seen as the only proper form of a state system was also a cause for concern for many states. Thus, many of the states in Central and Eastern Europe complained that the protection of minorities impeded the development of national unity and weakened the unity of the states by encouraging separateness. This concern has remained to be one of the grounds for which many African states oppose to minority rights.²⁴

The existence of all these unfavourable conditions and limitations coupled with the political developments of the post-World War I period led to the eventual demise of the minority treaties system.²⁵ Many agree however that the ultimate failure of the minorities system could not be separated from the prevailing world order of the time and the fate of the League of Nations itself.²⁶ Thus with the

²³ As Thornberry put it: 'the League regime can be understood as being framed in the light of Woodrow Wilson's reflection that – nothing is ... more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities.' Thornberry 'Is there a phoenix in the Ashes? International law and minority rights' 15 *Texas Int'l L. J.* 440.

²⁴ In this regard the position taken by Namibia in the 1990 Constitution is illuminating. Hailbronner stated that 'the concept of special 'group rights' for the various ethnic groups forming the people of Namibia has been rejected as a potential source of danger for the unity of the state and for the concept of equal rights of citizens.' Kay Hailbronner 'The legal status of population groups in a multinational state under public international law' in Yoram Dinstein and Mala Tabory (eds.) *The protection of minorities and human rights* (Dordrecht: Martinus Nijhoff Publishers, 1992) 118.

²⁵ One such development was Nazi Germany's exploitation of the minority rights system as a pretext for its expansionist purposes to invade many European countries, which eventually led to the outbreak of World War II. See Sigler (1983) 4.

²⁶ See Hannum (1990) 54-55; N Lerner 'The evolution of minority rights in international law' in Catherine Brölman et al. (eds.) *Peoples and minorities in international law* (1993) 85-96.

outbreak of World War II the League of Nations collapsed and with it the minority system.²⁷ Nevertheless, the rights and protection mechanisms have continued to have an ongoing value for the articulation of norms of international law on minorities.²⁸

Despite its many limitations and eventual failure, the minorities system afforded a degree of protection for the selected minority groups in the designated states.²⁹ In general, the system provided for two category of protection: protection aimed at ensuring equality and non-discrimination and special protection for minorities. These protections laid down the foundation for the articulation of norms of international law for the protection and the rights of minorities. The system also marked the beginning of the international judicial protection of minority rights as the Permanent Court of International Justice (PCIJ) issued decisions and opinions which are still relevant in the discussion on minority rights in international law.³⁰

Some observations are, however, in order as to the nature of the protections guaranteed by the treaties. First, although the minorities treaties recognized minorities as groups, the minorities did not have any legal foundation or *locus standi* for establishing their claims before the League or the PCIJ although they enjoyed the right to submit petitions.³¹ Another is that generally the protections did not imply any broader economic or political autonomy.³² In other words, the primary concern of the system was equality and non-discrimination on the one hand and limited cultural rights of minorities on the other. Third, humanitarian

²⁷ The observation of Sigler is however worth quoting 'the failure of the League of nations minority system was not a failure of the concept of minority rights. Rather it was a misapplication of the minority rights concept.' Sigler 75.

²⁸ See, for example, P Thornberry 'The UN Declaration on the rights of Persons Belonging to National or Ethnic, religious and Linguistic Minorities: Background, analysis, observations and an update' in Alan Phillips and Allan Rosas (eds.) *Universal minority rights* (1995) 14-18.

²⁹ See Hannum (1990) 52-53; Lerner (1993) 83-84; Asbjorn Eide *Minority situations: In search of peaceful and constructive solutions* 66 *Notre Dame L. Rev.* (1991) 1316-1319.

³⁰ See generally A. M. de Zayas 'The international judicial protection of peoples and minorities' in Catherine Brölmann et al. (eds.) *Peoples and minorities in international law* (1993) 253-287.

³¹ See Lerner (1993) 85; Welhengama 9.

³² Hannum (1990) 55.

considerations and human dignity were not important foundations of the system.³³ Finally, the League system did not stop short of guaranteeing the rights of minorities; it also imposed duties upon them by a resolution adopted by the Assembly of the League in 1922.³⁴ The relevant part of the resolution reads:

While the assembly recognizes the primary right of the minorities to be protected by the League from oppression, it also emphasizes the duty incumbent upon persons belonging to racial, religious or linguistic minorities to cooperate as loyal fellow-citizens with the nations to which they now belong.³⁵

3.2.3 Minorities under the UN: 'The United Nations cannot remain indifferent to the fate of minorities'

The United Nations Organization succeeded the League of Nations as a new world organization immediately after World War II. Unlike its predecessor however, it took a completely different approach to the issue of minority protection. For a long time since its creation, the UN showed, if at all, little interest either to adopt the minority protection system of the League or to develop a new system for the protection of minorities. The approach employed to address the challenge of the minority issue in Europe was to deal with it unilaterally or through bilateral or multilateral treaties without the involvement of the UN. Thus, there were many treaties that were concluded after World War II to address minority issues, all of which out side of the auspicious of the UN.³⁶

As far as rights are concerned, the UN system was centred on the rights of the universal human rights. The prevalent opinion in the early period of the UN system was that individual rights and the principle of non-discrimination were the

³³ Thornberry maintains a different opinion when he argued that one of the key points of the minority system was the 'attempt to guarantee the rights of minorities for *humanitarian* and pragmatic reasons.' (emphasis added) Thornberry (1995) 15.

³⁴ This was in response to the fears expressed by states about separatist tendency and disloyalty of minorities. See Welhengama (2000) 10.

³⁵ As quoted in Welhengama (2000) 10.

³⁶ For list of such treaties see Lerner (1993) 84-85.

appropriate means of protecting every one, members of minorities included.³⁷ Consequently, no reference was made to minorities in the Charter of the UN as such.³⁸

The main concern of the new international body, as outlined in Article 1(1) of the Charter of the UN, is 'to maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.' As expressed later in the Universal Declaration of Human Rights,³⁹ assuming that it was the absence of international protection and promotion of human rights that contributed to the horrors of World War II, the Charter of the UN provided under Article 1(3), as one of its purposes, the achievement of 'international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' It seems that it was not contemplated that there may arise a future scenario of major disputes involving ethnic minorities in the same territory causing severe problems for international peace and security.⁴⁰ It follows that the sufficiency of the promotion and protection of human rights and fundamental freedoms for all coupled with non-discrimination seems to have been taken for granted.⁴¹

³⁷ Lerner (1993) 85. Hannum (1990) 57.

³⁸ The Charter of the UN however made reference to the protection and promotion of human rights in the preamble and Articles 1(3), 13, 55 (c), 56, and 76 (c) and it also reaffirmed 'faith in fundamental human rights and in the equal rights of men and women' without distinction on the grounds of race, sex, language, or religion.

³⁹ Preambular para. 2 of the UDHR reads 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'.

⁴⁰ Welhengama (2000) 12.

⁴¹ The statement of Sumner Welles, the American undersecretary of state, is illuminating in this regard: 'Finally, in the kind of world for which we fight, there must cease to exist any need for the use of the accursed term 'racial or religious minority.' If the people of the earth are fighting and dying to preserve and to secure the liberty of the individual under law, is it conceivable that the peoples of the United Nations can consent to the reestablishment of any system where human beings will still be regarded as belonging to such minorities?' (emphasis added) As quoted in Sigler 77. Sigler criticized this position as flowing from a misconception of discrimination in the

Nevertheless, an interesting development to the situation in Africa emerged with the birth of the new world organization. This is marked by the inclusion into the Charter of the UN of the equal rights and self-determination of peoples, albeit the reference to self-determination was made only twice and in both cases in the context of developing 'friendly relations among nations'.⁴² Unlike the League era when self-determination was applied selectively and hence lacked the status of universal principle of international law,⁴³ the equal rights and self-determination of peoples have become, under the UN, a fundamental principle of international law.⁴⁴ This elevated status of self-determination, which has evolved into a right first under the 1960 Declaration on Colonial Countries and subsequently under the two UN Covenants,⁴⁵ later served as a vehicle for the decolonization process in Africa and elsewhere in the world.⁴⁶

In 1960 the UN General Assembly adopted the Declaration for the Granting of Independence to Colonial Countries and Peoples.⁴⁷ Premised, among other things, on the principle of equal rights and self-determination of peoples enshrined in the Charter of the UN, this Declaration 'solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its

sense that it excluded the possibility that minorities may wish to be different and recognized as minorities. Sigler 77.

⁴² See the Charter of the UN Arts. 1(2) and 55.

⁴³ It is interesting to quote here the report of one of the expert committees that worked on the issue of self-determination during the League era: 'Although the principle of self-determination of peoples plays important part in modern political thought, especially since the great War, it must be pointed out that there is no mention of it in the covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as positive rule of the Law of Nations...' As quoted in Hannum 29.

⁴⁴ The 1960 UN Declaration on the Granting of Independence to Colonial countries and Peoples and the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations declared self determination a right of peoples on the basis of the principle of equal rights and self determination of people enshrined in the Charter of the United Nations.

⁴⁵ Art. 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural rights declare self-determination as a right of all peoples.

⁴⁶ See the Declaration on the Granting of Independence to colonial Countries and Peoples, GA Res. 1514 (XV) of 14 Dec. 1960.

⁴⁷ GA Res. 1514 (XV) UN GAOR 15th Sess. Supp. No. 16 at 66 UN Doc. A/4684 (1960).

forms and manifestations' and declares under its Article 2 that 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

It must, however, be pointed out that there is a distinction between self-determination of the League era and that of the UN in decolonizing Africa. Where as what applied in Europe following World War I was national self-determination, it was territorial self-determination that applied in the decolonization process of Africa. Accordingly, the two had varied results as far as minorities are concerned. The application of national self-determination to Europe created relatively homogenous states in most cases.⁴⁸ As Hannum observed, 'while approximately half of the population of Europe were minorities in 1914, only one fourth were minorities in 1919.'⁴⁹ In Africa, territorial self-determination was directed only to the removal of European colonialism and, ultimately, it sanctified the artificial boundaries carved up by the colonial powers with no preference to the settlement patterns and pre-colonial mode of organization of the various ethnic groups. Thus, self-determination simply affirmed the continuation of the diverse groups amalgamated into the same state under those boundaries. The effect of which is that today there are many minorities in many African states, and in contrast to the situation in Europe⁵⁰ many states in Africa do not have a majority ethnic group⁵¹ and in many others the majority is only a bare one.⁵²

There is no doubt, therefore, that the decision of the UN to distance itself from taking any firm responsibility for the rights and protection of minorities has

⁴⁸ Rachel Murray and Steven Wheatly 214.

⁴⁹ Hannum (1990) 53.

⁵⁰ In eastern Europe, where there has been a concentration of minorities in Europe, minorities represented from roughly 15 % to over 50% (in Czechoslovakia and Yugoslavia). Hannum (1990) 55. At the end of the Cold War these states were themselves divided into many other states further reducing the concentration of minorities.

⁵¹ See Chris Dammers and David Sogge 'Central and Southern Africa' in *World Directory of Minorities* (1997) 466.

⁵² See Julia Maxted and Abebe Zegeye 'North, West and the Horn of Africa' in *World Directory of Minorities* (1997) 401.

disproportionately affected African minorities.⁵³ The minorities system of the League⁵⁴ and the various treaties concluded between various European states after WWII⁵⁵ were in place to address the issue of minorities in Europe. By contrast, no attempt was made to ensure the institutionalization of similar arrangements, for example by way of treaty with the departing colonial powers, for addressing the issue of minorities in Africa, which has remained to be a serious concern for the peace and cohesion of many African states.

The concern of many states has been their sovereignty, non-intervention, territorial integrity and the sanctity of their boundaries. Accordingly, sovereign equality of states and non-intervention are established to be part of the founding principles of the UN.⁵⁶ Unfortunately, it has been these principles that were given prominence in the agenda of the continental organization, the Organization of African Unity.⁵⁷ These international law norms, to which *uti possidetis* was added in 1964,⁵⁸ together with the celebrated international legal ideal of the nation-state⁵⁹ encouraged African states to labour on building, albeit unsuccessfully, a

⁵³ This view is in consonance with the opinion expressed by Jacob Robinson who, speaking about the effect of this situation on minorities in general, noted that minorities may, under these circumstances, be vulnerable to a less sympathetic state structure. First, they may face discriminatory treatment because of their ethnic, religious or linguistic characteristics, second, gradual weakening of their position may result in a loss of their identity as a cultural, ethnic or religious group. As quoted in Welhengama 18.

⁵⁴ The League system was definitely constructed to afford protection to those European minorities whose interest was not fully attended to by the application of national self-determination. As Hannum rightly put it 'the minority guarantees built into the various post 1919 treaties were not inserted to redress earlier depredations by empires..., but rather to assuage and protect those 'national' minorities whose claims to self-determination were not recognized by the victorious Great Powers.' Hannum 53-54.

⁵⁵ These treaties were necessary to attend to the gap that the collapse of the minority system of the League has brought about after World War II. on the various treaties see Welhengama 11.

⁵⁶ See Art 2(1) and (2) of the Charter of the UN. For a discussion on how the claims of minorities are circumvented by these norms of international law see Asbjorn Eide *Minority situations: In search of peaceful and constructive solutions* 66 *Notre Dame L. Rev.* (1991) 1311.

⁵⁷ The constitutive instrument of the OAU, The Charter of the OAU, was adopted in May 1963 in the Ethiopian capital, Addis Ababa.

⁵⁸ See African Head of states and Governments Resolution on Border Disputes Among African States adopted in Cairo July 1964. AHG/Res. 16(I)

⁵⁹ Okafor wrote: 'Since the Peace of Westphalia in 1648, the idea of the nation-state in which nation and state coincided, as opposed to territorial states that are composed of many distinct nations or sub-state groups, has remained ascendant. This nation-state model spread globally through colonial rule and peer review, and became the fashionable model for state-building the

cohesive and culturally unitary nations by ignoring and through repression of the socio-cultural differences of the diverse and distinct socio-cultural groups composing them.⁶⁰ African minorities were, therefore, victims of these unfortunate developments in the new era of the UN. The human rights ideal occupying central place, subservient to the maintenance of international peace and security, in the agenda of the UN has contributed little to prevent the plights of minorities.

The UN heavily relied upon and invested in such selected principles as the human rights and fundamental freedoms of individuals, non-discrimination and equal rights and equality before the law. It was believed by many that through non-discrimination and equality of rights and equality before the law individuals belonging to a minority could be sufficiently protected.⁶¹ This underlined the adoption of a number of conventions and declarations by the UN and international organizations, particularly in the field of non-discrimination.

The first international human rights instrument, the Universal Declaration of Human Rights (UDHR), provided for individual rights only. It however expanded the principle of non-discrimination enunciated under the Charter of the UN.⁶² Accordingly, its Article 2 proclaims: '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 any other status'. The UDHR had no provision for the rights of minorities nor does it mention minorities any where.⁶³ Efforts were

world over.' Okafor 'After martyrdom: International law, sub-state groups, and the construction of legitimate statehood in Africa' 41(2) *Harvard Int'l L. J.* (2000) 519.

⁶⁰ For a discussion on the efforts African states put to suppress ethno-cultural differences see Okafor (2000) 521-526.

⁶¹ According to Lerner [T]he fact that persons were usually discriminated against because of membership of a certain group- defined by race, colour, ethnic or national origin, religion, culture or language- was not ignored. However, it was not considered sufficient to justify the recognition of rights of the group or minorities as such.' Lerner 85.

⁶² See Arts. 1 (3), 13 (1) (b) and 55 (c) of the Charter, which all deal with non-discrimination.

⁶³ Art. 26 is, however, of particular importance in as far as it calls upon states to pursue a policy for the promotion of 'understanding, tolerance and friendship among racial and religious groups.'

however made by various states to include a provision for the protection of minorities. Denmark, the former Yugoslavia and the USSR proposed for such provision to be included in the UDHR. But all such proposals were opposed by many states and ultimately rejected.⁶⁴ This is explained by the general lack of interest on the part of the majority of member states of the UN to the whole question of minorities.⁶⁵

There were many reasons why states opposed minority rights. One such reason was national policies of states regarding integration and assimilation.⁶⁶ Another reason is the 'fear on the part of all countries, and especially newer states, that the recognition of minority rights will encourage fragmentation or separatism and undermine national unity and the requirements of national development.'⁶⁷ There is no doubt that the traditional jealousy of states to guard their sovereignty from intrusion have also generally contributed in this regard. Hannum further identifies other 'socio-political realities' that inspired the opposition of states to acknowledge minority rights. One such factor is the incongruity between the concept of minorities and the theoretical paradigm of the state both in 'the individual social contract theory of Western democracies or the class based percepts of Marxism.'⁶⁸ Most importantly, there exists a disparity between the theory of the nation-state and the reality of minorities in many heterogeneous states.

⁶⁴ In Europe the unfortunate consequence of this negative attitude to minorities was the attempt by many states to create ethnically cleansed states after World War II by embarking upon the expulsion of national minorities through population transfer in which over two million Germans perished in the process. See A de Zayas 'The international judicial protection of peoples and minorities' in Brölmann, Lefebvre, Zieck (eds.) *Peoples and minorities in international law* (Dordrecht, Martinus Nijhoff Publishers, 1993) 258-259.

⁶⁵ According to Humphrey, the UN had no interest in the creation of a machinery for the promotion of minority rights due to pressure from, in particular, the European and Latin American countries. J. P. Humphrey 'The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities' 62 *AJIL* (1968) 870. Similarly Sigler observed: 'Czechoslovakia, Poland and other minority states did not wish to return to a condition that encouraged dissension by ethnically alien groups. In Latin America and North America, various resolutions were adopted maintaining that the concept of international protection of minorities was inapplicable in the Western Hemisphere.' Sigler 76.

⁶⁶ Lerner (1993) 85.

⁶⁷ Hannum (1990) 71.

⁶⁸ As above.

Another very strong reason against minority rights, pointed out by Welhengama,⁶⁹ was that ‘the very process of singling out a minority for special treatment was detrimental to the stability of the nation-state system.’ What was feared in this process was the likelihood of creating ‘invidious distinctions between citizens’, and that the accommodation of minority rights might create a sense of disadvantage on the part of other members of society. In the case of Africa, this problem is compounded by the presence of large number of minorities in many African countries.

Despite the fact that these various factors obstructed the inclusion of a provision on minority rights in the UDHR, the General Assembly of the UN declared, at the time of the adoption of the UDHR, that ‘the UN could not remain indifferent to the fate of minorities.’⁷⁰ In what justifies the neglect of minority rights in the UN agenda and leaves the issue of minorities for future treatment, the UN further said ‘[B]efore taking any effective measures for the protection of racial, national, religious or linguistic minorities, it is necessary to make a thorough study of the problem of minorities.’ This led to the authorization of the UN Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to make a through study of the problem of minorities. Nevertheless until the mid of the 1970s the Sub-Commission accomplished little to address the issue of minorities in any substantive way as its efforts failed to attract the required backing from the concerned organs of the UN.⁷¹

Apart from the UDHR many of the other instruments adopted by the UN and its agencies were largely on non-discrimination. the ILO Convention on Discrimination in Employment and Occupation of 1958,⁷² its Equality of Treatment and Social Security Convention of 1962, the UNESCO Convention

⁶⁹ Welhengama (2000) 18.

⁷⁰ GA Res 217 1948.

⁷¹ See J. P Humphrey ‘The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities’ 62 *AJIL* (1968) 869.

⁷² See Lerner (1991) 151-154.

against Discrimination in Education of 1960,⁷³ the UNESCO Declaration on Race and Racial Prejudice,⁷⁴ the UN Convention on the Elimination of All Forms of Racial Discrimination of 1966,⁷⁵ the Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief of 1982⁷⁶ are included in this category.⁷⁷ By far the most important provision developed under the auspices of the UN on the rights of minorities is Article 27 of the ICCPR.

Almost all of the legally binding instruments from these various sources are elaboration of the non-discrimination principle in specialized fields. Invariably they are formulated as individual rights following the UN's almost exclusive focus on individual rights and freedoms. Intending to avoid public opinion against the acceptability of the instruments, they provided little in a way that entitles minorities to any right as a group.⁷⁸

The only exception from the trend to subsume minority rights within the limited category of individual human rights was the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention is directed against the destruction of national, racial, ethnic, and religious groups as such, as opposed to the rights of individuals.⁷⁹ Accordingly, it guarantees the most basic group right, the right to physical existence. Even here, the proposal to include cultural genocide (ethnocide) was rejected and the Convention prohibits

⁷³ In its article 6 the Convention recognized the rights of members of minorities to carry on their own educational activities, including the maintenance of schools and the use or teaching of their own language. Nevertheless, this is subject to 'the educational policy of each state,' and cannot be prejudicial to national sovereignty. For a discussion on the Convention See Natan Lerner *Group rights and discrimination in international law* (Dordrecht: Martinus Nijhoff Publishers, 1991) 147-150.

⁷⁴ See Lerner (1991) 155-162.

⁷⁵ See Lerner (1991) 45-74.

⁷⁶ See Lerner (1991) 75-98.

⁷⁷ The UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 is another instrument on non-discrimination but has little to do with the issue of minorities as conceived in this study.

⁷⁸ See for example Art. 6 of the UNESCO Convention against Discrimination on Education which is subject to the educational policy of the state and hence its applicability is at the mercy of the will of the state.

⁷⁹ See the Genocide Convention Art. 2.

only physical and biological genocide.⁸⁰ In effect, the protection afforded under the convention does not extend to the distinct characteristic features that define the collective identity of the group. Accordingly measures that are directed at diminishing and ultimately destroying these distinct characteristic features are not prohibited under the convention as long as those measures do not involve physical or biological genocide of the members of the group concerned.⁸¹ This necessitates the recognition and protection of the rights of minorities in the areas of cultural identity.

The legacy of the focus on human rights and non-discrimination to the almost exclusion of minority rights is the existing preference in international law of individual rights to the rights of minorities.⁸² This preference permeates even in the instruments purportedly designed for minority protection. So we ask, do individual rights and non-discrimination afford *enough* protection and rights to minorities? Still of particular importance is the question of whether the individual rights cum non-discrimination approach is always good to all situations of minority problems. True individual rights and non-discrimination are basic for persons belonging to minorities, but is that all it takes to ensure the rights and protection of minorities? These are issues to be addressed in the last section of this chapter.

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⁸¹ Those measures are manifestations of cultural genocide which 'extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a verity of ways, and often includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.' David L. Nersessian 'Rethinking cultural genocide under international law' Human Rights Dialogue Series 2 (12) Spring 2005 (Carnegie Council on Ethics and International Affairs) 7.

⁸² Leuprecht observed in this regard that: 'It must be admitted that there still exists quite a strong individualistic bias in international human rights law ...' Peter Leuprecht 'Minority rights revisited: New Glimpses of an old issue' in Philip Alston (eds.) *Peoples' rights* (Oxford: Oxford University Press, 2001) 122.

It seems that the following few decades since 1945 constitute a period of recession in the articulation of international norms on the rights and protection of minorities with the exception of Article 27 of the ICCPR.⁸³ Generally, it is also interesting to note that it is in particular the development of ethnic minority rights that has been inhibited. As far as religious rights are concerned, the major human rights instruments including the UDHR provide for at least freedom of religion.⁸⁴

3.3 Defining the concept of minority

In this section an overview of some of the attempts made at the international level to develop a generally accepted definition of the concept minority. As the discussion below shows, there is no agreed upon definition of the concept as yet. Nevertheless, a review of several of the proposals seems to suggest that a reasonable degree of consensus on some of the defining elements of the concept has emerged. An overview of these proposals will be followed by a discussion on these essential elements of a definition of minority. The examination of the various proposed definition is geared towards engendering a definition of minorities in the African context. Thus, the section will end by developing such a definition.

3.3.1 Definition: Controversial, is it worth it?

International norms in the field of minority rights are generally fraught with controversies and there is little consensus as to the full range of the rights of minorities in international law. There is however no area of minority rights as controversial as the definition of the term *minorities*. This is an area with respect

⁸³ The Late 1980s and particularly early 1990s mark a turning point in that there has emerged new interest in the development of norms on the rights and the protection of Minorities. It is during this time that the Declaration on Minorities was adopted by the UN.

⁸⁴ See, for example, Art. 18 of the UDHR and Art. 18 of the ICCPR.

to which opinions are still as divided as in the late 1940s.⁸⁵ As Capotorti put it, '[T]he preparation of a definition capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it today.'⁸⁶ This difficulty is not as yet overcome.

The controversy on the definition of minorities over the years prompted some to doubt the relevance of having any such definition. According to this group of scholars a definition is not a prerequisite for developing a system of protection of minorities. Thornberry, while admitting the importance of definition for reasons of clarity, reiterated the view that 'the lack of a universal definition does not, however, prevent a description of what is and has been understood by the terms...'⁸⁷ Similarly Hannum expressed the view that the absence of a widely accepted definition of minority does not bar from using a common sense conception of the term.⁸⁸ Alfredson and Zayas maintained that 'a precise definition is not necessary', because 'the answer is known in 90% of the cases.'⁸⁹ Most importantly, Capotorti maintains that 'application of the principles set forth in Article 27 of the Covenant cannot, therefore, be made contingent upon a 'universal' definition of the term minority, and it would be clouding the issue to claim the contrary.'⁹⁰

It is this position that has become the official position of the UN and other international bodies. In the drafting of the Declaration on the Rights of persons

⁸⁵ For example, in 1950 the UN Commission on Human Rights rejected proposals for a definition of a minority saying that '... it was realized that...it would be difficult if not impossible for the Commission to reach general agreement on a definition that would be universally applicable...' See UN Doc. E/CN.4/689, para. 245.

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⁸⁷ Patrick Thornberry *International law and the rights of minorities* (Oxford: Clarendon Press, 1991) 164.

⁸⁸ Hurst Hannum 'Contemporary developments in the international protection of the rights of minorities' 66 *Notre Dame L. Rev.* 1431.

⁸⁹ See G. Alfredsson and A. de Zayas 'Minority rights: Protection by the United Nations (1993) 14 (1-2) *Human Rights L. J.* 3.

⁹⁰ See F Capotorti Study on the rights of persons belonging to ethnic, religious, and linguistic minorities (New York: United Nations, 1991) para. 564

belonging to National, Ethnic, Religious, and Linguistic Minorities (The Declaration on the Rights of Minorities) the Commission on Human Rights took the view that 'the question of definition was not a necessary prerequisite for drafting the declaration and that this question should not hinder the continuation of drafting work.'⁹¹ Similarly, the Working group established to draft the Declaration stated that 'the declaration could function perfectly well without precisely defining the term as it was clear... to which groups the term referred to in concrete cases.'⁹² The view of the OSCE High Commissioner on National Minorities, Max van der Stoep, is almost in the same line. In an often quoted statement, he once said

What is a minority? I do not pretend to improve on the work of many experts who over the years have not been able to agree on a definition, so I won't offer you one of my own. I would note, however, that the existence of a minority is a question of fact and not of definition...Even though, I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one.⁹³

Other legal scholars including Shaw, Nowak and Packer took a different position on the issue. This group of scholars emphasize that the proper application of the international standards on minority rights requires a clear conceptualization of the notion minority. According to Parker the absence of a definition 'opens the door to possibly unfounded, unwarranted or unjust invocations of the rights and raises the prospect of social tension and conflict concerning the legitimacy of claims and the full content of their rights. It also poses a difficulty in assessing compliance by states.'⁹⁴ In his view, defining minority is imperative not only for practical reasons but also for theoretical clarity. The quest for autonomous definition, contends Nowak, arises not only from the ambiguous nature of the term minority but also from the need to prevent states from international standards, for example by denying the existence of minorities within their

⁹¹ UN Doc. E/CN.4/1986/43 3.

⁹² UN Doc. E/CN.4/1991/53 para. 9.

⁹³ Max van der Stoep 'Key-note address to the Human Dimension Seminar, case studies on national minorities issues' Warsaw 24-28 May 1993, reprinted in 1(1) *CSCE ODHR Bulletin* 22.

⁹⁴ John Packer 'On the content of minority rights' in J Rääkkä (ed.) *Do we need minority rights?* (1996) 121.

territories as some states tried.⁹⁵ The definition of the notion minority is also important to determine the subject of minority rights. Shaw, therefore, holds the view that 'a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants.'⁹⁶ Indeed, there are reasons that necessitate the search for a commonly agreed upon definition of the notion minority.

Requirements of predictability and legal certainty also dictate that conceptual clarity is required to achieve the common understanding and consistent application of legal standards. It must also be pointed out that the controversy with respect to minority rights is partly explained by the absence of a common understanding of the concept. In confirming this point, Packer observed that the fear of states that 'minority rights' are a precursor to disintegration of the state – to separatist claims threatening the territorial integrity of the state is prompted by the lack of clarity in international standards on the basic concepts on which they are premised.⁹⁷

Nevertheless, it is important that this search must be undertaken by having regard to the dynamic nature of the issue of minorities⁹⁸ and the diversity in the nature and manifestation of the minority phenomenon in different parts of the world.⁹⁹ Thus the definition must be flexible enough to accommodate regional even country differences. To put it differently, it must allow contextual understanding of the concept minority to command general acceptability.

⁹⁵ Nowak Commentary CCPR 487

⁹⁶ Malcolm N Shaw 'The definition of minorities in international law' in Yoram Dinstein (ed.) 1-2.

⁹⁷ Packer (1996) 121.

⁹⁸ As the First Secretary General of the UN pointed out in 1950 'minorities are social realities which are dynamic rather than static, and change under the influence of various circumstances.' *Definition and classification of minorities* UN Sale no. 1950. XIV. 3 para. 48, 12.

⁹⁹ Ramaga observed that 'because of diverse experiences of different states, solutions can hardly be formulated in universal principles but depend on the particular circumstances of particular contexts.' Philip Vuciri Ramaga 'Relativity of the minority concept' 14 *HRQ* (1992) 112. In defining minority this variation should be taken into account.

3.3.2 Examination of the definition of minority

At the international level, the search for a definition of the notion *minority* has begun soon after the institutionalization of the minority protection system under the League of Nations. In 1930, the Permanent Court of International Justice had the opportunity to elaborate the notion 'community' as envisaged in the Greco-Bulgarian Treaty of 1919. Noting that the notion has a minoritarian character, the PCIJ defined a 'community' as

A group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.¹⁰⁰

This definition was developed for the purpose of a particular treaty within the framework of the Eurocentric minority protection system of the League. It is nevertheless relevant, as it has been employed as a foundation for subsequent inquiry into the issue of definition of the notion minority.¹⁰¹ In this definition, 'communities' are identified by reference to their distinct characteristics in terms of race, religion or language. As will be shown in subsequent discussions, these characteristics are important in the definition of the notion minority. Similarly, the internal conviction of the members as belonging to a group referred to in the definition is an element that recurs in almost all attempts of defining the concept minority.

¹⁰⁰ Greco-Bulgarian Communities case [1930] P.C.I.J. Ser.B. No. 17 at 21.

¹⁰¹ This definition incorporates both subjective and objective elements as essential defining features which has become a pattern in the discussion on the definition of the notion of 'minority'. See M N Shaw 'The definition of minorities in international law' 9; Philip Vuciri Ramaga 'The Group concept in minority protection' 15(3) HRQ (1993) 557. Indeed this approach is also used to define the concept 'peoples' as subjects of the right to self-determination.

As has been noted earlier, after the establishment of the UN, the focus on human rights of individuals and the generally prevalent contempt of states to the issue of minorities led to a general neglect to the development of norms on the rights of minorities. This had limited the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its works for many years since its establishment in 1946. A major step was taken in the efforts of the Sub-Commission when it appointed Special Rapporteur Francesco Capotorti to conduct a study on the rights of persons belonging to minorities based on Article 27 of the ICCPR. This study, by far the most comprehensive study on the rights of minorities under Article 27 of the ICCPR, defined the concept minority for the purpose of Article 27 of the ICCPR:

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.¹⁰²

Although, as Capotorti indicated, this definition was partly based on the work of the PCIJ, it introduced new elements that did not feature in the works of the later. The reference to numerical inferiority, a requirement of non-dominance and nationality and the relativity of the existence of minority to the rest of the populations are newly added. On the other hand, this definition omitted the reference to a locality from the *Greco-Bulgarian case* of the PCIJ and hence limited minority status to the national level only. Despite its contribution in clarifying certain aspects of what constitutes a minority, this definition did not attract the acceptance of the UN Commission on Human Rights.

Later on when a decision was made to prepare a declaration on the rights of minority rights, the Human Rights Commission requested the Sub-Commission to prepare a text defining the term *minorities*. In the light of this, the Sub-Commission submitted to the Commission a text on the definition of a *minority* prepared by Deschênes. According to this text, minority is

¹⁰² Capotorti para 568.

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.¹⁰³

There are two observations that must be made here. First, a preference is made in this definition to the majority over 'the rest of the population' in Capotorti's formulation. This preference seems to insist that there must be a majority group in order to speak of the existence of a minority. Second, this definition narrowed down the aim of the members of the group to achieving equality in fact and in law.¹⁰⁴ This definition was not also accepted by the Commission on Human Rights.

In legal literature and official documents, the most widely acknowledged definition is the one formulated by Capotorti.¹⁰⁵ Taking that into account, in the examination of the essential defining elements of a minority, Capotorti's definition is taken as a point of departure. The elements in this definition are: the numerical inferiority of the group; the non-dominant position that it has in the society; the nationality requirement; the ethnic, religious and linguistic characteristics distinguishing the group from those of the rest of the population of the state; and the collective will to preserve their culture, traditions, religion or language.

a. Numerical Factor

It is appropriate first to make some observations regarding the numerical factor as envisaged by Capotorti's definition. First, the definition acknowledges that, objectively speaking, minority is primarily a numerical status in that the size of a

¹⁰³ See UN Doc. E/CN.4/Sub. 2/1985/31/Corr.1 (14 May 1985) para 181, 30.

¹⁰⁴ In the discussions on the definition at the Sub-Commission, among other things, the expression 'aim to achieve equality' attracted criticism. See M N Shaw 12.

¹⁰⁵ See Nowak 487; J Pejic 'Minority rights in international law' 19 *HRQ* (1997) 670.

group within a given society is crucial in determining its minority status.¹⁰⁶ Although the use of the term 'inferior' is meant to indicate that numerical minority position of the group is required, a neutral term with no undesirable connotations would have been suitable.¹⁰⁷ Second, the numerical factor is relative. It determines minority status only relationally by reference to the size of 'the rest of the population of a state.'

The first issue that arises with respect to the numerical factor is the minimum numerical threshold required to qualify for recognition as minority. Clearly, two persons do not form a minority for the purpose of minority rights.¹⁰⁸ At the same time setting a precise figure as a numerical minimum, as suggested by the Swedish Government for a minimum of 100 persons, would not be realistic, although such a standard could be desirable for reasons of legal certainty. According to Capotorti, '[I]n principle, even quite small group has the right to claim the protection provided for in Article 27, to the extent to which it seems reasonable to expect the state to introduce special measures of protection.' Here emphasis must be put to the last aspect of the formulation which is the operative part of the statement. From this perspective and taking into account the complexity of multiethnic states in Africa owing to the breadth of ethnic diversity, it is proposed here that the size must be sufficient¹⁰⁹ to reasonably expect the state to guarantee to the group the rights of minorities.¹¹⁰ The determination of

¹⁰⁶ Almost every conceptualization of minority is made on the basis of a presupposition that a minority is a numerically smaller group.

¹⁰⁷ See Kristin Henrad 33.

¹⁰⁸ Nowak 488.

¹⁰⁹ Gilbert succinctly captured this point: '...while a minority must be numerically smaller than the majority population, it must also constitute a sufficient number for the state to recognise it as a distinct part of the society and to justify the state making the effort to protect and promote it.' G Gilbert 'The legal protection accorded to minority groups in Europe' 23 *Netherlands Yearbook of International Law*(1992) 72-73.

¹¹⁰ In 1953 the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities provided that 'minorities must include a sufficient number of persons to preserve by themselves their traditional characteristics.' UN Doc. E/CN.4/703 (1953), para. 200 as quoted in M N Shaw 25. The problem with this formulation is that it puts the emphasis on the sufficiency of the size of the group to preserve their identity. One of the characteristic features of minority situation is that the group is not large enough to protect its characteristics from erosion by the domination of the majority. The Frame Work Convention Articles 10(2), 11(3) and 14(2) speaks of 'substantial numbers'.

the sufficiency of the size of the group is a question of fact that must be considered on a case by case basis.¹¹¹

It is suggested that 'states should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it.' As pointed out by Shaw, what this means is that, where the group is so small that positive state obligation to the group by way of minority rights would be a disproportionate burden upon the resources of the state, the group cannot be treated as a minority at least for rights that create positive state obligations.¹¹² The proportionality principle also implies that the nature of rights of minorities of different population size proportionally vary based on the relative size of each.¹¹³ In the context of Africa where the size of ethnic groups varies from many millions as Hausa-Fulani of Nigeria to tens of thousands as the application of the rule of proportionality must be accompanied by other considerations such as historic inequities suffered by the group.

Another issue that must be considered is whether the determination of minority status is to be made in relation to the total population of a state or the population of some internal political unit such as a province or a region. Indubitably the expression 'the rest of the population' is primarily a reference to the total population of a state. Accordingly, some legal scholars tend to restrict the frame of reference to the national level. In *Ballantyne, Davidson and McIntyre V. Canada*, the Human Rights Committee (HRC) held the view that 'the minorities referred to in article 27 are minorities within such (member states of the ICCPR) a state, and not minorities within any province.'

¹¹¹ Taking as a point of departure the view that membership of a group must be sufficient to preserve group characteristics, Ramaga stated that 'sufficiency of the group is certainly a question of fact depending on the nature of the characteristics and the social environment of the group.' Ramaga (1993) 577.

¹¹² Shaw 25.

¹¹³ Kristin Henrad observed that 'the proportionality principle should be used to determine the width of positive state obligations by taking into account the scale of the respective minority groups.' 33.

The problem with this approach is that it fails to take into account situations in which large portion of political power is constitutionally or otherwise vested in local administrative unit, as is usually the case in federal states. In such a case, the characteristics and interests of the minority at a provincial level could be exposed to the same level of erosion by the decision of the majority at the province as the characteristics and interests of the minority at the national level.¹¹⁴ In a separate opinion, the minority of the HRC in *Ballantyne, Davidson and McIntyre V. Canada* expressed the need to take into account such considerations in the application of Article 27.¹¹⁵ Some scholars also maintain that the numerical status of the group may be judged by reference to an internal political structure in addition to the whole country in so far as such entities have certain powers, as federal units do, which can affect the interest of the population group concerned.¹¹⁶ This seems to be a reasonable approach in the light of the overall purpose of minority rights and protection.

At the European level, the Parliamentary Assembly of the Council of Europe has proposed a definition in Recommendation 1201.¹¹⁷ According to Recommendation 1201's definition of minority, the concept of minority can also include minorities at the regional level in a given State. In this regard, at least at the European level, the issue of whether or not local minorities fulfilling the definitional features may be considered as minorities has been dealt with in a way that includes them into the category of minorities.

¹¹⁴ In his note 44, De Varennes made the point that: '[I]t could be validly maintained that the drafters of Article 27 simply overlooked that in a federal state, even a national majority may find itself subjected to serious mistreatment if it is a numerical minority in one of the federal units and outside the reach of federal (national) protection.' De Varennes 143.

¹¹⁵ The minority members of the HRC disagree with the reasoning that 'because English-speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of Article 27' and with the conclusion that 'persons are necessarily excluded from the protection of Article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a state, but is not clearly a numerical minority in the state itself.' Individual opinion by Mrs. Elizabeth Evatt, co-signed by Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic as quoted in De varennes 142-143.

¹¹⁶ See Ramaga, *Relativity* 105-110; Kristin Henrad 35.

¹¹⁷ Parliamentary Assembly, Council of Europe, *Recommendation 1201* (1993), "On an Additional Protocol on the Rights of National minorities to the European Convention on Human Rights", 1993.

The expression 'the rest of the population' also invites the issue of whether or not it presupposes the existence of a homogeneous majority group by reference to which the minority status of groups is to be determined. In a situation where there is no clear majority, the expression is interpreted to refer to the aggregate of all groups of the population of a state.¹¹⁸ Accordingly, minority status is to be determined based on a purely numerical criterion of whether the group in question constitutes less than 50 percent of the population of a state.¹¹⁹ Where all population groups constitute less than 50 percent of the population of state when taken individually, then each group is a minority as against the aggregate of all the other members of society.¹²⁰ The criticism raised against this point of view is that 'the comparison is between a culturally homogeneous group and an amorphous one (the aggregate of all the rest).'¹²¹

This criticism, however, seems to require, for determining minority status, the existence of a majority with some common characteristics if the majority is not a homogeneous whole in terms of its ethnic identity. True, that the existence of common characteristics would make the determination of minority status easy and the need for minority protection apparent. Yet, the absence of such common characteristics does not make the application of minority rights to situations where all groups singularly constitute less than 50 percent of the population unnecessary. What matters is that the decision making process and the structure of the state is majoritarian in its formulation. It is often the case that majoritarian decision making is made based on nationalistic considerations and usually engenders cross cultural coalitions. Under such circumstances, the interest of certain groups will almost always be overlooked and hence exposing their group

¹¹⁸ Nowak 488; Shaw 25; Capotorti 96.

¹¹⁹ De Varennes 141.

¹²⁰ Gudmundur Alfredsson 'Minority rights: International standards and monitoring procedures' in Norman Taku (ed) *From human wrongs to human rights – Part VII* (Centre for Human Rights, University of Pretoria: 2000) 37.

¹²¹ Ramaga Relativity 117.

characteristics to erosion.¹²² What Kymlicka said in relation to what he calls 'national minorities' illustrates this point although the context he envisages is one in which there is a majority group:

The viability of their (national minorities') societal cultures may be undermined by economic and political decisions made by the majority. They could be outbid or outvoted on resources and policies that are crucial to the survival of their societal cultures.¹²³

b) Non-dominant position

For many, numerical status alone is not enough in conceptualizing what constitutes a minority. In addition to numerical minority position, therefore, Capotorti's definition provides that a group has to be in a non-dominant position so as to constitute a minority. This characteristic of minority status is closely linked to the numerical factor. On account of their relative small size, minorities normally enjoy limited control over the political or economic life of the society non-dominant position is a natural manifestation of numerical minority status of the group. Putting it differently, the question is whether non-dominant position can stand by itself alone

Non-dominant position as essential defining feature of a *minority* recognizes that a minority is not just a numerical phenomenon, rather it is a political and sociological reality as well. In the light of this, minority status is conceptualized in

¹²² The observation of James Madison in the Federalist papers aptly illustrates this point: 'It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustices of the other part... *If a majority be united by a common interest, the rights of a minority will be insecure.*' (emphasis mine) James Madison *The Federalist* No. 51 in *The Modern Library College Editions* (1937) 339. Although in this context the term minority is not employed in a way the term is ordinarily conceptualized under international law, it however illustrates the point made here.

¹²³ Multicultural citizenship 109. According to Kymlicka a societal culture is ' a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.' Kymlicka 76.

terms of the relationship of the group in question, primarily, to political power,¹²⁴ although the economic, cultural and social standing of the group are also indicators of the weak position of that group.¹²⁵ This seems to suggest that to be considered as a minority, a group must not only constitute less than 50 percent of the population of a state, it must as well be powerless and hence with little control, if at all, over the decision making structures and processes of the state.¹²⁶ It is this reality of powerlessness that makes minorities vulnerable. And it is from this position of general vulnerability and weakness that the need for minority protection finds one of its justifications.¹²⁷

The question that arises here is whether the non-dominant position of the minority in question is relative to the dominant position of another group. To put it differently, the question is whether non-dominance necessarily suggests subordination or oppression of the minority. More often than not, owing to their numerical status, minorities normally lack the capability for political, economic cultural or social influence in their society. As such they are ordinarily exposed not only to political but also to social and economic dominations. It naturally follows from this that non-dominance generally implies subjugation. As Henrard argues, however, it does not necessarily imply a status of being subordinate or oppressed.¹²⁸

In multiethnic states as many in Africa, minority situation is compounded by the sheer multiplicity of groups and the contrasting degree of relationship that they enjoy with political power. Thus for example, the Masai of Kenya, the San of Botswana, the Batwa of Rwanda and Burundi, the Berber population in Algeria

¹²⁴ 'In modern times,' writes Ramaga, 'political power is the major instrument of dominance. It may negate the possible influence of the majority by precluding the effect of all other elements of dominance.' Ramaga *relativity* of 113.

¹²⁵ Nowak 188

¹²⁶ Modeen expressed this same view: 'the signs of a minority are that it forms a group which recognizes itself as a group which cannot achieve majority status or retain equal influence over the machinery of a state.' Ted Modeen *The international protection of national minorities in Europe* (Abo Academi, 1996) 22.

¹²⁷ Capotorti 12.

¹²⁸ Henrard 36.

and Morocco are not on equal status with their neighbors the Kikuyu, the Tswana, Hutus or Tutsis and Arabs in those countries. The latter groups are generally in a privileged position, while the former ones suffer political, social and economic marginalization. To recognize the two categories of groups as having equal minority status would be unjust to the situation of the former group. At the same time, it would not be right to deny minority status to the latter group on account of general dominance. It seems that the right approach under such circumstances is to recognize the minority status of all groups but with different rights and entitlements proportional to the degree of their vulnerability and weakness. Otherwise, denying the status of minority and the corresponding rights to relatively dominant groups would invite fear of exclusion and resistance. As the issue of political status of groups is acute in multi-ethnic states of Africa, conflicts can emerge when there is even the perception by ethnic groups that they are disadvantaged. In Africa, the question of minority status, especially in terms of the criterion of non-dominance, is further complicated by the way in which elites have exploited ethnic differences for political purposes. Moreover, minority rights are not meant to engender tensions and division in society.

Less weight should therefore be put on the issue of non-dominant position as a defining element of a *minority* particularly in the context in which there is no single majority ethnic group, as is the case in many African states.¹²⁹ Under such circumstances, the focus should not be on exclusion, but on how to promote fair and equal opportunities of all ethnic groups in all sectors of public life.

c) Nationality

Capotorti maintains that the term 'minority' applies only to nationals of a state for the reason that non-nationals are protected by customary international law. This

¹²⁹ The issue of dominant minorities becomes relevant only in the context as the one in Apartheid South Africa where the minority enjoyed monopolistic control of the state machinery and practices discrimination against other groups. But such is not so much a matter of minority rights, it is a question of democratic governance.

conclusion is also a result of the broad interpretation of Article 27 of the ICCPR from one that imposes negative obligation to one that requires states to ensure realization of minority rights. As far as the narrowly defined rights of Article 27 are concerned, it is not clear why their application should be limited to nationals only. What that article requires state parties is to refrain from denying minorities the right to enjoy their culture, to profess their religion or to use their own language.¹³⁰ This formulation, to the extent that it does not require the state to provide for the realization of those rights, is not meant to make distinction between nationals and foreigners.

In addition to the nature of the formulation of the rights in Article 27, there are other arguments supporting the application of the protection under that article to non-nationals as well. As Nowak argued, grammatical interpretation of the article suggests that the reference to 'persons' as opposed to 'nationals' or 'citizens', as in Article 25, is meant to apply both for nationals and non-nationals.¹³¹ Systematic reading of the text of the ICCPR also leads to the same conclusion. As a general rule, under Article 2 states parties to ICCPR are obliged to guarantee the rights in the ICCPR to all persons under their jurisdiction without distinction as to, *inter alia*, nationality.¹³² Exceptions to this rule must be made expressly as in Article 13 (only for aliens) and Article 25 (only for citizens). In the absence of such express special provision, as in Article 27, all rights under the Covenant, including those under Article 27, are available to non-nationals in as much as to nationals. General Comment 23 of the HRC seems to have finally settled this issue, when it declared that the individuals designed to be protected need not be citizens of the state party.¹³³ Thus, the minorities referred to include minorities the members of which are not nationals of the state.

¹³⁰ See Human Rights Committee, General Comment 23, Article 27 (Fifth session, 1994) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies U.N. Doc. HRIGEN/1/Rev. 1 at 38 (1994) para5(2) (Hereafter General Comment 23)

¹³¹ Nowak 489

¹³² Nowak 489

¹³³ General Comment 23 para. 5(1).

The nationality requirement is however an issue where minority rights is understood more comprehensively and broadly than the narrow formulation of Article 27 of the ICCPR. The issue is then whether states are obliged towards non-national minorities to provide support for the realization of their rights to enjoy ones culture, to practice ones religion and to use ones language. Clearly, it would not be tenable and realistic to conceive minority rights as imposing such obligations on states. It is therefore necessary to make a distinction between nationals and non-nationals in the application of minority rights. Such an approach is used in the advisory opinion of PCIJ in the case regarding the *Treatment of Polish Nationals and Other Persons of Polish origin or Speech in the Danzing territory*:

The members of minorities who are not citizens of the state enjoy protection – guaranteed by the League of Nations – of life and liberty and the free exercise of their religion, while minorities in the narrow sense, that is minorities the members of which are citizens of the state, enjoy – under the same guarantee – amongst other rights, equality of rights in civil and political matters, and in matters related to education...

Following this line of argument, it can be held that non-national minorities have minority rights in the narrow sense only, i.e. protection against denial of the rights under Article 27. To the extent that minority rights are interpreted as entitling minorities to broader rights such as political representation and affirmative measures, they can be made available only to minorities whose members are nationals. There are some scholars who wish to limit the application of minority rights to groups with established ties with the state.¹³⁴ Nevertheless, as far as the narrowly defined basic minority rights are concerned, it is not clear why, as the HRC observed, migrant workers or even visitors to a state party constituting minority groups should be denied the rights to enjoy their culture, to profess their religion and to use their own language.¹³⁵

¹³⁴ Nowak maintains that immigrants, including migrant workers can be able to claim the protection of Article 27 after a certain (long) period of residency in the state. Nowak 490; Thornberry criticises the HRC's position that even visitors are entitled to the rights under Article 27, Thornberry The UN Declaration 32.

¹³⁵ See General Comment 23 para 5(2).

It is not therefore appropriate to generally conclude that the concept minority ordinarily exclude non-nationals. It is equally erroneous to conceive of the concept of *minority* as equally applying to nationals and non-nationals at all times. In the African context however, the most pressing problem is not whether minority rights apply to non-nationals. Instead, the question is recognition of minorities and minority rights by African states to promote peaceful coexistence among groups. The issue of recognition continues to be a major concern in Africa and is linked to participation in public life and access to resources, particularly land. Such is the case, for example, in the Democratic Republic of Congo, Kenya, Zambia, Botswana and Côte d'Ivoire. In most of these states, the issue of recognition is also about citizenship. Taking that and the future development of norms on minority rights into account, it is important to point out that the exclusion of groups from enjoying minority rights on the basis of nationality can be problematic and must be an exception. This point is further strengthened by the artificial nature of the boundaries of African states. There are many cases in which the boundaries divide one ethnic group into at least two states.¹³⁶

d) Ethnic, religious or linguistic characteristics¹³⁷

Another essential definitional component of a 'minority' is the possession by the group of ethnic, religious or linguistic characteristics different from the rest of the population of the state. Possession of distinct characteristics and the numerical condition constitute the objective criterion for determining minority status. Accordingly, groups within a population may be considered minorities for the purposes of international law only when they differ from the rest of the population of the state in which they exist by reference to these distinct characteristics.¹³⁸

¹³⁶ For instance, Somalis are divided between Kenya, Somalia and Ethiopia.

¹³⁷ For a discussion why minority status is limited to ethnic, religious or linguistic minorities see Section...Chapter I above.

¹³⁸ Nowak 491.

For practical reasons as well as conceptual clarity, distinction is often made between ethnic, linguistic and religious minorities. Given the focus of this study, it is important to examine the relationship between ethnic characteristic on the one hand and religious and linguistic characteristics on the other.

It has been since 1950 that the adjective 'ethnic' is used to refer to a particular category of minority groups. Originally, it was the adjective 'racial' that was used during the League of Nations period and later on during the initial years of the UN.¹³⁹ The UN Sub-Commission decided to replace the term 'racial' by 'ethnic' to refer to minorities only in 1950.¹⁴⁰ The reason for this was the non-scientific basis of racial categorization and its limited in its scope in that it refers only to hereditary physical features, as opposed to the more inclusive meaning of 'ethnic' which covers biological, cultural and historical characteristics.¹⁴¹ At present, the use of 'ethnic minorities' preferred by international norms covers 'racial minorities'.

Although it is not an exclusive defining element of ethnicity, culture in its broader sense is generally considered as central to the definition of ethnicity.¹⁴² Special Rapporteur Doudou Thiam Observed: 'It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things.'¹⁴³ In confirming this view, Eide maintained that '...ethnicity is generally defined by a broad conception of culture, including a way of life.'¹⁴⁴

¹³⁹ Thus, for example, the GA Resolution 217 C (III) of 1948 made reference to 'racial' minorities and did not mention 'ethnic' to describe minority groups.

¹⁴⁰ Shaw 17; Capotorti 34.

¹⁴¹ Capotorti 34; Shaw 17.

¹⁴² See the discussion in Chapter I Section ...

¹⁴³ 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind' by Mr Doudou Thiam, Special Rapporteur, UN Doc.A/CN.4/398, para. 58. as quoted in William A Schabas *Genocide in international law* (Cambridge: Cambridge University Press) 126.

¹⁴⁴ Asbjorn Eide *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (hereafter *Commentary to the UN Declaration on Minorities*) UN Doc./ E/CN.4/Sub.2/Ac.5/2001/2 para 6.

Based on the grammatical construction of Article 27 of the ICCPR, one can also infer that culture is indeed an attribute of ethnicity. This is simply by matching the reference to 'ethnic, religious or linguistic' in the initial part of the article with 'culture, religion and language' in the last part.¹⁴⁵ This however should not be taken to mean that religion and language are not aspects of culture. In many ways, language and in some instances religion constitute part of the characteristic feature of the culture of groups.¹⁴⁶ But since that is not always the case, the article treats culture, religion and language separately to avoid gaps in the application of the provision and to allow the possibility of group identification on the basis of religion or language.

In the African context, one can generally say that language is one of the most important elements defining the ethnic identity of groups, although that may not be the case all the time.¹⁴⁷ In one of its decisions on the issue of culture, the African commission signified the importance of language in the culture of groups:

Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities.¹⁴⁸

In the *Prosecutor v. Akayesu* case, the International Criminal Tribunal for Rwanda stated: 'An ethnic group is generally defined as a group whose members share a common language or culture.'¹⁴⁹

¹⁴⁵ Ramaga Basis of minority identity 414.

¹⁴⁶ See Section Chapter I

¹⁴⁷ Writing on the issue of ethnicity in Africa Lewis observed 'Each tribal community (a derogatory reference to ethnic groups in Africa) was distinguished from others by its possession of a separate culture and way of life, a *distinctive language or dialect*, and often a separate sphere of political authority.' I M Lewis 'The tribal factor in contemporary Africa' in Colin Lwgum and Drysdale (eds.) Africa Contemporary Record – Annual survey and documents 1969 -1970 (1970) A 12.(emphasis added)

¹⁴⁸ Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 *Malawi African Association, Amnesty International, Sarr Diop, Union Interafricaine des Droits de l'Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit he l'Homme v. Mauritania* Thirteenth Activity Report of the African Commission 1999-2000, ACHPR/RTP/13th, Annex V para. 137.

¹⁴⁹ *The Prosecutor v. Jean-Paul Akayesu* Case No. ICTR-96-4-T, para. 512.

Treating language as a variable of ethnicity would invite the question of when a group can be taken as a linguistic minority per se. It is submitted here that a group constitutes linguistic minority where its language is the first of the most important features of its identity in the society. Thus, in Canada, for example, language is important for the identity of Quebecois, for Indian Canadians on the other hand ethnicity is. Where language is an aspect of the culture of a group and the group identifies itself in terms of ethnic identity to which language forms a part, the group can be treated both as an ethnic minority and a linguistic minority. Such a group can therefore invoke the rights of ethnic minorities as well as the rights of linguistic minorities. When, however, the language of this group is given a status of national language because for some historical reason it has become a lingua franca for the majority of the population of a state, as is the case with the Amharic language in Ethiopia, the group does not qualify to be a linguistic minority.¹⁵⁰ It can, however, legitimately invoke a status of an ethnic minority and hence the rights accorded to such minorities.

It is often said that it is relatively easy to define religious and linguistic minority.¹⁵¹ According to Nowak, for example, religious minorities are those groups that profess and practice a religion that differs from that of the majority of the population.¹⁵² Linguistic minorities refer to those groups of the population that use a language that clearly differs from that used by the rest of the population.¹⁵³ The issue of defining groups on the basis of religion or language becomes essential, primarily, where either of these characteristics are the most important elements on the basis of which groups identify and distinguish themselves.

¹⁵⁰ See Henrard 55.

¹⁵¹ Nowak 491; Pejic minority rights in int'l law 673.

¹⁵² Nowak 491. It must however be acknowledged that 'religion' in this context should be construed to include all kind of belief systems in addition to the major religions. Although Article 27 seems to duplicate the right under Article 18 when it speaks of the rights of religious minorities as involving the right to profess and practice their religion, the intention is not on freedom of religion as such. It is rather on the right of the group to be recognized as such as religious minority entitled to the establishment and maintenance of religious institutions and schools, the protection of religious rites and holy places which together constitute as a physical embodiment of the religious identity of the group.

¹⁵³ For a given form of speech to be considered as a language, it has to be distinctly different from other languages.

Generally, it seems that religious or linguistic characteristics are specific and deal with an element defining the nature of certain groups. On the other hand, an ethnic characteristic is relatively broad in that often times it encompasses elements of linguistic and sometimes religious characteristics. Accordingly, persons 'who belong to groups defined as ethnic would have more extensive rights relating to the preservation and development of other aspects of their culture.'¹⁵⁴

In the 1992 UN Declaration on Minorities, the adjective 'ethnic' is used together with 'national'. The distinction between 'ethnic' and 'national' characteristics has invited discussions. The use of the term 'national' in international law discourse lacks coherence and does not signify the same meaning in different contexts. The use of the term originates in Europe and seems to be a preferred term in the European human rights framework.¹⁵⁵ It can be said that in the context of the 1992 UN Declaration, the use of the adjective 'national' along with 'ethnic' does not necessarily signify the existence of a difference between national minority and ethnic minority. In his Report to the Sub-Commission, Special Rapporteur Eide stated

...in the phrase 'national minority', national cannot refer to citizenship, unless it is intended to cover all minorities (religious, cultural and ethnic) who are nationals of the country in which they live. Since that is hardly the intention, the concept 'national minority' must refer to ethnicity.¹⁵⁶

Following this view, it can be said that ethnic minority includes national minority. This indicates that, despite the reappearance of the term 'national' in the 1992 Declaration, the conclusion by Capotorti that the omission of the reference to 'national' from Article 27 is on account of the inclusive meaning of 'ethnic' to

¹⁵⁴ See Commentary to the UN Declaration on Minorities para. 6.

¹⁵⁵ See Thornberry 33.

¹⁵⁶ Asbjorn Eide Second Progress Report to the Sub-Commission on the Study of Possible Ways and Means of Facilitation the Peaceful and Constructive Solution of Problems Involving Minorities UN Doc. E/CN.4/Sub.2/1992/37, para. 98.

cover national minorities has not lost its relevance. This conclusion is in consonance with the observation of the Working Group on the Declaration:

‘...it was said that it would be difficult or even impossible to set up legal distinctions between national and ethnic groups, that the term ‘ethnic’ probably encompassed ‘national’ and that, in order to avoid confusion in different jurisdictions, a formulation including all these elements should be prepared by the working group.’¹⁵⁷

e) The collective will to preserve distinctive features of the group

In the definition of a minority, the definitional elements examined above, which constitute the objective dimension a minority, are normally accompanied by a subjective criterion. This subjective dimension of the definition of a minority consists in the awareness by members of a minority of their distinctive ethnic, religious, or linguistic characteristics that set them apart from others and the collective will of the group to preserve those characteristics as the basis of its identity.¹⁵⁸

The question that often arises in this regard is how to determine the existence of this subjective criterion in the definition of a minority. Is it necessary for the group to declare its willingness to preserve its distinctive characteristics? The most plausible approach to this is expressed in the views of Capotorti on the matter. He emphasizes the close link between the objective dimension in the possession of distinct ethnic, religious or linguistic features and the subjective dimension. Accordingly, he maintains that the subjective element does not need to be expressed, instead ‘the will in question generally emerges from the fact that a given group has kept its distinctive characteristics over a period of time.’¹⁵⁹ This approach is premised on at least two considerations. The first of these

¹⁵⁷ As the Working Group on the Declaration put it: ‘...it was said that it would be difficult or even impossible to set up legal distinctions between national and ethnic groups, that the term ‘ethnic’ probably encompassed ‘national’ and that, in order to avoid confusion in different jurisdictions, a formulation including all these elements should be prepared by the working group.’ As quoted in Thornberry *The UN declaration* 33.

¹⁵⁸ Pejic 671.

¹⁵⁹ Capotorti 96; Shaw 28.

considerations is the fear that states may abuse the subjective requirement to deny the minority status of some groups. According to Shaw, 'it would be too easy for a state to so pressurize a minority that its members felt unable to make a positive declaration regarding the collective wish to survive as a group.'¹⁶⁰ It is however important to point out that even in the absence of pressure on the part of the state, members of minorities may fail to exhibit a sense of solidarity and to manifest their distinct identity as a result of oppressive historical experiences and other social circumstance. The second is the logical view that 'a group that has survived historically as a community with a distinct identity could hardly have done so unless it has positively so wished.'¹⁶¹

Broadly speaking, one can say that the elements of a definition of minority can be categorized into objective characteristics pointing to the size, position and identity of the group and the subjective element consisting of the will of the members of the group to preserve their identity. Here the question is: which of the two dimensions takes priority? This brings us to a discussion on self-identification

It seems that the criterion that is increasingly preferred internationally for determination of group status, at least as far as indigenous groups are concerned, is that of self-identification. In Article 1(2) of the International Labour Organization (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent States stresses the priority of self-identification in the identification of a group:

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.¹⁶²

It is also pointed out that Special Rapporteurs of the UN have also recommended the use of self-identification for the purpose of identifying minorities as well as indigenous groups.¹⁶³

¹⁶⁰ Shaw 28.

¹⁶¹ Shaw 28.

¹⁶² See *Convention Concerning Indigenous and Tribal Peoples in Independent States* (ILO No. 169), adopted 27 June 1989, entered into force 5 September 1991.

¹⁶³ Zelim 46.

This approach is however criticized. According to Shaw 'any move to making self identification 'a fundamental criterion' of determination beyond the special case of indigenous groups would prove counter productive, as well as unjustified in law.'¹⁶⁴ Consequently, he expressed a different view on the issue: 'the criterion of objective distinctiveness is essential for acceptance as a minority under international law.'¹⁶⁵ The main reason for rejection of self-identification as the main criterion is that it would invite a situation in which all kinds of groups would claim minority status.¹⁶⁶ It seems however that this fear is taken too far. The preference to self-identification is not meant to make it the exclusive criterion in determining minority status. It is not the case that every claimant would acquire a minority status simply on the basis of self-identification. The claim must ordinarily be established not only by the desire of the claimant group but also on the basis of some objective characteristics.

Are indigenous groups minorities?

At the international level, distinction is generally made between ethnic minorities and indigenous groups. There is, therefore, a trend to treat indigenous groups as a special category distinct from minorities.¹⁶⁷ This however does not mean that there is no commonality between the two categories.

It is in ILO Convention No. 107 on Indigenous and Tribal Populations of 1957 that they are recognized for the first time as a distinct category. In 1971, the UN Sub-commission on Prevention of Discrimination and Protection of Minorities authorized Special Rapporteur Martinez Cobo to prepare a study on 'The

¹⁶⁴ Shaw 29-30.

¹⁶⁵ Shaw 29.

¹⁶⁶ Shaw 29; Zelim 46.

¹⁶⁷ To a large extent, it was for strategic reasons that indigenous groups were initially treated as a special category. According to Sanders, 'a focus on indigenous peoples as a special category could avoid the egalitarian imperative inherent in the fight against racism as well as the political obstacles to progress on minority rights.' Douglas Sanders 'The UN Working group on indigenous populations' 11 HRQ (1989) 406.

Problem of Discrimination Against Indigenous Populations'. In the Report he submitted to the Sub-Commission, Cobo provided for the following definition,

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁶⁸

Clearly, the definitional elements particularly such as non-dominant position, cultural distinctiveness are features common to both indigenous groups and ethnic minorities. Viewed from this perspective, there is little debate that indigenous groups can be treated as ethnic minorities as long as they constitute less than 50 percent of the population of the state in which they live.¹⁶⁹

Of the various elements of the definition, aboriginality (i.e. having the characteristic of being the first inhabitants of a territory) is often taken as the most important distinguishing characteristic of indigenous groups.¹⁷⁰ This element captures the idea of indigeness that the term 'indigenous' conveys. Accordingly, to be treated as indigenous, it seems necessary that a group shows that it is the original inhabitant of a territory and continues to occupy parts of that territory. Related to this is of course the special relationship that indigenous groups have with their territories.¹⁷¹ Indigenous groups are thus said to be always attached to their land.

¹⁶⁸ United Nations Study on Indigenous Populations, U.N. Sales No. E. 86.XIV.3, at 50-51.

¹⁶⁹ In Bolivia and Guatemala indigenous groups are numerically superior and hence cannot be treated as minorities. See *Working Paper on the Relationship and Distinction between the Rights of Persons belonging to minorities and those of Indigenous Peoples* Submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights by A Eide and E I Daes UN Doc. E/CN.4/sub.2/2000/10 para. 29. (hereafter Working Paper)

¹⁷⁰ Gudmundur Alfredsson 'Minority rights and a new world order' in Donna Gomien (ed.) *Broadening the frontiers of human rights Essays in Honour of Asbjorn Eide* (Oslo: Scandinavian University Press, 1993) 70. See also Working Paper para 24 and para 37.

¹⁷¹ See Hurst Hannum, *Minorities, Indigenous Peoples, and Self Determination* in Louis Henkin and John Lawrence Hargrove (eds.) *Human Rights: An Agenda for the Next Century*, Studies in Transnational Legal Policy, No 26 (The American Society of International Law, Washington DC, 1994) 9.

In the context of Africa, the applicability of the criterion of aboriginality as a criterion of indigenesness is highly questionable.¹⁷² As the Report of the African Commission's Working Group on Indigenous Populations/Communities rightly observed, the various ethnic groups that inhabit African states 'are indigenous to Africa.'¹⁷³ As far as attachment to land and dependency on natural resources is concerned, nearly 70 percent of African minorities are territorially based¹⁷⁴ and almost all of them are dependent on the natural resources of the territory that they occupy for their livelihood. This makes the line of distinction between the two concepts on the basis of attachment to land very thin.

Indeed, that is not the central criterion by which the African Commission's Working Group characterizes the indigenous concept. According to the report of the Working Group, indigenous groups refer to those 'in a structurally subordinate position to the dominating groups and the state, leading to marginalization and discrimination.'¹⁷⁵ Issues of subordination, marginalization and discrimination are indubitably issues to which the concept of minority rights addresses itself. It is not, therefore, clear how those issues would differentiate the concept of indigenous from that of ethnic minority.

Under such circumstances, the only reliable way for determining whether a group is ethnic minority or indigenous is matter to be left to the decision of the group concerned. At the international level, self-identification is central to determine who indigenous people are. This is specifically stipulated in Article 1(2) of the International Labour Organization's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. In the African context therefore, as a matter of rule, it is for the group to determine whether it has to be recognized as indigenous instead of ethnic minority.

¹⁷² Working Paper para 37.

¹⁷³ 101.

¹⁷⁴ Bertram G Ramcharan 'The protection of minorities in Africa' 101.

¹⁷⁵ 101.

At the international level although there is a rising tendency to treat indigenous groups as distinct from minorities, the distinction between the two is not clear-cut. Indeed, as the practice of the UN Human Rights Committee with respect to Article 27 of the ICCPR indicates, groups ordinarily referred to as indigenous are treated as minorities and obtained relief for their complaint under that article. As the forgoing paragraphs demonstrate, this unclear distinction is further clouded by the particular features of African societies. It is no wonder therefore that the usefulness of the distinction between indigenous groups and ethnic minorities in the African context is put in question.¹⁷⁶ A similar view seems to be held in the African human rights system

*Whatever the specific term to analyse and describe their (marginalized and discriminated peoples') situation will be, it is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action.*¹⁷⁷

Generally, therefore, it is maintained in this study that the concept ethnic minority normally covers indigenous groups. It can however be said that indigenous groups are a special type of minority as the concept minority is broader in its scope to include other type of groups as well.

Working definition

In the various definitions, it seems that much of the focus in the discussion on the subjective dimension is on the preservation of the distinct identity of the group.¹⁷⁸ It is however important that the will to maintain distinct identity by the group is not meant to exclude the group from taking part in the national life of the state in which its members exist. What the collective will of the group to preserve its distinct identity requires is recognition of the group's distinct identity and interests

¹⁷⁶ Working Paper para. 25.

¹⁷⁷ Report of the ACHPR Working Group 102. (emphasis added)

¹⁷⁸ The definition by Jules Deschenes differs in this regard as it limits the aim of minorities to 'achieve equality with the majority in fact and in law.' See note 227 and accompanying text.

by the state. It is, however, equally important for a minority that there is guarantee that it participates in the public domain in equality with other groups. The interest of minorities in many African states is to take part in the national life of the society on equal basis with others while their distinct identity is sufficiently recognized and protected. This point is included as an element of the proposed working definition, which is formulated as follows:

An ethnic minority is a group that possesses common distinct ethnic identity and constitutes less than fifty percent of the population of a state, whose members, although resident in that state, have the interest to maintain their distinct identity while at the same time they participate in the national life on an equal basis with others.

3.4 The rights of minorities under international law

3.4.1 Universal human rights and minority rights

In international human rights framework, the primary concern is the protection and promotion of universal human rights. These rights are entitlements that pertain to all human beings at all times irrespective of their particular circumstance. Human rights are inherent in human nature and thus constitute 'the birthrights of all human beings.'¹⁷⁹ Human rights are normally cast in universal terms entitling all human beings to the same rights and protections.¹⁸⁰

Universality and equality are, therefore, the most important defining characteristic features of human rights. Human rights are universal in the sense that all persons are entitled to them by virtue of their humanity. Moreover, human rights are available to all human beings in the same way. The UDHR illuminates this

¹⁷⁹ The Vienna Declaration and Program of Action adopted 25 June 1993 by the World Conference on Human Rights at Vienna, Austria Part I para. 1

¹⁸⁰ The terms used in proclaiming human rights such as 'all human beings', 'everyone', 'no one' bespeaks the universal character of human rights.

idea when it proclaims: ‘*All human beings* are born free and equal in dignity and rights’ (emphasis added).¹⁸¹ Thus no distinction is made among human beings on account of their particular situations. This expresses the idea that whatever differences between individuals are irrelevant as far as the possession of human rights is concerned.¹⁸² Universal human rights are therefore conceived in a general form. They, therefore, emphasise equality of rights for all and cherish the commonality and sameness of human beings.¹⁸³

The basis of universal human rights as articulated in international human rights law is the dignity of the human person.¹⁸⁴ In the words of Rosaly Higgins human rights are understood as ‘part and parcel of the integrity and dignity of the human being.’¹⁸⁵ It is therefore argued that human rights are directed at protecting and enhancing the dignity of human life.¹⁸⁶ It seems that in international human rights, human dignity is conceived as providing the *raison d’être* (ultimate purpose) for the system of human rights.¹⁸⁷ Indeed, what gives human rights the force that they command in the political and legal spheres almost in all parts of the world is their indispensability for the dignity of human life.

The various human rights instruments make reference to the concept of human dignity in various ways. Accordingly, the Preamble of the UN Charter refers to ‘the dignity and worth of the human person’¹⁸⁸, while the preamble of the UDHR

¹⁸¹ UDHR Art. 1.

¹⁸² The major international human rights instruments, what are called international bill of rights – consisting of UDHR and the two UN Covenants -, reflect this idea. For example Article 2 of the UDHR provides: ‘Every one is entitled to all rights and freedoms...without distinction of any kind...’

¹⁸³ The focus here is on formal equality, i.e., entitling all human beings to the same or equal rights.

¹⁸⁴ For a general discussion on this see Jerzy Zajadlo ‘Human dignity and human rights’ in Raija Hanski and Markku Suksi (eds.) *An introduction to the international protection of human rights* (1999) 15-24.

¹⁸⁵ Problems and Processes 96.

¹⁸⁶ Donnelly has thus written, ‘We have human rights not to the requisites for health but to those things needed for a life of dignity, for a life worthy of a human being...’ Jack Donnelly *Universal human rights in theory and practice* (Ithaca: Cornell University Press, 1989) 17.

¹⁸⁷ According to Zajadlo as a principle ‘inherent human dignity’ indicates the ideological goal for the whole international system of human rights protection. 22.

¹⁸⁸ See Preamble to the UN Charter para. 2.

speaks of the 'inherent dignity ... of all members of the human family.'¹⁸⁹ It is also referred to in the preambles and texts of the ICCPR and the ICESCR.¹⁹⁰ Pursuant to Article 1 of the UDHR, the normative justification of universal human rights is the principle that equal dignity is due to every human person. This relationship between human rights and human dignity is explicitly stated in common paragraph 2 of the Preamble to these Covenants. According to this paragraph, human rights 'derive from the inherent dignity of the human person.'¹⁹¹

There are very few, if any, who disagree that contemporary concern with the international protection of human rights arose as a reaction to the atrocities committed in Europe during World War II. As such human rights 'reflect', in the words of Boutros-Boutros Ghali, 'a moment in the development of history.'¹⁹² As a concept that is prompted by the historical experiences of the international community, human rights are meant to provide solution to very crucial problems in human existence. Thus, they 'embrace an attempt at an explication of the reasons for the immense violations of fundamental rights, and a proposal of solutions which are to ensure that such violations will not recur in the future.'¹⁹³

In the preamble to the UN Charter, while proclaiming the interest 'to save succeeding generations from the scourge of war', the peoples of the United Nations at the same time 'reaffirm their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.'¹⁹⁴ These two aspirations are expressed in the preamble consecutively.¹⁹⁴ Arguably, this manifests the recognition that the prevention of the recurrence of the horrors

¹⁸⁹ See Preamble to the UDHR para 1.

¹⁹⁰ See Art. 10 (1) of the ICCPR and Art. 13 (1) of the ICESCR.

¹⁹¹ Preambular para 2 of the Vienna declaration similarly provides '...all human rights derive from the dignity and worth inherent in the human person.'

¹⁹² See *Human Rights: The common language of humanity* text of the statement made by Secretary-general Boutros-Boutros Ghali in Vienna at the opening of the World Conference on Human Rights on 14 June 1993.

¹⁹³ Marek Piechowiak 'What are human rights? The concept of human rights and their extra-legal justification' in Raija Hanski and Markku Suksi (eds.) *An introduction to the international protection of human rights* (1999) 3.

¹⁹⁴ They are stated in para. 1 and para. 2 of the preamble respectively.

of the likes of World War II is in part linked to the protection of fundamental human rights, the dignity and worth of the human person. It is, therefore, from the realization of what grave violations of human rights of persons can do in the destruction of human life and the common good of humanity that the contemporary conception of human rights is born.¹⁹⁵

These socio-historical factors that immediately shaped the development of modern international human rights are specifically referred to in the UDHR.¹⁹⁶

Paragraph 2 of its preamble provides

... disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...

Clearly, this reflects that it is out of the recognition of 'recent horrors, as well as standing challenges, threats, and prospects harboured by the world situation, now and in the foreseeable future' that the creation of commonly agreed upon international mechanism to safe guard freedom and equal dignity for all human beings was born.¹⁹⁷ The creation of this mechanism is based not only on the appreciation of the unique worth of every human being but also on the understanding of its contribution to the realization of the common good in the world. Indeed, this can be gathered from what the UDHR and the two human rights Covenants proclaim: '...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'¹⁹⁸

¹⁹⁵ As Piechowiak put it: 'The international community's appreciation of the unique worth of every human being led not only to a concern for the elimination of elements destructive of the individual, but also to a concern for the creation of the conditions which would enable him or her to develop and flourish.' As note 323 above 3-4.

¹⁹⁶ In the view of one author the international human rights regime 'amounts to an empirically informed socio-historical diagnosis of prevailing and prospective circumstances of human life in the Aftermath of World War II.' Tore Lindholm 'Article 1' in Gudmundur Alfredsson and Asbjørn Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999) 62.

¹⁹⁷ As above 62.

¹⁹⁸ See Preamble to the UDHR para.1 and common preambular para. 1 of the ICCPR and ICESCR.

It is true that human rights are necessary to achieve freedom, equality and justice. Indeed, they are designed to ensure that these values are achieved for all members of the human family. Nevertheless, universal human rights do not deliver freedom, equality and justice equally for all. Those with privileged social, political or economic conditions in society would reap more from universal human rights. By contrast, those with disadvantaged social, political and economic conditions gain less from such a system. In effect, universal human rights have disproportionate impact on individuals and groups situated on unequal positions. Clearly, they are not therefore sufficient to ensure the equal enjoyment of rights equally by all and definitely to deliver freedom, equality and justice equally for all. In circumstance in which there are individuals and groups with unequal conditions and opportunities, as is the case in almost all multiethnic societies, universal human rights can entail undesirable consequences. The equal application of human rights to persons and groups situated in unequal conditions would perpetuate and even enhance inequality within society. And such is indeed an injustice particularly for members of disadvantaged communities such as minorities. What Judge Tanaka observed in a dissenting opinion in the *South-West Africa case* fully reflects this point

To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently...To treat unequal matters differently according to their inequality is not only permitted but required...¹⁹⁹

In order to ensure that freedom, equality and justice are achieved equally for all, it is imperative that disadvantaged communities and their members are accorded with special rights. Minority rights are such rights that seek to ensure that members of minorities and minorities enjoy the rights available for all on an equal basis with others in society. They are rights that are meant to redress the disadvantaged conditions of minorities that result from their minority status. As Kymlicka has put it: 'Minority rights eliminate rather than create inequalities.

¹⁹⁹ *South-West Africa case* (1966) ICJ Reports 248ff, 305-306.

Some groups are unfairly disadvantaged in the cultural market place, and political recognition and support rectify this disadvantage.²⁰⁰

Looking at the rights of minorities in international law, one finds that one of the most important justifications for ascription of rights to minorities is the aim of ensuring substantive justice to all members of society through genuine equality and non-discrimination. In its Advisory Opinion on Minority Schools in Albania, one of the two things that the PCIJ deemed particularly necessary for the protection of minorities is 'to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of a state.'²⁰¹ This ideal of ensuring equality for members of minorities continues to inform the minority rights system under the UN. This can be gathered from various instruments relevant to the rights and protection of minorities. One such instrument, the International Convention on the Elimination of All Forms of Racial Discrimination, in its Article 2 defines 'racial discrimination' in a way that recognizes the concerns of minorities in this area:

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.

What is provided for in Article 4(1) of the Declaration on the Rights of Minorities is consistent with the spirit of this definition. According to this provision, 'States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.' This envisages that in circumstance in which the disadvantage position of minorities impairs the full enjoyment and exercise of human rights and fundamental freedoms of their members, there is a need to put in place special protection to members of minorities to nullify the impairment.

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²⁰¹ *Minority Schools in Albania* PCIJ, Ser. A/B, No. 64 (1925) 17.

Viewed from the above perspective, one can consider minority rights as those human rights suited to members of minorities.²⁰² This is actually the way Peter Leuprecht has conceived minority rights. 'Human rights', said Leuprecht, '... are also, and must also be, rights of 'l'homme situé', the suited human being, the human being living in certain conditions which may affect his or her enjoyment of fundamental rights.'²⁰³ And according to him, one such condition is belonging to a minority, which justifies the granting of specific rights. On account of this, some characterised the system of minority rights in international law as 'a two-sided problematic consisting of the *de facto* and *de jure inequality* in the relationships of dominant and non-dominant groups, and the normative response of international community to counteract this state of affairs.'²⁰⁴

It can be gathered from what has already been discussed that human rights are based, among other things, on the need to create the conditions which would enable human beings to develop and flourish. It is true, however, that the development of human beings takes place in and requires a particular cultural context. In 1947 in its statement on human rights, the American Anthropological Association contended that the individual realizes her personality through her culture, hence respect of individual differences entails a respect for cultural differences.²⁰⁵ Cultural recognition is also a matter of both dignity and social justice.

Many contemporary scholars also accept that the relationship of individuals to their culture forms an indispensable environment for their development and sense of identity. Allan Buchanan contends that membership to a particular

²⁰² Thornberry has best expressed this idea with the following: 'minority rights are also human rights, in the sense that only a legal regime which guarantees both the basic rights for all and the special rights addressed to minorities is capable of doing justice to men and women in their cultural setting, rather than as shorn of any cultural peculiarities.' Patrick Thornberry 'Is there a phoenix in the ashes? – International law and minority rights' 15 *Texas International Law Journal* (1980) 440.

²⁰³ Minority rights revisited 120.

²⁰⁴ Zelim 90.

²⁰⁵ American Anthropological Association 'Statement on human rights' 49(4) *American Anthropologist* (1947) as discussed in Rodolfo Stavenhagen 'Cultural rights: A social science perspective' 94

culture constitutes part of the good life for many individuals.²⁰⁶ Writing on cultural rights and minorities, Eide pointed out that ‘the basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up. The preservation of that identity can be of crucial importance to wellbeing and self-respect.’²⁰⁷ From the perspective of political theory, Will Kymlicka argues that culture not only provides the necessary context for making meaningful choices for effective exercise of one’s freedom but it also constitutes a basis for the definition of one’s identity and hence serves as a source of self-respect.²⁰⁸

In international human rights law, the importance of culture is specifically addressed. This is reflected in the recognition of cultural rights in various human rights instruments and those dealing with minorities.

Article 27(1) of the UDHR provides ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’ There is no doubt that this pronouncement is a manifestation of the importance accorded to culture for the dignity and self-development of all persons. Article 22 of the UDHR is direct in its articulation of the indispensability of culture. The relevant part of the article reads ‘Every one ... is entitled to realization ...of the economic, social and *cultural rights indispensable for his dignity and the free development of his personality.*’ (emphasis added). Similarly Article 15(1) of the ICESCR proclaims, among other things, the right of every one to ‘take part in cultural life.’ Pursuant to Sub-Article 2, the steps that states must take for the realization of this right ‘shall include the conservation, the development and the diffusion of science and culture.’

Culture is by its nature a collective good. The development, sustenance and expression of a culture presuppose the existence of a group that is identified with

²⁰⁶ Allen Buchanan *Secession: The morality of political divorce from Sumter to Lithuania and Quebec*

²⁰⁷ 85.

²⁰⁸ See *Multicultural citizenship* 82-93.

that particular culture.²⁰⁹ The interest in culture makes it imperative that apart from individuals, cultural groups are also given due recognition and protection.²¹⁰ The reference to a community in the right to culture in Article 27 of the UDHR is not therefore without reason, albeit no group is recognized as having rights under international law.²¹¹ The 1948 Convention on the Prevention and Punishment of the Crime of Genocide prohibits the physical or biological destruction of national, ethnic, religious or racial groups.²¹² According to Buergenthal, by outlawing the destruction of national, ethnic, racial or religious groups, the Genocide Convention formally recognizes the right of these groups to exist as groups, which surely must be considered as the most fundamental of all cultural rights.²¹³ As history and recent events show, minorities are particularly vulnerable to the crime of genocide, and hence the protection envisaged by the Convention is particularly relevant to their survival.

The system of minority rights finds one of its justifications from the inseparable bond between culture or cultural identity and the community to which the culture belongs. In the *Minority Schools in Albania* case referred to above, the other of the two things that the PCIJ regarded as particularly necessary for realizing the ideals of the system of minority protection is the need 'to ensure for the minority element suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.'²¹⁴ The Sub-Commission on the Prevention of discrimination and Protection of Minorities expressed the end of protection of minorities in similar terms:

Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential

²⁰⁹ As the World Commission on Culture and Development puts it: 'Cultural freedom is a collective freedom. It refers to the right of a group of people to follow or adopt a way of life of their choice.' *Our creative diversity: Report of the World Commission on Culture and Development* (1995) 25.

²¹⁰ This is particularly true for minorities which are normally in need of recognition and special protection on account of their generally weak socio-political power in society.

²¹¹ The only exception is the right of peoples to self-determination which is given a place of honour as common Art. 1 of the ICCPR and ICESR.

²¹² See Article 2 on the definition of the crime of genocide.

²¹³ T Buergenthal *International human rights in a nutshell* (1988) 49.

²¹⁴ *Minority Schools in Albania* PCIJ, Ser. A/B, No. 64 (1925) 17.

treatment in order to preserve basic characteristics which they possess and wish to distinguish them from the majority of the population... It follows that differential treatment of *such groups* or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole.²¹⁵

This demonstrates that one of the aims of minority rights is the protection of the collective identity of minority groups which they could not otherwise achieve by themselves unlike other members of the national community.

In contemporary international law, the rights of persons belonging to ethnic or linguistic minorities to enjoy their own culture or use their own language, in community with other members of their group, is proclaimed under Article 27 of the ICCPR. In its General Comment 23 on Article 27, the Human Rights Committee asserted that the protection of minority rights under that article 'is directed to wards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.'²¹⁶

The right of persons belonging to ethnic minorities to enjoy their culture is further reaffirmed in the Declaration on the Rights of Minorities. Pursuant to its Article 4(2) 'states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs...' The most important addition of this provision to Article 27 of the ICCPR is that the right is formulated in positive terms and hence goes beyond the minimal protection of non-interference that Article 27 envisages. The Convention on the Rights of the Child also provides in Article 30 for the right of a child belonging to a minority to enjoy his or her own culture.²¹⁷ The most important effect of these provisions is that

²¹⁵ As quoted in Patrick Thornberry 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and An Update in Alan Phillips and Allan Rosas (eds.) Universal Minority Rights (1995) 18.

²¹⁶ Human Rights Committee, General Comment 23, Article 27 (fifth Session, 1994) UN Doc. HRI/GEN/1/Rev.1 at 38 (1994) para. 9.

²¹⁷ This article is premised on the understanding that the child's culture is particularly necessary to her survival and personal development and recognizes that the children are the ultimate inheritors of the cultures of their communities. This is also the rationale for the prohibition of 'forcibly transferring children of the group to another group' in Article 2(e) of the Genocide Convention.

states are expected to pursue a policy that embraces the full diversity of their cultural components.

As has already been observed earlier, the creation of the international human rights system is linked to considerations of peace and security. It is believed that the protection and promotion of universal human rights contributes to national and international peace, while their violation may lead to instability and tensions. Nevertheless, in the field of human rights there is no other system of rights whose institutionalization is premised on pragmatic considerations of national stability and international peace and security than minority rights.

Historically the conception of the minority protection system has always been a mechanism for addressing ethnic conflicts and maintaining stability and peace. For example, it is argued that the minority protection system of the League of Nations 'can be understood as being framed in the light of Woodrow Wilson's reflection that "nothing is more likely to *disturb the peace of the world* than the treatment which might in certain circumstances be meted out to minorities."²¹⁸

Indeed, that the ideal of achieving peace and stability underlies the League system was manifestly expressed by the PCIJ in the case of *Minority Schools in Albania*:

the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the populations of which differs from them in race, language or religion, *the possibility of living peacefully alongside that population and co-operating amicably with it*, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs (Emphasis added).²¹⁹

The existence of what Zelime called 'a feedback loop' between the protection of minorities and the stability and peace of states is demonstrated by even momentarily reflection on recent events in the world. In the past few decades, many societies in the world including in Africa, Asia, Latin America and Europe

²¹⁸ Thornberry *Is there a phoenix in the ashes?* 440.

²¹⁹ *Minority Schools in Albania* PCIJ, Ser. A/B, No. 64 (1925) 17.

have experienced various levels of ethnic strife.²²⁰ In many of these conflicts, minorities are involved. As the study of Ted Robert Gurr has demonstrated, patterns of discrimination and neglect of minority protection, including violations of rights of minorities lead to various forms of conflict and to threats of national and international peace.²²¹

Moreover, many of the horrible atrocities and violations of human rights witnessed in the 20th century were perpetrated against members of minorities.²²² Even today membership in a minority continues to be a reason for persecution and perpetration of grave violations of human rights in some parts of the world. This is a reminder that there is indeed a need to further articulate, develop and promote norms for the rights and protection of minorities not only at the international level but also at the regional level to effectively deal with the peculiar manifestations of problems involving minorities in various parts of the world.²²³

The current international norms on the rights and protection of minorities are nothing less than the normative responses of members of the international community to deal with those conflicts and violations which often threatens the peace and stability of states and the lives and wellbeing of many peoples in the world. It manifests an instance in which a system of rights is used to redefine the relationship among the diverse groups within states by guaranteeing their equality and recognizing their respective rights.

The 1992 Declaration on the Rights of Minorities distinctly states that ‘...the promotion and protection of the rights of persons belonging to national or ethnic,

²²⁰ For a comprehensive account of these conflicts See generally Donald Horowitz *Ethnic Groups in conflict* (1985).

²²¹ See Ted R Gurr *Minorities at risk*

²²² The Genocide in Europe during World War II and the 1994 Rwanda Genocide are some of the many similar atrocities inflicted upon minority groups.

²²³ Hurst Hannum once suggested that ‘additional thought and analysis should be given to defining the scope and content of minority rights, indigenous rights, and self-determination in the contemporary world.’ ‘Minorities, indigenous peoples and self-determination’ in Louis Henkin and John Lawrence Hargrove (eds.) *Human rights: An agenda for the next century* (1994) 12.

religious and linguistic minorities contribute to the political and social stability of states in which they live.’²²⁴ This paragraph manifests the practical value of a regime of minority rights for advancing harmonious relations among the diverse groups inhabiting the state. It also implies that the interest of national cohesion and stability of states dictates that the interests of minorities are sufficiently accommodated.²²⁵ Recognition and protection of the rights of minorities is indubitably an effective mode of accommodating the interests of minorities in society.²²⁶

Discrimination is one of the prejudices that minorities ordinarily suffer causing animosity between their members and others in the society. In the preamble to the International Convention on the Elimination of All Forms of Discrimination of 1965, it is stipulated that ‘discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same state.’²²⁷ Recognition of minorities and their rights promotes their equality and public image as important components of society.

The UN has expressed that conflicts within states have become a source of concern for stability and peace within states and at the international level. Former UN Secretary-General Boutros-Boutros Ghali in his ‘An Agenda for Peace’ report noted that:

²²⁴ Preamble to the Declaration on the Rights of Minorities para. 5.

²²⁵ The Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990 in its paragraph 30 provides: ‘The participating States ...further reaffirm that respect for rights of persons belonging to national minorities as part of universally recognised human rights is an *essential factor* for peace, justice, stability and democracy in the participating states (Emphasis added).’ CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990) reprinted in 11 *Human Rights Law Journal* (1990) 232.

²²⁶ A publication of the UN reinforces this idea as follows: ‘Meeting the aspirations of national, ethnic, religious and linguistic groups and ensuring the rights of persons belonging to minorities acknowledges the dignity and equality of all individuals, furthers participatory development, and thus contributes to the lessening of tensions among groups and individuals. These factors are major determinants of stability and peace.’ *Minority Rights Fact Sheet No. 18 (Rev.1)* 1.

²²⁷ CERD para. 7.

...the cohesion of states is threatened by brutal ethnic, religious, social, cultural and linguistic strife. Social peace is challenged on the one hand by new assertions of discrimination and exclusion and, on the other, by acts of terrorism seeking to undermine evolution and change through democratic means.²²⁸

The link between these challenges and the issue of minorities is specifically addressed by the Secretary-General when he outlined what is required for resolving these problems. Ghali stated:

One requirement for solutions to these problems lies in commitment to human rights *with special sensitivity to those of minorities*, whether ethnic, religious, social or linguistic (emphasis added).²²⁹

It can be concluded from the foregoing discussion that minority rights are distinct from but related to universal rights. As the Human Rights Committee observed, minority rights are rights 'that must be protected as such and should not be confused with other personal rights conferred on one and all under the covenant.'²³⁰ Minority rights are therefore distinct from, and additional to universal human rights.²³¹ Nevertheless, these two categories of rights are very much related in many ways. The relationship between the two is one of complementarity. In the final analysis, however, minority rights are also real human rights, as Thornberry said, in the sense that

...only a legal regime which guarantees both basic rights for all and the special rights addressed to minorities is capable of doing justice to men and women in their cultural setting, rather than as being shorn of any cultural peculiarities.²³²

It is however important to make a distinction between minority rights that are valued in and of themselves and hence form public ideals of universal reach like universal human rights and minority rights that are contingent or contextually necessary ways of achieving desired ends such as peaceful co-existence.

²²⁸ *An Agenda for Peace: Preventive Diplomacy, Peace Making and Keeping* Report of the Secretary-General Pursuant to the statement adopted by the summit meeting of the security council reprinted in 4 (3) AfJICL (1992) 740-767 para 11.

²²⁹ Para. 18.

²³⁰ General Comment 23 para. 9.

²³¹ See General Comment 23 para. 1.

²³² Is there a phoenix in the ashes? 440.

Cultural rights can be seen as having universal reach and fall within the category of what John Rawls called ideal theory. By contrast autonomy regimes including power sharing arrangements, regional governments and personal laws for minorities can be seen as a proper part of non-ideal theory which 'deals with unfavourable conditions, that is with the conditions of societies whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult or impossible.'²³³ In this regard what Henry Steiner said is illuminating:

The question raised is whether autonomy regimes express respect for difference or express despair over the possibility that diverse peoples can live with difference. Their widespread use in diverse countries and their potential effectiveness in realizing important goals indicate that these arrangements, if not ideal, are not anathema. They may rest on genuine acceptance by all affected communities. They may grow out of concrete and agonizing histories, frequently involving authoritarian and abusive rule over a minority that has been denied a fair share of power, resources, and opportunities. Often the product of negotiations between hostile communities seeking to contain discord that may have led to violence, they appear to be justified in such circumstances as the best available solution to otherwise unyielding problems.²³⁴

Thus, although autonomy regimes in the form of power sharing or self-government are placed within the rubric of minority rights, their justification is contextual and lacks universal reach. They are developed in any factual situation as a response to unfavourable conditions particularly such as ethnic conflict and systematic oppression. The characterization of such protection mechanisms as rights extends their force 'beyond the welfare maximizing, contextual justification for autonomy regimes as 'least worst' solutions to pressing situations.'²³⁵

3.4.2 Contemporary international norms on minority rights

Following the typology of the PCIJ in the *Minority in Albania* case, subsequent articulation of norms on minority rights have focused on two areas, which are

²³³ John Rawls *The law of peoples* (

²³⁴ Henry Steiner 'Ideals and counter-ideals in the struggle over autonomy regimes for minorities' 66 *Notre Dame L. Rev.* (1991)

²³⁵ As above

sometimes regarded as pillars of international minority protection.²³⁶ These two areas involve equality and non-discrimination on the one hand and special rights on the other. Narrowly speaking, therefore, the international norms on minority rights consist of equality and non-discrimination and special rights.

In many circumstances, what prompts tension in multiethnic states is the historical inequities and contemporary patterns of discrimination inflicted upon minorities. The many international instruments that prohibit discrimination deal with, if not exclusively, situations in which minority groups and their individual members may be denied equality of treatment. The prohibited grounds include those that are particularly relevant to minority situations, i.e., race, language, religion, national or ethnic origin, social origin, birth, birth or any other similar status. It is well established that equality and non-discrimination forms part of the norms on the rights of minorities.²³⁷

Equality and non-discrimination provisions are contained both in the general human rights instruments including the UN Charter and in a number of specialized international instruments. They are referred to in general terms in Articles 1 and 55 of the UN Charter;²³⁸ Articles 2, 6 and 7 of the UDHR;²³⁹ Articles 2 and 26 of the ICCPR;²⁴⁰ and Articles 2 and 3 of the ICESCR.

²³⁶ See Fact Sheet No. 18 (Rev.1) Minority Rights 3-7; Gudmundur Alfredsson 60-68; Zelim 86-99

²³⁷ The Sub-Commission on the Prevention of Discrimination and Protection of Minorities in responding to the issue of whether 'prevention of discrimination' and 'protection of minorities are separate sated: 'It might be said that to prevent discrimination on grounds of race, language or religion, is to protect racial, linguistic and religious minorities. It might be argued, therefore, that there is no essential difference between the two expressions, and the Sub-Commission may decide to consider the prevention of discrimination and the protection of minorities as a single problem.' E/CN. 4/Sub.2/8 (29 Oct. 1947).

²³⁸ UN Charter Art. 1: 'Purposes of the United Nations are:

...3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental human rights for all without distinction as to race, sex, language or religion.*'

Art. 55: 'With a view to creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...C. Universal respect for, and observance of, human rights and fundamental freedoms *for all without distinction as to race, sex, language, or religion*' (emphasis added).

The non-discrimination clause is also provided for in many specialized international instruments. Included in this category are: ILO Convention Concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958;²⁴¹ the International Convention on the Elimination of All Forms of Racial Discrimination of 1965;²⁴² UNESCO Convention Against Discrimination in Education of 1960; UNESCO Declaration on Race and Racial Prejudice of 1978; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981²⁴³ and the Convention on the Rights of the Child.²⁴⁴

The prohibition of discrimination in these instruments seeks to exclude any action which directly denies or have the effect of denying to individuals or groups equality of treatment in the society in which they live. The Human Rights Committee in its General Comment 18(37) concerning non-discrimination under the ICCPR has interpreted discrimination as implying

²³⁹ UDHR Art. 2. Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²⁴⁰ ICCPR Art. 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.'

²⁴¹ Art. 1 defines discrimination as: 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.' In Art. 2 States Parties to the Covenant pledge to 'declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with view to eliminating any discrimination thereof.'

²⁴² Under Art. 2 racial discrimination is defined as '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.'

²⁴³ The expression 'intolerance and discrimination based on religion or belief' is understood in Art. 2 of the Convention to mean 'any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.'

²⁴⁴ In Art. 2 States Parties undertake to 'take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁴⁵

Apart from non-discrimination, there are positive safeguards which are particularly relevant to minorities from the principle of equality. These safeguards include recognition as a person before the law, equality before the courts, equality before the law and equal protection of the law.²⁴⁶

As far as the rights and protection of minorities goes, equality and non-discrimination would not be sufficient. Firstly, unless a level of real equality in all spheres of public life is established for all groups in society, equality and non-discrimination would not be enough to put minorities on equal footing with other members of society in the enjoyment of equal rights and freedoms.²⁴⁷ As Stavenhagen argued 'the enunciation of the principle of non-discrimination is not sufficient within the framework and processes of present day societies to provide to all individuals with equal access to all human rights.'²⁴⁸

Secondly and most importantly, the achievement of real equality is not the only concern of minorities.²⁴⁹ The enjoyment of certain cultural rights and the preservation of their distinct identity are equally important for them. As the PCIJ in the *Minority in Albania* case pointed out, minority rights are needed to ensure for minorities 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.'²⁵⁰ Apart from equality and non-

²⁴⁵ See UN Doc. CCPR/C/211. Rev.1/Add.1 General Comment 18(37) Human Rights Committee 21 Nov. 1989, para. 7.

²⁴⁶ See Arts. 6 and 7 of the UDHR; Arts. 14, 16 and 26 of the ICCPR and Art. 3 of the ICESCR.

²⁴⁷ As Alfredsson rightly points out 'a group cannot be really equal to the majority population unless it is accorded conditions equivalent to those of the majority. Even then,' he appreciates, 'the group will continue to be disadvantaged in light of the majority population's dominance in national life.' 62.

²⁴⁸ Stavenhagen 'Cultural rights: A social science perspective' 92.

²⁴⁹ Alfredsson is of the view that 'non-discrimination and individual rights may not be sufficient to meet or to satisfy minority needs.'

²⁵⁰ *Minority in Albania* case

discrimination, minorities need certain rights and protection mechanisms necessary for the development and enjoyment of their distinct culture. 'Unless such mechanisms are developed,' argued Stavenhagen, 'cultural rights will not be fully enjoyed and guaranteed for everybody, notwithstanding the principles of equality and non-discrimination.'²⁵¹

Those minority rights directed to make it possible for minorities to preserve their identity, characteristics and cultures are often called special or preferential rights. In some quarters, there is view that such rights creates privilege groups to the disadvantage of the majority and contradicts the rationale of equality.²⁵² Special rights are not however some sort of privileges. They are special not in the sense of privileges. What makes them special, as Thornberry *conspicuously* noted, is 'that certain kinds of rights are of direct interest to or addressed to, ethnic, religious or linguistic groups in order to defend their cultures, the practice of their religion and the use of minority languages.'²⁵³ They are not designed to give minorities a status or rights beyond and above that are ordinarily enjoyed by other members of society. Special rights are instead sought to afford to minorities the conditions which are ordinarily available to the dominant groups in society.²⁵⁴

Several international instruments enunciate special rights for minorities. They include: the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the ICCPR, the ICESCR, UNESCO's Convention against Discrimination in Education, the Convention on the Rights of the Child, UNESCO's Declaration on Race and Racial Prejudice, the Convention Concerning Indigenous and Tribal Peoples in Independent States, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, draft Declaration on Indigenous Rights. These instruments guarantee special rights in

²⁵¹ 92.

²⁵² See Welhengama 22.

²⁵³ Thornberry 440.

²⁵⁴ As Zelim put it: '...special rights, such as the use of native languages, running schools in culturally specific languages, participating in the political and economic affairs of states in matters concerning minorities, etc. are designed to create conditions enabling the minorities to catch-up with the majority in these vital areas.' 94.

the areas of culture, education, language, religion, social and economic affairs of minorities and effective political participation and representation at the national level.

Although CERD makes no specific reference to minority rights, its primary aim is to achieve not only *de jure* but also and most importantly *de facto* racial and ethnic equality. It thus mandates affirmative measures directed to achieve factual equality among racial and ethnic groups. Accordingly, under Article 2(2) states parties are required, when circumstance warrant, to 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' in order to ensure to them the full and equal enjoyment of human rights and freedoms. The reference to 'certain racial groups or individuals belonging to them' may be construed as referring to ethnic minorities as disadvantaged groups. Article 1 states that the special measures 'shall not be deemed racial discrimination'. The qualification, indicative of the temporary nature of affirmative measures, is that such measures shall not entail the maintenance of separate rights for different groups and must be discontinued after the desired objectives have been achieved.²⁵⁵

The formulation of some of the provisions of the UNESCO Declaration on Race and Racial Prejudice seems to have taken into account the situation of ethnic minorities. This can be gathered particularly from those provisions that mandate special measures by states.

Article 6(3). ... Where circumstances warrant, *special programmes should be undertaken to promote the advancement of disadvantaged groups and, in the case of nationals, to ensure their effective participation in the decision making process of the community.*

Article 9(2). ...*particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantage of the social measures in force, in particular in regard to housing,*

²⁵⁵ CERD Art. 1(4) and Art. 2.

employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education (emphasis added).

Affirmative measures are not the only measures in the category of special rights. Apart from affirmative measures, some of the characteristic features of minorities warrant other special rights on a permanent basis. The possession of distinct culture by minorities and the limitation that their numerical size put on their ability to effective political participation are of a permanent nature. Thus, such special rights as the maintenance of educational institutions, cultural rights, political participation in state affairs and minority representation in the decision-making structures of state, certain socio-economic rights such as land must be guaranteed absolutely.

Some of the international instruments guarantee such special rights for minorities. The provisions from the Declaration on Race and Racial Prejudice referred to above can appropriately fall in this category. A more specific example of such special rights is to be found in the preferential measures mandated by the Convention against Discrimination in Education:

Article 2. Where 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.

Of more direct relevance in its reference to minorities is Article 5 which provides:

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 the 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, which prejudices national sovereignty (emphasis added).

In terms of its legally binding character and direct reference to minorities, the only most significant of all special rights under international law is Article 27 of the ICCPR. The article reads:

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 practice their own religion, or to use their own language.

The simple reading of this article reveals that the beneficiary of the right are not minorities themselves but only their individual members and even individual members of minorities have only the right 'not to be denied'. Despite its minimalist and negative formulation, there is an increasing body of scholarly opinion that this provision imposes positive obligations on states to take appropriate measures affording to the minorities opportunities to manifest and preserve their distinct characteristics.²⁵⁶ 'Although Article 27 is expressed in negative terms' goes the commentary of the Human Rights Committee:

that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right is protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the state party.²⁵⁷

Most importantly, the Committee states that 'positive measures by states may also be necessary *to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion*, in community with other members of the group.'²⁵⁸

In elaborating what these measures could be, Capotorti points out that if Article 27 is read in conjunction with Article 18 – that provides for freedom of thought,

²⁵⁶ See Capotorti; Nowak; Thornberry; Eide; Alfredsson; Shaw

²⁵⁷ General Comment 23 para. 6(1).

²⁵⁸ General Comment 23 para. 6(2) (emphasis added).

conscience, and religion – persons belonging to minorities have the right to express their religion in worship, observance, practice, and teaching, whether in public or private.²⁵⁹ Article 27 also includes the right of parents to ensure the religious and moral education of their children in conformity with their own convictions.²⁶⁰ According to Capotorti, the protection of culture ‘includes that of its linguistic medium’ and concludes that states must provide for the teaching of the minority language and for its use in educational institutions other than those established by public authorities.²⁶¹

The most important document at the universal level as the first and only UN human rights instrument entirely devoted to minority rights is the 1992 Declaration on the Rights of Minorities.²⁶² This declaration not only elaborates the rights under Article 27²⁶³ but it also provides for other special rights. The most important of this is the right ‘to participate effectively in cultural, religious, social, economic and public life.’²⁶⁴ Effective participation is further elaborated in Article 2(3). As members of society, therefore, persons belonging to minorities have

the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not compatible with national legislation.

In line with this, Article 5(1) provides for the obligation of states to plan and implement national policies and programmes with ‘due regard for the legitimate interests of persons belonging to minorities.’

Asbjørn Eide, the Chairman of the Working Group on Minorities, in his commentary to the Declaration submitted to the UN Sub-Commission identified mechanisms of effective participation. Among these mechanisms that may

²⁵⁹ Capotorti 238.

²⁶⁰ As above.

²⁶¹ 239.

²⁶² Not until the adoption of this declaration did the human rights movement produce a universal instrument dedicated to the problems and rights of minorities and their members. This is in stark contrast with the many instruments that have been produced in other areas of human rights that begun with the 1948 UDHR.

²⁶³ See the Declaration on the Rights of Minorities Arts. 2(1) and 4(2).

²⁶⁴ The Declaration on the Rights of Minorities Art. 2.

increase the chances of minorities to effectively participate in the decision-making process over matters affecting themselves and the society in which they live, the commentary mentions representation in the various organs of the state, decentralization of powers based on the principle of subsidiary and the establishment of advisory or consultative bodies involving minorities within appropriate institutional framework.²⁶⁵ The aim of these measures is fair influence on national policy and decision-making, in particular, but not exclusively, on matters affecting the life and welfare of minorities. Moreover, as Thornberry put it the principle of participation 'has the advantage of turning the face of the minority to the general society, and represents an inclusive and not a separating concept.'²⁶⁶

In the area of economic growth and development, states are required to 'consider appropriate measures so that persons belonging to minorities may participate fully'.²⁶⁷ Particularly when venturing into development activities that specially concern minorities, states must both consult and secure the consent of the minorities concerned.²⁶⁸ In the case of *Ilmari Länsman et al. v. Finland* the Human Rights Committee indicated that the existence of prior consultation of the group concerned is one consideration for determining whether the development activities of the state constituting interference with a minority culture constitutes 'denial' in the sense of Article 27.²⁶⁹ The Draft UN Declaration on the rights of Indigenous Peoples requires that indigenous peoples give their free, informed

²⁶⁵ See Asbjørn Eide Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2001/2 paras. 42-48.

²⁶⁶ Thornberry 44.

²⁶⁷ The Declaration on the Rights of Minorities Art. 4(5).

²⁶⁸ In its General Comment 23 the Human Rights Committee stated:

...culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples... The enjoyment of these rights may require positive legal measures of protection and measures to ensure the *effective participation of members of minority communities in decisions which affect them* (emphasis added).

See para. 7.

²⁶⁹ Communication No. 511/1992 *Ilmari Länsman et al. v. Finland* Report of the Human Rights Committee Vol. II, GAOR Fiftieth Session, Suppl. No. 40 para 9(6). See also Communication No. 547/1993 *Apirana Mahika et al. v. New Zealand* Report of the Human Rights Committee Vol. II, UN Doc. A/56/40 para. 9(6).

and prior consent to the approval of development projects that affect their lands, territories and other resources.²⁷⁰

Given the variation in the problems and concerns of minorities from one society to another, minority rights are best analysed if they are seen as spreading on a continuum of rights. Accordingly, minority rights consist of rights ranging from basic universal human rights to measures necessary to enable minorities to develop their language and culture, to greater political control over issues of particular concern to minorities, to broad entitlements of political and economic autonomy.

Apart from non-discrimination and special rights, therefore, minority rights consist of individual human rights from which members of minorities benefit as individuals. Some of the individual rights are of direct relevance to members of minorities and minorities themselves. In the civil and political sphere, the right to personal security, due process of the law, rights to nationality, the right to political participation, freedom of thought, conscience and religion, freedom of expression, freedom of association and freedom of assembly are particularly important. The right to a fair trial with language interpretation and translation is also within this category. In the economic, social and cultural fields, the right to education and the right to participation in cultural life are of tremendous value.

Minorities are also guaranteed the basic right to existence by virtue of the Convention on the Prevention and Punishment of the Crime of Genocide. Article 2 of the Convention defines genocide as any act 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' It also includes the prevention of births within a group (biological genocide) and forcible transfer of children from one group to another. This acknowledges that removing children from their cultural environment is denying them the opportunity to acquire and internalize their customs, language and values and tantamount to the destruction of the child's groups, whose future depends on the

²⁷⁰ See Draft UN Declaration on the rights of Indigenous Peoples Art. 30

next generation. It is also argued that protection of the existence of minorities goes beyond the duty not to destroy or deliberately weaken minority groups. 'It also requires respect for and protection of their religious and cultural heritage, essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues.'²⁷¹

Although cultural genocide (ethnocide) is missing from the final Convention, broader cultural considerations are increasingly given a role in prosecuting genocide under the Convention. As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia indicates genocidal intent may be inferred 'from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in Article 4(2) [of the Statute of the Tribunal, corresponding to Article III of the Genocide Convention] but which are committed as part of the same pattern of conduct.'²⁷² The Tribunal, therefore, held that acts of cultural genocide – conducts violating what the Tribunal referred to as the 'very foundation of the group' – such as Serbian destruction of Muslim libraries and mosques and attacks on cultural leaders can establish genocidal intent against a protected group.²⁷³ It is also important to point out that it is by reference to cultural characteristics such as the group's social, historical and linguistic elements that one can determine whether a given group of people is protected under the Convention.

Minorities can also benefit from certain aspects of the right to self-determination.²⁷⁴ The right to self-determination is often conceived as consisting

²⁷¹ Commentary on the Declaration para. 24.

²⁷² Prosecutor v. Karadzic and Maladic (Case No. IT – 95 – 5 – R61, IT – 95 – 18 – R61) Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 para 84.

²⁷³ Prosecutor v. Karadzic and Maladic as above para 94.

²⁷⁴ Common Article 1 of the ICCPR and the ICESCR in its relevant part provides:

'1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

of internal and external dimensions.²⁷⁵ Viewed from the perspective of the three modes of exercising the right to self-determination envisaged by the Declaration on the Principles of International Law concerning Friendly Relations,²⁷⁶ external self-determination can be seen as consisting of either 'the establishment of sovereign and independent state (secession) or the free association or integration with an independent state'. Internal self-determination may fall under 'the emergence into any other political status freely determined by a people.' In the light of this, internal self-determination refers to the various mechanisms and institutional options through which self-determination is implemented within states.²⁷⁷

One way by which minorities may benefit from self-determination is through being part of the various institutional arrangements that facilitate the implementation of the right to self-determination within the territory of a given state. These institutional arrangements may take the form of consociational system, a federal system, regionalism or local government or even cultural autonomy in the areas of culture, education etc.²⁷⁸ Where minorities occupy a contiguous territory, territorial devolution of power in the form of federalism, regionalism or local government would give such minorities a degree of autonomy involving the exercise of governmental powers in the areas assigned

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case a people be deprived of its own means of subsistence.'

²⁷⁵ For discussion on the two dimensions of self-determination see Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) 22-25.

²⁷⁶ *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* under 'The principle of equal rights and self-determination of peoples' provides: 'The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.' GA Res. 2625 (XXV) Annex, 25 UN GAOR, Supp. (No. 28) UN Doc. A/5217 (1970) at 121.

²⁷⁷ Markku Suksi 'Participation in development through 'emergence into any other political status': With special reference to Africa' in Martin Schinin and Markku Suksi (eds.) *Human Rights in Development Yearbook 2002* (2005) 314.

²⁷⁸ As the African Commission on Human and Peoples' Rights pointed out in its decision on the Katanga case apart from independence self-determination can also be exercised through 'self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people...' *Katangese Peoples' Congress v. Zaire* para.

to such levels of organization. The UN draft Declaration on Indigenous rights illustrates the matters with respect of which indigenous peoples can exercise autonomy:

Indigenous peoples have the right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, employment, social welfare in general, traditional and other economic and management activities, land and resources administration, the environment, entry by non-members, as well as internal taxation for financing these autonomous functions.²⁷⁹

This can equally apply to other territorially concentrated ethnic minorities particularly where such organization offers the most effective mechanism for peaceful co-existence and promotion of the cultural identity of the groups. Such arrangement promotes effective participation and self-rule by the group and hence enhances its control over its own affairs. Unfortunately, however, there is so much resistance to according autonomy rights to minorities,²⁸⁰ although it is basically the best guarantee a minority could wish for and, under many circumstances, the most effective mechanism for peaceful co-existence and national cohesion.

Some observation can be made as to the nature of minority rights under international law. First, it is clear from the above discussion that there is no comprehensive and uniform system of minority rights in international law. Minority rights are articulated in scattered sources of international law. Second, in almost all the instruments relevant to minorities, minority rights are formulated as rights of individuals. The rights are not minority rights qua minorities. It is nevertheless clear that such an approach does not afford effective and sufficient protection to minorities. It seems that it is only if the norms on minority rights go beyond the rights of members of minorities and additionally recognize the rights of minorities as such that it is possible to have an effective and holistic system of minority rights can be established. It should not take another catastrophe

²⁷⁹ Draft Declaration on Indigenous Rights Art. 30.

²⁸⁰ For a discussion on the rejection of a proposal for a right to autonomy for minorities see Steven C. Roach 'Minority rights and an emergent international right to autonomy: A historical and normative assessment' 11 *Int'l J. on Minority and Group Rights* 427.

affecting minorities and members of the international community to move in that direction. Finally, to be useful in resolving conflicts international standards on minority rights focusing on autonomy arrangements must be articulated.²⁸¹

²⁸¹ See Eide Commentary on the Declaration on the Rights of Minorities paras. 39-41 talking about the positive results that such approaches brought about in some European states.