



7-1-1996

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### Recommended Citation

Maarji-Uddin, Qazi Mohammed (1996) "Minority Rights in International Law: Problems and Perspectives," *National Law School Journal*: Vol. 8: Iss. 1, Article 8.

Available at: <https://repository.nls.ac.in/nlsj/vol8/iss1/8>

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## MINORITY RIGHTS IN INTERNATIONAL LAW: PROBLEMS AND PERSPECTIVES

*Qazi Mohammed Maarij-Uddin\**

*There is no the slightest doubt that the vicious use of propaganda preying upon racial and national hatreds of people of the world this universe could shortly be transformed into a seething cauldron of infuriated nations.*

Ralph Bunche<sup>1</sup>

The resurgence of the question of minority rights in the recent times is probably an indication of the 'unsettled past', and lack of positive attention given to minority rights against a broader canvas of human rights.

The 1992 declaration adopted by the resolution 47/135 1992 of the General Assembly of the UN on the status of national, ethnic, linguistic and cultural minorities and certain other developments concerning the minority rights under the aegis of the OSCE<sup>2</sup> and Council of Europe have put beyond doubt the urgency of the situation, and the consequent need for redressal.

The hidden potential for conflict which the minority rights problem can carry is of exponential proportions as axiomatic from the developments in Central Eastern Europe. What the international community has witnessed in Yugoslavia is probably a mirror image of what can happen elsewhere, particularly in the former Soviet Union. Thus an extremely delicate handling of the situation which is being faced and which can develop is required.

Further the non-uniformity in the definition as to who is a 'minority' creates complications. In the age of standard setting of human rights, minorities have been variously classified depending upon their circumstances and position. Indigenous people, migrant workers, refugees and numerically inferior populations trapped inside the territorial frontiers of the state have been

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1. Brian Urquhart, *Ralp Bunche: An American Life*. (1993).
2. The acronym stands for Organisation on Security and Cooperation in Europe, which is a trans regional 'political process', consisting of 53 participating member states, is fast on the verge of institutionalization. As of 3 January, 1995, the Conference on Security and Cooperation in Europe (CSCE) has a new name i.e., Organisation on Security and Cooperation in Europe (OSCE). See Press Release No. 2/95 of the OSCE Secretariat, Department for Chairman-in-office Support, Vienna.

classified as minorities, based on their ethnic, linguistic, cultural and religious traits.

Asbjorn Eider, provides a working definition<sup>3</sup> of what actually constitutes a minority, which states:

*a minority is any group of persons resident within a sovereign state which constitutes less than half the population of national society and whose members share common characteristics of ethnic, religious or linguistic nature that distinguish them from the rest of the population.*

Eider discerns between a minority per se and a minority collated with a 'minority situation'. He says that a minority can exist with or without a 'minority situation'. A group numerically smaller than half the population can be perfectly comfortable in a society and experience no problem at all; in such cases it would be meaningless to refer to a 'minority situation'.<sup>4</sup>

A 'minority situation' according to Eider arises when there is a widespread sense of frustration among the members of minority groups, and that frustration is related to their belonging to that group. The cause or causes of frustration could be discrimination experienced in myriad forms.<sup>5</sup>

This essay seeks to examine and analyse the historical progression of minority rights, the reason for the 'minority rights' being excluded from the UN Charter, and subsequent resurgence in various international human rights instruments.

In the second part, an attempt is made to analyse the difficulty posed in explaining the right to self-determination in the context of minority rights.

Finally this essay examines the position of minority rights in the international human rights law, and addresses some of the grand initiatives at the regional level.

#### **HISTORICAL PROGRESSION OF MINORITY RIGHTS: AN OVERVIEW**

The emergence of minority rights has a fundamental basis on the development that took place in the latter half of the eighteenth and the nineteenth century. The American Declaration of Independence and the French Declara-

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3. See, *The Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Fortyfifth session, E/CN.Sub. 2/1993/34, para 29, p. 7.

4. *Ibid.*, para 31, p. 8. The scope and research of this essay is strictly confined to the parameters of the working definition given by Eider. Thus problems relating to refugees, migrant workers etc. are beyond the scope of this essay.

5. *Ibid.*, para 45, p.10.

tion of Rights of Man, proclaimed the values of liberty and fundamental freedoms. It is at this point of time really that there is a gradual shift in the perception of the individuals as to their rights.

During the nineteenth century this perception of 'individuality' was transformed into 'collectivity'. As Tom Hadden has put it:

During the nineteenth century, there appears to have been a general shift towards the recognition of peoples and classes as primary and social entities to which individuals belonged, whether they liked it or not. The new science of sociology focussed attention on such concepts as *Volksgeist*, group psychology and class interests. This was reflected primarily in the ideals of the nation-state and class politics. But it also led to an increased interest in identification and accommodation of minorities.<sup>6</sup>

The first minority treaties concerning the protection of minorities were negotiated in the Balkans towards the end of the nineteenth century.<sup>7</sup> The further basis for the minority rights assuming significance was due to the dissolution of the three multinational empires, the Ottoman, the Austro-Hungarian and the Russian empire, which resulted in the proliferation of number of nation-states. The political maps which were drawn far from satisfactory and invariably there were populations which came under the alien domination due to this arrangement. To take a few examples, Italy and Romania obtained large territories which were ethnically different from the ethnonation.<sup>8</sup> In the case of Romania one-third of the population was non-Romanian, whereas in case of Italy the proportion was lower albeit substantial.<sup>9</sup>

Even in other states which were created as a result of this dissolution of empires the ethnic maps were chequered. Czechoslovakia was composed of seven ethnic groups: Czechs, Slovaks, Germans, Hungarians and Ukrainians,

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6. Hugh Miall (Ed.), *Minority Rights in Europe: The Scope for Transitional Regime*, 22 (1994). See Chapter 4 by Tom Hadden.

7. *Ibid.*, p. 23.

8. It is important to note the distinction between a nation and ethnonation. Eider in his report points out that nation is understood as the aggregate permanent population of sovereign state. Thus a nation includes various ethnic groups. It is a technical and legal concept, linked to the notion of citizenship in its legal sense. Article 15, of the Universal Declaration of Human Rights, stating that everyone has a right to nationality, means everyone has the right to hold the citizenship of the state, which makes him or her a part of the nation. Whereas a ethnonation is based on ethnicity rather than citizenship, and is more or less an indeterminate group, sometimes straddling the territories of two or more states, of persons who consider themselves to share common traditions and characteristics. See, Eider, *op. cit.*, in note 3, p. 8. (para 35).

9. Danilo Turk, "On the Rights of All Peoples to Self-Determination", presented at the 21 Century Trust Fellowship Conference on the theme: *What is a nation? The Limits of Self-Determination*, Alsace, France, 30 August 1994, p. 4.

Poles and Jews. The kingdom of Serbs, Croats and Slovenes or the former Yugoslavia had nine ethnic groups: Serbs, Croats, Slovans, Bosnian Muslims, Hungarians, Germans, Albanians, Romanians and (unrecognized) Macedonians.<sup>10</sup>

What is clear from the aforementioned compositions of few states, is that the ad hoc nature of settlements reached, could be sustained due to the political climate then prevailing and subsequently due to the cold war. Thus realistically speaking there was no pragmatic settlement keeping in mind the diversity of various ethnic groups. It is in this context the observations of James Mayal becomes relevant. He says:

*Woodrow Wilson had originally conceived Article 10 of the League Covenant in a way which would qualify the permanent freehold of the European successor states. He envisaged circumstances arising, either as the result of demographic change or as a consequence of major shift in public opinion, which would justify a change in territorial boundaries. The idea was so radical that it was opposed by his own delegation and would have certainly been resisted by the other major powers at the peace conference.*<sup>11</sup>

#### **DE-INTERNATIONALIZATION OF MINORITY RIGHTS**

The most intriguing question perhaps regarding the status of minority rights was its de-internationalization which was manifest from its conspicuous absence from the UN Charter, and the Universal Declaration of Human Rights.

Some of the principal reasons that can be identified are thus:

- (i) Failure of the League Nations in addressing the sense of minority rights despite adequate concerns;
- (ii) Minority rights fell into disrepute after Hitler invoked it as a justification for his expansion into Central and Eastern Europe;<sup>12</sup>
- (iii) Post World War II revivalism of individualist philosophy which was universal in character. The dominant trend was to encourage the assimilation of minorities on the theory that if the rights of everyone are protected without distinction "as to race, sex, lan-

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10. *Id.*

11. James Mayall, *Sovereignty and Self-Determination in Europe*, *op. cit.*, in note 6, chapter 2, p. 9. Article 10 of the League Covenant as finally adopted read: All members of the League undertake to respect and preserve as against external aggression the *territorial integrity and existing* political independence of all members of the league. In case of any such aggression or in case of any threat of such aggression, the Council shall advise upon the means by this obligation shall be fulfilled.

12. *Ibid.*

guage or religion" or on other grounds, nothing else needs to be done.<sup>13</sup>

It is interesting to note that despite the aforementioned reasons, there were initiatives taken to revive the 'Minority right' protection regime under the aegis of UN. Under Article 68 of the UN Charter, the Economic and social council authorised the Commission on Human Rights to create three sub-commissions: one dealing with freedom of press and information (result of the US initiative), one on the prevention of discrimination, and a third on the protection of minorities (result of the Soviet initiative).<sup>14</sup>

Unfortunately the Commission did not follow the Council's directives closely and instead of creating three sub-commissions, it created two, collating the sub-commissions on prevention of discrimination and protection of the minorities.<sup>15</sup>

Humphrey observes that this combination made it easier for the United Nations to dodge the responsibility for the protection of minorities, something to which the League of Nations had attached great importance.<sup>16</sup> As to the functioning and effectiveness of the Sub-Commission, he says that it has done some excellent work towards the prevention of discrimination, but through no fault of its own has made little contribution to the protection of minorities.<sup>17</sup>

But despite all these developments, the issue of minority rights could not be easily washed off. The drafting committee of the Human Rights Commission by virtue of Article 36 of the text prepared dealt with racial, linguistic and religious minorities. But it did not place any obligation on the government for financial assistance.

Article 46 of the Secretariat which the drafting committee followed almost textually upto that point stipulated that the members of minorities would

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13. John P. Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", 62 *A. J.I.L.* 869 (1968). Professor Humphrey says that 'probably there were deeper reasons'. One was the shift in political power and influence away from Europe and the dominant voice at San Francisco and after, of countries of immigration. Further he says that during the era of decolonisation, countries of Africa and Asia were pre-occupied with nation-building thus notwithstanding that it is precisely in these countries that minority problems were the greatest.

14. *Ibid.*, p. 870.

15. *Id.*

16. *Id.*

17. *Ibid.*, p. 871. Prof. Humphrey made these remarks in 1968. The situation today has changed due to the dissolution of the two federations of Yugoslavia and former Soviet Union and the consequent ethnic strife. In the contemporary times the Commission has been far more active for obvious reasons. Thus the above remark is important only for understanding the position as it existed then.

have the right to establish and maintain schools and other institutions "out of an equitable proportion of any positive financial assistance from the government by the Drafting Committee", according to Humphrey is a further proof of early bias of the United Nations against any scheme to protect minorities.<sup>19</sup>

In 1948 the General Assembly refused to include any article on minorities in the UN Declaration on Human rights, 1948. Even after this efforts continued to address the question of minority rights and finally crystallized as Article 27 of the International Covenant on civil and political rights.

### **SELF-DETERMINATION IN CONTEXT: THE CHALLENGE OF MINORITY RIGHTS**

The right of 'all peoples' to self-determination as enshrined<sup>20</sup> in Article 1.2 and Article 55 of the UN Charter has emerged as a fundamental norm of international law, but with abundant disclaimers to prevent the misuse of it.

The correlation of minority rights with the right to self-determination has given rise to several complexities. The first question we need to answer is: who constitutes a group of minority?

The permanent Court of International Justice in its advisory opinion of

18. *Ibid.*, p. 873.

19. *Id.* Even under Article 27 of the ICCPR no positive action was contemplated. The General resolution 47/135 of 18 December 1992 regarding national or ethnic, religious and linguistic minorities under Article 1.2 says: States shall adopt appropriate legislative and other measures to achieve those ends.

20. Article 1 of the International Covenant on Civil and Political Rights and Economic, Social and Cultural Rights reiterates the said right. Apart from that various regional instruments also proclaim the said right. Principle VIII of the Helsinki final Act proclaims the said right but with a speciality. It refers to the determination of 'internal' and 'external' political status by 'all peoples'. It is submitted that this is closest to the Wilsonian conception of self-determination. For details on Wilsonian conception, see, Pomerance, 70, *AJ.I.L.* 16 (1976). Another very interesting feature in the Helsinki Final Act, 1975, Principle VII which has been reaffirmed in the Concluding Document of the OSCE Vienna Meeting on the Follow-up to the conference (1989), paragraph 4 is that: all peoples always have the right, in full freedom to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. Prima facie the aforesaid affirmation has two-fold implications:

- (a) right of all peoples to self-determination is not an exhaustive right. Thus it suggests that even if people have exercised this right in the past, they still retain the right to determine their political, economic, social and cultural status depending upon their circumstances.
- (b) unless the term 'all peoples' is interpreted in a restrictive sense, this right could also extend to the minorities. But for obvious reasons of destabilization of the states, such an interpretation is not tenable in the context of international relations today.

31 July 1930 on *Greco Bulgarian Communities Case*<sup>21</sup> stated that existence of minorities is a question of fact, it was not a question of law. From the point of view of International law, whether a state recognizes minorities in its internal law or not is not decisive.<sup>22</sup>

The term 'minority' is considered to exclude those groups that can be defined as 'peoples'. Elaine Eddison<sup>23</sup> quotes Symonides who differentiates between them in the following way:

..... the term minorities should be distinguished from that of 'peoples', who not only desire preservation and further development of their specific characteristics but, beyond that, also want to attain sovereignty and full independence. Among 'peoples' in Europe we can enumerate parts of federal states in Soviet Union, Yugoslavia, the Czech and Slovak Federal republic as well as parts of Spain (Catalonia and Basque country). From this point of view 'minorities' are characterized by the fact that there usually exists a country of origin (with exception of indigenous populations), whereas 'people' may be qualified as 'nation without states'. Thus for example, in Yugoslavia, Albanians can be qualified as a minority, whereas Croats and Slovemans are peoples.

Keeping in mind the above analysis, it is difficult to address the problem of Northern Ireland which is considered to be a classical case of a 'double minority' problem. Moreover, the above differentiation is more a result of 'pragmatic thinking' which is the need of the hour after the recent developments in Central Eastern Europe and the potentiality existing in adjacent parts of former Soviet Union i.e., to take away the right to self-determination beyond the context of minority rights. In order to sustain the above interpretation in wider time frame, it is imperative that the rights of minorities be given priority and measures be taken to help the minority community to preserve and promote their ethnic, linguistic, religious and cultural rights.

If such measures are not taken the frustration of minority communities in various parts of the world may proliferate beyond containment. It is interesting to observe that some of the newly created States, recognise the need for such measures. It is refreshing to look at the Constitution of the Republic of Macedonia<sup>24</sup> in this regard which not only guarantees the right to the members

21. P.C.I.J., Ser. B., No. 17, 22, cited in Eider, op. cit., in note 3, p. 25 (para 113).

22. *Id.*

23. Elaine Eddison, *The Protection of Minorities at the Conference on Security and Cooperation in Europe*, papers in the theory and practice of human rights, Number 5, University of Essex, 1993 p. 8.

24. The Constitution came into force on September 17, 1991. For a more detailed discussion on the Constitutional developments in Central Europe in the context of obligations under international law see: Eric Stein, "International Law in Internal Law: toward Internationalization of Central Eastern European Constitutions?", 88 *A.J.I.L.* 427 (1994).



of other nationalities to 'foster and develop their identity and national attributes' (Article 48) by various measures but also establishes a inter-ethnic council under the National Assembly. The Council consists of members of the various nationalities who are collectively vested with the responsibility for making appraisals and proposals for the solution of the problems of different nationalities. The National Assembly is obliged to take into consideration the appraisals and proposals of the Council and to make decisions regarding them (Article 78).

As per the Critescu report<sup>25</sup> the right to self-determination depends upon the following criteria:

- (a) distinctive language, culture and religion;
- (b) a shared sense of history;
- (c) commitment to maintain their communal identity;
- (d) an association with defined territory.

On an analysis of the four criteria for the exercise of the right to self-determination, it is clear that almost all the minorities satisfy the first three yardsticks i.e., they have distinctive ethnic features, a shared common past and a will to maintain their identity. The fourth yardstick or qualification as to association with a defined territory creates some problems. If we take the argument that minorities have a 'country of origin', as explained earlier, their association with defined territory leads us to their country of origin rather than currently occupied territory. Thus no valid claim for self-determination can be sustained.

However, if the association with a defined territory is interpreted outside the context of country of origin as was done by the Critescu report, the claim of minority group for the right to self-determination can be sustained. But again such an analysis may not be of much consequence, in terms of addressing the problem pragmatically.

Since none of the territories occupied would be 'ethnically pure', in the sense that if the minority is granted the right to self-determination, it would create another problem, i.e., the earlier minority would become a majority and so on. Thus it would be like opening a Pandora's box.

Thus any territorial settlement of the minority population by granting them separate statehood is a dangerous proposition. The results can spell nem-

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25. *Report of the Special Rapporteur on the Historical and Current Development of the right to Self-Determination*, UN Doc E/CN.4/Sub.2/404.Rev.1, 1981, cited in Hadden *op. cit.*, in note 6, p. 30.

esis for the human race. Right to self-determination in principle implies the right of 'all peoples' i.e., both majority and minority and not either of them.

Eider in his report<sup>26</sup> discusses various situations to answer the apparent impasse created in resolving the minority populations quest for independence and statehood viz.,

- i. In para 84 of the report he refers to a situation where representatives of the group concerned can prove beyond reasonable doubt, that there is no prospect for a near future that the government will become representative of the whole people,<sup>27</sup> minorities will be entitled to demand and receive support for independence. But he conceded that even if sufficient evidence is given to substantiate the claim, at present there is no machinery at the international level to which aggrieved party can turn for finding.
- ii. Where part of the settled population is denied citizenship so as to exclude them from participating in the political process, thus the government is not representative of the whole people. In this situation he says that the primary effort should be to ensure that they obtain citizenship.<sup>28</sup>

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26. Eider, *op. cit.*, in note 3, p. 19.

27. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States 1970, stipulates that the government should be representative of whole people belonging to the territory without distinction as to race, creed or colour. This disclaimer was reiterated in the Vienna Declaration emanating from the 1993 UN World Conference on Human rights albeit with a distinction. The Vienna Declaration exempted only a government representing the whole of people belonging to the territory without distinction of *any kind* (emphasis added). See *infra*. note p. 306.

28. One of the most intriguing questions regarding the development of minority rights protection regime is: what is really the status required for availing such a protection apart from being numerically inferior? Of particular importance are some of the European initiatives which mandatorily require 'citizenship' or 'nationality' as a basis for availing such a protection./ Some of the instruments worthy of consideration are:

- (a) The European Charter for Regional or Minority Languages, which requires traditional usage by 'nationals' as a basis of recognition of the language.
- (b) Proposal for a European Convention for the protection of minorities, prepared by the European Commission for Democracy Through Law, Strasbourg, 4 March 1991, CDL (19) 7. The proposal under draft Article 2.1 stipulates that the term minority shall mean a group which is smaller in number than rest of the population of a state and whose members are nationals of that state.
- (c) Proposed text of the Additional Protocol to the Convention for the Protection of Human Rights and fundamental Freedoms concerning persons belonging to national minorities, attached to Recommendation 1201 (1993), of the Parliamentary Assembly of the Council of Europe. Article 1(a) of the aforesaid protocol, says that the expression "national minority" refers to a group of persons in a state who reside on the territory of that state and are citizens thereof.

- iii. The question of territorial sub-division or in the words granting the groups in question the right of local self-government, or granting some form of autonomy<sup>29</sup> is considered to be a viable and a practical via-media but with a qualification that such an organisation should be based on democratic and not ethnocratic, content.<sup>30</sup>

Professor Kirgis has identified the various faces of self-determination as exhibited in the United Nations era,<sup>31</sup> he lists the right of minority groups within a larger political entity, as recognised in Article 27 of the Covenant on Civil and Political Rights and in the General assembly's 1992 Declaration on the rights of persons belonging to national or ethnic, religious and linguistic

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*Cited in, Patrick Thornberry, International and European Standards on Minority Rights, op. cit., in note 6, Chapter 3, p. 19. The Concluding Document of the Vienna Meeting on the follow-up to the Conference (1989) of the OSCE under paragraph 13.7 says that: Member states will ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, sex, language, religion, political or other opinion, national or social origin, property birth or other status.*

In my analysis there is probably a conflict between the aforesaid instruments of the Council of Europe, which stipulate a condition as to 'citizenship' or 'nationality' for the enjoyment of minority rights and the commitment under paragraph 13.7. All 31 members of the Council of Europe are members of the OSCE, which consists of 52 states. Though paragraph 13.7 is in the context of universal human rights and not minority rights, must necessarily cover individuals belonging to the minority groups. Any discrimination based on birth or other status apart from many other grounds as engendered under paragraph 13.7, necessarily include non-discrimination on the grounds of 'citizenship' or 'nationality'. Thus any stipulation requiring 'citizenship' or 'nationality' is ultra vires the commitment under paragraph 13.7.

29. One example of the successful regional autonomy for a minority group would be the Aaland Islands of Finland which are largely populated by Swedish minorities of Finland. The official sources have classified them as 'autonomous, demilitarized and unilingually Swedish province of Finland'. After the Finnish declaration of independence in 1917, the population of Aaland sought unification with Sweden, which was promptly refused. On the recommendation of the council of league, there was an agreement between Sweden and Finland in 1921 to provide special guarantees for preservation of Swedish language and culture. The recently concluded 'Autonomy Act', provides the regional parliament of Aaland to frame laws in virtually all areas affecting life except foreign policy and defence. Cited in Eddison, *op. cit.*, in no. 23, p. 20. It is submitted that the example of Aaland Islands which is probably the most successful model cannot be generalised. but one thing which is clear is that every 'minority situation' demands a more 'local response' which can be forthcoming only from the needs of the particular minority group involved. Thus any attempt to import any solution from outside the specific context will lead to only more complications.
30. Shelby Steele offers an interesting critique against this approach though in a different context. He calls this autonomy as the New Sovereignty. He says that what actually starts as an attempt to address the real grievances ends up creating new sovereign feidoms. His thesis strongly advocates that 'only inclusion answers history's exclusion'. See. Shelby Steele, Harper's Magazine Foundation, July 1992, pp. 48-49.
31. Fredric L. Kirgis, "The Degrees of Self-Determination in the United Nations Era", 88 A.J.I.L. 304 (1994).

minorities. He points out that since Article 27 does not talk about self-determination the rights guaranteed thereunder are distinct from right guaranteed under Article 1 of the aforementioned covenant.

He quotes Thomas Frank who denies the existence of any general right to secede, but notes that a minority within a state may have the right to secede roughly analogous to decolonization right if it is persistently and egregiously denied political and social equality and as well as the opportunity to retain its cultural identity.<sup>32</sup>

### ***RESPONSE OF INTERNATIONAL LAW TOWARDS MINORITY RIGHTS***

As already stated the first mention of minority rights in an international instrument after the coming into existence of the United Nations appeared in the Covenant on civil and Political Rights under Article 27.

The subsequent developments in form of both international and regional instruments are fairly recent. These developments were more a response to contain the sudden developments after the end of cold war; the dismantling of Communism and the collapse of federations of Soviet Union and Yugoslavia and the consequent ethnic strife.

In this part of the essay the developments would be discussed under two sub-headings:

- (1) Developments under the Rubric of UN
- (2) Regional Developments

### ***DEVELOPMENTS UNDER THE RUBRIC OF UN***

The first presence which the minority rights made in the post-war world was under Article 27 of the Covenant of Civil and Political Rights. Article 27 reads:

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

On a plain analysis of the provision the following characteristics could be culled out:

- (i) Article 27 *prima facie* imposes a negative duty in a positive form on the State, i.e., not to discriminate or non-discrimination;

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32. *Ibid.*, p. 306.

- (ii) Article 27 stipulates an individual right in community with others,<sup>33</sup>
- (iii) The article does not clearly implicate state action for the benefit of minorities,<sup>34</sup>
- (iv) Rights of minorities may not be universal rights since the groups may not exist in all states,<sup>35</sup>
- (v) Article 27 does not make any mention of the right to self-determination of minorities.<sup>36</sup>

One important fact which has to be kept in mind is that Article 27 of the Covenant on Civil and Political Rights does not ipso facto apply to all states. Moreover, the first protocol to the covenant which allows for individual petitions to be filed for violation of any of the rights guaranteed under the covenant only if the state concerned has exclusively ratified the protocol apart from the covenant itself.

The recently adopted declaration by resolution 47/135 on 18 December 1992 of the General Assembly of the United Nations has inaugurated the era of standard setting in minority rights. As Thornberry puts it: the declaration transcends some of the limitations of Article 27. The salient features of the declaration are thus:

- (i) Under Article 1, a positive duty is cast on states to take 'appropriate measures' to protect the existence and identity of minorities.
- (ii) Members of minorities have a right to maintain contacts with other minorities as well as with kin group across frontiers.

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33. Catherine Lalumiere has quoted Professor Rivero to explain the jurisprudential distinction between individual and collective rights. He says: to recognise the rights of the groups is to maintain that such rights of group must be capable of performing their function for the individual's benefit if individual is to be a full human being. The rights of groups are nothing else than the right of the individual to receive from groups the means he needs for self-fulfillment ..... since the group derives its own rights from serving the individuals who compose it, it has no rights against the rights of the individual ..... See, opening statement by Catherine Lalumiere, Secretary General of the Council of Europe, *Human Rights at the dawn of the 21st Century, proceeding of the inter-regional meeting organised by the Council of Europe in advance of World Conference on Human Rights*, 28-30 January 1993, Council of Europe Press, 1993, p. 9.

34. Patrick Thornberry, *International and European Standards on Minority Rights*, *op. cit.*, in note 6, Chapter 3, p. 15.

35. *Ibid.*

36. See, *Supra* n. 28. Professor Kirgis discerns between Article 1 of the ICCPR which talks about all peoples right to self-determination and Article 27. In his opinion Article 27 necessarily excludes right to self-determination.

- (iii) Article 9 indicates that the UN system as a whole is expected to contribute to achieve the purposes of declaration.
- (iv) Under Article 5, national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.
- (v) The declaration under Article 8.4 implicitly excludes any right to self-determination by reaffirming the twin principles of territorial integrity and political independence of states.

Some of the important unclear areas about the said declaration are pointed out by Thornberry which are as follows:

- (i) The title of the Declaration adds 'national' to the list of minorities in Article 27 of the covenant, but it is not clear whether it signifies any rule about 'nationality' of citizenship of the States in which they exist. The observation is important due to the interpretation given by some of the European States that it applies only to citizens and nationals.<sup>37</sup>
- (ii) No definition of minority is given in the text.
- (iii) No suggestion of territorial sub-division vis-a-vis- the minorities is in the text, though implicitly any action contrary to territorial integrity and political independence of states is prohibited under Article 8.4 as mentioned above.

### **REGIONAL DEVELOPMENTS**

Some of the initiatives which have been taken at the regional level are worth consideration. There have been attempts on part of both OSCE and the Council of Europe to address the question of minorities more comprehensively than before in light of the current experiences in the former Yugoslavia and the potential existing elsewhere in the region.

Starting from the Helsinki Final Act, 1975 the issue of minority rights has remained high on the agenda of the OSCE. Principle VII of the aforesaid Act states:

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

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37. *Supra*. n. 28.

The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (1990, Copenhagen Document) is a milestone in the development of minority rights protection. The salient features of Copenhagen document on minority rights are enshrined in Part IV. They are:

- (i) Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law.
- (ii) members of the OSCE will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with other citizens in the exercise and enjoyment of human rights and fundamental freedoms.
- (iii) To belong to a national minority is a matter of person's individual choice and no disadvantage may arise from exercise of such choice.
- (iv) Persons belonging to national minorities have right to promote their language, and identity. They are also authorised to maintain educational, cultural and religious institutions.
- (v) To establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other states with whom they share common ethnic or national origin, cultural heritage or religious beliefs.
- (vi) The participating states will create conditions for the promotion of the identity of the minorities.
- (vii) Recognition of the rights of national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.
- (iii) The participating states, in their efforts to protect and promote the right of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other international instruments and consider adhering to relevant conventions, if they not yet done so, including those providing for a right of complaint by individuals.

Apart from the aforementioned principles the Copenhagen document enumerates a comprehensive code for minority rights including some specific discussion of particular minorities e.g., Roma Gypsies who have been in an extremely vulnerably position. Following this up is the Helsinki Declaration, 1992, which establishes the High Commissioner on national minorities.<sup>38</sup>

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38. See. 31 *I.L.M.*, 1385 (1992) at 1396.

The chief role of the High Commissioner is to provide an 'early warning' and as appropriate, early action "at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage but in the judgment of the High Commissioner, have the potential to develop into a conflict within the OSCE area affecting peace, stability or relations between participating states, requiring the attention of and attention by the Council or the CSO.<sup>39</sup>

The two distinct situations where the role of the high commissioner is limited are worth consideration. They are:

- (1) The High Commissioner will not consider national minority issues in situations involving organised acts of terrorism.<sup>40</sup>
- (2) The High Commissioner will not consider violations of OSCE commitments with regard to individual person belonging to a minority.

It is submitted that these developments should be interpreted optimistically as it at least establishes the genuine concern of the participating states, if not any legally binding obligation.

The Council of Europe also has been following up the developments under the aegis of OSCE. Since the membership of states is overlapping, the commitments and concerns of states are well established. Under the European Convention on Human rights and Fundamental Freedoms, 1950, the concept of national minority is recognised under Article 14. Any individual, provided the state concerned has ratified, the aforesaid Convention, can file a petition for violation of his rights.<sup>41</sup>

### CONCLUSION

The resuscitating of the question of minority rights protection, especially after the end of cold war seems to have some remarkable resemblances

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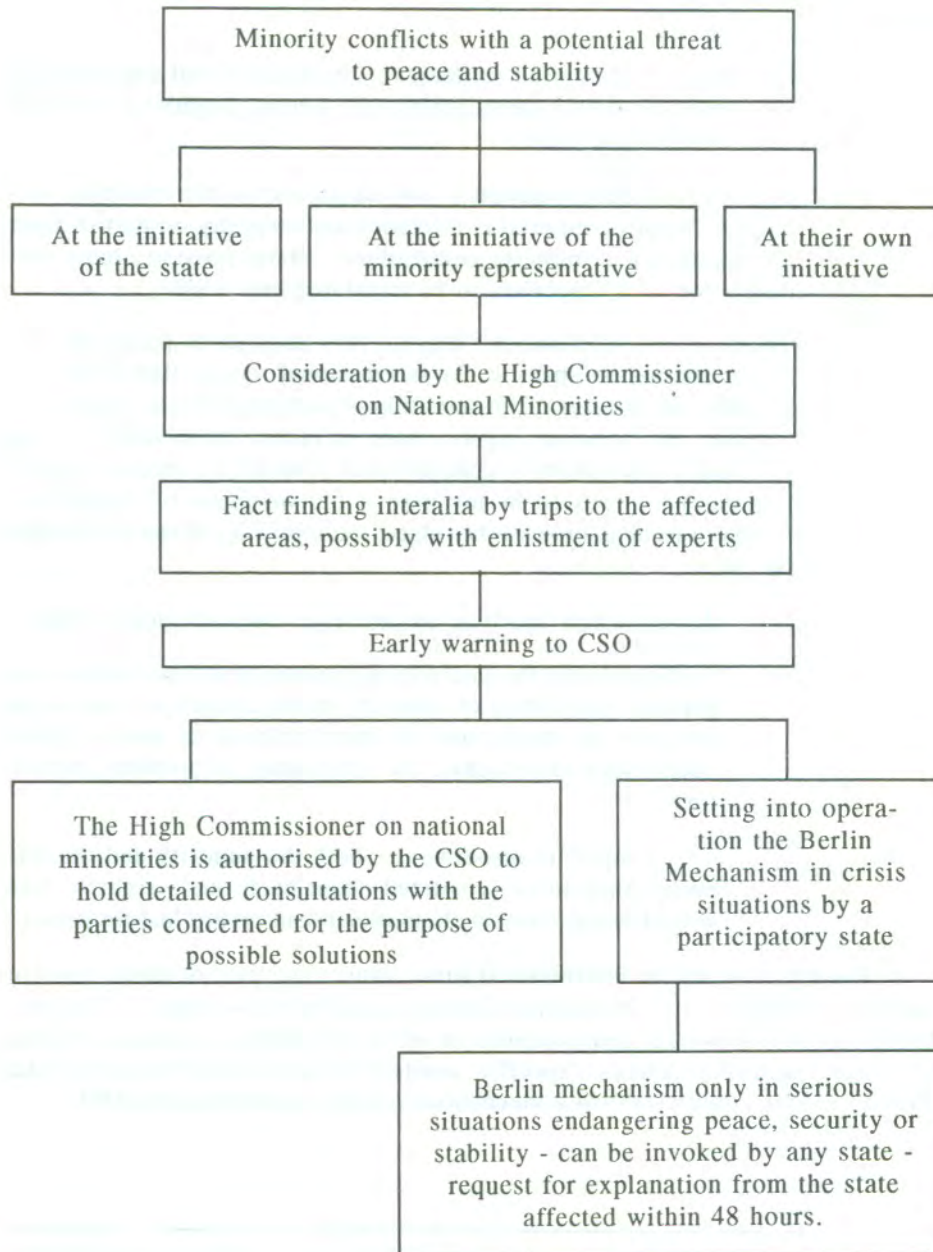
39. See Part II, Helsinki Summit Declaration paragraph 3. The acronym CSO stands for 'The Committee of Senior Officials' which is responsible for overview, management and co-ordination of the OSCE activities. It meets every two to three months. The OSCE Council is the central decision making and governing body of the OSCE.

40. This condition warrants criticism because it necessarily excludes situations, as faced by Northern Ireland, and it dispenses with the idea that minorities can be characterized as 'terrorists' for acts of self-preservation. Thus by excluding the role of the High Commissioner in terrorist situations the possibility of any constructive dialogue is ignored.

41. See 33 *I.L.M.* 1065 (1994). Recently the protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery has been signed. This is a revolutionary development as once the new protocol is ratified, individual will have direct recourse to the European Court on Human rights. Kindly refer to *supra*, n. 28.



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Source: OSCE Facts, published by the OSCE Secretariat, 1994

to the political climate prevailing after the end of the first world war. It seems as if history is repeating itself.

The special message which we have learnt from our experience is as under:

- (1) No amount of 'imposed settlements', both territorial and political are going to sustain them against the ethnic, linguistic and cultural traits of the people.
- (2) Right to self-determination is not the answer to the minority protection. What is required is tolerance and empathy on part of both the majority and minority communities. States have to create mediums for such objectives to be translated into reality.
- (3) The problems of minorities may be very peculiar or place specific or discrimination specific. By international recognition of minority problem in form of preservation of national, ethnic, linguistic, cultural and religious rights, there is indeed cognizance of the problem at an extremely general level. If at all the minority problem has to be addressed in any part of the world be it Yugoslavia, Northern Ireland, or any other place, the following initiatives should be taken:
  - (a) Agenda which 'specifies' and addresses the problem in 'context'.
  - (b) Willingness of the international political will to realise that general recognition of minority rights creates a situation in abeyance as cognizance is there without an answer, thus added need to recognise the addressing of problem in context.
  - (c) The 'people' in question i.e., both the majority and the minority have to be sensitized about each one's right to live with dignity. Only such approach can create lasting peace.

Finally, to keep the international surveillance over places which involve 'minority situations' the Trusteeship Council could be resuscitated.<sup>42</sup> The modalities could be worked out keeping in mind the state concerned and the groups in question to address 'specific' needs. Further it would be good if the United Nations could establish a mechanism which is similar to the OSCE.

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42. See Thomas M. Franck, "Soviet Initiatives: U.S. Responses - New Opportunities for Reviving the United Nations System", 83 *A.J.I.L.* 531 (1989) for similar proposal in the context of preservation of rain forests in Brazil.