

Draft paper

Minority rights in international law: From liberal individualism to multiculturalism and beyond

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I Introduction

Ours is a time of multiculturalism. While largely homogenous societies are becoming ethnically diverse, with rising identity consciousness of groups the diversity of multiethnic societies is becoming more pronounced. Amid this resurgence of ethnic consciousness and the spread of democratic changes during the post-Cold War period,¹ we have witnessed, across the globe, increasing claims for recognition and inclusion. In its dramatic manifestations, this has taken the form of ethnic conflicts ranging from those involving the inclusion of diverse racial groups as in South Africa and Namibia to long-standing tensions between Catholics and Protestants in Northern Ireland, genocidal fighting between Hutus and Tutsis in Rwanda and Burundi, violence in Basque region and Algeria, separatist movements in Quebec, Senegal, Kurd and East Timor and civil wars in the Balkans, Sudan, DRC and Cote d'Ivoire.²

Until the end of the Cold War period, international law has generally been ill-equipped to provide the necessary framework for resolving such conflicts. The intensity, prevalence and political saliency of ethnic conflicts have prompted international law to develop

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¹ See generally Samuel Huntington *The third Wave: Democratization in the late twentieth century* (1991).

² For a detailed analysis of ethnic based conflicts see Ted R Gurr *Minorities at Risk, A global view of ethnopolitical conflicts*(1993); & Donald Horowitz *Ethnic groups in conflict* (1985).

mechanisms for responding to such conflicts. This led to a reconsideration of international law's position on minority rights, a position that was abandoned following the collapse of the League of Nations. This renewed interest in minority rights has been expressed by the adoption of a plethora of instruments on the rights and protection of minorities.

This paper examines this renewed interest of international law in minority rights. The questions that it addresses itself to include: What is the nature of international law's renewed interest in minority rights? What are the limitations of international norms on minorities in terms of accommodating ethnic diversity? How can these limitations be rectified and the response of international law made more effective and globally relevant? This paper will argue that multiethnicity rather than homogeneity is an essential value of the human condition in multiethnic societies that states need to take account of. On the basis of this premise, it makes a proposition that it is only a multicultural conception of minority rights transcending the dominant framework of the nation-state and liberal individualism that can provide an effective and globally relevant framework for resolving problems of ethnic diversity.

II Framework for analysis

An examination of international norms on minorities reveals that there are two related types of guarantees for minorities. The first guarantee is what may be referred to as institutional tolerance, which can be expressed as a non-discrimination right.³ This ensures to minorities that state authorities refrain from engaging in activities that interfere with or unduly restricts minorities from pursuing their cultures, using their languages and practicing their religions. It imposes on state authorities a negative obligation by prohibiting them from actions that prevent members of minorities from enjoying their culture. The rights guaranteed are not minority rights *qua* minorities. They are rather rights of 'persons belonging to minorities' and hence are individual entitlements. They entitle members of minorities not to be prevented from participating in the cultural life of

³ See United Nations Human Rights Fact Sheet No. 18 (Rev.1) *Minority Rights* (1998) 2-4.

their group. Accordingly, members of minorities are free, within certain limits, to use their minority languages, participate in the reproduction and development of the minority culture and practice their religion. It is formulated as a negative right and takes the form of non-discrimination. As a negative right, it entitles members of minorities to remedies when their freedom to participate in the cultural life of their group is curtailed by an action of state authorities.⁴ It does not aim at affording any substantive positive guarantees that ensure the survival of minority cultures. In international law, this perspective is represented by the literal and traditional understanding of Article 27 of the International Covenant on Civil and Political Rights (ICCPR).⁵ This perspective is generally in agreement with the dominant liberal individual rights and nation-state framework. Not only that the right guaranteed is individual but it is also a negative one. It does not in any substantive way detract from the conception of the state as a single-nation state.

The other guarantee that international norms on minorities provide is what may be referred to as the rights of protection (positive right to culture). These are rights whose object is to make it possible for minorities to preserve their identity, characteristics and cultures and are often called special.⁶ These provide certain limited guarantees for minorities whereby state authorities not only refrain from hampering the right of members of minorities to participate in the cultural life of their groups but also provide certain positive or protective measures that are necessary for the enjoyment that right. The aim of these guarantees is to protect the culture of minorities for the interest of members of minorities.⁷ It is normally formulated as a positive right to culture. In its strong sense, this right requires state authorities to make provisions that allow the preservation of minority cultures such as through minority schools and other cultural institutions. Some of the positive guarantees under the 1992 UN Declaration on

⁴ Like any other right, interference with the right of a person belonging to a minority to participate in the cultural life of the minority would not automatically entitle the person to a remedy. Often, it is generally where such interference is unreasonable and disproportionate that such a person would be granted a remedy.

⁵ GA Res. 2200 A (XXI), 16 Dec. 1966.

⁶ See Minority rights (n 3 above) at 4.

⁷ It is maintained that these rights are granted 'to make it possible for minorities to preserve their identity, characteristics and traditions.' As above.

Minorities⁸ such as the right of a minority to exist and the right to enjoy their own culture, to profess and practice their own religion, and to use their own language fall in this category. Yet, as the main focus of these provisions is the protection or preservation of minority cultures for members of minorities, they do not necessarily require that the character of the state as a nation-state be in any significant way changed.

Although this may be considered as a significant advance in accommodating the interest of minorities, the formulation is largely influenced by the dominant liberal individual rights and nation-state framework. The rights, although positive in their formulation, are essentially individual rights. The holders of the rights are not minorities as a group but, in the words of the 1992 UN Declaration on Minorities, 'persons belonging' to minorities.

The conception of minority rights advanced in this paper is not limited to institutional tolerance and not even positive protection. Like the dominant framework that focuses on the protection or preservation of minority cultures, a multicultural conception of minority rights requires that minority cultures are protected. It also demands that minorities are provided with the necessary resources that enable them to reproduce, develop and maintain their cultures. Most importantly however, a multicultural conception of minority rights demands that the institutions, processes and symbols of the state recognize, affirm and express the cultures of minorities. In here the state is conceived to be multiethnic composed of diverse and overlapping ethnic groups rather than a nation-state. The interest of minorities to use their languages in their dealings with state authorities and to have their culture reflected in the institutions and processes of the state is fully recognized. It also offers a flexible framework for ensuring real representation and participation of all groups in political decision making and distribution of resources and for articulating and institutionalising self-determination rights.

Institutional tolerance and protection of the culture of minorities require little engagement with minorities. Minorities are seen and institutionally portrayed as 'others' or inside-

⁸ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res. 47/135, 18 Dec. 1992. [Hereinafter the UN Declaration on Minorities]

outsiders. By contrast, a multicultural conception of minority rights treats minorities as integral part of the whole and demands that public institutions and members of the general public recognize minorities and take account of important aspects of their cultures rather than merely viewing them from a distance and outside. Unlike the prevailing frameworks of tolerance and protection, it also treats the demands and the underlying interests of minorities as group interests not merely as the interests of their individual members. This it does without essentialising the characters of groups, but with recognition that various cultural groups live interdependently, interact and exchange and influence each other.⁹ This paper therefore argues that minority rights need to be conceptualized beyond the dominant frameworks of the nation-state and liberal individualism in order to be effective for accommodating diversity in multiethnic states.

This demands the review of norms on minorities in two ways. First, it requires that international law, apart from its concern for the protection of the cultural integrity of minorities, has to provide normative rules that ensure affirming and institutionally expressing and celebrating the diverse makeup of society including minority cultures. Only such a conception of minority rights is capable of responding to the demands of minorities to use their language not only as between themselves but also in public and in formal settings and to have their culture reflected in the institutions and processes of the state. Second, international norms on minorities should transcend the dominant nation-state and individual rights paradigm and give recognition to the rights of minorities as minorities particularly, but not limited to, self-determination rights and group representation. These are necessary to effectively resolve ethnonational conflicts and issues of political power distribution and minorities' participation in and benefit from development at the national level.

⁹ It must be noted however that there are exceptions to this. There are some groups that live in relative isolation from others and may seek to be accordingly left alone.

II The rise and fall of minority rights under international law

Historically, international law responded to problems of group conflicts through a system of minority protection. An examination of international law starting from the era of the League of Nations to the present reveals that there are three periods in the evolution of international norms on minorities. Although there was no direct continuity between the minority protection system of the League and contemporary norms on minority rights, important features of these norms are ruminants of that experiment. This section offers a critical review of the rise and fall of international norms on minorities highlighting the influence of the nation-state ideal and liberal individualism.

The minority protection system of the League of Nations

The American and the French Revolutions inaugurated the era of the constitutional state. With the replacement of the divine right of kings by popular sovereignty, nationalism became an organising principle of the state. The state saw its unprecedented transformation since the treaty of Westphalia when people began to see the state as the political expression of the nation. As the state became dependent upon the support of the masses for its survival and legitimacy, it tied knot with nationalism. Much of the 19th century was a period of consolidation of the nation-state which became the only legitimate form of political organisation for much of the world during the 20th century.¹⁰ An important manifestation of this was the process of nation-building, which has been expressed in terms of systematic processes of the socio-cultural homogenisation and political integration of the population of a state. The prevailing thinking and practices of the homogenizing process of nation-building of this period aimed at overcoming ethnic diversity, and hence was hostile to claims for recognition. There were very few countries

¹⁰ The pervasiveness of the nation-state led some to conclude its inevitability. Ernest Barker summarised this when he stated: 'The history of the century since 1915 ... will teach us that in some form a nation must be a State, and a State a nation ... A democratic State which is multi-national will fall asunder into as many democracies as there are nationalities.' Ernest Barker *National character and the factors in its formation* (1927) 17. Commenting on the persistence of the nation-state Anthony Smith observed that 'the nation state is the norm of modern political organisation and it is as ubiquitous as it is recent. The nation state is the almost undisputed foundation of world order, the main object of individual loyalties.' Anthony Smith *Theories of nationalism* (1971) 2.

which have accepted ethnic diversity as part of the process of nation-building. Switzerland has been the only such country.¹¹ The tension between the homogenisation processes of the nation-state and the reality of ethnic diversity was expressed in terms of the problems of minorities. The response of international law to issues of ethnic diversity within states was framed against this background and within the dominant framework of the nation-state.

Following World War I, the nation-state model of political organisation acquired international legal recognition when the principle of national self-determination became the basis for the post war settlement.¹² This made the principle of national self-determination part of the liberal ideas that brought about the replacement of unrepresentative and oppressive monarchical states with popular sovereignty and national governments. Its application for managing the post-World War I order in Europe led to the dismemberment of the Austro-Hungarian and the Ottoman Turkish empires and the emergence of new states constituted mainly along national lines.¹³ The result has been the homogenisation of much of the population of European states. According to Hannum 'while approximately half of the population of Europe were minorities in 1914, only one fourth were minorities in 1919.'¹⁴

Despite the primacy given to national self-determination to address the challenges of diversity, many European states including the new ones continued to be inhabited by groups that do not share the language and culture of the national majority. The first alternative approach adopted under the League of Nations system and much later upon its collapse has been the manipulation of peoples to match borders. The international system allowed treaty regulated transfer of populations. Thus, for example, minority exchanges between Greece and Turkey and between Greece and Bulgaria were provided for in the

¹¹ See C A Macartney *National states and national minorities* (1934) 154-155

¹² See Li-ann Thio *Managing Babel: The international legal protection of minorities in the twentieth century* (Leiden: Martinus Nijhoff Publishers, 2005) 36-37.

¹³ The groups constituted into the new states include the Czechs, Poles, Slovaks, Serbs, Croats and Slovenes.

¹⁴ Hurst Hannum *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (1990) 53.

1919 Treaty of Neuilly and 1993 Treaty of Lausanne.¹⁵ All the same the aim was to create ethnically homogenous populations within states.

The other approach was the minority protection system of the League of Nations. Under this system, states were obliged to exact certain minimum protection to identified minorities living in their territories. This was a mechanism that was developed as a last resort. According to Thio the '[m]inorities' regime was the product of compromise rather than a utopian project.'¹⁶ It was not the mere fact of the existence of distinct ethnic groups within a state and the need for their protection that guided the adoption of the system. As Thio further elaborated

The minorities' treaties were conceived as a pragmatic response to a 'specific problem existing in a given area for we hope, a limited time'. They were corrective to 'certain ethnographical situations of difficulty' arising from the post war territorial settlements.¹⁷

Clearly, the system was not developed as an alternative to the nation-state and its principle of nationality. Yet, the minority protection system manifests an instance where a concession was made to the principle of national self-determination and the nation-state framework, albeit only as an exception. Many assumed the guarantees were only a temporary measure and once the minorities were effectively assimilated, the guarantees would no longer be necessary.¹⁸ At the time there was no interest to create multinational states by granting national groups political autonomy in a way that makes minority groups a permanent feature of the makeup of those states.¹⁹

In addition to this, one finds that the minority protection system of the League had two components that correspond to the two kinds of guarantees of international law to minorities identified above. The first component covered the principle of non-discrimination, that is, members of the minority were as entitled to equal enjoyment of

¹⁵ See Jennifer Jackson Preece 'Ethnic cleansing as an instrument of nation-state creation: Changing state practices and evolving legal norms' 20(4) *Human Rights Quarterly* (1998) 817-843.

¹⁶ Li-ann Thio *Managing Babel: The international legal protection of minorities in the twentieth century* (2005) 73.

¹⁷ *Ibid.*, 45

¹⁸ See Report of M. de Mello-Franco, 9 December 1925, *LNOJ*, 7th year (1926), 141.

¹⁹ See Calderwood, 'The Protection of Minorities by the League of Nations', 2 *Geneva Research Information Committee Special Studies* (1931) 17 at 21.

civil and political rights as other nationals.²⁰ 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.’²¹ According to the PCIJ, the intended purpose of the guarantees for equality was to ‘prevent any unfavourable treatment, and not to grant a special regime of privileged treatment.’ They were, the Court added, of ‘a purely negative character in that they are confined to a prohibition of any discrimination.’²² According to the PCIJ the other element was premised on the need ‘to ensure for the minority element suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.’²³ These guarantees for cultural rights provided that minorities should enjoy the equal right to establish, control and manage their own ‘charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.’²⁴ These two dimensions of minority guarantees have had a defining influence on subsequent developments of international norms on minorities.

Post-World War II period: The fall of the League system, the rise of universal rights and the triumph of the nation-state

At the end of the First World War ‘international protection of minorities’ was the great fashion: treaties in abundance, conferences, League of Nations activities, an enormous literature. Recently this fashion has become nearly obsolete. To-day the well-dressed international lawyer wears ‘human rights’.²⁵

²⁰ *Rights of Minorities in Upper Silesia (Minority Schools)*, 1928 PCIJ Series A, No.15, 29.

²¹ *Minority Schools in Albania* PCIJ, Ser. A/B, No. 64 (1925) 17.

²² As note 9 above.

²³ As note 8 above.

²⁴ Article 67, Section V, Treaty of Peace between the Allied and Associated Powers and Austria, St Germain-en-Laye, 10 September 1919, in force 8 November 1921.

²⁵ Kunz ‘The present status of the international law for the protection of minorities’ 48 *Am. J. Int’l L.* (1954) 282-287, 282.

The minority protection of the League of Nations did not succeed as a normative framework for addressing problems of ethnic diversity. It collapsed with the demise of its parent organisation the League of Nations following the outbreak of World War II.²⁶ This was the time when the nation-state achieved its dominance as the only acceptable form of political organisation the world over.²⁷ Seen in light of the premium that the nation-state has put on homogeneity, the minority guarantees of the League system and by extension norms for the preservation of ethnic diversity were seen to be antithetical to national cohesion and political stability.²⁸ There was therefore no suitable ideological and political environment that could support a system of minority protection.

The new international system created after 1945 under the UN was formulated largely "without consideration of the questions of principle" which arise from the existence of ethnocultural minorities in a "world dominated by the concept of the national State as the...unit of political organization".²⁹ With the institutionalisation of the new system of the United Nations, minority rights fell out of fashion. Instead, universal rights of individuals appropriated from the liberal individual rights developed in western nation-state democracies became the fashion of the day. Thus, these new rights have been institutionalized as the framework for the protection of individuals and groups, albeit, in the case of the latter only indirectly. As a result, the focus of the human rights norms developed during this period has been confined almost exclusively to the rights of individuals. Indeed, this represents a major achievement of the 20th century not least because it has provided the framework for democratic changes in many parts of the world. Nevertheless, by denying any legitimate space to group claims it has

²⁶ See Hannum (n 14 above) 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.

²⁷ See Joost Herman 'Intergovernmental organizations, the Nation-State, and minority protection: Possibilities and obstacles for the 21st century' in M Castermans, F. van Hoof and J. Smith (eds.) *The role of the nation-state in the 21st century* (1998) 293 (stating that for many states national homogeneity was self-evident and it was legitimate to pursue forceful integration and applying a strict rule of equality based on the national identity to every citizen).

²⁸ See Herman (as above) 292-294 (arguing that minorities and ethnic diversity in general were seen as spoiling the sought after display of homogeneity and therefore the strength of the nation-State vis-à-vis other nation-States). Moreover, the system of minority protection lost much of its legitimacy due to its selective application and its manipulation by Nazi for its expansionist policies. See Jay A Sigler *Minority rights: A comparative analysis* (Westport, Connecticut: Greenwood Press, 1983) 4.

²⁹ Inis Claude, *National Minorities: An International Problem* (Cambridge, Mass.: Harvard University Press, 1955) 113.

simultaneously offered a framework legitimating the pursuit of homogeneity and suppression of diversity.

I submit that the neglect of the question of ethnic diversity within states under the UN system was not merely a misjudgment, but a paradigmatic blind spot. 'The general tendency of the post-war movements for the promotion of human rights has been,' as Inis Claude put it,

to subsume the problem of ...minorities under the broader problem of ensuring basic individual rights to all human beings, without reference to membership in ethnic groups. The leading assumption has been that members of ...minorities do not need, are not entitled to, or cannot be granted rights of a special character. The doctrine of human rights has been put forward as a substitute for the concept of minority rights, with the strong implication that minorities whose members enjoy individual equality of treatment cannot legitimately demand facilities for the maintenance of their ethnic particularism.³⁰

Accordingly, the only minority grievances considered legitimate were those involving discrimination such that individual equal rights guarantees were seen as the appropriate response. Apart from this, any notion of minority rights as entitlements of minority groups qua groups to preserve cultural distinctness and by extension for the protection of diversity was rejected. Diversity has been perceived as a threat, a challenge or a nuisance, an obstacle not only to achieve homogeneity but also to the achievement of equal rights by all without regard to their group membership.

The dominant opinion of the time was that there was no need for minority protection where individual rights were effectively protected.³¹ It was the individual as human being that was taken into consideration by the UN as deserving, almost exclusively,

³⁰ As above 211.

³¹ The statement of Summer 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 See Sigler (n 28 above) 77. Sigler criticized this position as flowing from a misconception of discrimination in the sense that it excluded the possibility that minorities may wish to be different and recognized as minorities.

international protection. 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 assumed that through non-discrimination and equality of rights and equality before the law individuals belonging to a minority could be sufficiently protected.³² The best way to achieve equality was thought to be to treat all persons as individuals without regard to their group membership. This underlined the adoption of a number of conventions and declarations by the UN and international organizations, almost exclusively on individual human rights and non-discrimination.

The first such international human rights instrument was the Universal Declaration of Human Rights (UDHR). The UDHR provided for individual rights only. It however expanded the principle of non-discrimination enunciated under the Charter of the UN.³³ 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. As the travaux préparatoires indicate, however, the initial draft of the Universal Declaration did include a guarantee that

in all countries inhabited by a substantial number of persons of a race, language or religion other than those of the majority...minorities shall have the right to establish and maintain, out of an equitable proportion of public funds...their schools, cultural institutions, and to use their language before courts, organs of the state and in the press and public assembly.³⁴

³² See United Nations Human Rights Fact Sheet No. 18 *Minority rights* (Rev. 1 Feb. 1998) 2. 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 (n 26 above) 85.

³³ See Arts. 1 (3), 13 (1) (b) and 55 (c) of the Charter, which all deal with non-discrimination.

³⁴ United Nations, E/CN.4/Sub.2/384/Add.2, p. 44.

This was not however accepted by the majority of member states of the UN.³⁵ All that the General Assembly of the UN managed to say at the time of the adoption of the UDHR was that ‘the UN could not remain indifferent to the fate of minorities.’³⁶ Seemingly, in an attempt to justify the neglect of minority rights in the UN agenda and leave 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. Yet even this limited mandate was not free of controversy given the hostility of many member states towards minority provisions. As the Sub-Commission own rapporteur admitted, from the passing of this resolution until 1989 both the UNCHR and the sub-commission failed to address the issue of special minority protection.³⁷

The only exception to this general trend of the post-1945 human rights standards has been 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.

This is the first international norm that has universalized the concept of minority rights.³⁸ So far, this provision constitutes the only legally binding norm, other than the Genocide Convention, on the rights and protection of minorities under international law. As it is apparent from the formulation of this provision, consistently with the prevailing liberal individual rights paradigm, minority rights are articulated not as minority rights qua

³⁵ 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 (n 28 above) 76.

³⁶ GA Res 217 C (III) 1948.

³⁷ United Nations, E/CN.4/Sub.2/1989/43, p. 4.

³⁸ Patrick Thornberry ‘Is there a phoenix in the Ashes? – International Law and Minority Rights’ 15 *Texas Int’l L. J.* (1980) 443.

minorities, but only as entitlements to persons belonging to minorities, and hence as individual rights. This marked a paradigmatic shift in the approach to problems of ethnic diversity from the protection of minorities *qua groups* of the League era to the protection of *persons* belonging to minorities that has become a characteristic feature of minority rights norms of the international system.

So far, this provision constitutes the only legally binding norm, other than the Genocide Convention, on the rights and protection of minorities under international law. Despite attempts to conceptualise this provision constructively as imposing positive obligations on states,³⁹ the track record of the jurisprudence of the Human Rights Committee of the UN shows that the test for determining violation under Article 27 is whether there has been denial of the guarantees in that article. Even worse, in as long as the interference in the rights guaranteed under Article 27 are minimal, a state would not be held to be in violation of any rights under Article 27.⁴⁰ As one commentator observed

That case (*Jouni E Lansman v. Finland*), and the subsequent case of *Aarela v. Finland* ...demonstrate that the threshold of “denial” of minority rights in Article 27 of the ICCPR is quite high. It raises difficult questions, including the permissibility or even necessity of economic affirmative action in favour of members of minority groups. None of these questions have, as of yet, been answered by the HRC.⁴¹

Thus, notwithstanding the changing understanding of the reach of Article 27, it is remotely likely that a state would, in the normal course of things, be responsible for

³⁹ ‘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.’ General Comment 23 para. 6(2) (emphasis added).

⁴⁰ See for example Communication No. 671/1995, *Jouni E Lansman v. Finland*, Views of 30 October 1996, CCPR/C/65/D/671/1995; Communication No. 779/1997 *Anni Aarela and Jouni Nakkalajarvi v. Finland* views of 24 October 2001, CCPR/C/73/D/779/1997.

⁴¹ Alexander H. E. Morawa ‘The United Nations monitoring bodies and minority rights, with particular emphasis on the human rights committee’ in *Minority issues handbook, Mechanisms for the implementation of minority rights* (European Centre for Minority Issues, October 2006 reprinting) 29, 44.

violation of a right to enjoy one's culture under Article 27 if a member of one of its ethnic minorities showed that the state failed to provide for the development of her minority culture.⁴² If a minority disappears due to a pressure of assimilation, there would be no violation of Article 27 guarantees as long as there was no coercion. Clearly then, notwithstanding its significance in legally establishing certain rights for minorities, the interpretative understanding of Article 27 did not go far enough in its enunciation of minority rights in clear terms.⁴³ As Adeno Addis observed, the teaching of Article 27 is simply that individual choices should not be constrained by the state for one group of individuals more than it is for another group of individuals.⁴⁴

Generally, the first few decades of the UN era saw the decline in the international concern for the protection of minorities and the corresponding triumph of the forces of homogeneity. Unlike the League of Nations in whose agenda minority rights were given specific application, the UN largely excluded the issue of minorities from its main areas of activities. The protection of minorities did not feature even in relation to its mandate in the maintenance of international peace and security. In the field of human rights standard setting, universal human rights and non-discrimination took almost exclusive attention in the articulation and development of new norms. Even when the concern for minorities was forced into the standard setting process, the tendency was to address it through non-discrimination and individual rights of members of minorities. It seems, therefore, 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 despite the minimal protection envisaged under Article 27 of the ICCPR, which was at any rate formulated as an individual right with limited, if any, substantive guarantees, whose content is uncertain and controversial.

⁴² The standard that the Human Rights Committee has normally employed to determine whether there is violation of right under Article 27 is what may be called the 'denial of right' or interference test. It does not seem that the decline of the state to provide for the development of the culture of a minority can amount to 'denial of right' or interference for the purpose of Article 27.

⁴³ After reviewing the debate around the meaning of Article 27, Lerner concluded that this is a manifestation of 'the shortcomings of the Covenants approach to minority rights.' Lerner (n 26 above) 91.

⁴⁴ Adeno Addis 'Individualism, communitarianism and the rights of ethnic minorities' 66 *Notre Dame L. Rev.* (1992) 615, 638.

International law and minorities after 1989: Between continuity and change, from liberal individualism to multiculturalism?

Until the end of the Cold War, international law has therefore generally been ill-equipped to provide the necessary framework for resolving problems of ethnic diversity within states and the resultant conflicts. The intensity, prevalence and political saliency of these conflicts amid global democratic changes prompted international law to reconsider its position on minority rights that was abandoned following the collapse of the League of Nations. This new thinking, reinforced by the prevalent conflicts of the time,⁴⁵ gave rise to proposals to deal with minority rights in specific instruments.⁴⁶ Within the UN system, the result of this development was the adoption of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities by the UN General Assembly in 1992.⁴⁷

It can be said that the adoption of the Declaration ushered in the beginning of a new period in the development of international norms on minority issues, although the instrument still reflects the individualist orientation of the UN. As the first human rights instrument of the UN on minorities, the Declaration reflects, although not fully, an acknowledgement by the international community of the need to recognize the rights of minorities and provide for normative frameworks that respond to ethnic tensions that threatened peace and stability within states.

This declaration not only elaborates the rights under Article 27⁴⁸ but it also provides for additional special rights. It also went on to remedy the failure of Article 27 of the ICCPR

⁴⁵ It is reported by the UN that in the first half of the 1990s alone, nearly five million peoples died world wide as a result of civil wars and ethnic conflicts.

⁴⁶ In his 'An Agenda for Peace' Report the then Secretary-General of the UN Boutros -Boutros Ghali in 1992 suggested as a solution to conflicts involving minorities commitment to human rights 'with a special sensitivity to those of minorities'. He further said that 'the League of Nations provided a machinery for the international protection of minorities. The General Assembly soon will have before it a declaration on the rights of minorities. That instrument, together with the increasingly effective machinery of the United Nations dealing with human rights, should enhance the situation of minorities as well as the stability of states.' para. 18.

⁴⁷ UN Doc. GA Res/47/135 adopted on 18 Dec. 1992.

⁴⁸ See the Declaration on the Rights of Minorities Arts. 2(1) and 4(2).

to specify state measures aimed at the promotion of minority rights. Henceforth, states were required to adopt provisions for minority language instruction and the promotion of knowledge concerning minority cultures and languages amongst the majority population. It also guarantees the right 'to participate effectively in cultural, religious, social, economic and public life.'⁴⁹ 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.' In the area of economic growth and development, states are also required to 'consider appropriate measures so that persons belonging to minorities may participate fully'.⁵⁰

The declaration incorporates certain aspects of a multicultural conception of minority rights. This involves having minority cultures reflected in national frameworks. Accordingly, Article 4(4) requires that states 'should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territories.' Similarly, Article 5(1) obliges states to plan and implement national policies with due regard for the legitimate interests of persons belonging to minorities. This allows the inclusion of the history, traditions, language and culture of minorities in the narration of the national history and expresses an affirmation that they form an essential part of the society to which they belong. Much of the emphasis is on providing guarantees that protect minorities from assimilation into and domination by the mainstream dominant section of society. But for minorities to have influence on the national political and economic processes, it is equally necessary that they have access to important economic and social opportunities readily available for members of the mainstream dominant section of society.. In recognition of this, Article 4(4) further states: 'Persons belonging to

⁴⁹ See the Declaration on the Rights of Minorities Art. 2.

⁵⁰ The Declaration on the Rights of Minorities Art. 4(5).

minorities should have adequate opportunities to gain knowledge of the society as a whole.’ This also ensures that minorities are not only afforded protection for their culture from domination but also that they attain equality at the national level.

Clearly, these aspects of the minority guarantees under the 1992 UN Declaration on Minorities can detract from the nation-state conception of the state. Nevertheless, their formulation and limited scope falls short requiring the redefinition of the character of the state. Whereas Article 4(4) is qualified with the phrase ‘where appropriate’ and uses ‘should’ instead of the commonly used mandatory term ‘shall’, Article 5(1), although formulated as a mandatory provision, renders the obligation open for abuse by inserting the qualification ‘legitimate interests’ whose determination is ultimately a prerogative of the state. Moreover, Article 4(4) does not require that minority cultures are given institutional expression and national significance in other aspects the political, economic and social processes than education. Generally, the main focus of the guarantees in the declaration remains to be the protection or preservation of the characters of minorities by carving up a space that permits the maintenance of minority identities *within* the group.

Although this declaration marked a significant advancement in the elaboration of norms on minority rights and incorporates aspects of a multicultural system, the formulation of its provisions are problematic and betray the continuity of the influence of the dominant frameworks of the earlier period.

First, as a continuation of the shift from the protection of minorities qua minorities to persons belonging minorities inaugurated by Article 27, all the provisions of the declaration spoke of the rights of persons belonging to ‘national or ethnic, linguistic and religious minorities’. The rights guaranteed are therefore essentially individual rights.⁵¹ This individualistic bias of international human rights law bars the recognition of

⁵¹ 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.

collective or group rights,⁵² which is an equally important dimension for resolving problems of ethnic diversity.

Second, the guarantees in the declaration with their emphasis on preservation of minority cultures tend to treat minority groups and their cultures as 'others'. It does not envisage the inclusion of minorities and their cultures into the image of the national polity. Rather they are conceived and presented as separate categories. There is little that requires that characteristics of minorities inform the definition of the character of the state. The declaration is silent on the issue of recognition of the languages of minorities for official purposes and in the interaction of members of minorities with state authorities.

Third, the provisions of the declaration are replete with multiple qualifications involving vague or equivocal wording such as "encourage conditions", "appropriate measures", "where appropriate", "where possible", "where required", and "in a manner not incompatible with national legislation". Article 4(2) of the declaration, for example, contains several escape clauses and gives little guidance on what is expected of states to enable minorities to express and develop their culture, language and religion.⁵³ Third and equally important, this instrument is not legally binding. It is a political instrument that enjoys a moral force.

Finally, the understanding of the new elements added by this declaration seems to be constrained by the dominant paradigm that informs Article 27 of the ICCPR. As a result, it is doubtful if the understanding of participation in political and economic processes is anything more than a requirement that the state consults concerned minorities where it develops and implements policies that may affect such groups.⁵⁴ If the jurisprudence of

⁵² See James Anaya 'The capacity of international law to advance ethnic or nationality claims' in Will Kymlicka (ed.) *The rights of minority cultures* (1995) 321, 326.

⁵³ See Pejic 'Minority rights in international law' 19 *Human Rights Quarterly* (1997) 677.

⁵⁴ 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.

the Human Rights Committee is something to go by, it would not be inaccurate to have such doubts. In the case of *Ilmari Länsman et al. v. Finland*, for example, 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 amounts to ‘denial’ in the sense of Article 27 of the ICCPR.⁵⁵ Moreover, this understanding is further supported by the general limitation clause in Article 8 of the declaration that asserts the priority of sovereign rights of states including their sovereign equality, territorial integrity and political independence over minority rights. This precludes the possibility of interpreting the right of minority participation as requiring states to adopt institutions and procedures that ensure their representation and actual involvement in the economic and political process of the state. This is because, as Anaya put it, ‘[s]overeignty is jealous of matters of social and political organisation.’⁵⁶ In the end, the guarantees in the declaration can have only a very limited effect on the character and mode of operation of the state vis-à-vis the various communities constituting them.

II The salient features and limitations of contemporary norms on minority rights

The system of minority rights was developed on the basis of the minority-majority dichotomy. It thus began by taking the existence of a majority as a given. The majority has two attributes. The first of this is numerical. It thus accounts for more than half of the population of the state. The other attribute of the majority involves power relation. The majority is thus not only constitutive of more than half of the population of the state but it is also in an established dominant position in the political and economic fields. This means that the majority is normally thought of as enjoying dominant control over the

⁵⁵ 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).

⁵⁶ Anaya (n 52) 326 -327.

institutions of the state on a permanent basis. The general framework of minority protection is predicated on this relational conception of minority-majority.⁵⁷

It may be that norms on minorities has to be formulated taking into account this relational dynamics. This is not however the way that problems of group relations manifest themselves all the time. Thus, during the time of apartheid despite their numerical dominance black South Africans were not dominant in the political domain and the state was run by the minority white regime. Such is the case to day in Rwanda and until very recently in Burundi. Moreover and most importantly, this bi-polar conception of the problem of ethnic diversity is very limited for more reason than one. There are many countries in which no single group enjoys a numerical and political majority position. Such is the case for example for the great majority of African states.⁵⁸ In these countries the problem often manifests itself not in this minority/majority dialectic, but in the form of a rivalry for control or share of political power and access to resources.⁵⁹

Another but related feature of minority rights norms is that they tend to focus on protection. As noted above, the main concern of norms on minorities has generally been to counter majoritarian excesses. Thus, in most cases they are formulated in the negative. Article 27 of the ICCPR is a classical example of this. When formulated in the affirmative, the norms tend to focus on stating the right of the minority to preserve its own goods. The kind of multiculturalism that this framework promotes is one that treats groups separately. This has two dimensions. First, it draws much inspiration from the 18th and 19th century nationalist conception of cultural groups as potential nations. An example of this was the minority protection system of the League of Nations. That system was institutionalised within the framework of the principle of nationality which was predicated on a conception that each ethnic group was entitled to national self-

⁵⁷ See the Advisory Opinion of the PCIJ on *Minority Schools in Albania* (n 21 above).

⁵⁸ See Crawford Young *The politics of cultural pluralism* (Madison, Wisconsin: University of Wisconsin Press, 1976) 97.

⁵⁹ See Harvey Glickman and Peter Furia 'Issues in the analysis of ethnic conflict and democratization processes in Africa today' in Harvey Glickman (ed.) *Ethnic conflict and democratisation in Africa* (Atlanta, Georgia: African Studies Association Press, 1995) 16.

determination.⁶⁰ The guarantees for minorities were institutionalised as a different form of the application of national self-determination where the later could not have been fully realised. The other one defines ethnic minorities as the ‘other’ who are viewed as being separate. Much of the norms on minorities are of this nature. They confine the purpose of minority rights to the preservation of the distinct identity of ethnic minorities. As observed earlier, many of the minority guarantees of the 1992 Declaration on minorities are of such kind. The same can be said of Article 27 of the ICCPR which, the HRC stated, aims at ‘ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.’⁶¹

Besides, the framework of protection coupled with the minority/majority divide unnecessarily restricts the dimensions of minority issues. Although the element of protection is important, its understanding of minority demands has been reductionist. By reductionist, I mean the confinement of the normative basis of minority rights to the preservation of culture identity. It is limited in the sense that minority issues understood in terms of demands for recognition are more than just about the preservation of cultures. On top of this, in many cases, although culture remains to be an important component, many demands for recognition stem from problems of political and economic exclusion. This says that what is required is not merely protection. It primarily requires the formulation of a constitutional framework expressive of a political system that is inclusive of all cultural groups. The characterization of the essence of minority issues by Justice Sachs of the Constitutional Court of South Africa resonates with this perspective.

There is no clear majority population in South Africa, against which a minority need to be protected. Linguistically and culturally speaking, there are only minorities in our country. The problem is to balance out their various interests rather than to protect any one group against another.⁶²

⁶⁰ Thio indicated that ‘[t]he international protection of minorities was a “strict and logical corollary of the principle of self-determination of nations’, a compensatory substitute in lieu of independent statehood.’ (n 12 above) 36.

⁶¹ General Comment 23 para 9.

⁶² *The Gauteng Provincial Legislature in re: Dispute concerning the constitutionality of certain provisions of the School Education Bill of 1995* CCT 39/95, 4 April 1996; 1996 (3) SA 165 (CC) para. 81.

This is not to suggest that protection is unnecessary. It is rather to say that it is limited. As in South Africa and the vast majority of African states and other multiethnic states, the issue must be formulated as raising the questions of how to provide inclusive institutional and political arrangements and how to achieve equitable and effective share from the political and economic process of the state for all groups. Of course all groups seek protection for their cultures. In addition to this, perhaps most importantly, they ask to use their languages in the public sphere, to have appropriate schools and access to the media, to be acknowledged and affirmed in the curricula and narratives of the societies they have helped to build, and to be able to live in accord with their cultural ways without discrimination, so they too can participate in the governance of the constitutional association without oppression.⁶³ Only a multicultural conception of minority rights can provide the framework for accommodating these kinds of needs.

Another feature of the norms on minorities is their confinement to culture. It can be seen from guarantees to minorities that the focus of the norms is limited to cultural rights. Thus, minority rights are mainly formulated as mechanism for the protection of minority groups from cultural assimilation into the dominant centre. Their proclaimed aim is essentially to secure the minimum conditions necessary for the preservation of the cultural identity of minorities. The limit of this almost exclusive focus on culture is that it fails to take full account of the uneven political power relations and distribution of resources that underlies the inequality and marginalisation of minority groups.

In most cases, there exists an uneven relationship between the dominant ethnic group whose interest normally find expression in the national interest and the minority.⁶⁴ This may take different forms including unequal regional development and/or differential access to positions of power or different forms of exclusion or discrimination in social, economic and political life. An examination of the nature of ethnic problems in Africa sufficiently demonstrates this.

⁶³ Tully (n 71 below) 165.

⁶⁴ See 'Introductory notes by Rodolfo Stavenhagen' in *Ethnic violence, development and human rights* report by Netherlands Institute of Human Rights (SIM) (1985) 14.

The first and most prevalent demand for recognition involve conflicts between competing groups for control or share of state power. As the pattern of many conflicts in Africa reveals, minority issues in Africa are essentially about distribution of political power and access to resources. These are products of the specific historical experiences of colonialism and patterns of inequality exacerbated by the independent African state. Part of the reason for this is that more often than not problems of political, social and economic exclusion and marginalization follow ethnic lines. There is great inequality in the level of political participation, representation and access to resources among the constituent ethnic groups. There is little correspondence between the level of representation and socio-economic opportunities between various groups. Broadly speaking therefore the first and by far the most important demand of groups are those concerning representation in the political processes of the state and those about socio-economic justice. It must however be emphasised that these broad themes are intimately intertwined with the interest of various communities to achieve inclusion into the society on an equal basis with respect and dignity. As much as they seek to have a say, they also seek to have their identities reflected in the organisation, symbols and processes of the state. Even this goes beyond a demand for cultural preservation or protection.

There are many instances in which groups have been forcibly incorporated into the modern nation-state system. The situation of indigenous groups and pre-colonial peoples of Africa is a good example of this. What is at issue here is self-determination. Thus, many other conflicts in Africa have shown that much of the contention and the demands for equal recognition revolve around self-determination rights. Some of the most destructive conflicts Africa has witnessed in the post-independence period have thus been those involving demands for self-determination.⁶⁵ In many ways, an affirmation of the equality of these groups and recognition of their cultural and political traditions demand

⁶⁵ According to some studies, out of more than 40 internal armed conflicts that took place in Africa during 1946-2001, self-determination conflicts account for about 35 percent. See details from *Armed Conflict 1946-2001* at <http://www.pcr.uu.se/publications/ucdp_pub/conflict_list_1946-2005.pdf> ; for the same period refer also to 'The chronology of armed conflict: prehistory to present' attached as appendix 4 in Carolyn Pumphrey et al. (eds.) *Armed conflict in Africa* (Lanham, Maryland, and Oxford: The Scarecrow Press, Inc., 2003) 211-282.

that they exercise control over their affairs. This can be met only through self-determination rights such as the right to self-government.

Most groups that demand for self-determination rights are often territorially concentrated and some of them have or had their own independent political system. Many of the pre-colonial states and kingdoms of Africa and indigenous peoples fall in this category. Other groups have, in the process of their struggle for the recognition of their cultures and for equality, developed national consciousness. As a result, they evolved into national groups seeking some form of self-determination. According to Dominique Arel, 'Flanders, Quebec and Catalonia share this in common: in each case nationalism arose against the domination of the language of the "centre".'⁶⁶ Many of the national groups in Ethiopia such as the Oromos also manifest these characteristics. Central to the demand of various communities in the Niger Delta region of Nigeria such as the Ogoni for self-determination the struggle for socio-economic justice and control over natural resources. Historical factors and contemporary patterns of real or perceived discrimination also play major role in the development of group nationalism. For some like English speaking Cameroon, Eritrea, and the Isaq of Somalia the fact that they were under a different colonial administration from other parts of the state to which they have been incorporated has been one of the factors inspiring their demand for self-determination.⁶⁷ The struggle

⁶⁶Dominique Arel 'Political Stability in multinational democracies: Comparing language dynamics in Brussels, Montreal and Barcelona' in Alain-G. Gagnon and James Tully (eds.) *Multinational democracies* (2001) 77.

⁶⁷ English speaking Cameroon was part of the former British administered UN Trust Territory whereas the former Republic of Cameroon was the former French administered UN Trust Territory. They were united to form the Federal Republic of Cameroon on the basis of a UN sponsored referendum. The federal union of the two was however subsequently abrogated in 1972 giving rise to a secessionist sentiment in English speaking Cameroon. (See generally P Konings 'The Anglophone problem in Cameroon' *The Journal of Modern African Studies* (2000)). Similarly, Eritrea, a former colony of Italy which was administered as a UN Trust Territory by British, formed a federation with Ethiopia under a UN sponsored referendum in 1952. The anomalous relationship that resulted from the federation subsequently brought about the abrogation of the federal union by Emperor Hailesilassie I in 1962 leading to the beginning of the Eritrean liberation struggle See Alexis Heraclides *Self-determination of minorities in international politics* (Portland, Oregon: Frank Cass, 1991) 177-195 ; The northern secessionist territory of Somalia, which declared itself in 1991 to be the Republic of Somaliland, was a British colony and hence had separate history from the south which was under Italian colonial rule. See J Klabbers and R. Lefeber 'Africa: Lost Between self-determination and *uti possidetis*' in C Brölmann, R Lefeber & M Zieck (eds.) *Peoples and minorities in International law* (Dordrecht: Martinus Nijhoff Publishers, 1993) 65-70.

of southern Sudan for self-determination traces its root back to regional discrepancies in British colonial administration and beyond.⁶⁸

The focus on the rights to culture, although necessary, is not good enough to address issues underlying such ethnonational conflicts and other conflicts pertaining to organisation of political power and distribution of resources. To be effective for accommodating ethnic diversity and cater for the interest of groups in multiethnic societies, international law needs to go beyond the right to culture and formulate norms that not only celebrate and promote diversity (multicultural or multiethnic) but also address demands for political representation and socio-economic justice as well as those for self-determination rights.

For the purpose of addressing demands for self-determination rights, one way of making a progress in this direction is to bridge the seemingly inflexible divide that international law created between 'peoples' as holders of rights and minorities. Moreover, these issues must be approached as group specific issues and their resolution necessitate recognition of collective rights. This indicates that there is a need for minority norms to transcend the dominant framework of individual rights and incorporate the concept of collective rights. This is not by any means new to international law. At the international level, the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention on Indigenous and Tribal Peoples articulate indigenous peoples' rights as collective rights. At the regional level, the elaboration of the potentially important collective rights of 'peoples' under the African Charter on Human and Peoples Rights provides another is also a good example.⁶⁹

Given the trajectory of international law in making distinctions between peoples, minorities and indigenous peoples, it is doubtful if there is much space for further development in that direction. Regional systems seem to have the potential for taking the

⁶⁸ See Angela M. Lloyd 'The Southern Sudan: A compelling case for secession' 32 *Columbia Journal of Transnational Law* (1994) 439-451.

⁶⁹ For further details on the operation of these rights see Solomon A Dersso 'The jurisprudence of the African Commission on Human and Peoples Rights with respect to peoples rights' 6 *African Human Rights Journal* (2006) 358.

development further. There are indeed indications that in Europe and Africa this is already taking place. In Europe the OSCE and other European forums have been engaged in the development of norms that seek to address demands for minority representation and political power distribution. Examples include the Copenhagen Document of the Conference on the Human Dimension of the CSCE of 1990 and the normatively weaker Lund Recommendations on Effective Participation of National Minorities in Public life of 1999. In Africa as well, encouraging developments are emerging. One can mention here the advances made in the interpretation of the provisions on peoples rights. Although the jurisprudence of the African Commission is far from satisfactory, it nevertheless provides a lot of room for further development. This can also be gathered from the adoption of the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities.⁷⁰

IV A multicultural/multiethnic conception of minority rights

A multicultural conception of minority rights is one that takes ethnic diversity seriously and seeks to affirm and celebrate it. One may say this is exactly what contemporary norms on minorities seek to achieve. To that I say I have no disagreement. But I would add that the approach of a multicultural conception of minority rights is different. Contemporary norms on minorities seek to promote diversity by protecting the culture of minorities, of course very poorly at that. Being protectionist, these norms thus tend to be paternalistic. This is by no means to undermine the virtues and achievements of these norms. What I am arguing is that contemporary norms on minorities treat the cultures of minorities mainly as objects to be protected or to be preserved. They in effect approach it as the 'other'. They thus tend to essentialise the culture of minorities.

By contrast, a multicultural conception of minority rights treats the culture of minorities not merely as object of protection, but it considers it as an integral part of the identity of the society to which the minorities belong. It begins by acknowledging that the culture of

⁷⁰ See ACHPR and IWGIA *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005).

minorities, despite its non-recognition, contributed in the making of the body politic of the society. It also recognises the culture of minorities not only for protection, but also and most importantly, for building and enriching the social and political fabric of the society concerned. It does not see the culture of a minority as standing in isolation but interdependently with the culture of others. As James Tully captured it, '[n]ot only do cultures overlap geographically and come in a variety of types. Cultures are also densely interdependent in their formation and identity.'⁷¹ For a multicultural conception of minority rights even if it has a certain constant core, culture is not bounded and internally homogenous.⁷² Multiculturalism/multiethnicity is not a phenomenon that expresses the presence of multiple distinct and incommensurable others. Instead, it is, once again Tully has put it aptly,

a tangled labyrinth of intertwining cultural differences *and* similarities, not a panopticon of fixed, independent and incommensurable worldviews in which we are either prisoners or cosmopolitan spectators in the central tower.⁷³

The language of recognition, made popular by Charles Taylor,⁷⁴ here helps to further elaborate the nature of a multiethnic conception of minority rights. Recognition is not understood here as a one directional process. Nor is it a one time act. Recognition is rather dialogical. It involves the parties concerned in a process of conversation, debate and discussion for mutual understanding, consideration and settlement. It requires a continuous engagement, negotiation and adjustment. Hence, it is also a continuous process. Recognition is also understood as having two dimensions: a vertical and a horizontal.

Vertical recognition

This involves various institutional elements and processes through which the state protects and gives expression to cultural diversity. For this, the state must first create a

⁷¹ James Tully *Strange multiplicity: Constitutionalism in an age of diversity* (1995) 10-11.

⁷² As above, 11.

⁷³ As above, 11.

⁷⁴ See Charles Taylor 'The politics of recognition' in Amy Gutmann (ed.) *Multiculturalism – Examining the politics of recognition* (1994) 25-73.

channel for conversation and negotiation with the various groups seeking political recognition. On the basis of the understanding reached through the discussions and negotiations, the state must formulate institutional and normative systems capable of giving sufficient and effective recognition to all its constituent cultural groups. Vertical recognition thus relates to the processes by which a state gives protection to and institutional expression of ethnic diversity. It is vertical because it applies to the public realm that defines state-society relations. Seen in this light, vertical recognition is not completely new. Aspects of it are contained in contemporary norms on minorities. A good example of this is the 1992 UN Declaration on minority rights.⁷⁵

The nature of a state that adopts a multicultural conception of minority rights is such that its institutional and normative systems reflect and celebrate the diversity of cultures constituting it. At the level of institutions, the most important aspects are official language determination, the content of national education curricula, the determination of public holidays and national symbols, the recognition national heroes/heroines and the naming of public places. Although all of these aspects are important and in many ways interrelated, I would address here language as an example.

language

Where states are made of groups speaking various languages, the determination of official or national languages is often contentious. Under the nation-state model, there is only one language that is accorded official recognition. That is invariably the language of the dominant group in society. The language of other groups is neglected. Some conflicts that arise in such societies are based on the demand of groups for recognition of their language as an essential component of their culture. In Africa this has been the case, for example, in such countries as Ethiopia,⁷⁶ Malawi,⁷⁷ Botswana⁷⁸ and Algeria.⁷⁹

⁷⁵ See for example Arts. 1, 2 and 4. For early analysis of the various provisions of the declaration see 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 Philips and Allan Rosas (eds.) *Universal minority rights* (1995) 13.

⁷⁶ For the most part of its long history as an independent state, Ethiopia pursued a political process that recognized and gave public expression to the dominant language Amharic to the exclusion of other

This is an area for which contemporary international norms on minorities provide very little, if any, guidance. More advances have been made at the national level through the constitutional systems and practices of various countries. In his monumental study on the rights of minorities, based on examination of the various national systems of many countries Francesco Capotorti⁸⁰ identified four approaches in the constitutional practice of states with respect to the status of languages. The first approach is to give official or national status to all languages spoken in a country. Historically, a good example of a country with such approach is Switzerland. Partly it is the fact that the number of languages spoken in the country is few that have made this possible as there are only four language groups.⁸¹ By far a very advanced and relatively recent example is the South African Constitution of 1996.⁸² Here, there are eleven languages that are accorded official

languages. As language is the main ethnic marker that distinguishes the various groups in the country, it plays an essential part in the national movements that waged war against successive Ethiopian regimes. See Christopher Clapham 'Ethnicity and the national question in Ethiopia' in P Woodward and M Forsyth (eds.) *Conflict and peace in the Horn of Africa: Federalism and its alternatives* (Aldershot: Dartmouth Publishing Co. Ltd, 1994) 27-40.

⁷⁷ Although Malawi consisted of more than a dozen ethnic groups, its post-independence nation-building process under the one party rule of President Hastings Banda has been directed to 'the promotion of one ethnicity – the Chewa – as the national mainstream, and one region – the centre – as Malawi's heartland.' See generally Deborah Kaspin 'Tribes, regions and Nationalism in democratic Malawi' in Ian Shapiro and Will Kymlicka (eds.) *Ethnicity and group rights* (New York and London: New York University Press, 1997) 464-503. As part of this process, Chechewa, the Chewa language, was made the only national language of the country. See See Pascal Kishindo 'The impact of a national language on minority languages: The case of Malawi' 12(2) *Journal of Contemporary African Studies* (1994) 138.

⁷⁸ Like most African countries, Botswana is composed of various ethnic groups speaking different languages. Its constitution nevertheless gives official recognition only to English and the Tswana language, the language of the dominant ethnic group. Since recent times, other groups have begun to articulate their grievances and demand for equal recognition. See generally Jacqueline S Solway 'Reaching the limits of universal citizenship: "Minority" struggles in Botswana' in Bruce Berman et al. (eds.) *Ethnicity and democracy in Africa* (2004) 129-147.

⁷⁹ One of the characteristic features of the post independent politics of Algeria has been the tension between the policy of Arabization pursued by Algeria and the struggle of the Berbers for equal recognition as distinct groups. An important aspect of the demand of Berbers for recognition has been their language as Arabic was the only language with official recognition to the exclusion of their language. This finally led to the amendment of the Constitution of Algeria to recognize Tamazigt, the language of Berbers.

⁸⁰ For a succinct review of this See Francesco Capotorti *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (United Nations Publication, Sales No. E.78.XIV.1) 75-89.

⁸¹ As above, 76.

⁸² The Constitution of the Republic of South Africa Act 108 of 1996.

status under the Constitution.⁸³ The relevant parts of Section 6 of the Constitution provides

1. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isisNdebele, isiXhosa and isiZulu

...

3 (a) The national government and the provincial governments may use any particular official languages for the purpose of government, taking into account usage, practicality, expense, regional circumstances, the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents

On the basis of these principles, the National Language Policy Framework proposes the use of all official languages in ‘all legislative activities’ as a matter of rights, though in provincial legislatures the incidence of use of the languages in the region can be taken into account. For administrative purposes, it requires that government documents must be in all eleven languages ‘when the effective and stable operation of government at any level requires comprehensive communication of information’, or in all of the official languages of the province. Where the use of all the official languages cannot be made available, they should be published in six languages.⁸⁴

The other approach, only some languages are given official status. In Canada and Belgium, their respective constitutions give recognition to the languages that are spoken by the major national groups of the two countries. The problem with this approach is that it leaves out other languages. Thus in Canada indigenous languages are not given official status. In some cases, the multiplicity of languages may dictate that only major languages are given official status at the national level. This should not however lead to the total non-recognition of other languages. Where the languages of smaller groups are spoken widely in a particular region, they can be accorded official status territorially. Thus while

⁸³ See for more Kristin Henrard ‘Language rights and minorities in South Africa’ 3 *Int’l J. on Multicultural Societies* (2001) 78-98.

⁸⁴ For further details see Iain Currie ‘Official languages and language rights’ in Stuart Woolman et al (eds.) *Constitutional Law of South Africa* (2006, 2nd ed. V. 3) Chapter 65.

the most widely spoken languages can be given official status at the national level, other languages can be given similar status in areas where they are predominantly spoken.

The third approach is the one where official status was given to minority languages at the regional level but not nationally. Capotorti cited as an example of a country that adopted this approach Austria. One can add Spain in this category.⁸⁵ In Africa, a recent good example of this can be the 1995 Federal Constitution of Ethiopia.⁸⁶ Although Article 5(1) of the Constitution proclaims that all Ethiopian languages shall enjoy equal state recognition, it is the dominant Amharic language that is given the status of a ‘working language’ at the federal level.⁸⁷ For other languages, Article 5(3) provides that regional governments ‘may by law determine their respective working languages.’ This is further supplemented by the provision under Article 39(2) that

Every nation, nationality, and people in Ethiopia has the right to speak, to write and develop its own language...

Against this background, national policies have been formulated.⁸⁸ The Federal Cultural Policy encumbers the federal government with the responsibility to provide assistance for developing ‘alphabets to those languages that do not have scripts and to provide professional assistance in deciding the language of instruction, mass communication and for official use at the federal, regional, Zonal and when necessary at district levels.’ Similarly, the Education and Training Policy stipulates the rights of nations/nationalities to learn in their language, while at the same time providing one language for national and another for international communication. This is mainly for primary level education. For the implementation of this right, the policy provides that ‘the language of primary teacher training for kindergarten and primary education will be the nationality language used in the area.

⁸⁵ See Pierre Coulombe ‘Federalist language policies: the case of Canada and Spain’ in Alain-G. Gagnon and James Tully (eds.) *Multinational democracies* (2001) 242.

⁸⁶ The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995.

⁸⁷ See Art. 5(2).

⁸⁸ For details Mohammed Habib ‘Federalism and its implications for the language question in Ethiopia’ paper presented at the *First National Conference on Federalism, Conflict and Peace Building* (2004) 243-251.

The fourth approach that Capotorti identified involves countries in which no official status was given to minority languages but their use is guaranteed by the constitution, by law or by treaties in a wide range of activities.⁸⁹ This approach has the same problems as the second one. Given the symbolic as well as practical importance that official status has, this would not be a preferred approach for implementing a multicultural conception of minority rights.

From the perspective of a multicultural conception of minority rights, the decision for recognition of the official status of languages is not a matter that should be premised merely on political expediency. Since recognition is dialogical in the sense explained earlier, this process needs to involve discussion and negotiation in a way that is all inclusive but with specific focus on non-dominant groups. Where there are only few languages spoken in a country, the first approach involving official recognition of all languages is logical as its application can be administratively manageable and financially sustainable. This does not however apply in many circumstances. Accordingly, in cases where there are many languages spoken in a country, a revised version of the second approach fits best. Such countries, as are most in Africa, can best accommodate their diversity by giving official recognition at the national level for those languages spoken by a significant percentage of the population and by affording similar status provincially or locally for other languages that are predominantly spoken in specific regions or localities.

Thus, unlike the historically dominant framework of the nation-state that excludes or seeks to melt ethnic groups into a new cultural whole, the framework of the multicultural approach recognizes the fact and value of ethnic diversity and uses the affirmation of that diversity to bind the people of a country into a political unity. Tully eloquently explains this

Citizens have a sense of belonging to, and identification with, a constitutional association in so far as, first, they have a say in the formation and governing of the association and, second, they see their own cultural ways publicly acknowledged and affirmed in the basic institutions of their society.⁹⁰

⁸⁹ Capotorti (note 80) 76.

⁹⁰ Tully (n 71) 197-198.

Since all groups are recognized and treated as valuable parts of the whole, they all see that they are at home which they share justly with others. The reason is simple. The extent to which members of minorities feel accepted, through accommodation of their specific needs and institutional expression of their identities, affects positively their ability to see the society as a common project.⁹¹

Horizontal recognition

Although vertical recognition is vital, where different groups in society do not accept each other the institutional recognition of ethnic diversity would not have the social basis for sustaining it. All members of society must treat persons belonging to groups different from theirs with due respect and consideration. Not only that groups must be willing to accept each other and live together. They must also mutually cooperate and collaborate on most spheres of social and public life. Individuals belonging to various groups must find a way of accommodating each others differences and working together. Civil society organizations and other social actors can help in creating the social, economic and cultural incentives for the pursuit of common objectives. The essence of horizontal recognition is therefore the presence of mutual engagement, interaction and dialogue within the social sphere between different groups and their individual members. It is called horizontal because it applies to the social sphere.

Mutual recognition is not limited to tolerance. It requires not merely that members of various cultures tolerate the culture of others and respect their identities. It further requires that they are able to engage with the cultures of others with due respect and sensitivity. Cultural dialogue between various sections of society is therefore an important component of horizontal recognition. Where people develop mutual trust and confidence, the engagement between them can even become critical but constructively. This is important to avoid prejudices between various groups. ‘The more familiar people become with expressions of diversity,’ observes Makkonen, ‘the less room there would

⁹¹ Timo Makkonen ‘Is multiculturalism bad for the fight against discrimination’ in Martin Scheinin and Reetta Toivanen (eds.) *Rethinking non-discrimination and minority rights* (2004) 173.

be for prejudices and negative stereotypes.’ He goes on to say that ‘[d]iversity would appear more as a matter of everyday experience, and not some distant, peculiar phenomenon.’⁹² As experience shows, as people are exposed to and learn about the cultures of others, they come to develop sensitivity, care and understanding.

It must be underscored that horizontal recognition is very much intertwined with vertical recognition. Vertical recognition creates the necessary condition for horizontal recognition. Since it enjoys a lot of prestige and considerable power, vertical recognition ‘sets the tone of the rest of society’.⁹³ Moreover, where vertical recognition exists, the various public institutions including those involved in decision-making serve as forum of horizontal recognition and dialogue among various sections of society. Important among these are the media and the education system. In a multiethnic society, the media has to create an environment in which a variety of ideas and information are produced and communicated in various languages. It can also be used in the promotion of the cultures of various groups in society which enables members of society to be familiar with the rich diversity of cultures in their country.⁹⁴ Similarly the education system needs to provide a framework by which not only that minorities are able to get education in their own languages particularly at the primary level but also that all groups receive education about their own culture as well as the culture of other groups in society.⁹⁵

From the perspective of a multiethnic conception of society, public decision-making bodies particularly parliaments and courts can also serve as forum of horizontal recognition. Parliaments should not be seen merely as entities serving majoritarian interests. In multiethnic societies, they should mainly serve as representative bodies in which all significant social groups have a say. As such, parliaments can also become important avenue for inter-cultural dialogue and hence for horizontal recognition. Similarly, in such societies courts can serve in harmonizing individuals from different

⁹² As above, 173.

⁹³ Bhikhu Parekh *Rethinking multiculturalism – Cultural diversity and political theory* (2000) 223.

⁹⁴ See the OSCE Guidelines on the use of Minority Languages in the Broadcast Media of 2003.

⁹⁵ Article 4(4) of the 1992 UN Declaration on Minorities. See Asbjorn Eide *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities* UN Doc. E/CN.4/Sub.2/1993/34/Add.4, 11 August 1993 paras. 8-12.

social backgrounds if they are seen less as adversarial and more as forum of dialogue. In a multiethnic society judges, in the course of adjudication, need to see their roles not merely as determining winners and losers but also as offering for the parties, particularly in those cases involving cultural issues and representation, an opportunity to express their concern and present their positions regarding their understanding of how the law should be interpreted. When they hand down their judgments, courts should reason with both sides in even-handed ways and offer them a solution that is accommodative of their concerns which serves the basis for continuous dialogue, negotiation and mutual understanding between the parties and their respective groups.⁹⁶ This way it is also possible to avoid the simplistic popular conceptions by which cultures are narrated as being irreconcilable between themselves and being in conflict with individual interests.

It can be gathered from the foregoing that horizontal recognition is important not merely for harmonious multicultural coexistence but and most importantly it also serves as a vehicle, together with vertical recognition, for building and nurturing a common culture that ties members of society together. As Bhikhu has put it '[w]hen both private and public realms create propitious conditions for equal intercultural interaction with such judicious government help and intervention as might be appropriate in different societies, a multiculturally constituted common culture is likely to develop.'⁹⁷ This is what gives the state its civil religion by virtue of which the state commands the allegiance and loyalty of its citizens. The identity that the state comes to have is not some abstract formation and limited to its institutions. It is rather 'embedded in and nurtured by its diversity'.⁹⁸

V Conclusion

One of the challenges of the 21st century for multiethnic societies is how to achieve a peaceful and democratic accommodation of ethnic diversity. Historically, it is through norms on minorities that international law has attempted to respond to the demands of

⁹⁶ See Tully (n 71)165-176. The point is particularly captured in the illustration that Tully offered based on Shakespeare's drama of *Antigon* at 174.

⁹⁷ Bhikhu (note 93) 224.

⁹⁸ As above.

such diversity. In the foregoing, this paper critically reappraised the nature of this response of international law. It was pointed out that in their latest formulation the maximum that these norms seek to guarantee is the protection of the cultures of minorities. The paper identified and showed that there are three areas of minority issues to which these norms fail to provide sufficient guidance. An attempt has been made to show how these critical demands of diversity can be addressed. To this end, the paper articulated what it calls a multiethnic/multicultural conception of minority rights. The difference between the existing international norms on minorities and this conception of minority rights is not merely in their reach in providing solutions to those important issues of diversity. There is also a paradigmatic difference. Existing international norms on minorities operate within the confinement of the dominant frameworks of the nation-state and individual rights. The conception of minority rights advanced in this paper represents an attempt to transcend these dominant frameworks and articulate a multiethnic state system in the place of the nation-state model and group oriented minority rights including self-determination rights that complement individual rights. Some developments identified at the national and regional levels strongly suggest a realization of the need for adopting such an approach. If there is room in international law to further rethink and develop norms on minorities, there is a need to approach it by transcending the dominant systems of the nation-state and individual rights.