

The Failure of the International System of
Protection of Human Rights :
Ethnic and National Minority Rights.

By

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Civilization should be judged by its treatment of minorities.

Notre civilisation sera jugée selon le traitement qu'elle donne à ses minorités.

GANDHI

Abstract

The primary objective of this work is to examine how effective international mechanisms for the protection of minorities are in resolving ethnic conflicts. Often violent, these conflicts threaten the territorial integrity and stability of states; yet in most cases, states oppose implementation of measures to protect minorities. The denial of minority rights is probably the single most important factor in the escalation of ethnic conflicts.

This work surveys existing international mechanisms for minority protection and explores the reasons why an effective system for protection of minority rights has yet to be established. It will attempt to answer the following question: Why has the United Nations system failed to deliver effective protection of minorities? The thesis explores changing attitudes towards minorities in the light of theory of international human rights law. Special attention will be paid to the emerging international phenomenon of non-governmental organizations.

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Preface

The primary objective of this work is to examine ways in which international mechanisms for the protection of minorities can be effective in resolving ethnic conflicts. These often violent conflicts present a dangerous threat to the territorial integrity and stability of states; yet in a majority of cases, states oppose implementation of measures to protect minorities. The denial of minority rights is probably the single most important factor in the escalation of ethnic conflicts.

This work explores the reasons for the failure to establish an international system for protection of minority rights. It will attempt to find answers to the following questions: Why has the United Nations system failed to deliver effective protection of minorities? Why is the international community unable to enforce the current, limited provisions for international protection of minorities? Why do states object to any positive measures to protect minorities?

This thesis will propose new means for dealing with the complex problems of majority - minority relations. It will explore changing attitudes towards minorities in the light of the theory of international human rights law. Special attention will be paid to the emerging international phenomenon of non-governmental organizations.

The international protection of minorities will be analyzed in its historical perspective. The tension between individual and collective rights, and the principle of equality will be examined as some of the main elements in the social and legal evolution of humanity throughout history. The concepts of an ethnic minority and a national minority will be described, and issues touching on the difficulty of defining a minority will be discussed.

In the first part of this work, the focus will be on theoretical and legal issues concerning ethnic minorities, including the definition of minorities, minority rights as group rights, and the relationship with other rights such as the rights of indigenous populations and majority rights.

The controversial relationship between minority rights and self-determination will be examined by analyzing the following questions: What is the real function of the rights of self-determination in the International Covenants on Human Rights? What is the relationship between the terms "people" and "minorities," as used in the international instruments? How can the conflicting rights of minorities to self-determination and the territorial integrity of the state (and its people as whole) be reconciled?

The second part will focus on describing and evaluating the protection of minorities in a historical perspective. The early period of non-systematic protection of minorities in Europe will be analyzed, as well as the more coherent League of Nations minority protection system.

The third part of this thesis will concentrate on universal instruments and United Nations standards for the protection of minorities. Universal instruments examined include: the United Nations Charter; the Universal Declaration of Human Rights (UN, 1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Optional Protocol to the International Covenant on Civil and Political Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (UN, 1965); the Convention on the Elimination of All Forms of Discrimination against Women (UN, 1979); the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Belief (UN, 1981); the Declaration on Race and Racial Prejudice (UNESCO, 1978); and the Declaration on the Rights of Persons

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Finally, the following new OSCE instruments will be analyzed: the text of the Conference on Human Dimensions in Copenhagen in June 1991 (Document of the Copenhagen Meeting of the Conference on Security and Cooperation in Europe, June 29, 1990); the Proposal for a European Convention for the Protection of Minorities, presented on February 8, 1991, by the Commission for Democracy Through Law (Venice Commission); the Proposal for an Additional Protocol to the Convention on Human Rights and Fundamental Freedoms

(ECHR) concerning the Protection of Minorities in the Participating States of the Conference on Security and Co-operation in Europe, proposed by Breitenmoser and Richter. A number of other texts containing minority provisions, such as constitutions, laws, and bilateral and multilateral treaties, will also be examined. In conclusion, the primary focus throughout this thesis will be on solutions for preventing the occurrence of ethnic tensions and conflicts.

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<i>Y v Belgium,</i>	No. 2332/64, December 7, 1966, Yearbook 9, 418.

Abbreviations

CAHMIN	Committee for the Protection of National Minorities (CoE)
CBSS	Council of Baltic Sea States
CDDH	Council of Europe Steering Committee for Human Rights
CDCC	Council for Cultural Co-operation (CoE)
CDMM	Steering Committee on the Mass Media (CoE)
CD	Copenhagen Document
CSO	Committee of Senior Officials
CoE	Council of Europe
EC	European Community
EU	European Union
ECommHR	European Commission on Human Rights
ECourtHR	European Court on Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECPM	European Convention on the Protection of Minorities
ECommDL	European Commission for Democracy Through Law
FCPNM	Framework Convention for Protection of National Minorities (CoE)
HCNM	High Commissioner on National Minorities (OSCE).
ILO	International Labour Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural rights
ODIHR	Office for Democratic Institutions and Human Rights (OSCE/CSCE)
OSCE (CSCE)	Organization for Security and Cooperation in Europe (before January 1, 1995, the Conference on Security and Co-operation in Europe)
PCIJ	The Permanent Court of International Justice

ICJ	International Court of Justice
PCIJ	Permanent Court of International Justice
PCIJ Series A	Collection of Judgements of PCIJ (1922-1930)
PCIJ Series A/B	Collection of Judgements, Orders and Advisory Opinions (1931-1940)
UNCLT	United Nations Conference on the Law of Treaties (Vienna, 1968/69)
UNESCO	United Nations Educational, Scientific and Cultural Organization
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

1. Introduction

Today, ethnic conflict is one of the major causes of loss of life, inhuman treatment, and poverty. Ethnic conflict also presents one of the most dangerous threats to a state's territorial integrity. Yet, in the majority of cases, states are generally opposed to implementing measures either to protect minorities or to recognize the rights of minorities. Given the worldwide ethnic revival, this refusal is probably the single most important factor in the rising number of ethnic conflicts.

Why has ethnic revival occurred? Some people argue that it is a reaction to the stronger assimilating forces now operating on ethnic minorities as a result of increased communications, technological developments, population growth and increased state nationalism.¹

When minorities are deprived of normal political channels to communicate and participate as such in political life, when their group political rights are denied, they may use violent means to draw attention to their situation and to their concerns. When we analyze the root of ethnic conflicts, in a majority of cases we discover a failure to accommodate the needs and aspirations of minorities.

The problem of international protection of minorities has become very important to the European and global communities following the collapse of the Soviet Union and the disintegration of the former Yugoslavia. In 1992 ethnic conflicts developed rapidly all over the Balkans, Central Europe and the former Soviet Union. It is important to note that Yugoslavia, with its complex minority situation, had been one of the countries most actively working for the protection

¹

A. Smith, *The Ethnic Revival in the Modern World* (Cambridge, New York: Cambridge University Press, 1981) at 20.

and recognition of minorities, both in the United Nations and in the Organization for Security and Cooperation in Europe (OSCE) Moreover, in 1978, Yugoslavia prepared the original draft of the United Nations *Declaration, On the Status of People Belonging to Ethnic, Racial, Religious, and Linguistic Minorities*.

After the fall of the communist regimes in central and eastern Europe, the Conference on Security and Cooperation in Europe recognized the right of members of minorities "freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts against assimilation against their will."²

The possibility of inter-ethnic violence is still a major threat to international peace and stability in central and eastern Europe. The situation in the former Soviet Union is still volatile after the disintegration of the state in 1991. Ethnic conflicts have broken out in several of the former Soviet republics and some have evolved into outright war.

Asbjørn Eide, the Special Rapporteur to the United Nations Sub-Commission on Prevention of Racial Discrimination and Protection of Minorities, stated in his July 1992 report, that: "leaving aside the issue of Kosovo, it might appear that the solutions found in Yugoslavia were very sophisticated, comprehensive and aimed at a degree of national and ethnic popularism unparalleled anywhere in the world."³ Furthermore, in his opinion a solution will not easily be achieved: "It would be excessively legalistic and naive simply to compare national legislation with regard to minorities on the assumption that

² Report of the CSCE Meeting on Experts on National Minorities on July 19, 1991, (1991) 12:8-9 Human Rights Law Journal at 332 [hereinafter *Report of the CSCE Meeting on Experts on National Minorities*].

³ A. Eide, "Internal Conflicts under International Law, Focus on Ethnic Conflict, Minority Rights and Human Rights"(1986) 18:4 Bulletin of Peace Proposals at 518.

perfect models could be found which could prevent the eruption of violent conflict."⁴

The example of ethnic conflict in Yugoslavia may provide arguments for opponents of protection and recognition of minority rights. Some States in the international community may argue that recognition of different nationalities among its citizens could lead to territorial change and eventual disintegration of the State. Yet, it also seems clear that failure to use official communication channels between majority and minority, and failure to recognize minority rights, can only lead to an increasing number of violent ethnic conflicts.

The international community offers limited possibilities for responding to internal conflict involving the violation of minority rights or general human rights within a state.⁵ As the result, the main focus of the international community has been to find constructive ways of dealing with ethnic conflicts once they break out. Nonetheless, there is also a strong desire to build a solid foundation upon which to build a system to prevent large scale violations of human and minority rights.⁶ There is presently a gap between implementation machinery and the need to act upon warnings of mounting dangerous ethnic tension.

It appears that even very sophisticated and effective systems of international legal protection of minorities are limited to situations where escalation of ethnic hostilities is beyond the control of the state authority. The international system of protection of minorities can play a very important role in situations where States are disintegrating and the application of domestic measures is ineffective. At the same time a major change in state attitudes

⁴ *Ibid.*

⁵ *Ibid.* at 515.

⁶ *Ibid.* at 516.

towards minorities is now under way. Despite recognition of minority rights, first by the League of Nations, and now by the United Nations and through the European system of protection under the European Convention on Human Rights (ECHR) and OSCE proceedings, a majority of the states has not been willing to vest rights in minorities. That appears to be changing, and an increasing number of states now seems willing to admit the existence of national minorities and to include their rights in domestic legal systems.

It is interesting to consider the reasons for the change of the attitude towards national minorities in Europe. First, the fall of the communist states has put in question all forms of pure authoritarian rule. It has become apparent that simple suppression of national minorities does not work. Second, a feeling of national identity is one of the strongest of human emotions. In situations where a group of people perceives itself to be different from the majority population of the state, it may be very easy for nationalist leaders to begin the process of separation from the state and to accelerate ethnic conflicts. Finally, the more the national identity of minorities is denied or suppressed, the more they may be convinced to use the vocabulary of self-defence and to see independence as the only solution.

A delicate issue that remains to be resolved is that of balancing minority rights and nationalist collectivism. Very often in the present situation in Europe it is impossible to draw a clear line separating minority rights from nationalism. Most legal experts believe that the rights of minorities should not include the right to full self-determination. At the same time, history demonstrates that many present states would not exist but for the exercise of the right of self-determination by minorities within many present or former states.

Czech President Vaclav Havel, in an address delivered on October 8, 1993 to the General Assembly of the Council of Europe in Vienna, gave a warning about the growing threat of nationalism in Europe:

Another great testing ground for Europe consists in how we deal with the temptation to open the back gate to the demons of nationalist collectivism with an apparently innocent emphasis on minority rights and on the right of minorities to self-determination. At first, this emphasis would seem harmless and beyond reproach. But one real consequence could be new unrest and tension, because demands for self-determination inevitably lead to questioning the integrity of the individual states and the inviolability of their present borders, even the validity of all post war treaties.

Attempts of this kind are dangerous chiefly because they look not to the future but to the past, for they call into question the very principle of civil society, and the indivisible rights of the individual, as well as the certainty that only democracy, individual human rights and freedoms and the civil principle can guarantee the genuinely full development of even that aspect of one's identity represented by membership in a nationality.⁷

In a historical perspective, the rights of minorities were also an important element in the Bolshevik Revolution of 1917 in Russia. V.I. Lenin promised all nations under colonial and foreign occupation that communism would grant them freedom and recognition. According to international legal scholar Antonio Cassese: "His obvious aim was to disrupt colonial empires and redistribute power in the international community on the basis of the idea of equality among nations, thereby assisting in the emergence of new international subjects consisting of those very peoples which had previously borne the colonialist yoke."⁸ Thus, western recognition of the rights of national minorities in Europe seemed to parallel communist doctrine in some respects.

⁷ V. Havel, "Short-sighted stumbling toward a new Europe" (Address delivered on October 8, 1993 to the General Assembly of the Council of Europe in Vienna), *The Globe and Mail*, (November 30, 1993) 14.

⁸ A. Cassese, *International Law in Divided World* (Oxford: Clarendon Press, 1986) at 135.

The first elaborate system for the international protection of minority rights established by the League of Nations was not very successful. At best, it established new institutions, but was only partially effective in the protection of group rights as such. After the breakdown of the League system, something was needed to fill the gap in the international protection of minorities. The United Nations has taken a different approach, stressing individual as opposed to group rights and including the protection of minorities within the general notion of human rights. Due to definitional difficulties, as well as the negative historical experience with the protection of minorities, during the early days of the United Nations, the international community changed its perspective from group rights to individual rights.⁹

As a result, the United Nations has been slow to come to grips with group of minority rights as such and has been working on a draft declaration since 1978. Only very recently, in 1991, did the General Assembly adopt a Declaration *On the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*¹⁰

⁹ J. Helgesen, "Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process," in A. Rossas & J. Helgesen, eds., *The Strength of Diversity, Human Rights and Pluralist Democracy* (Dordrecht, Boston, and London: Martinus Nijhoff Publishers, 1992) at 159.

¹⁰ Declaration On the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities UN Doc. E/CN.4/Sub.2/1991/40 Rev.1, December 12, 1991 [hereinafter *UN Declaration on Minorities*]

1.1. The Definition of the Minority

The thesis of this paper is that article 27 of the International Covenant on Civil and Political Rights (ICCPR) contains a code of state conduct that, if properly developed, could provide the foundation for an effective multinational system of minority rights protection. From this perspective, article 27 was very much an advance over past multinational efforts to approach this difficult area, and remains the best and clearest statement of minority rights and state duties in their regard. The analysis in this paper has been driven by an appreciation of the present value and future potential of the legal concepts included in article 27. This article reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their language."¹¹

Before answering the question, "What are the rights of minorities?," there is a need to answer the plain question: "What constitutes a minority?" Numerous attempts by scholars and politicians have failed to produce a universally accepted definition of "minority." The most popular explanation for the absence of a universal definition of minorities is the complexity of the subject, and the political imperative for urgent action¹² to resolve the "minority problem."¹³

¹¹ The International Covenant on Civil and Political Rights, UN Doc. GA/Res/2200 A/(XXI)/Dec 16, 1966.

¹² Many states refuse to acknowledge that they have ethnic minorities: for example, France presented a position that claimed it does not have any minorities on its territory, and made reservation on this issue to the article 27 of the ICCPR.

¹³ J. Packer, "On the Definition of Minorities" in J. Packer & K. Myntti, eds., *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo: Åbo Åkademi University, 1993) at 23-65.

Another possible reason for the lack of a universal definition may be that the absence is a tactical measure by states to avoid consideration of substantive rights. Since the "minority problem" usually involves a complicated mixture of historical, political, territorial and legal issues, the lack of a definition is convenient excuse for states to delay acting to protect minorities.

Implementation of measures for minority protection is often delayed or avoided by state governments because of the risks of creating competition and possible conflict between various ethnic or other groups within a particular society. Many modern social systems have promoted the ideal of a just society. Ideas of "the rule of law," "civic society," "equality," and "human rights" are fundamental concepts in this endeavor. The primary focus is therefore on the individual citizen with concern for minorities being a secondary issue that arises as a function of the extent to which such societies may be ready to be "just." The philosophical departure for human rights, based on natural law theory, is that, in nature all human beings are born equal, therefore there is a need to give equal treatment to all members of society.¹⁴

During the first years of the United Nations, the main focus was on the protection of individual rights and minority issues were largely ignored. Later, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sub-Commission) was entrusted with the difficult task of defining a minority. The first version of a definition read as follows:

- (a) The term "minority" includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- (b) Such minorities should properly include a number of persons sufficient themselves to develop such characteristics;

¹⁴ *Ibid.* at 27.

(c) The members of such minorities must be loyal to the State of which they are nationals.¹⁵

Under this definition, the main characteristic that distinguishes a minority is non-dominance, and an element of ethnic, religious or linguistic traditions. In addition, the group must have a strong desire to preserve those traditions. The rights of the group are limited by the obligation of loyalty to the state.

In 1977, after several years of study, Francesco Capotorti, a Special Rapporteur appointed by the UN Sub-Commission, submitted a final report, "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities."¹⁶ It was a comprehensive study of the rights of persons belonging to such minorities. Capotorti also formulated a definition of the term "minority" as follows:

(...) a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members -- being nationals of the State -- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁷

The most significant elements of the Capotorti definition were a non-dominance and numerical inferiority. The Capotorti definition was generally accepted by the UN Commission on Human Rights (UNCHR).¹⁸ However, while Capotorti's definition was the basis for future discussions, the Commission continued to work on drafting various minority-related documents that led to other definitions of minorities.

¹⁵ UN CHR, UN Doc. E/CN.4/358 of January 30, 1950.

¹⁶ F. Capotorti, *The Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1979), UN Doc. E/CN.4/Sub.2/238/Rev.1 [hereinafter *Capotorti Report*]

¹⁷ *Ibid.*

¹⁸ The UN Commission on Human Rights is the main UN body responsible for all aspects of human rights violations, while the UN Sub-Commission is subordinate of the Commission and reports the results of its work to the Commission.

The UN Sub-Commission transmitted to the UNCHR a text prepared in 1985 by J. Desch enes.¹⁹ He defined a minority as follows:

(...) a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.²⁰

The new element in the Desch enes definition was requirement of citizenship.²¹

Unfortunately, the process of finding an acceptable definition on the United Nations forum has been stalled since 1986, and neither of the above definitions has been endorsed either by the United Nations or through other international law processes. It is generally understood that the term "minority" does not include such groups as aliens (non-citizens), refugees or migrant workers.²²

Pressed by the rapid development of the "minority problem" in Europe, after 14 years of elaboration, a working group of the UNCHR finally completed the "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities." The Commission adopted the text by consensus in February 1992 and the Economic and Social Council approved it in July 1992; the final proclamation by the General Assembly arrived on 18 December 1992. This document does not include a definition of a minority.²³

¹⁹ J. Desch enes is a Canadian expert in international law and minority rights.

²⁰ J. Desch enes, Proposal Concerning a Definition of the Term "Minority," U.N. Doc. No. E/CN.4/Sub.2/1985/31 and Corr.1.

²¹ Packer & Myntti, *supra*, note 13 at 55.

²² M. Nowak, "The Right of Self-Determination and Protection of Minorities in Central and Eastern Europe in light of the case-law of the Human Rights Committee" (1993) 1:1 International Journal on Group Rights at 12.

²³ Packer & Myntti, *supra*, note 13 at 53.

Leading experts rationalized the absence by suggesting that there is no need to define the term.²⁴

Regional inter-governmental bodies have also grappled with the issue of defining "minority." Reference to minorities may be found in article 14 of the European Convention for Protection of Human Rights, the recently adopted European Charter for Regional or Minority Languages; the Council of Europe Framework Convention for the Protection of National Minorities; and in the documents of the OSCE.

In the European context, article 2 of the Proposal for a European Convention for Protection of Minorities (by the Venice Commission in 1991) gives the following definition:

a group which is smaller in number than the rest of the population of the State, whose members, who are nationals of that State have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion and language.²⁵

Another definition of "minority" is found in the draft Protocol on Minority Rights to the European Convention on Human Rights, adopted by the Parliamentary Assembly of the Council of Europe on February 1, 1993. It represents the preliminary conclusion of a debate which stretched over many years. This Protocol differs significantly from article 14 of ECHR, as its definition of minority includes a requirement of citizenship in the state in which the minority members reside.

There was also an alternative proposal adopted by the Parliamentary Assembly of Council of Europe. In article 1 of this additional protocol to the

²⁴ *Ibid.* at 23.

²⁵ Article 2, Paragraph 1, of the Proposal for a European Convention for the Protection of Minorities, by the European Commission for Democracy through Law (ECOMM DL), adopted on February 8, 1991 (1993) 12:6-7 Human Rights Law Journal at 270.

ECHR Concerning Persons Belonging to National Minorities the following definition of the term "minority" was proposed:

For the purposes of this convention the expression 'national minority' refers to a group of persons in a state who

- a. reside on the territory of that state and are citizens thereof,
- b. maintain long standing, firm and lasting ties with that state,
- c. display distinctive ethnic, cultural, religious or linguistic characteristics,
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a religion of that state,
- e. are motivated by a concern to preserve together that which continues their common identity, including their culture, their traditions, their religion or their language.²⁶

Inclusion of the citizenship condition in the definition of "minority" was a response to the situation in the Baltic States with large Russian origin minorities, and the large migrant worker population in a number of European States.²⁷ The citizenship requirement was criticized by some scholars, concerned that this requirement might have a negative impact on minorities in Central and Eastern Europe. In addition to the Russian minority in the Baltic States, there is a Romani (Gypsy) minority in the Czech Republic. The new citizenship laws of these states are deliberately excluding large segments of society from citizenship and are thus denying them legal status and proper protection. This situation may evolve into full scale ethnic conflicts.²⁸

²⁶ "The Proposal for Additional Protocol to the ECHR Concerning Persons Belonging to National Minorities, adopted by Parliamentary Assembly of Council of Europe, Recommendation No. 1201"(1993) 14:3-4 Human Rights Law Journal at 145.

²⁷ H. Klebes,"Introduction to the Draft Protocol on Minority Rights to the ECHR, adopted by the Parliamentary Assembly of the Council of Europe in Recommendation No. 1201 (1993)" (1993) 14:3-4 Human Rights Law Journal at 142 [hereinafter *Klebes Introduction*].

²⁸ Recommendations by the CSCE High Commissioner on National Minorities, Max van der Stoel, upon his visits to Estonia, Latvia and Lithuania, HCNM Doc. No. 206/93/L/Rev., (1993) 14: 5-6 Human Rights Law Journal at 216-221; and, the Report of the High Commissioner on National Minorities, "Roma(Gypsies) in the CSCE Region"(presented at the meeting of the Committee of Senior Officials, September 21-23, 1993) at 6.

Recently, an important contribution to the evolution of a definition of minority has been by Asbjørn Eide. In resolution 1989/44 of September 1989,²⁹ he was entrusted by the UN Sub-Commission, with the preparation of a report on national experience regarding peaceful and constructive solutions to problems involving minorities. Eide's final report, "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities"³⁰ is not intended as a comprehensive worldwide view of approaches to minority situations. It is more a study of constructive ways to address grievances between majorities and minorities within the boundaries of sovereign States, based on principles of contemporary international law.³¹ In his study Eide proposed the following working definition of a minority:

For the purpose of this study, a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population.³²

In his study Eide stressed that "a minority" can exist without a "minority situation." A group numerically smaller than half the population can be perfectly comfortable in society and experience no problems at all.³³

Another definition of minority has been developed and put forward by J. Packer an internationally recognized authority on minority rights: " 'The' or 'a minority' is a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule."³⁴

²⁹ A. Eide Report, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, U N Doc. E/CN.4/ Sub.2/1993/34, and Add. 1,2,3,4. on August 10, 1993 [hereinafter *Eide Report*].

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.* sec. 29 at 7.

³³ *Ibid.* sec. 31 at 8.

³⁴ Packer & Myntti, *supra* note 13 at 45.

This definition relies strongly on a subjective element of shared desires relating to an aim or object.

International standards have also been expanded by bilateral treaties regulating minority protection. The Polish-German Treaty on Good Neighborliness and Friendly Cooperation (June 17, 1991)³⁵ is one such example. This treaty, *inter alia*, regulates the rights of the ethnic minorities in the two states. Articles 20-22 define the German minority in Poland and the Polish minority in Germany. Parties to the treaty agree that protection should be based on an international standard. The two states obligate themselves to support the activities of minorities. This provision goes further than the traditional approach of international law, which is defined in negative terms. Another provision of the treaty sets limits on minority rights, namely, that members of minorities must be loyal to the state whose citizenship they hold. The Treaty's provisions on the status of minorities hold the promise of being a model for other treaties between new democracies in Central and Eastern Europe.³⁶ This treaty was followed by a number of similar bilateral treaties between almost all central and eastern European states under the terms of the Pact on Stability in Europe.³⁷

35 The Treaty on Good Neighborliness and Friendly Cooperation between German Federal Republic and Republic of Poland, text in *Warszawa-Bonn, 1945-1991* (Warszawa: Polski Instytut Spraw Międzynarodowych, 1991) at 339-408.

36 For example article 21 of the Treaty on Good Neighborliness and Friendly Cooperation between German Federal Republic and Republic of Poland, reads: "... High Parties will establish adequate conditions to support the ethnic, cultural, linguistic and religious identity of the respective minority groups ...".

37 *Pact on Stability in Europe*, Paris, March, 20-21, 1995.

1.2. Individual *versus* Collective Rights

Collective rights have not achieved the level of acceptance accorded to individual rights. While few would attack the idea of individual rights, respectable arguments are often made against the recognition of collective rights.³⁸ The difference between individual and collective rights is considered fundamental on several levels.³⁹ Those rights have roots in different philosophical and legal concepts.

One basic question that must be addressed is whether minorities are entitled to collective international rights or whether they are restricted to claiming rights as individual members of a minority? There are different opinions on this issue.

Resolution 5(XXX), adopted on August 31, 1977 by the UN Sub-Commission, recommended that the UNCHR consider drafting a declaration on the rights of members of minorities⁴⁰ within the framework of the principles of article 27⁴¹ of the ICCPR. According to Capotorti, article 27 does not refer to a minority as a subject of the rights described; rather, it puts emphasis on the collective exercise of such rights.⁴² He further concludes that the norm included in article 27 has two dimensions: protection of the group and protection of the individual members of the group. Strong opposition by states to the recognition of "collective" minority rights is rooted in the fear that minorities will invoke

³⁸ D. Sanders, "Collective Rights" (1991) 13 Human Rights Quarterly at 368-386.

³⁹ J. Pestieau, "Minority Rights: Caught Between Individual Rights and Peoples' Rights" (1991) 4:2 Canadian Journal of Law and Jurisprudence at 361.

⁴⁰ Text of draft Declaration UN Doc. E/CN.4/1990/41, para.51.

⁴¹ Text of this article is reproduced in Appendix 1 of this work.

⁴² F. Capotorti "Are Minorities Entitled to Collective International Rights?" in Y. Dinstein & M. Tabory, eds., *The Protection of Minorities and Human Rights* (Alphen van den Rijn: Sijthoff, Noordorf, 1980) at 507.

the right of full self-determination, which would mean separation and creation of an independent new state. Moreover, states are hostile to minorities seeking to appropriate any part of state authority.

In Western legal theories, strong arguments have been advanced in favour of the primacy of individual rights and there is often opposition to recognition of collective rights. The individual must be assured of inviolability of certain rights which allows him or her to determine his or her own goals. However, others have argued that peoples also have the following rights: the right to respect for their culture, the right to self-determination, group existence, non-discrimination, identity, political representation, language, religion, and education. The rights of groups can be conceived as limiting the rights of the individual.⁴³

The recent changes in eastern and central Europe and in the former Soviet Union have provoked debate about rights, and the fundamental difference between liberal individual rights theory and the given Marxist view on collective rights. The Marxist theory of rights has been criticized by liberal philosophers because they saw Marxist states as having undetermined the rule of law and denied individuals their fundamental human rights. Yet it is clear that some of the elements of the Marxist theory are positive in regard to minority protection. For example, the Marxists linked rights and duties of the members of minorities; therefore if the minority members want to exercise their rights, they must undertake certain duties and show loyalty to the state.

Similarly, many socialist scholars are sceptics about civil liberties. Socialist academics argue that civil liberties are negative rights, which offer no guarantee

⁴³ For example there is evident conflict between group right to healthy well being and requirement of popular immunization against communicable diseases, and the right of individual to personal integrity.

that the right-bearer is actually able to use his or her rights.⁴⁴ For them, the whole idea of human rights is a new form of the concept of natural rights; and the concept of natural rights is rejected by socialists because, historically, it is tied closely to the emergence of *bourgeoisie* society. In the Western conception, human rights appear as negative rights - the rights individuals assert against any oppressive action of the government. In as much as socialist ideology claims that socialism implies genuine care for others, positive or affirmative rights feature more prominently than negative rights. One measure of social progress towards a socialist or communist society would be the shift from negative to positive rights.⁴⁵

The socialist critique of the notion of rights in liberal democratic societies therefore emphasizes the individualism of rights. Marxists hold that only in capitalistic societies are individuals isolated from each other and in continuous conflict with each other. As described in Marxist works, the main motivation for individualism in capitalist society is the drive to perpetuate the struggle for wealth and power.⁴⁶

Marx had a very strong view on the notion of the right to private property to which he devoted considerable time, and which he attacked most vigorously. By the right to property, Marx meant a person's "right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society, the right of selfishness."⁴⁷ In Marx's view, the right to private property leads to isolation and unavoidable conflict within society. Thus there is no need to replace defective capitalistic rights to property with a

⁴⁴ T. Campbell, *The Left and Rights, A Conceptual Analysis of the Idea of Socialist Rights* (London, Boston, Melbourne and Henly: Routledge & P. Kegan, 1983) at 4.

⁴⁵ S. Lukes, *Marxism and Morality* (Oxford: Clarendon Press, 1985) at 37.

⁴⁶ *Ibid.* at 37.

⁴⁷ A. E. Buchanan, "Marx and Justice. The Radical Critique of Liberalism " in Rowman and Littlefield, Totowa, eds., *Marxism and Rights* (New Jersey: Greenwood Press, 1982) at 61.

superior communist right to property.⁴⁸ His critique of the right to private property was based on the belief that, under communism, the sources of social conflict would disappear and there would, therefore, be no need for a system of rights to guarantee the individual member of society his share of the social product or of the control over socialized means of production.⁴⁹

Individual rights are usually recognized within liberal democratic societies. Yet discrimination almost always occurs because an individual is part of a group with fixed characteristics not unique to single individuals. Equality is an individual right because individuals seek protection against discrimination rooted in the individual characteristic. However, equality can be also a group right, understood as the sum of the rights of the individual members of the group. Organizations representing groups appear to be the best bodies to support the rights of their members, i.e., to seek affirmative action programs, engage with media or lobby governments.

Collective rights involve a change from group protection of members, to the protection of unique collectivities. Ethnic and national minorities usually seek more than their individual members' right to equality and participation within the larger society; they also seek the group's survival. The leaders of ethnic and national minorities often look to the state for support. They seek either protection or autonomy as the means to ensure survival and development of their collectivity.

Until recently, international instruments had not used the term "collective right" with respect to non-state subjects. In the draft of the Universal Declaration on the Rights of Indigenous Peoples, the term is used for the first

⁴⁸ *Ibid.* at 63.

⁴⁹ *Ibid.* at 64.

time. In Part II of the draft, articles 4, 5, and 6 directly give rights to groups.

Article 4 states:

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person.⁵⁰ (emphasis added)

Article 5 states:

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification.⁵¹ (emphasis added)

Article 6 states:

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

- (a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
- (b) any form of forced assimilation or integration;
- (c) dispossession of their lands, territories or resources;
- (d) imposition of other cultures or ways of life; and
- (e) any propaganda directed against them.⁵² (emphasis added)

Another international instrument which gives rights to groups is the Proposal for a European Convention for the Protection of Minorities.⁵³ In Chapter II - Right and Obligations, article 3, section 1, the term "minority" refers to a group. Article 3 of the Proposal states:

1. Minorities shall have the right to be protected against any activity capable of threatening their existence.

50 UN CHR The *Draft Universal Declaration on The Rights of Indigenous Peoples* UN Doc. E/CN.4/Sub.2/1991/40/Rev.1: Annex II.

51 *Ibid.*

52 *Ibid.*

53 "The Proposal for a European Convention for the Protection of Minorities," by the European Commission for Democracy through Law (Venice Commission) adopted on February 8, 1991 (1992) 12:6-7 Human Rights Law Journal at 270.

2. They shall have the right to the respect, safeguard and development of their ethnical, religious, linguistic identity.⁵⁴

In this case, the Proposal described indirectly collective rights.

The only international instrument devoted directly to collective rights is the African Charter of Human and Peoples' Rights.⁵⁵ The new way of thinking presented in the African Charter (adopted in Algiers in 1976),⁵⁶ and the important political implications of collective rights were treated with skepticism by many Western scholars. The Charter was a product of an informal gathering of lawyers, political scientists, and politicians.⁵⁷ In the Charter, rights of minorities are understood primarily as collective rights, in contradiction to the conventional western view. I. Brownlie states that this document was "a work of high idealism and fairly high level of abstraction."⁵⁸

The recent interpretation of article 27 of the ICCPR by the UN Human Rights Committee indicates an evolution in thinking that would permit group rights to be recognized within the United Nations system. In its General Comment No. 23⁵⁹ the UN Committee stated: "Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion..."⁶⁰ (emphasis added) This is a new departure for the UN system in that it explicitly refers to the group rights of minorities.

⁵⁴ *Ibid.*

⁵⁵ African Charter, *supra*, note 57.

⁵⁶ African Charter of Human and Peoples Rights, also known as the Banjul Charter on Human and Peoples' Rights, adopted by the Organization of African Unity in 1981.

⁵⁷ I. Brownlie, "The Rights of Peoples in Modern International Law" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 11.

⁵⁸ *Ibid.* at 12.

⁵⁹ United Nations Human Rights Committee (UN-HRCee), General Comment No. 23(50) on Article 27/ Minority rights, adopted by the Committee at its 1314 meeting (fiftieth session) on April 6, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5.

⁶⁰ *Ibid.*

For the purposes of this thesis, it may be useful to present the catalogue of group rights presently found in international law. An analysis of United Nations instruments and those of the Organization for Security and Cooperation in Europe reveals an explicit recognition of a number of minority rights. The language commonly used in these documents is "persons belonging to minorities," but the collective dimension of the provisions is nevertheless clear.⁶¹ These rights are as follows:

The right to group existence.⁶² Obviously, for the group to exist, the physical survival of its individual members has to be ensured. The 1948 Genocide Convention was the reaction of the international community to the atrocities against minority groups during World War II. Article 1 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁶³ provides that states shall protect the existence of minorities. The legislative and practical measures are to be implemented through the domestic legal systems of the states.

The right of non-discrimination.⁶⁴ In a broad sense, this right contains not only a negative prohibition and a recognition of formal equality, but also implies positive actions in favour of minorities in order to protect them. International instruments are evolving to include more positive measures and affirmative actions. The Convention on Racial Discrimination and the Declaration on Religious Intolerance and Discrimination are, at this stage, the most important general instruments of this kind.

⁶¹ *Ibid.*

⁶² *Ibid.* at 30, and also E.I. Daes, "Native People's Rights" (1986) 27:13 *Les Cahiers de Droit* at 125.

⁶³ *UN Declaration on Minorities*, *supra*, note 9.

⁶⁴ D. Sanders, "Collective Rights" (1991) 13:3 *Human Right Quarterly* at 385.

The right to preservation of the identity⁶⁵ of the group, including the right to be different.⁶⁶ This right is a component of various rights which could be claimed by religious, linguistic or other groups. Article 1 of the United Nations Declaration⁶⁷ provides that states shall protect the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories. In addition to this, the CSCE Geneva Declaration⁶⁸ on the Rights of Minorities (1991) states that persons belonging to national minorities have the right freely to express, preserve, and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all aspects, free of any attempts at assimilation against their will.

The right to special measures⁶⁹ needed for the maintenance of the identity of the group. Taking into consideration the character of the group, the nature and scope of such measures may depend on the degree of historical disadvantage and past discriminatory practices.

The right to establish institutions⁷⁰ observing the standards of national laws. The United Nations Declaration provides, in article 2, that persons belonging to minorities have the right to establish and maintain their own associations. The CSCE Geneva Declaration⁷¹ reaffirms that the participating states will not hinder the exercise of the right of persons belonging to national minorities to establish and maintain their own educational, cultural and

⁶⁵ E.I. Daes, "Native People's Rights" (1986) 27:13 *Les Cahiers de Droit* at 129.

⁶⁶ B.G. Ramcharan, "Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution" (1993) 1 *International Journal on Group Rights* at 31.

⁶⁷ *UN Declaration on Minorities*, *supra*, note 9.

⁶⁸ *Report of the CSCE Meeting on Experts on National Minorities*, *supra*, note 2, part II, second paragraph.

⁶⁹ Ramcharan, *supra*, note 66 at 32.

⁷⁰ *Ibid.*

⁷¹ *Report of the CSCE Meeting on Experts on National Minorities*, *supra*, note 2.

religious institutions, organizations and associations. For religious and linguistic minorities the institutionalized protection of rights is essential.⁷²

The right to trans-border communication, cooperation, and federation with other minorities.⁷³ This right should be not viewed as conflicting with the duty of loyalty to the state. The United Nations Declaration⁷⁴ provides again, in article 2, that persons belonging to minorities have the right to establish and maintain, without discrimination, free and peaceful contacts with all members of their group and with persons belonging to all minorities as well as contacts across frontiers with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties. The CSCE Geneva Declaration emphasizes the importance of communication between persons belonging to national minorities without interference by public authorities "and regardless of frontiers."⁷⁵

The right to proportional representation and participation in the various levels of Government.⁷⁶ The legal system of a particular country should have provisions for minority participation and representation in political, judicial and administrative life. There is a strong indication that national laws should reflect provisions of the international standards, but the practice of the states in this issue is not always very supportive.

Article 2 of the United Nations Declaration⁷⁷ states that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. In addition to this, the Principle of the CSCE Geneva

⁷² Ramcharan, *supra*, note 66 at 32.

⁷³ *Ibid.* at 31.

⁷⁴ *UN Declaration on Minorities*, *supra*, note 9.

⁷⁵ *Report of the CSCE Meeting on Experts on National Minorities*, *supra*, note 2.

⁷⁶ E.I. Daes, *supra*, note 65 at 144.

⁷⁷ *UN Declaration on Minorities*, *supra*, note 9.

Declaration⁷⁸ provides for the right of persons belonging to minorities to effective participation in public affairs.

The right to impose duties, in certain conditions, upon members of the group. In order to preserve group well-being, the group has the right to seek financial contributions from its members. This right is limited by the inherent notion of respect by everyone for human rights. Paragraphs 2 and 3 of article 8 of the UN Declaration on Minority Rights set limitations on the ability of groups to exercise this right.⁷⁹

The right to recognition of legal personality.⁸⁰ This right is not yet accepted in international law, but in some legal systems recognition is granted to groups.

The group rights in this catalogue are not generally recognized by all members of the international community and some of them are the subject of continuing controversy.⁸¹

The mainstream western doctrine of human rights, represented in declarations, bills of rights, and similar human rights documents, emphasizes protection of the mental and physical integrity of the individual.⁸² Article 27 of the ICCPR contains a direct expression of concern for the rights of persons belonging to minorities. The doctrine of rights so far developed by the western world has been mainly individualistic. Nevertheless, there are some western voices supporting collective rights.⁸³

78 *Report of the CSCE Meeting on Experts on National Minorities*, *supra*, note 2, part III, first paragraph.

79 UN Declaration on Minority Rights, G.A. Res. 47/135, dec 1992, Annex.

80 Ramcharan, *supra*, note 66 at 30.

81 *Ibid.* at 28.

82 *Ibid.*

83 *Ibid.* at 30.

1.3. Minority Rights *versus* Peoples' Rights

Traditional international law held that States are its only subjects. In the nineteenth and twentieth century, international law doctrine slowly started developing the idea of non-state subjects of international law.⁸⁴ The first step in this direction was the system of guarantees and protections for groups and minorities under the League of Nations.⁸⁵ Post World War II political developments recognized the need for universally applied principles favouring the liberation of oppressed peoples from colonial domination. The international community formulated its policy in UN General Assembly Resolution 1514 (XV), the Declaration on the Granting of the Independence to Colonial Countries and Peoples of December 1960. Significantly, this was the first time a reference to "all peoples" had been made in the international system.

Who holds the right of self-determination? This question must be asked to understand fully the relation between the right to self-determination and minority rights. In international instruments, entitlement to the rights of self-determination is given to "all peoples." But what is meant by "all peoples"? One answer is that "peoples" means the entire population of the state; the second is that "peoples" means all persons who belong to distinctive groupings on the basis of race, ethnicity, and religion.

In the opinion of Yoram Dinstein,⁸⁶ it is important to make a distinction between a people and a nation.⁸⁷ Dinstein concludes that it is much easier to define a nation than a people. All nationals living within the boundaries of the

⁸⁴ J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 160.

⁸⁵ Chapter two (2.2) of this work

⁸⁶ Yoram Dinstein is professor of international law at Tel-Aviv University.

⁸⁷ Y. Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 *The International and Comparative Law Quarterly* at 103.

State form the nation.⁸⁸ He suggests that two main elements are necessary to define a people, one objective and the other subjective. The first is the physical existence of an ethnic group with a common historical past. The second and subjective element is the collective will of the group to achieve statehood.⁸⁹

Traditional international instruments assume that States are legitimate representatives of people. The reality of state-society relations is, in many cases, far from this principle.⁹⁰

The relationship between the term "people" and the term "minority" can not be described as simple opposition.⁹¹ A member of a minority could claim protection of her/his rights and at the same time claim some rights reserved to "peoples" (for example, self-determination).⁹²

1.4. Indigenous Peoples and Minority Rights

Indigenous groups and minorities are confronted with similar challenges. Many of their problems (for example, relations with a local government) could be resolved in a similar way. Other problems (for example, the relationship that indigenous people have to nature and land) need separate solutions. Both indigenous peoples and minorities have often suffered from massive denials of human rights and widespread discrimination. Such violations persist today in

88 *Ibid.* at 104.

89 *Ibid.*

90 R. Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in J. Crawford ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 25.

91 D. Makinson, "Rights of Peoples: Point of View of a Logician" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 73.

92 J. Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 61.

many states. While there has been some progress, in particular in Australia, Canada, New Zealand, Scandinavian countries and the United States, much remains to be done.

In the past, indigenous peoples had very limited international protection options. In many cases they were forced to use international protection instruments developed to protect the rights of minorities.

a. Indigenous Populations at the United Nations

In the 1970s, international bodies started to treat indigenous populations differently from minorities. In 1972, the United Nations Sub-Commission requested the Special Rapporteur José Martines Cobo to prepare a *Study of the Problem of Discrimination against Indigenous Populations*.⁹³ A major outcome of this study was a working definition of indigenous peoples for the purpose of international action.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁹⁴

This definition differs significantly from definitions of minorities. The main elements of the definition are: historical continuity with pre-colonial societies; a

⁹³ UN CHR, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7 and Add.1-4 (1986).

⁹⁴ *Ibid.*

distinct relation to territory; and the collective will to transmit their social institutions and legal systems to future generations. Most definitions of minorities contain the following elements: numerical inferiority; citizenship; ties with the state; and ethnic, cultural, linguistic distinctiveness from the majority. Common to both definitions are a group motivation to preserve its identity and non-dominant position in a society.

Because there are fundamental differences between the two groups they cannot be treated identically in international law. The United Nations created separate working groups on minorities and on indigenous populations to draft different standards of protection.

On the recommendation of the Sub-Commission and the Commission on Human Rights, the Economic and Social Council (ECOSOC), in resolution 1982/34 of May 7, 1982, authorized the Sub-Commission to establish a Working Group on Indigenous Populations, which was to meet for five working days before each session of the Sub-Commission to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations.⁹⁵ The Working Group, through its meetings, developed procedures different from those used by the UN bodies. The Working Group methods could be characterized by an open and flexible approach which was deemed essential in order to obtain relevant information and solicit the views of interested parties.⁹⁶

The United Nations Working Group on Indigenous Populations⁹⁷ has continued to work on issues related to indigenous populations. The proposal of

⁹⁵ *United Nations Action in the Field of Human Rights*, UN Doc. ST/HR/2/Rev.2. (New York: United Nations Publications, 1983) at 57.

⁹⁶ Report of the Working Group on Indigenous Populations on its second session, by Chairman-Rapporteur, A. Eide, UN Doc. E/CN.4/Sub.2/1983/22, at 5.

⁹⁷ The relevant recommendation was made by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2(XXXIV) Sept 8,

a draft Universal Declaration on the Rights of Indigenous Peoples is the latest example of work done in this area.⁹⁸

The text of the draft Universal Declaration is more far reaching than United Nations documents relating to minorities. There is an explicit reference to a right of self-determination for indigenous populations.⁹⁹ In Part I, section 1, the draft reads:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.¹⁰⁰

This declaration was the first to vest indigenous peoples with the right of self-determination. At the same time, it clearly expressed the collective rights of indigenous peoples. The term "collective right" is used for the first time in Part II of this document,¹⁰¹ in articles 4, 5, and 6, which contain direct references to the collective rights of groups.

Both minorities and indigenous groups are concerned with preserving and developing their distinct individual identities. Because minorities and indigenous peoples have suffered from similar patterns of discrimination, there is a tendency by states to treat them in the same way. It is true that the historical oppression of both groups has similar roots in many states. At the same time, there are major differences. The problems related to minorities have developed mainly in a European historical context. Indigenous peoples' issues first emerged

1981, endorsed by the Commission on Human Rights in its Resolution 1982/19 of March 19, 1982, and authorized by the Economic and Social Council in its resolution 1982/34 of May 7, 1982.

98 The United Nations Declaration on Indigenous Populations, UN Doc. E/CN.4/Sub.2/1991/40/Rev.1: Annex II, Draft of late fall, 1991.

99 *Ibid.*

100 *Ibid.*

101 *Ibid.* para, 4, 5, and 6.

in the Americas where, following the colonial invasion, indigenous peoples were alienated from the mainstream of their natural societies as a result of the many "civilizing" and assimilation measures directed against them by the dominant population.¹⁰²

As far as self-determination is concerned, there is again a difference between these two groups. Indigenous peoples almost all have a special relationship with the land and a unique holistic approach to the environment. Indigenous peoples distance themselves from the protections provided by minority rights. They demand more substantial rights, including the right to self-determination and autonomy.

Many cases have dealt with the issue of indigenous rights. In *Santa Clara Pueblo v. Martinez*,¹⁰³ *Attorney General of Canada v. Lavell*,¹⁰⁴ and *Lovelace v. Canada*,¹⁰⁵ the common issue was the exclusion of women from participation and from the rights accorded to men in an Indian reserve community because the tribe or band had patriarchal rules for membership.

*Lovelace v. Canada*¹⁰⁶ is regarded as a leading case in the matter of indigenous rights. Sandra Lovelace, a member of Maliseet Band and a status Indian, was born and brought up on the Tobique Reserve. Under Section 12 (1) (b) of the version of the *Canadian Indian Act* in force at the time, she lost her Indian status when she married a man who was not a status Indian. This situation amounted to gender discrimination.¹⁰⁷ After Lovelace divorced, she

¹⁰² R. L. Barsh, "Indigenous Peoples & Minorities, Present Status and Future Directions" (1983) 2:1 Human Rights Tribune at 26-28.

¹⁰³ Case, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

¹⁰⁴ Case, *Attorney General of Canada v. Lavell*, S.C.R. 1349 (Can., 1974).

¹⁰⁵ Case, *Lovelace v. Canada*, Communication No. R.6/24, Report of the Human Rights Committee, 1981, UN Doc. A/36/40, annex XVIII.

¹⁰⁶ *Ibid.*

¹⁰⁷ N. S. Rodley, "Conceptual Problems in the Protection of Minorities: International legal Developments" (1995) 17:1 Human Rights Quarterly at 68.

sought to return to the reserve, but could not do so, since she was no longer considered to have Indian status. The UN Human Rights Committee (UN-HRCee) found this to be a violation of article 27 of the ICCPR. The Committee determined that the exclusion of Lovelace was not justified because she was, in fact, a member of the Tobique Maliseet collectivity. In addition, the Committee did not accept that "to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe,"¹⁰⁸ the basis upon which Canada sought to justify this discrimination.¹⁰⁹

A decision of the UN-HRCee of March 26, 1990, expressed its views under article 5(4) of the Optional Protocol to the ICCPR concerning Communication No. 167/1984, submitted by Bernard Ominayak, Chief of the Lubicon Lake Band.¹¹⁰ This Communication addressed historical inequalities and recent developments threatening the Lubicon Lake Band's way of life and culture. The Band alleged that Canada was in violation article 27 of the ICCPR by denying the Lubicon Lake Band's right of self-determination and the rights flowing from it to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not be not deprived of its own means of subsistence. These violations are considered by the author to contravene Canada's obligations under article 27 of the ICCPR.

The facts of the communication were as follows.¹¹¹ Chief Ominayak was the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. Under Canada's

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ The UN Human Rights Committee, Communication No. 167/1984, as cited in (1990) 11:3-4 Human Rights Law Journal at 305.

¹¹¹ *Ibid.*

Constitution the Lubicon Lake Band is subject to the authority of the Parliament of Canada. According to the Supreme Court of Canada decision in *R. v. Sparrow*,¹¹² federal legislature power must be exercised in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometers in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their first language, and many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.¹¹³

The Lubicon Lake Band claims that the Canadian Government, through the Indian Act of 1970 and Treaty of 21 June 1899 (concerning aboriginal land rights in Northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life.

The opinion presented by the Committee on this case found that the rights protected by article 27 of the ICCPR include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.¹¹⁴ The Committee decided that the facts presented in the case constituted a violation of article 27.¹¹⁵ At the same

¹¹² [1990] S.C.R. 1075

¹¹³ UN HRC, Communication, *supra*, note 110 at 305.

¹¹⁴ *Ibid.* at 310.

¹¹⁵ *Ibid.* at 311.

time, it accepted the remedy proposed by the State party to redress the conflict situation (the remedy was a change in the *Indian Act*).¹¹⁶

Another case in which the Human Rights Committee examined the applicability of the article 27 of the ICCPR was *Kitok v. Sweden*, Communication No. 197/1985, Decision of July 27, 1988.¹¹⁷ In this case, the Committee found that particular restrictions on freedom of movement and rights of the family could be justified.¹¹⁸

This case concerned the Saami minority in Sweden. The Swedish Parliament had tried to protect the environment as well as preserve the well-being of the indigenous Saami minority. The Reindeer Husbandry Act of 1971 provided that members of Saami ethnic minority, who engaged in any other profession for a period of three years, lost their right to breed reindeer if they were not again officially granted membership in a Saami village. This provision was applied to Ivan Kitok, a Swedish citizen of Saami ethnic origin who had lost his membership in the Saami village, notwithstanding the fact that he had always lived on Saami lands and had always retained links with the Saami community. In a communication submitted in 1985 against the final decision of the Swedish Highest Administrative Court, he alleged violations of his right to self-determination under article 1 and of his right under article 27 to enjoy his own culture in community with the other members of the Saami minority.¹¹⁹

Since article 1 deals with rights conferred upon peoples, the UN Human Rights Committee decided that Kitok did not have this right as an individual. The right to self-determination may only be claimed in community with others.

¹¹⁶ *Ibid.*

¹¹⁷ UN Human Rights Committee, Communication No. 197/1985, as cited in (1990) 11:1-2 Human Rights Law Journal at 148.

¹¹⁸ Rodley, *supra*, note 107 at 69.

¹¹⁹ UN Human Rights Committee Communication No. 197/1985, *supra*, note 117.

In its final opinion, the Committee left no doubt that the Saami are an ethnic minority in the sense of article 27 and that reindeer husbandry is so closely connected to the Saami culture that it must be considered as an essential part of this culture.

The Committee expressed its concerns that ignoring objective ethnic criteria in determining membership in a minority may have been disproportionate to the legitimate ends sought by the legislation. By recognizing the apparent conflict between the Swedish legislation and international standards, the Committee concluded that the restrictions could be a reasonably and objectively justified as being in the interest of the continued viability and welfare of the minority as a whole. The Commission therefore concluded that Sweden had not violated article 27 of the ICCPR.¹²⁰

b. International Labour Organization Conventions

The International Labour Organization (ILO) has been a significant exception among international organizations in that it has directly addressed the issue of the rights of indigenous populations. A special Committee of Experts on Native Labour was created in 1926, and its recommendations led to improvement working conditions of indigenous labour in the 1930s. After the Second World War, another Committee of Experts met in 1951, and the ILO conducted a study of the living and working conditions of indigenous populations. During the preparatory work which led to the adoption of ILO

120 *Ibid.*

Convention No. 107,¹²¹ the assimilationist approach to the issue was evident in its language. This approach was subsequently subjected to detailed criticism by human rights advocates and representatives of indigenous populations. Despite the criticism, the Convention contains important standards, such as the right to collective and individual land ownership, the right to compensation for land taken by government, and the principle of non-discrimination.¹²² Increased pressure from indigenous populations and non-governmental organizations (NGOs) in the 1980s led to a reassessment of language about the acceptability of assimilation.

The ILO Convention on Indigenous and Tribal Peoples (No.169/1989) and Chapter 26 of "Agenda 21" (the United Nations program of action for environment and development approved by the Earth Summit [1992]) contain the most important and strongest protections regarding indigenous peoples.¹²³ These documents declared for the first time the political and territorial rights of indigenous peoples and recognized that this gave them the right to take responsibility for the management of their natural resources. The references to assimilation and integration were eliminated, and Convention No. 169 included requirements for consultation with indigenous peoples whenever laws or administrative regulations affecting them are considered.

In addition to this, the terminology used in these documents was changed from "indigenous populations" to "indigenous peoples." The term "peoples" however is given a special limited meaning. Article 1(3) of Convention No. 169 provides that "use of the term 'peoples' in this convention shall not be

¹²¹ International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, signed June 26, 1957, entered into force June 2, 1959, 328 UNTS 247.

¹²² Barsh, *supra*, note 102 at 27.

¹²³ *Ibid.*

construed having any implications as regards the rights which may attach to the term under international law."¹²⁴

The new ILO Convention No. 169, which put in place some restrictions on a state independence in its dealings with indigenous populations, is a improvement over the old ILO Convention No. 107.

1.5. Self-Determination, Sovereignty, and Autonomy

Self-determination and the rights of minorities are two sides of the same coin.¹²⁵ Independence and the creation of a new state may result in the domination of one particular ethnic group over another, and hence to minority problems. The two main questions arising from the texts of international protection machinery are: What is the meaning of self-determination in the International Covenants on Human Rights? What is the relationship between the terms "people" and "minorities" as these terms are used in international instruments?

Recent developments in Europe reflected, in many cases, a process of state disintegration. Nationalist doctrine claims that the world's peoples are divided into nations and that each nation has the right of self-determination.¹²⁶ On this basis, nationalist parties and governments commonly assert that minorities are entitled to self-determination and claim that the natural consequence of the right of self-determination is secession.

¹²⁴ ILO Convention No. 169, Article 1(3).

¹²⁵ P. Thornberry, "Self-determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 *International & Comp., Law Quarterly* at 867.

¹²⁶ M. Ignatieff, *Blood and Belonging, Journeys into The New Nationalism* (Toronto: Penguin Books, 1993) at 3.

The issue of self-determination and its relation to minorities has been the subject of numerous studies.¹²⁷ The concept of self-determination was first expressed by President W.Wilson when he made an American Peace Proposal in 1917.¹²⁸ In the inter-war period, the principle was only applied in a number of limited situations.¹²⁹ After World War II self-determination evolved into an enforceable right to freedom from colonial rule.¹³⁰ When the UN system was established and the UN Charter signed, the primary focus was on the rights and obligations of the sovereign member states. Despite intensive use of the notion of self-determination in the inter-war years, according to prevailing legal doctrine, it was not considered a part of positive international law.¹³¹ In the UN Charter, self-determination is expressly mentioned in articles 1(2) and 55. Article 1(2) places the principle among the purposes of the United Nations; self-determination is linked with the notion of "people." At the San Francisco Conference of June 26, 1945, the attitude towards minorities was largely negative. There was no proposal for international protection of minorities despite high interest in the protection of individual rights.

¹²⁷ For example, H. Hannum, in *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); A. Cristescu, *The Right to Self-Determination, Historical and Current Development on the basis of United Nations Instruments*, study prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/404/Rev.1; M. Pomerance, *Self-Determination in Law and Practice* (Boston: Martinus Nijhoff Publishers, 1982); P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991); A. Cassese, "The Helsinki Declaration and Self-Determination" in T. Buergenthal, ed., *Human Rights, International Law and the Helsinki Accord* (New York: The Bobbs-Merrill Company, 1977).

¹²⁸ M. H. Halperin & D.J.Scheffer, *Self-Determination in The New World Order* (Washington D.C.: Carnegie Endowment for International Peace, 1992) at 16.

¹²⁹ *Ibid.* at 19.

¹³⁰ *Ibid.* at 20.

¹³¹ *Ibid.* at 33.

In the first phase, the term "self-determination" was used only in reference to decolonization,¹³² and was recognized as a "principle," not a "right."¹³³ In 1954, a discussion was held in the United Nations about self-determination and colonialism. A Belgian representative proposed what was then considered a radical thesis by insisting that the principle of self-determination could be applied to indigenous groups and minorities.¹³⁴ This thesis was rejected by a majority of states. As a result of the increase in Afro-Asian membership of the UN in the 1960s, the principle of self-determination was often invoked as a right of dependent peoples. At first, several of the colonial powers resisted the idea that there was a legal right of self-determination, preferring to view it as a mere political aspiration. From this moment, the notion of self-determination was historically bound up with decolonization.¹³⁵ On December 14, 1960, the General Assembly declared, in Resolution 1514(XV),¹³⁶ that "people" are holders of the right to self-determination. The context for "people" referred solely to colonialism. As P. Thornberry¹³⁷ described it: "The logic of this resolution is relatively simple: people hold the rights to self-determination; a people is the whole people of a

132 A. Cristescu, *The Right to Self-Determination, Historical and Current Development on the basis of United Nations Instruments*, study prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/404/Rev.1, at 9.

133 Halperin & Scheffer, *supra*, note 128 at 22.

134 P. Thornberry, "Self-determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 *International & Comp., Law Quarterly* at 873.

135 H. Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 34.

136 *The Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN General Assembly Resolution 1514 (XV), of December 14, 1960.

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territory; a people exercises its right through the achievement of independence."¹³⁸

One of the main conflicts between the rights of minorities and majorities arises in attempting to harmonize the principles of self-determination and territorial integrity. The practice of international law attempts to balance the territorial integrity of the state and the principle self-determination of a people. Two UN Resolutions, General Assembly Resolution 1514(XV) on the Granting of Independence to Colonial Peoples, and General Assembly Resolution 2625(XXV), the Declaration of Principles on Friendly Relations, describe self-determination and caution against any interpretation which implies the violation of territorial integrity. Resolution 1514 (XV) states: "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of the country is incompatible with the purposes and principles of the Charter of the UN."¹³⁹ In Resolution 2625(XXV), the General Assembly adopted and proclaimed the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among the States in accordance with the Charter of United Nations and declared that the principles of the Charter embodied in the Declaration constituted basic principles of international law. Resolution 2625(XXV) states: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States."¹⁴⁰ In these instruments, there is therefore a very strong limitation on the right of self-determination.

¹³⁸ Thornberry, *supra*, note 134 at 875.

¹³⁹ UN GA Res. 1514, *supra*, note 136.

¹⁴⁰ The UN General Assembly Resolution 2625 (XXV) of October 1970.

How can the conflicting rights of minorities to self-determination and the territorial integrity of the state (and its people as a whole) be reconciled? Some help may come from international practice concerning the recognition of new post-colonial independent states in old inherited boundaries. For the international community, the stability and finality of frontiers was viewed as the most important issue. Under present practice in international law, the right to self-determination continues beyond the moment of decolonization, and allows choices as to political and economic systems within the existing boundaries of the state. But self-determination stops at the point of demands to redraw international boundaries. International law practice is to recognize "people" as meaning all the peoples of the given territory. Therefore, minorities do not have a right to secession, to independence or to change international frontiers to join similar groups. On the other hand, there is nothing in international law that prohibits secession or the formation of new states. If secession has in fact occurred, and state has emerged with its own government, functioning effectively with a given territory, recognition of this state will often follow. For example, recognition of Slovak Republic, Slovenia, and Bosnia-Herzegovina.

The second phase of the development of the concept of self-determination led to the transformation of this principle into a human right.¹⁴¹ The adoption of the two covenants on human rights in 1966 (ICCPR and ICESCR) changed the principle of self-determination into the right to self-determination.¹⁴² The first articles of both covenants state: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely

¹⁴¹ Thornberry, *supra*, note 134 at 33.

¹⁴² A. Cassese, "The Helsinki Declaration and Self-Determination, in Human Rights" in T. Buergenthal, ed., *International Law and the Helsinki Accord* (New York: The Bobbs-Merrill Company, 1977) at 22.

pursue their economic, social and cultural development."¹⁴³ In the years following the Declaration on Granting Independence to Colonial Countries and Peoples, the practice of international law regarding self-determination evolved to include situations going beyond the context of colonialism. For example, this right has been extended to other peoples subject to foreign or alien domination (emergence of new democracies in central and eastern Europe). This trend in international law was endorsed by the United Nations Declaration on Friendly Relations.¹⁴⁴ The Declaration describes situations of self-determination not only in a context of decolonization but also in situations where there is "subjection of peoples to alien subjugation, domination and exploitation."¹⁴⁵ From this date on, references to self-determination are recast in human rights terms. The Helsinki Final Act and the African Charter on Human Rights provide that all people shall have the right to self-determination.

This acceptance has been evident in various advisory opinions of the International Court of Justice. The earlier advisory opinions of the ICJ on the right to self-determination were limited to decolonization. In the *Western Sahara* Advisory Opinion,¹⁴⁶ the Court affirmed the linkage between self-determination and the right of peoples under colonial rule.¹⁴⁷ Judge Nagendra Singh noted:

the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. ... Thus even if integration of territory was demanded by an interested State, as in this

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- 143 Article 1 of the International Covenant on Economic, Social and Cultural Rights, GA. Resolution 2200A (XXI) of Dec. 16, 1966, and article 1 of the International Covenant on Civil and Political Rights, GA. Resolution 2200A (XXI), of Dec. 16, 1966.
 - 144 UN G. A. Res., 2625, *supra*, note 140.
 - 145 *Ibid.*
 - 146 ICJ Reports (1975) 12, para. 162
 - 147 Hannum, *supra*, note 135 at 37, and *Western Sahara* Advisory Opinion, I.C.J. Reports 1975, at 12, para. 81.

case, it could not be had without ascertaining the freely expressed will of the people - the very 'sine qua non' of all decolonization.¹⁴⁸

In the ICCPR, self-determination is included in articles 1 and 27. Article 1 of both the UN Human Rights Covenants begins with the following phrase: "All peoples have the right to self-determination." Article 27 of ICCPR alone contains general provisions in regard to minority rights.¹⁴⁹ However, neither of the articles provides a comprehensive definition. The text and the *travaux préparatoires* support the view that the Covenants reach beyond the colonial situation.¹⁵⁰ A tension between "people" and "minority" was apparent in various stages in the drafting. Political control is not included in the enumerated rights of minorities.¹⁵¹

New light was shed on the problem of self-determination and minorities by general comment No. 23 of the UN Human Rights Committee.¹⁵² In this comment, the Committee expressed the opinion that the right to self-determination cannot be claimed under the Optional Protocol. The right belongs only to "peoples" and is not an individual right.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under Article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant.[...]
- 3.1 The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right recognizable under the Optional Protocol.¹⁵³

148 Hannum, *supra*, note 135 at 37.

149 Thornberry, *supra*, note 134 at 877.

150 *Ibid.* at 878.

151 *Ibid.*

152 United Nations Human Rights Committee, General Comment No. 23(50) on article 27/ Minority rights, adopted by the Committee at its 1314 meeting (fiftieth session) on April 6, 1994, UN Doc. CCPR/C/21/Rev.1/Add.5.

153 *Ibid.*

Further expansion of the traditional interpretation of article 27 of the ICCPR is offered by the UN Human Rights Committee in the area of protection of persons belonging to minorities who are not citizens of the State. This is a new approach of the United Nations, especially significant in light of recent developments in the post-communist states in Central and Eastern Europe. In some of those states, new citizenship laws have had negative impacts on some minorities.¹⁵⁴ The Human Rights Committee stated:

- 5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party.¹⁵⁵

Furthermore, the Committee stated that the persons belonging to minorities do not need to be permanent residents of the State party. The obligation of the state is extended to migrant workers and even visitors.¹⁵⁶

Various international instruments such as the Genocide Convention, ILO Conventions, and the Helsinki Final Act, still preserve the distinction between self-determination and minority rights.

The right to self-determination according to the present interpretation of international law is the right of peoples, with strict limits on application. The United Nations and states in practice recognized only very limited rights to external self-determination, defined as the right to freedom from a former colonial power, and internal self-determination, defined as independence of the whole state's population from foreign intervention or influence.¹⁵⁷ Despite the

¹⁵⁴ For example, new citizenship law in the Czech Republic was discriminatory towards Romani (Gypsy) population, and the new citizenship law of Estonia was discriminatory towards its Russian minority.

¹⁵⁵ UN-HRCee, Gen. Com., on article 27, *supra*, note 152.

¹⁵⁶ *Ibid.*

¹⁵⁷ Hannum, *supra*, note 135 at 49.

limitations on the present application of the right to self-determination, the idea of self-determination as a human right will continue to be a major political force in international relations.¹⁵⁸

Current international law has sanctioned self-determination as an anti-colonial postulate; however, it has not been accepted as a principle to protect national or ethnic groups, or as a postulate for defying autocratic regimes. State sovereignty, infringed in the case of colonialist and similar regimes, has shielded States from the demands of ethnic minorities.¹⁵⁹

It is not easy for minorities to employ language of the right to self-determination. Nonetheless, international law does recognize a limited application of the group rights that may be of benefit to minorities.

158 *Ibid.*

159 Cassese, *supra*, note 8 at 135.

2. The Historical Background of Protection of Minorities

In order to fully understand the contemporary challenges presented by international protection of minorities, a historical perspective is essential. A number of present inter-ethnic conflicts are deeply rooted in the historical conflicts between hostile ethnic groups. This element is present in the conflict in former Yugoslavia, as well as in many conflicts in Central Asia.

2.1. Protection of Minorities in International Treaties. The Early Period of Non-Systematic Protection

The first texts providing for favorable treatment of minorities can be found in international treaties dating from the sixteenth and seventeenth centuries.¹⁶⁰ Protection was limited to the European legal and political arena. The cornerstone of modern international law, the *Treaty of Westphalia* in 1648, contained certain guarantees for religious minorities.¹⁶¹ Other international agreements, notably the *Treaty of Osnabrück* and *Treaty of Oliva* (1660)¹⁶² between Poland and Sweden, guaranteed different sects protection for their religious rights and for separate schools. However, this early protection of religious rights can not be interpreted in the same way as contemporary minority rights protection.¹⁶³ The early protection of the religious rights in XVII century

¹⁶⁰ H. Hannum, "Contemporary Developments in the International Protection of the Rights of Minorities" (1991) 66:5 Notre Dame Law Review at 1431.

¹⁶¹ *Ibid.*

¹⁶² Treaty of Osnabrück or Treaty of Oliva(1660), between Poland and Sweden.

¹⁶³ Hannum, *supra*, note 160 at 1431.

was not in any means similar to modern concepts of rights. The early religious rights were usually granted as a privilege by the sovereign.

For the next two centuries fragmented protection was offered mainly to religious minorities. Thus, there were some guarantees of minority rights in the decisions of the *Congress of Vienna* (1815), the *Treaty of Berlin* (1876) and even in some domestic legislation (e.g., the Bulgarian Constitution of 1879).¹⁶⁴

However, it was not until the end of First World War that the international community, using the League of Nations, put in place a system for the protection of minorities. This first comprehensive and institutionalized system of protection for minorities was created by League of Nations in a series of international instruments, known as the minority treaties.¹⁶⁵

2.2. The League of Nations Experience with Regard to Protection of Minorities

The League of Nations was created by the *Treaty of Versailles* on June 28, 1919.¹⁶⁶ The *Treaty of Versailles*, signed between the Allied and Associated powers and Poland,¹⁶⁷ served as a model through the twentieth century for a group of international instruments called minority treaties. The main goal of the minority treaties was to enable minorities to enjoy basic human rights, both in law and in practice.¹⁶⁸ The system of the minority treaties is divided into three

¹⁶⁴ *Ibid.* at 1432.

¹⁶⁵ *Ibid.*

¹⁶⁶ Treaty of Peace with Germany (Treaty of Versailles) of June 28, 1919.

¹⁶⁷ Treaty between the Principal Allied and Associate Powers and Poland on June 28, 1919.

¹⁶⁸ I, A. Daes, *Freedom of the Individual under Law, A Study on the Individuals Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the*

main categories.¹⁶⁹ The first category contains treaties signed between the Great Powers and the states defeated in the First World War (Austria, Hungary, Bulgaria and Turkey). The second contains treaties imposed on newly created states or states with redrawn boundaries (Czechoslovakia, Greece, Poland, Romania, and Yugoslavia). The last category includes regulated special territories under the supervision of the League of Nations (Åland Islands, the Free City of Danzig, the Memel Territory, and Upper Silesia).¹⁷⁰

The most innovative element of the minority treaties was that rights were to be guaranteed by the League of Nations, not, as was customary, by the Great Powers. An additional element was the advisory function of the Permanent Court of International Justice (PCIJ).¹⁷¹ In a number of advisory opinions, the PCIJ defined the main principles relating to the protection of minorities, many of which remain valid in the contemporary context.¹⁷²

The fact of judicial supervision itself has been considered one of the important new elements in the post-First World War minority protection system.¹⁷³ For example, the Advisory Opinions of the PCIJ contained statements to the effect that real equality demands positive action and special measures for minorities. Unfortunately, this was rarely given effect.¹⁷⁴ Another innovative element of the League of Nations System was that positive rights respecting language, education, religious and cultural activities were guaranteed. These were collective rights and, as such, tended to conflict with the liberal, western

Universal Declaration of Human Rights, United Nations Publication, Sales No. E.89.XIV.5. p.2.

169 Hannum, *supra*, note 160.

170 *Ibid.*

171 *Capotorti Report, supra*, note 16 par. 124 at 24.

172 *Ibid.* at 24 par. 125.

173 *Ibid.* at 24 par. 123.

174 PCIJ advisory opinion of April 6, 1935 on the Question of the Minority Schools in Albania, (1935) P.C.I.J., Series A/B, No. 64 .

tradition of individual rights. Individual rights for persons belonging to minorities were also included. Individuals were entitled to equal treatment, but not special treatment (different from other citizens of their state).

In an advisory opinion of April 6, 1935 *On the Question of Minority Schools in Albania*,¹⁷⁵ the PCIJ stated two main objectives with regard to minority rights. First, in order to achieve true equality between the majority and minority the parties were to ensure close to perfect equality between individuals belonging to minorities and other nationals of the State and give minority groups suitable means to preserve their racial, traditional and national characteristics. Secondly, all nationals of each of the countries in question were to be granted equality before the law, in civil and political rights, in treatment and security, as well as equal access to public employment. The Court stated:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs.¹⁷⁶

Finally, provisions in the minority treaties guaranteed protection of the right to nationality.¹⁷⁷ The PCIJ in its advisory opinions regarding minority rights provided some guidelines in Advisory Opinion of September 15, 1923 on acquisition of Polish nationality.¹⁷⁸

One of the examples of the League of Nations minority protection system was the situation in the Free City of Danzig. Protection of the Polish minority in

¹⁷⁵ PCIJ advisory opinion of April 6, 1935 on the Question of the Minority Schools in Albania, (1935) P.C.I.J., Series A/B, No. 64 at p. 18, see also, German Settlers in Poland (1923), PCIJ, Series B, No. 6 at 24-25.

¹⁷⁶ *Ibid.* at 17.

¹⁷⁷ *Capotorti Report, supra*, note 16 par.99 at 18.

¹⁷⁸ PCIJ, Series B, No 7.

Danzig was set out in a Convention between Poland and the Free City of Danzig.¹⁷⁹ The city was inhabited by a predominantly German population, although Danzig's close economic links with Poland constituted the main argument in support of its incorporation into post-war Poland. In addition to German and Polish ethnic groups in Danzig, there was a significant presence of the Kashubians, a native group of eastern Slovians who spoke a distinctive language. The Treaty of Versailles gave the League of Nations control of the administrative affairs of the Free City of Danzig. The League was to have Danzig under its protection, to maintain a High Commissioner there, and to ratify the future constitution of Danzig. The High Commissioner was also to settle disputes between Poland and the Free City of Danzig.¹⁸⁰

As far as the rights of Poland to Danzig were concerned, their formulation was only general in character, although the Treaty of Versailles devoted much space to them. Among numerous economic and other rights (such as the right of access to the port, the right to control the railway system and the right to administer postal, telegraphic and telephone communications), the protection of the Polish minority was explicitly guaranteed. The Treaty provided that any discrimination against citizens of Poland and people of Polish origin was forbidden.¹⁸¹

At first, the Council of the League of Nations and the High Commissioner made vigorous use of their powers in Danzig and even wanted to extend them. The Council of the League of Nations, for example, forced the authorities in Danzig to introduce certain amendments to the constitution passed by the

179 The Convention between Poland and Free City of Danzig, Paris, Nov., 9, 1920, World Court Reports.

180 E. Cieslak & Cz. Biernat, *History of Gdansk* (Gdansk: Wydawnictwo Morskie, 1988) at 409.

181 *Ibid.* at 413.

Danzig Constituent Assembly.¹⁸² Gradually, however, the importance of the League of Nations in Danzig diminished. This was linked with the general weakening of the role and significance of the organization. Particularly violent attacks against the powers of the League of Nations, especially against the High Commissioner in Danzig, were launched after 1933 by the Nazis. These attacks were made easier by the fact that the Polish government, instead of sustaining the rights of the High Commissioner and the Council of the League of Nations, agreed to direct discussions with Danzig.¹⁸³

Provisions for the protection of minorities were also contained in the Polish-German Upper-Silesia Treaty of 1922.¹⁸⁴ It not only guaranteed certain rights -- including life, liberty, and the free exercise of religion -- for all inhabitants, equal treatment before the law, and the same civil and political rights for all nationals, but also:

- (1) the same treatment and security in law and in fact to all linguistic, religious, or ethnic minority groups of nationals; and
- (2) the right of minority groups to establish schools and religious institutions, and to use their own language for publications, at public meetings, and before the court.¹⁸⁵

Judicial decisions based on the German-Polish Convention on Upper-Silesia led to recognition of the individual in international law. A Pole and a Czech were the first private individuals in the history of international law to establish personal rights against the State. The applicants as individuals were

182 *Ibid.* at 415.

183 *Ibid.* at 426.

184 *Ibid.*

185 P. Sieghard, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 377.

granted a standing and their case was accepted by an inter-governmental organ.¹⁸⁶

Under the League of Nations, according to the rules set out in the minority treaties, the procedure for the review of petitions from minorities was as follows.¹⁸⁷ First, the petition had to be accepted and communication was submitted to the Government. A petition from a minority group, when received by the Secretariat, was examined for compliance with the following conditions:

- it must not come from an anonymous or non-authentic source;
- it must not be worded in violent language;
- it must allege a breach of the provisions of minority treaties.¹⁸⁸

If it was accepted, the petition was communicated to the members of the Council, and examined by the Committee of the Three known as "the Minorities Committee." This Committee made the substantive decision in the case. The Committee could choose one of the following options in examining a application: (a) reject a petition; (b) undertake direct negotiations with the concerned Government to find an acceptable solution; or (c) request placement of the issue on the agenda of the Council of League of Nation for consideration.¹⁸⁹ A written communication was sent to the parties.¹⁹⁰

The collapse of the League of Nations minorities system came after Germany, claiming that its minorities were mistreated in other member states, left the organization in 1933. The following year Poland announced that it

¹⁸⁶ *Steiner and Gross v. The Polish State*, Upper Silesian Arbitrary Tribunal, Cases Nos. 188 and 287, Annual Digest 1927-8.

¹⁸⁷ L.S. Sohn & T. Buergenthal, *International Protection of Minority rights. The League of Nations System and Post-World-War-II Arrangements in, International Protection of Human Rights* (New York: The Bobbs-Merril Company, 1973) at 235.

¹⁸⁸ Capotorti, *supra*, note 16 par. 106 at 20.

¹⁸⁹ *Ibid.* par.107 at 20-21.

¹⁹⁰ See table at the end of this work.

would no longer abide by the minority treaties. Further developments included the dismemberment of Czechoslovakia in 1938. Finally, in December 1939, after the eruption of World War II, the minority section of the League of Nations was disbanded.

Generally, although the system functioned for a twenty-year period, the League of Nations system of protection of minorities rights did not work well. During these two decades, only four individual cases were deemed admissible. In the opinion of many scholars, the system of minority treaties was a failure.¹⁹¹ This system had two standards: one for colonial empires, and another for defeated states and newly created states.¹⁹² Further shortcomings of this system included: a lack of broad political or economic autonomy, limited application of the right to "self determination," and a slow, bureaucratic approach.¹⁹³ The failure of the League of Nations minorities protection system was not a failure of the concept of minorities rights itself. The failure of the system should also be viewed in the broader context of the general ineffectiveness of international relations at the time.¹⁹⁴ Despite its shortcomings, the League of Nations system served as a basis for future systems of protection of minority rights.

¹⁹¹ Hannum, *supra*, note 160 at 1432.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Capotorti, *supra*, note 16 par. 134 at 24.

3. Minority Rights: Protection Under the United Nations System

As the earlier historical discussion has shown, World War II was a turning point in government attitudes towards the rights of minorities. Despite the changing attitudes, demands for the international protection of minorities continued to be opposed by States that saw such participation as threats to their existence and to their governing ideologies.¹⁹⁵ Attempts to promote the protection of minorities by such respected international law scholars as H. Lauterpacht and H. Kelsen had little initial effect on the United Nations system of protection of human rights created after World War II which focused on guarantees for individual rights and omitted minority rights as such. As a result the political aspirations of many minority groups, especially in the Soviet zone of influence in eastern Europe, remained frozen under regimes hostile to minority rights and unsympathetic to human rights protection generally.¹⁹⁶ The collapse of the Soviet Empire triggered a chain reaction of the revival of minority claims, a phenomenon that shows little signs of abating.¹⁹⁷

In the present post-cold war period characterized by eruptions of ethnic conflicts, the international community, diplomats and scholars have been preoccupied with finding solutions to resolve these conflicts. In the international arena, human rights standards have been established to cover individuals, including members of minorities. But the setting of standards which would create additional rights and make special arrangements for persons belonging to minorities and for the minorities as groups has been slow, despite being a stated

¹⁹⁵ For example by Latin American States and United States of America.

¹⁹⁶ Rodley, *supra*, note 107.

¹⁹⁷ *Ibid.*

goal of the United Nations.¹⁹⁸ In recent years, there has been increased interest in the problems of minorities and a corresponding increase in international actions to protect minority rights.

3.1. Existing International Standards for Protection of Minorities

Prohibition of discrimination and equal enjoyment of universal human rights are generally recognized rules of international law.¹⁹⁹ The cornerstone for a universal application of these principles is found in the provisions of the *United Nations Charter* (1945) and the *Universal Declaration of Human Rights* (1948). Other, more detailed UN instruments refer to issues of non discrimination and equality. Those instruments include the two *International Covenants*, one on, *Economic, Social and Cultural Rights* (ICESCR) and the other on *Civil and Political Rights* (ICCPR), both adopted by the United Nations in 1966. Non-discrimination is also included in a number of specialized international agreements and declarations. These include: the *International Convention on the Elimination of All Forms of Racial Discrimination* (United Nations, 1965); the *Convention on the Elimination of All Forms of Discrimination against Women* (United Nations, 1979); the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* (United Nations, 1981); the *Convention on the Rights of the Child* (United Nations, 1989); the *Convention concerning Discrimination in Respect of Employment and Occupation* (ILO Convention No. 111, 1958); the *Convention*

198 G. Alfredsson & A. de Zayas, "Minority Rights: Protection by the United Nations" (1993) 14:1-2 Human Rights Law Journal at 1-2.

199 *Ibid.*

Against Discrimination in Education (UNESCO, 1978); and the *Declaration on Race and Racial Prejudice* (UNESCO, 1978). These instruments include guarantees for individual members of minorities as well as some group rights. Rights guaranteed with regard to persons belonging to minorities include, in particular, recognition before the law, equality before the courts, equality before the law and equal protection of the law. These rights are guaranteed by the provisions of articles 6 and 7 of the Universal Declaration and articles 14, 16 and 26 of the ICCPR.²⁰⁰

Non-discrimination is also established as a general rule in regional human rights instruments.²⁰¹ These include the *European Convention on Human Rights* (1950, article 14), the *European Social Charter* (1961), the *Declaration regarding Intolerance - A Threat to Democracy* (1981), the *Framework Convention for the Protection of National Minorities* (1994), the *American Convention on Human Rights* (Organization of American States, 1969), and the *African Charter* (OAU 1981). In the European arena, the body which has recently been most active in establishing new non-discrimination and equality standards is the Organization for Security and Cooperation in Europe (OSCE). This organization adopted such important documents as the *Final Act* (Helsinki, 1975), the *Charter of Paris for New Europe* (Paris, 1990), the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 1990), the *Concluding Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 1991), *Report of the CSCE meeting of Experts on National Minorities* (Geneva, 1991), and the *Budapest Document: Towards a Genuine Partnership in a New Era* (Budapest, 1994).

²⁰⁰ *Ibid.* at 2.

²⁰¹ *Ibid.*

Throughout the post-war history of the United Nations, the protection of minorities was related to the rule of non-discrimination. During the drafting of the United Nations Charter in San Francisco, Latin American States and the United States of America replaced the concept of "protection of minorities" with the concept of "prevention of discrimination."²⁰² The omission of a direct reference to minorities in the United Nations Charter lessened the possibilities for the international protection of minorities. The concept of non-discrimination included in the Charter was not, by itself, sufficient to focus international community attention on the needs and interests of minorities.²⁰³

Like the UN Charter, the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948 contains no reference to the rights of persons belonging to ethnic, linguistic or religious minorities.²⁰⁴ The General Assembly expressed its concern about the protection of minorities in Resolution 217 C (III) of December 10, 1948, stating that the United Nations could not remain indifferent to the fate of minorities, but that, at the same time, the "minorities problem" was complex and delicate.²⁰⁵

Nor was positive protection of minorities included in two the Covenants. Article 27 of the ICCPR, for instance, presents minority rights in negative terms. At the same time, however, the United Nations has commissioned numerous studies and reports to signal that, despite its absence from UN documents, minority protection is still important. As mentioned earlier, the main study on the rights of persons belonging to minorities was carried out by Francesco

²⁰² P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Carleton Press 1991) at 123.

²⁰³ *Ibid.*

²⁰⁴ *Capotorti Report, supra*, note 16 at 27.

²⁰⁵ *Ibid.*

Capotorti,²⁰⁶ a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sub-Commission).

In his final report in 1977, Capotorti recommended that full use be made of the procedures available under the ICCPR to implement its provisions on minorities (article 27), and that there be procedures at the national level to deal with minority rights violations established under this article. He also proposed drafting an international declaration on the rights of members of minorities.

Although this study became a benchmark for the development of modern minority protection, the important conceptual work done by Capotorti was not translated by the United Nations into a practical instrument for protecting minorities. Instead, the United Nations has limited itself to commissioning additional reports and studies. For example, in 1989 another member of the Sub-Commission, Asbjørn Eide,²⁰⁷ was asked to prepare a report on national experience with peaceful and constructive solutions to problems involving minorities. He submitted a preliminary report that same year, and progress reports in 1991 and 1992.²⁰⁸ His final report was presented in August 1993.²⁰⁹ The Eide report, the purpose of which was to promote new approaches to minority protection, is the most important minority protection oriented document in recent times.

²⁰⁶ *Ibid.*

²⁰⁷ Asbjørn Eide is Director of the Institute of Human Rights in Oslo and is a member of the United Nations Sub-Commission on Prevention and Protection of Minorities. A. Eide is also the former Director of the International Peace research Institute and the former Secretary-General of the International Peace Research Association in Oslo. In the course of a distinguished career in the fields of human rights, international law and peace research A. Eide has written over 130 publications and is the author of *The Universal Declaration of Human Rights: A commentary* (1991), among many other books.

²⁰⁸ The first progress report UN Doc. E/CN.4/Sub.2/1991/43, the second progress report UN Doc. E/CN.4/Sub.2/1992/37.

²⁰⁹ *Eide Report, supra*, note 29.

The Eide report was based on a three year study of the policies and practices towards minorities of all governments. International NGOs also had an opportunity to contribute evidence and opinions regarding protection of minorities. The main areas covered in this report are: the definition of a "situation involving minorities"; problems surrounding a definition of minority; the right to self-determination; the present international position on minority rights; and possibilities for peaceful and constructive solutions to situations involving minorities. According to Eide's report:

The framework for the solution of minority situation problems consists in a combination of several elements: (a) Respect for territorial integrity; (b) Ensuring equality and non-discrimination in the common domain; (c) Arrangements for pluralism in togetherness; (d) Where appropriate, pluralism by territorial subdivision.²¹⁰

The Eide Report also includes recommendations to the UN Sub-Commission. Those recommendations form three main groups. First, he recommended that, in all states, there should be "a common domain of equality and non-discrimination."²¹¹

Second, he recommended that measures should be taken at the national level that would include, among others, the right of minorities to receive education in their own languages and cultures, and that "the curricula in all States should teach tolerance of all groups."²¹² The measures at the national level should also include: effective implementation of the civil rights of members of minorities and majorities; equal enjoyment of economic and social rights; opportunities for effective participation in the political organs of society; incorporation in the constitution of political participation of minorities; recognition and respect by the members of minorities of their duties to the

²¹⁰ *Eide Report, supra*, note 29, par. 124 at 27.

²¹¹ *Eide Report, supra*, note 29, Add.4 at 2.

²¹² *Ibid.* at 3.

society at large; and existence of effective recourse and conciliation mechanisms.²¹³

Third, at the international level, Eide also recommended that states should adhere to established principles of international law; at the bilateral level they should strictly observe principle of non-intervention; and at the regional and sub-regional level appropriate organizations "should increase their efforts to provide procedures and channels for early and peaceful settlement of disputes involving minorities."²¹⁴

At the United Nations, Eide recommended the following measures. The UN Sub-Commission should consider preparation of a comprehensive programme of action against widespread discrimination as well as positive measures for promotion of the rights of members of minorities. This comprehensive programme should include, among other things, the problem of nationality laws, the meaning and scope of self-determination, prevention of violent group conflicts, and monitoring the situation of vulnerable groups.

Eide also recommended that specialized agencies and other organs of the United Nations should concentrate on activities that lessen the prospect of group conflicts. Specifically, he mentioned the work of the Office of the United Nations High Commissioner for Refugees, UNESCO, the ILO, the World Bank, and the United Nations Research Institute for Social Development.

The last part of Eide's recommendations is focused on the significant role of non-governmental organizations. According to him this role would include: helping to create awareness of potential violent conflicts; providing additional information on the situation of minorities; and building bridges between groups in conflict.

²¹³ *Ibid.* at 4-5.

²¹⁴ *Ibid.* at 7.

The Eide report set directions to promote the rights of minorities; however, to date, the international community has been very reluctant to follow its recommendations. The Sub-Commission, the UN body that requested this study, committed very little time for discussion of the Eide report when it was completed, despite the fact that most of work of the UN Sub-Commission and the UNCHR is devoted to the consequences of failing to protect minorities.

In its conclusion the Eide report warned the international community that a failure to protect minority rights and an inability to build close inter-community cooperation could readily provide opportunities for nationalist politicians to exploit ethnic differences and misunderstandings. From the Eide Report we can learn how difficult it is to find peaceful solutions to violent conflicts.²¹⁵

3.2. Existing Provisions on Special Measures and Special Rights

As was mentioned at the beginning of this chapter, the prevailing view of founders of United Nations was that, if individual rights were properly protected, special provisions for the rights of minorities would not be needed. As a result, the United Nations has been criticized for having failed to properly understand and provide protection for minorities.²¹⁶

Awareness of the need for differential treatment of minorities in order to preserve their distinct characteristics was present in the pre-United Nations era.²¹⁷ It is regrettable that the United Nations stopped short of recognizing

²¹⁵ A. Eide, "New Approaches to Minority Protection" (1993) *Minority Rights Group Report* at 6.

²¹⁶ Thornberry, *supra*, note 202.

²¹⁷ Alfredsson & Zayas, *supra*, note 198 at 2.

already established rules of international law. One possible explanation may be that the post-Second War political agenda did not include minorities. Another may be that most of the drafters of the United Nations instruments were from states that had no minority problems within their own borders (or at least did not admit of having such problems).²¹⁸ At first sight, it seems as if the adoption of provisions incorporating special rights and measures for the protection of minorities might have prevented many of the serious violations of human rights throughout the United Nations' history. Until the recent worldwide eruption of inter-ethnic violence, the United Nations was very slow in addressing these issues seriously. The adoption of the United Nations Declaration on Persons Belonging to National Minorities is a leading example of its conservative approach. The organization does not seem able to present modern solutions for current problems. It has only managed to offer partial solutions and ineffective programs of action. The Declaration is only a program of action for the participating governments, not a binding international instrument.

The case law of the UN-HRCee includes many cases which were held inadmissible. Nonetheless, these decisions have contributed to the further development of international minority human rights law. Numerous cases unsuccessfully brought to the Committee's attention were linguistic discrimination complaints of persons of Breton ethnic origin, five of which were communications against France²¹⁹ submitted by members of the Breton ethnic

218 J. Helgesen, "Protecting Minorities in the CSCE Process," in A. Rossas and J. Helgesen, eds., *The Strength of Diversity, Human Rights and Pluralist Democracy* (Hague: Martinus Nijhoff Publishers, 1992) at 161.

219 *S.R., v France*, Communication No.234/1987, Nov., 5, 1987; *C.L.D., v. France*, Communication No., 228/1987, July 18, 1988; *J.B., v. France*, Communication No. 324/1988, Of., 1988; *H.K., v. France*, Communication No.325/1988, Oct., 25, 1988; *R.T., v. France*, Communication No. 262/1987, Mar. 30, 1989.

group. They alleged violations of articles 2, 19, 24, 26, and 27 of the Covenant on the grounds that the Breton language was not admitted or was discriminated against in schools and in the public administration sphere with respect to postal and fiscal matters. All five communications were dismissed because of rule of non-exhaustion of domestic remedies under article 5 (2) b of the Optional Protocol of the ICCPR.²²⁰ Nonetheless, the reasoning of the UN- HRCee offers insight into developing area of international law.

For example, in one of the cases, *T.K. v France*,²²¹ the author of the communication was a French citizen of Breton ethnic origin who stated that he was treated in a discriminatory fashion by French authorities because he used the Breton language. The author claimed that, because the French government refuses to recognize the Breton language, there is inequality between native French-speaking and native Breton-speaking French citizens. The French government's position was that the prohibition in its Constitution of distinction on grounds of origin, race or religion means that there are no minorities in France, and therefore article 27 does not apply.²²² In its refusal to admit the communication, the Committee based its decision on the following grounds. First, the claimant failed to exhaust all available domestic remedies. Second, the author had demonstrated his proficiency in French, it would not be unreasonable for the government to require him to submit his claim in French to French courts. Third, the French Government made a valid reservation to the Covenant.²²³ In a dissenting opinion, Mr. Wennegren argued that the

220 M. Novak, "United Nations Human Rights Committee Survey of Decisions" (1990) 11:1-2 Human Rights Law Journal at 154.

221 *T.K. v. France*, Communication No. 220/1987, UN. Doc. A/45/40/1990 Vol.2 at 118; *C.L.D. v France*, Communication No. 228/1987;

222 *Ibid.* at 304-305.

223 (1990) 11:3-4 Human Rights Law Journal at 303.

complainant had no effective domestic remedy; thus the communication should have been declared admissible.

It appears that protection of linguistic minorities is included in article 27 of the ICCPR. The specific right protected by the article is the right to speak the minority language.²²⁴ Although the jurisprudence of the United Nations organs does not include decisions related to linguistic minorities, the recent case of *McIntyre v. Canada*,²²⁵ did address some of the problems experienced by linguistic minorities.

In the *McIntyre case*, the UN-HRCee was called upon to discuss the problem of double minorities. The *McIntyre case* was originally brought against the province by the members of the English-speaking minority in Quebec, a province where restrictive language legislation exists. The French language law (Bill No. 101, S. Q. 1977, C-5, and its modifications) prohibited the use any language other than French in commercial advertising. Because they are forbidden to use English for purposes of advertising, e.g., on commercial signs outside the business premises, or in the name of the firm,²²⁶ the complainants alleged that they were victims of violations of articles 2, 19, 26 and 27 of the ICCPR by the Federal Government of Canada and by the Province of Quebec. The authors of the original communication, Mr. Ballantine and Ms. Davidson,²²⁷ owned a company with English-speaking customers in Quebec and have always used English signs outside their establishment to attract potential customers. The author of the second communication, Mr. McIntyre, received a notice from the Commissioner-Enquirer of the "Commission de

²²⁴ Rodley, *supra*, note 107.

²²⁵ Communications, Nos. 359/1989 and 385/1989, UN Docs. C/PR/C/47/D/336/1989 and 389/1989/Rev.1, May 5, 1993.

²²⁶ UN Human Rights Committee, "Violation of freedom of expression on English speaking of Quebec/ McIntyre at all. v. Canada" (1993) 14:5-6 Human Rights Law Journal at 171.

²²⁷ Communication No. 359/1989, *J. Ballantyne and E. Davidson v. Canada*.

protection de la langue française" that the outside sign "Kelly Funeral home" constituted an infraction of the *Charter of the French Language*.

The main argument of the UN-HRCee in deciding not to consider the McIntyre complaint as a potential violation of articles 27 and 26 of the ICCPR, was that the anglophone minority in Quebec was the majority group in the whole of Canada. The Committee established that commercial expression in language other than officially established is protected by article 19 (2) of the ICCPR.²²⁸ In light of *McIntyre case*, protection of the right to use minority language included in article 27 does not specify particular categories of language beyond speech, in its common meaning.²²⁹ The *McIntyre case* was highly controversial and brought an unusual number of separate opinions.²³⁰

The UN-HRCee, in a recent General Comment on article 27,²³¹ reversed its long history of negative interpretation, expressing the opinion that:

Although article 27 is expressed in negative terms, 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 are 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 act of other persons within the State party.²³²

Thus, the UN-HRCee not only offered a new interpretation of article 27 favouring positive measures towards minorities, it also extended the responsibility of the State for the actions of non-state parties within its jurisdiction. This is a significant change in the United Nations attitude towards minorities.

²²⁸ Rodley, *supra*, note 107 at 55.

²²⁹ *Ibid.* at 56.

²³⁰ UN Human Rights Committee, *supra*, note 226 at 177.

²³¹ U N Human Rights Committee, General Comment, *supra*, note 152 at 130.

²³² *Ibid.*

3.3. United Nations Minority Protection Machinery

The United Nations human rights machinery is based on the provisions of the UN Charter. A leading role in the international control of human rights is played by the Economic and Social Council and subsidiary bodies. Those latter include the UN Human Rights Commission, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and UN High Commissioner for Human Rights. The mandate of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities is: (a) to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and make recommendations to the UNCHR concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, religious and linguistic minorities; and (b) to perform any other functions entrusted to it by the Economic and Social Council or by the Commission.

A second type of machinery used by the United Nations to protect minorities is the Committee system of control and implementation established in accordance with the United Nations human rights treaties. Those treaties require state parties to report at regular intervals to their respective monitoring bodies. This part of the system includes the Human Rights Committee, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child, the Committee against Torture, and the Group of Three established under the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Human Rights Committee and CERD, in particular carry out their functions in an increasingly effective manner, both in the examination of

the reports and in the subsequent questioning of government representatives at their meetings.

For persons belonging to minority groups who consider that their human rights and fundamental freedoms have been violated, the United Nations offers the following procedures.

First, the UNCHR employs a special procedure established by the United Nations Economic and Social Council in Resolution No. 1503 (XLVIII) of May 27, 1970.²³³ This procedure is directed to examining situations which reveal a consistent pattern of violations of human rights. The system established by the "1503" procedure has the widest scope of complaint procedures in the international human rights sphere. Yet, at the same time, it appears to be somewhat restrictive due to its confidentiality requirements.²³⁴

The intent of Resolution No. 1503 was to identify and eliminate situations of "consistent pattern of gross violations of human rights"²³⁵ and not to redress individual grievances. Individual complaints are taken only as the "patterns" of violations. In this respect, the "1503" procedure stands in contrast to procedures under the Optional Protocol of ICCPR, and the European Convention on Human Rights (whose aim is to bring redress to an individual complainant). Under this procedure, communications received by the Center for Human Rights, that allege such situations are forwarded first to the governments concerned for their comments. The communications, together with the comments of those governments, are then considered by a working group of the UN Sub-Commission on Prevention of Discrimination and Protection of minorities. If the sub-commission, on the recommendation of the working group, considers

²³³ UN ECOSOC Resolution No. 1503, UN Doc. E/4832/Add.1 (1970).

²³⁴ M.E. Tardu, "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure" (1980) 20:3 Santa Clara Law Review at 559.

²³⁵ *Ibid. supra*, note 233.

that a particular situation fulfils the criteria set out in Resolution 1503, it refers the communication to the UN CHR. The Commission then decides what further action ought to be taken. The Commission then report reasons on a such action to the ECOSOC. All activities under this procedure are confidential, and the results remain confidential, unless the ECOSOC decides otherwise.²³⁶ There is no time limit for completion of the proceedings and since no inter-sessional machinery exists, several situations are carried over from one session of the UNCHR to the next.²³⁷ The vagueness of his procedure stands in contrast to many topical or regional human rights protection systems. This procedure was also criticized by NGOs, which allege that it is very often used by governments accused of gross violations of human rights as a tool to move the issue into a confidential, non-public procedure.

Second, under the "optional protocol" procedure established by an Optional Protocol to the ICCPR, individuals who claim that their Covenant rights have been violated and who have exhausted all available domestic remedies may submit written communications to the UN-Human Rights Committee for consideration. No communication can be received by the Committee if it concerns a state party to the Covenant which is not also a party to the Optional Protocol. The Committee considers communications in the light of all the written information made available to it by the individual and by the state party concerned, and forwards its' views to both. This procedure is a general standard-setting process for international human rights law. As was discussed in other parts of this paper, a large number of communications has been received and considered under this procedure.

²³⁶ *United Nations Action in the Field of Human Rights, supra*, note 95 at 329.

²³⁷ M.E Tardu, *supra*, note 234 at 563.

Third, monitoring procedures exist that include the appointment by the UN Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities, of special rapporteurs or working groups with thematic or country oriented mandates. The rapporteurs are independent experts and several of their reports have addressed minority issues. For example, the special rapporteur on the situation of human rights in Chile, Mr. Abdoulaye Diéye, and Mr. Felix Ermacora and Mr. Waleed M. Sadi as experts in their individual capacity, were mandated under this procedure to study the fate of missing and "disappeared" persons in Chile (appointment by UNCHR).²³⁸ Other examples include, the Capotorti report in 1977,²³⁹ Cristescu report in 1981,²⁴⁰ Eide report in 1992,²⁴¹ and the rapporteurs on Iraq,²⁴² and Romania (appointed by Sub-commission).²⁴³

Fourth, other complaints procedures include those established under the International Convention on the Elimination of All Forms of Racial Discrimination. This mechanism provides the possibility of a written communication to the United Nations Committee on the Elimination of Racial Discrimination. Similarly, individuals and groups may also use procedures designed to bring complaints concerning human rights violations to the United Nations Educational, Scientific and Cultural Organization and to the International Labour Organization.

²³⁸ UN ECOSOC decision 1979/32 of May 10, 1979.

²³⁹ *Capotorti Report, supra*, note 16.

²⁴⁰ A. Cristescu, *The Right to Self-determination, Historical and Current Development on the Basis of the United Nations Instruments*, study for the UN Sub-Commission, UN Doc. E/CN.4/Sub.2/404/Rev.1.

²⁴¹ *Eide Report, supra*, note 29.

²⁴² The Rapporteur on Iraq, Mr. Max van der Stoep.

²⁴³ The Rapporteur on Romania, Mr. J. Voyame.

3.4. United Nations High Commissioner for Human Rights

The history of proposals regarding the post of the UN High Commissioner for Human Rights is long as, that of the United Nations itself. The first proposals were made by R. Cassin in 1947.²⁴⁴ The Cassin proposal was followed by the proposals of the Consultative Council of Jewish organizations and of Uruguay. There was then a revival of UN interest in the post in 1963 at the initiative of the USA and Costa Rica. Despite approval of the Working Group's Report by the UN CHR and subsequently by ECOSOC in 1967, there was a lack of follow-up action by the General Assembly. After two decades of further discussions, at its forty-eight session, the UN General Assembly finally created the post of the High Commissioner for Human Rights (HCHR).²⁴⁵ Mr. J. Ayala Lasso was nominated as the first Commissioner and he took up his functions on April 5, 1994.

The establishment of the post of the HCHR is an new development in the direction of greater direct protection of human rights by the United Nations. This new post was a result of the consensus reached at the World Conference on Human Rights on approaching the sensitive issue of human rights from a global perspective and on seeking global solutions to human rights problems.²⁴⁶ The mandate of the HCHR has been oriented towards promoting international cooperation in the field of human rights and strengthening implementation of all human rights, and other related issues.²⁴⁷ The HCHR, acting on the direction

²⁴⁴ R. S. Clark, *A United Nations High Commissioner for Human Rights* (The Hague: Martinus Nijhoff, 1972) at 39.

²⁴⁵ UN General Assembly Resolution 48/141.

²⁴⁶ Report of the UN High Commissioner for Human Rights to the UN Commission on Human Rights, UN Doc. E/CN.4/1995/98 at 4.

²⁴⁷ Those include: responding to serious violations of human rights; acting to prevent violations of human rights from becoming serious or widespread; assisting countries in transition to democracy; providing advisory services and technical assistance in the field of

set by the General Assembly, has taken a particular responsibility to promote the implementation of the principles contained in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. During country visits to Estonia, Latvia and Lithuania, the HCHR referred to issues relating to minorities as very difficult human problems.²⁴⁸ In addition to this, the High Commissioner stated:

Further progress in the field of the protection of minorities depends on concerned efforts by Governments and international and non-governmental organizations aimed at the creation of an open culture, at dissemination of understanding of the richness which exists in a multicultural and multiethnic society. The protection of persons belonging to minorities, based on mutual tolerance acceptance, promises new perspectives, free of the disasters familiar to any regions of the world.²⁴⁹

Given that the UN High Commissioner for Human Rights was only created in 1994, it appears to be too early to fully assess its apparent accomplishments and failures. The High Commissioner has received reaction to his activities from the NGO community. Some have stated that a more focused mandate would made the work of the High Commissioner more effective, while others criticize him for failure to react to NGO information on the situation in Rwanda.²⁵⁰ In his defence he stated: "We cannot eliminate the possibility of dramas [such as Rwanda] happening again, but I have been able to prove that my

human rights; coordinating human rights activities within the United Nations system; adapting the United Nations human rights machinery to current and future needs; promoting the right to development and enjoyment of cultural, economic and social rights; combating racial discrimination; promoting the rights of persons belonging to groups requiring special protection: women, children, minorities and indigenous people; combating the most atrocious human rights violations, such as torture and involuntary disappearances; promotion human rights education and public information activities; and implementing the Vienna Declaration and Programme of Action, UN Doc. E/CN.4/1995/98 at 6.

²⁴⁸ Report of the UN High Commissioner for Human Rights, *supra*, note 246 at 25.

²⁴⁹ *Ibid.* at 33.

²⁵⁰ M. Logan, "UN Rights Commissioner Has Advice for NGOs" (1995) 3:2 Human Rights Tribune at 37.

office is ready and able to react to crisis."²⁵¹ Furthermore, he claimed that his office reacted quickly to rising tensions in Burundi after his visit to this country in March 1994.

3.5. The International Tribunals for Former Yugoslavia and for Rwanda.

The recent atrocities in former Yugoslavia and in Rwanda, prompted the international community into action and have led to the establishment of an International Tribunal for each country. Those are the first UN Tribunals of their kind.

3.5.1. The International Tribunal for the Former Yugoslavia.

The establishment of the International Criminal Tribunal for the former Yugoslavia by the Security Council was one response of the international community to the gross violations of the rights of minorities that have occurred since the break-up of the Yugoslav federation. The legal foundations for the International Tribunal are found in Chapter VII of the United Nations Charter and they represent a measure for the restoration and maintenance of international peace and security.²⁵² The fact of the Tribunal's establishment represents a natural continuation of the work of the Security Council to curb serious violations of international humanitarian law in the former

²⁵¹ *Ibid.*

²⁵² M. Bergsmo, "The Establishment of the International Tribunal on War Crimes" (1993) 14:9-10 Human Rights law Journal at 371.

Yugoslavia.²⁵³ Many governments and interested NGOs contributed to the setting-up of the Tribunal.²⁵⁴ Three years after its creation, the International Tribunal for the Former Yugoslavia started its first trial in May 1996, charging a Bosnian of Serbian origin with war crimes against non-Serbs in Bosnia-Herzegovina.²⁵⁵

The trial illustrates the problems that UN Tribunal could face in trying to deliver justice to the people of post-war Bosnia-Herzegovina. In contrast to the post-World War II trials of Nuremberg and Tokyo, where the indictments were brought against the leading perpetrators of war crimes, the International Tribunal has started with lesser perpetrators.²⁵⁶ The Tribunal has faced a number of practical, financial and structural problems during the first years of its existence. For example it took more than 18 months to appoint a chief prosecutor, and continuing financial constraints impede the work of the the investigative teams. Moreover, the Tribunal is faced with the very difficult problem of collecting evidence and finding eyewitnesses in a region coloured by an atmosphere of fear and intimidation that militates against cooperation.²⁵⁷ The effectiveness of the Tribunal in delivering justice to oppressed minorities will become manifest in the near future.

253 *Ibid.*

254 *Ibid.* at 372.

255 M. Bergismo, "International Criminal Tribunal for Former Yugoslavia. Recent Developments" (1994) 15:11-12 Human Rights Law Journal at 409.

256 M. Crnobrnja, "Trials of the UN War-Crimes Tribunal" *The Globe and Mail* (May 10, 1996) A19.

257 Bergismo, *supra*, note 255 at 405.

3.5.2. The International Tribunal for Rwanda.

The mass killings in Rwanda, estimated to have taken at least 500,000 lives, added necessary weight to the Security Council decision to establish this international tribunal.²⁵⁸ Security Council Resolution No.955 called for the International Tribunal for Rwanda to "prosecute persons responsible for genocide and other serious violations of international humanitarian law."²⁵⁹ The Statute of the Rwanda Tribunal provides a sound legal basis for successful prosecution of genocide perpetrators. The International Tribunal has two main objectives: first, to bring to justice those responsible for the atrocities; and, second, to encourage and support local trials under the authority of the new national government.²⁶⁰ The Rwandan government has expressed its commitment both to the rule of law and to rooting out "ethnic" fear.²⁶¹

The future decisions of the Rwanda and former Yugoslavia Tribunals will no doubt offer new interpretation of international humanitarian law and set new directions to currently ambiguous legal principles. Despite the enormous practical, political, and legal difficulties facing the two Tribunals, they provide useful opportunities to the international community to respond to atrocities and to re-establish the rule of law once humanitarian military intervention has restored civil calm.

258 M. Meier Wang, "The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact" (1995) 27:1 Columbia Human Rights Law Review at 177.

259 Security Council Resolution No. 995, UN Doc. S/1994/1168(1994).

260 M. Meier Wang, *supra*, note 258 at 189.

261 *Ibid.* at 184.

4. The Council of Europe Activities Related to Protection of Minorities

The three main aims of the Council of Europe (CoE) are closely related to full enjoyment of rights by ethnic minorities. Those aims are: to protect and strengthen pluralist democracy and human rights; to seek solutions to the problems facing society; and to promote the emergence of a genuine European cultural identity.²⁶²

The European Convention on Human Rights (ECHR)²⁶³, one of the landmark achievements of the Council of Europe, is an international treaty which includes provisions for non-discrimination and protection of minorities. The Convention reflects the style and substance of human rights instruments in the post Second World War period. As one of the major standard-setting texts from this period the Convention does not contain language specific to minority rights protection. The main characteristic of the Convention is a focus on individual, not on collective rights. It must be stressed that "it does not focus on minorities."²⁶⁴ It sets out the inalienable rights and freedoms of each individual and obliges states to guarantee their enjoyment by everyone within their jurisdiction. Furthermore, it has established international enforcement machinery whereby states, and on certain conditions, individuals, may refer alleged violations of the Convention to the Convention institutions in Strasbourg.

²⁶² Council of Europe, *Achievements and Activities* (Strasbourg: Directorate of Information of Council of Europe, 1992) at 1.

²⁶³ The Convention for the Protection of Human Rights and Fundamental Freedoms, (Rome, 1959) *Human Rights in International Law, Basic Texts* (Strasbourg: Directorate of Human Rights, 1985) at 108 [hereinafter ECHR].

²⁶⁴ P. Thornberry & M.A. Martin-Estebenez, *The Council of Europe and Minorities* (Strasbourg: Council of Europe Publications, 1994) at 20.

Despite the extensive activities of the Council of Europe in the area of international protection of minorities, violations of the rights of minorities and discrimination have re-occurred recently in Central and Eastern Europe and former territory of Yugoslavia. In some of the States the response of the Council of Europe has been relatively swift. The reform of the protection mechanisms included in Protocol No. 11. to the Convention, as well as the adoption of the Framework Convention for the Protection of National Minorities, may serve as example of the increasing concern by the Council of Europe to find effective instruments to protect minorities.

This Chapter will discuss the protection of minorities offered under the European Convention on Human Rights as well as the large body of the jurisprudence developed by the Commission and the Court on Human Rights, which has had an impact on international law, theory, and practice. The Council of Europe New Framework Convention for the Protection of National Minorities has set out a positive example of how to approach the complex issues of relations between minorities and majorities. At the end of this chapter the special case of nomadic populations will be analyzed.

4.1. The Minority Rights Guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Rome, 1950)

After World War II, the system of protection created by the League of Nation was dismantled (formally in 1949). In 1950 the Council of Europe adopted the ECHR. Under the ECHR regime some of the rights of minorities are protected. However, the European system of protection of minorities is not a

very flexible judicial system. The main aim of this system is to protect individual rights. Minority rights can only be claimed by individual members of a minority. There is no explicit protection of minority rights as a collective right. Despite these drawbacks, the European system has produced the largest volume of adjudicated human rights cases.

4.1.1. The Material Rights Protected in ECHR

The ECHR guarantees the rights of minorities and prohibits discrimination against minorities.²⁶⁵ The range of individual rights protection in the Convention, as well as the possibility for groups to utilize its organs, present strong mechanisms for minority protection. The ECHR contains provisions applicable to minorities. The rights guaranteed are as follows: respect for private and family life (article 8); freedom of conscience and religion (article 9); freedom of expression (article 10); freedom of peaceful assembly and freedom of association with others (article 11); peaceful enjoyment of possessions (article 1, of the first Protocol to the ECHR); the right to education (article 2 of the first Protocol to ECHR); freedom of movement and freedom to choose one's residence (article 2 of the fourth Protocol to the ECHR); and the right to enter the territory of the State of which one is a national and a ban on expulsion from it (article 3 of the fourth Protocol to ECHR).²⁶⁶

The rule of non-discrimination is directly presented in article 14 of the Convention which states:

²⁶⁵ A. B. Baka, "The European Convention on Human Rights and the Protection of Minorities Under International Law" (1993) 8:2 Connecticut Journal of International Law at 236.

²⁶⁶ *Klebes Introduction, supra*, note 21 at 142.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²⁶⁷

As mentioned above, the ECHR does not establish special individual or collective minority rights. There is for example, no right to linguistic freedom, as the *Isop* case²⁶⁸ shows. There, the European Human Rights Commission denied such a right to the Slovene claimant. Similar cases have limited entitlement to minority members to use their own language in criminal and civil proceedings, e.g., speakers of Breton,²⁶⁹ Flemish,²⁷⁰ and Frisian.²⁷¹ The other linguistic right, access to education in the minority language, is also limited. The *Belgian Linguistic case* concerns non-discriminatory criteria regulating access to public schools, and does not provide a positive guarantee of education in the minority language.

In its present form the ECHR does not provide adequate protection to current challenges for the protection of minorities.²⁷² Council of Europe initiatives to reverse the negative situation for minorities will be discussed in chapter five, where the Framework Convention for the Protection of Minorities will be described.

²⁶⁷ ECHR, *supra*, note 263, Article 14.

²⁶⁸ *Isop v Austria*, No. 308/60 of March 8, 1962, Yearbook 5, 108.

²⁶⁹ *Bideaut v France*, No. 11261/84, December 6, 1986, D.R. 48, 232.

²⁷⁰ *Y v Belgium*, No. 2332/64, December 7, 1966, Yearbook 9, 418.

²⁷¹ *Fryske Nasjonle Partij and others v The Netherlands*, December 12, 1985, D.R., 45, 240.

²⁷² *Ibid.*

4.1.2. Guarantees of Equal Treatment of Minorities Included in Article 14 of the European Convention Human Rights.

The practical implications of equal treatment for minorities are raised by article 14 of the European Convention Human Rights. Article 14 of the ECHR reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²⁷³

This article is similar to article 2 (1) of the ICCPR,²⁷⁴ to article 2 of the Universal Declaration of Human Rights²⁷⁵ and to article 2 (1) of the Convention of the Rights of the Child.²⁷⁶ All of these instruments prohibit discrimination only in the context of the rights and freedoms set out elsewhere in respective instruments.²⁷⁷ The main issue raised by article 14 is whether it establishes a right to non-discrimination independent from rights and freedoms guaranteed by other provisions in the ECHR or whether, like the other Conventions, the norms included in article 14 are subordinate equality norms.²⁷⁸ Bayefsky, supporting the latter view, states that, the norms of article 14 should be read in conjunction with each of the rights and freedoms in the ECHR. In support of her argument, Bayefsky cites the *Belgian Linguistic case*.²⁷⁹

²⁷³ ECHR, *supra*, note 263.

²⁷⁴ G.A. Res. 220(XXI). 21 U.N. GAORR, Supp.(No.16) 52,U.N. Doc/6326(1966).

²⁷⁵ G.A. Des. 217 A(III), U.N. Doc. A/810, (Dec. 10, 1948) at 71.

²⁷⁶ G. A/Res./45/25, adopted in 1989.

²⁷⁷ A. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1989) 11:1-2 Human Rights Law Journal at 3.

²⁷⁸ *Ibid.* at 4.

²⁷⁹ *Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium (Belgian Linguistic case)* of 23 July 1968, Volume 6, Series A, ECourTHR, Para., 10 [hereinafter *Belgian Linguistic case*].

The Jurisprudence of the European Court on Human Rights suggests that the non-discrimination clause should be read in conjunction with the specific of rights and freedoms set up in the ECHR.²⁸⁰ In the case of *Marckx v. Belgium* and the case of *Inze v. Austria*,²⁸¹ the European Court on Human Rights stated:

Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of article 14 does not presuppose a breach of one or more of such provisions -- and to this extent is autonomous -- there can be no room for its application unless the facts of the case will fall within the ambit of one or more of the latter.

However, in its latest decisions, the Commission seems to be going in the direction an autonomous character to article 14. In the decision on the application 5763/72, the Commission stated that article 1 of Protocol No. 1 is not applicable because social security benefits do not constitute "possessions" in the sense of that article. Nonetheless, the Commission examined whether the challenged legislation was discriminatory in its application. The decision of the Commission was as follows: "the allegations which the applicant has made under articles of the Convention are related to the right to peaceful enjoyment of possessions and therefore raise an issue under article 1 of Protocol No. 1."²⁸²

The list of grounds of discrimination, in article 14 of the ECHR is open-ended and not exhaustive,²⁸³ a point expressed in the judgement in the case of *Rasmussen v. Denmark*.²⁸⁴

280 *Ibid.*

281 *Marckx v. Belgium*, 13 June 1978, Volume 311, Series A, European Court of Human Rights, paragraph 32; *Inze v. Austria*, 28 October 1987, Volume 126, Series A, European Court of Human Rights, paragraph 36.

282 *Case, X v. Netherlands*, application, No. 5763.

283 Bayefsky, *supra*, note 277 at 6.

284 *Rasmussen v. Denmark*, 28 Nov. 1984, Vol. 87, Series A, ECourtHR,

The question of discriminatory intention also arises in interpreting article 14. While case-law of the European Commission on Human Rights and the European Court on Human Rights has not developed interpretations of the discriminatory intention, the prevailing view, reflected in international jurisprudence, appears to be that unintended effects of discrimination are prohibited.²⁸⁵ In the *Belgian Linguistic case*, interpreting article 14, we find language that suggests that unintended impact is prohibited.²⁸⁶ At the same time this interpretation gives rise to some confusion. W. Black noted the following:

It might also be argued that the reference to the aim of law was to its social purpose rather than to an intentional distinction of a group. It would thus refer to the second state of an equality determination rather than to the first stage.²⁸⁷

In other international cases we also find support for protection against unintended effects. For example, in the *Advisory Opinion on Minority Schools in Albania*,²⁸⁸ the PCIJ stated that compulsory attendance of ethnic minorities at governmental schools violated the treaty.

The European Commission and European Court have examined the relationship between different treatment and discrimination. The point at which a different treatment becomes discrimination must then be determined in light of the social situation and the measures adopted or action taken. The Court, in the *Belgian Linguistic case* stated:

... the court following the principles, ... holds that the principle of equality of treatment is violated if distinction has no objective or reasonable justification. The existence of such a justification must be assessed in

²⁸⁵ W.W. Black, "Intent or Effect, Section 15 of the Charter" in Weiler & Elliot, eds., *Litigating the Values of the Nation: the Charter* (Toronto: Carswell, 1992) at 127-131.

²⁸⁶ *Ibid.*

²⁸⁷ *Klebes Introduction*, *supra*, note 21 at 159.

²⁸⁸ Heglesen, *supra*, note 221.

relation to aim and effects of the measure under consideration, in regard to the principles that normally prevail in democratic societies. A difference of treatment in the exercise of a rights down in the Convention must not only pursue a legitimate aim: an article is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.²⁸⁹ (emphasis added)

The definition of justified distinctions mentioned above contains three necessary conditions. The non-discriminatory distinction must have: (1) objective or reasonable justification, (2) positive relation between aim and effect of the measure, and (3) there must be a reasonable proportionality between the means and the aim.²⁹⁰

The analysis of the article 14 of the ECHR shows that it is mainly focused on equal treatment, and its application is limited to other rights and freedoms of the ECHR. Since, the cornerstone of the ECHR is protection of individual rights, the jurisprudence and practice of bodies created by the ECHR does not provide adequate guarantees to the groups. It focuses on guarantees of non-discrimination only in regards to the individuals of a group.

4.1.3. The Present Control Mechanism

The European Convention on Human Rights has established international enforcement machinery. While this machinery is shortly to be replaced by a new Single Permanent Court on Human Rights under Protocol 11 of the ECHR, it is necessary to analyze the present system for a number of

²⁸⁹ *Belgian Linguistic case*, *supra*, note 279 at 11.

²⁹⁰ *Ibid.* at 12

reasons. First, Protocol No. 11 to the ECHR, in its articles 4, and 5,²⁹¹ provides for the "transition" from the present to the new system. Second, the new Single Permanent Court of Human Rights (European Court on Human Rights)²⁹² should start with a clean slate and not have to consider cases which have already been dealt with partially under the old system: that is the existing Commission and Court should be allowed to finish all cases pending before them.

The present protection machinery of the ECHR is based on three institutions set up by the ECHR itself (article 19).²⁹³ Those institutions are: the European Commission of Human Rights, the European Court on Human Rights, and the Committee of Ministers of the Council of Europe.

Any alleged violation of the European Convention may be referred to the Commission. There are two types of applications: State application (article 24);²⁹⁴ and individual application (article 25).²⁹⁵ According to the Convention, any person, a non-governmental organization or a group of individuals may file an individual application. Thus, minorities acting as a group of individuals may file an application under article 25.

After a complaint is received, the Commission first determines whether the conditions of admissibility laid down by articles 26 and 27 of the ECHR²⁹⁶ have been complied with. These include: exhaustion of all domestic remedies and observance of a period of six months from the date on which the final decision was taken. Furthermore, an application introduced under article 25 may

291 The Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, articles 4, 5 as cited in (1994) 15:3 Human Rights Law Journal at 86-90.

292 Article 19, Section II of the Revised on May 11, 1994 by Protocol No.11, European Convention on Human Rights (1994) 15:3 Human Rights Law Journal at 37.

293 ECHR, *supra*, note 263.

294 *Ibid.* at 109-110.

295 *Ibid.*

296 *Ibid.*

not be dealt with by the Commission (article 27, §§ 1 and)²⁹⁷ when it is: anonymous; substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information; incompatible with the provisions of the Convention; manifestly ill-founded; and abusive.

The Commission plays an important role in cases of violations of rights of minorities. As the first body to act after communication of the alleged violation of rights, the decisions of the Commission are often more important than judgement of the Court. Further decision on the merits of a case may be taken either by the European Court on Human Rights another instrument created by the ECHR. It consists of a number of judges equal to the number of members in the Council of Europe²⁹⁸ (article 38).²⁹⁹ At present the individual does not have the right to bring his case before the Court, although he or she has the right to participate and be represented in proceedings before the Court. Protocol No. 9 of ECHR (not yet in force)³⁰⁰ will give the individual or non-governmental organizations the right to refer cases to the Court. This would be possible only after the Commission has found it to be admissible. Apparently, only the

²⁹⁷ *Ibid.*

²⁹⁸ Currently (February 1996) there are 37 members of Council of Europe, namely: Austria, Bulgaria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovenia, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom. Following countries applied for membership: Albania, Belarus, Moldova, Ukraine. Special Guest Status: Albania, Belarus, Moldova, Ukraine. Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia have requested Special Guest Status. The number of judges currently is 24 due to not all States members of Council of Europe ratified the ECHR and additional protocols or put forward list of judges to election by the Parliamentary Assembly from a list of persons nominated by the members of the Council of Europe.

²⁹⁹ ECHR, *supra*, note 263.

³⁰⁰ To the date, of November 1992.

following parties may submit a case to the Court: the Commission; the Contracting State whose national is alleged to be a victim; the Contracting State which referred the case to the Commission; and the Contracting State against which the complaint has been lodged. Finally, the European Court can only hear a case with respect to those states which have accepted its jurisdiction (article 48).³⁰¹

Finally, the Committee of Ministers, which is the executive organ of the Council of Europe (article 13, of the Statute of the Council of Europe) also has a role in determining admissibility. It is composed of the Ministers for Foreign Affairs (or their deputies nominated for that purpose) and the member States of the Council of Europe (article 14 of the Statute).

There are some limits on the minority as a collectivity successfully complaining to the Convention organs. The case-law of the Commission shows that only individuals discriminated against as members of a minority, can successfully pursuing a complaint. Each member of the group must prove that she/he is a "victim" of an alleged discriminatory act.³⁰² However, in the case of inter-State complaints, this limitation does not apply and the State complaining may invoke discriminatory practices.³⁰³

³⁰¹ ECHR, *supra*, note 263.

³⁰² Application No. 7823/77, 7824/77, *Kalderas Gypsies v the Federal Republic of Germany and the Netherlands*, D.R. 11,221.

³⁰³ Application No. 788/60, *Austria v Italy*, December 11, 1961, Yearbook 4, 116.

4.1.4. The New Control Mechanism (the Single Permanent Court of Human Rights) Created by Protocol No. 11 to the European Convention on Human Rights

The long established mechanisms of the ECHR in force since 1955, are undergoing major changes. A permanent European Court on Human Rights is to replace the existing Commission and Court and to take over the current functions of the Committee of Ministers with respect to human rights complaints.

On May 11, 1994, State parties to the European Convention on Human Rights signed Protocol No. 11.³⁰⁴ The need for a major reform of the organs of the ECHR and the idea of "merging" the Commission and Court were first advanced at a Committee of Experts meeting in July 1982.³⁰⁵ After lengthy discussion, the final proposal for the reform of the European System was endorsed in the "Vienna Declaration" of October 9, 1993.³⁰⁶

The new proposal recognized the need for a major reform of the present European system because of the rapidly growing number of applications, their increasing complexity, and the geographical growth of the Council of Europe. In order to increase the effectiveness of ECHR control machinery, Protocol No.11 establishes a new single, full-time European Court on Human Rights with the following new procedures will apply:

³⁰⁴ *Ibid.*

³⁰⁵ For detailed history of discussion on the concepts of reform see article A. Drzemczewski & J. Mejer-Ladewig, "Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994" (1994) 15:3 Human Rights Law Journal at 81-86.

³⁰⁶ The Vienna Declaration on the Vienna Summit of the Heads of State and Government of the Council of Europe's member States at October 8-9, 1993.

- filing of an application with the registry, accompanied by supporting documentation;
- registration of the application, its assignment to a Chamber and appointment of judge rapporteur;
- examination by a three-member committee;
- committee decision declaring the application inadmissible; this negative decision is final, or
- referral to the Chamber;
- communication of the application to the Government;
- establishment of facts and filing of the parties' observations;
- oral hearing;
- Chamber admissibility decision;
- possibility of friendly settlement;
- judgement (finding of violation/non-violation) by the Chamber or, where relevant, by the Grand Chamber.

There are several potential benefits to the establishment of a single permanent Court. First, continuous functioning of the Court could strengthen the enforcement of minority rights. Second, the new mandatory right to individual petition is a development of international law; members of a minority could at least address their grievances as individuals. Third, the one organ supervision system would be simple and more accessible for petitioners.

Revision of the Convention was necessitated by the increase in the number of applications, their growing complexity and the widening of the Council of Europe's membership. Revision of the monitoring and implementation machinery was essential to strengthen its efficiency. In conclusion, the new system should in particular: make the machinery more accessible to individuals; speed up the procedure; and make for greater efficiency.

There is now a need for political pressure on all participating States to ensure rapid ratification of the new Protocol so the new mechanism will become fully operational. The Protocol will enter into force on the first day of the month following the expiration of the period of six months after the date on which all parties to the ECHR have expressed their consent to be bound by the Protocol.

Recent years have seen a steady increase in the number of cases brought before the Strasbourg institutions. The European Commission on Human Rights has registered more than 19,000 individual complaints since its creation in 1954 and adopted decisions and reports on over 15,000 of them. The European Court on Human Rights has delivered some 350 judgements since its creation in 1959. The case-law of the Commission and the Court has further developed the Convention norms and, in many cases, changes in national legislation and practice have been ensured.

The most important question to be addressed is whether the well-established judicial supervision mechanism of the ECHR is the best suitable for effective, comprehensive protection of minorities? For the following reasons the answer to this question is negative. First, the ECHR system was designed in 1950, when international law standards were focussed on individual rights.³⁰⁷ Second, the ECHR system has judicial (European Court of Human Rights) supervision machinery which is slow, inflexible, and, by its inherent judicial characteristic, not the best option for protection of minorities (because conflicts involving minorities in most cases are political conflicts). Third, the provisions of the ECHR have lower standards than those in modern international law, and they have only limited applicability to minorities. In conclusion of this section it may be said that the Convention has been kept under a constant review with the aim of enhancing its efforts on the protection issue, either by extending the list of guaranteed rights or by improving the existing procedure, but practical results to minorities are not satisfactory.

³⁰⁷ Baka, *supra*, note 265 at 236.

4.2. Non-Territorial Minorities and Protection in the Framework of the Council of Europe (CoE)

Council of Europe activities relating to travellers and Roma (Gypsies)³⁰⁸ have extended over a long period. The Committee of Ministers, the executive body of the Council of Europe, has recommended several positive measures relating to the social situation of nomads in Europe.

In Resolution (75)13,³⁰⁹ on May 22, 1975, the Committee of Ministers invited governments to take all necessary measures to stop any form of discrimination against nomads, and has to adopt national legislative safeguards protecting their cultural heritage and identity.³¹⁰ The resolution has called on respective governments to promote policies protecting camping and housing, education, vocational guidance and vocational training. The resolution also addressed issues of health and social welfare, as well as social security and rights guarantees.

308 J.P. Liegeois, & N. Gheorghe, *Roma/ Gypsies: A European Minority*, The Minority Rights Group International Report, provide following explanation of the term Roma/Gypsy.

Gypsy: term used to denote ethnic groups formed by the dispersal of commercial, nomadic and other groups from within India from tenth century, and their mixing with European and other groups during their diaspora.

Roma/Rom: A broad term used in various ways, to signify: a) those ethnic groups (e.g. Kaladerash, Lovari, etc.) who speak the "Vlahic, "Xoraxane" or "Rom" varieties of Romani language. b) Any person identified by other as " Tsigane" in Central and Eastern Europe and Turkey, plus those outside the region of East European extraction. c) Romani people in general.

Traveller. A member of any of the (predominantly) indigenous European ethnic groups (Woonwagenbewonders, Minceréri, Jenish, Quintguis, Rosede, etc.) whose culture is characteristic, inter alia, by self-employment, occupational fluidity, and nomadism. These groups have been influenced to a greater or lesser degree by ethnic groups of (predominantly) Indian origin with a similar cultural base.

309 Resolution (75) 13, Containing Recommendations on the Social Situation of Nomads in Europe, adopted by the Committee of Ministers on May 22, 1975 at the 245th meeting of the Ministers' Deputies of Council of Europe.

310 Council of Europe Information Document No. CDMG(94) 15, *Council of Europe Activities Concerning Roma, Gypsies and Travelers*, Strasbourg, August 19, 1994, p.7

On February 22, 1983, the Committee of Ministers adopted Recommendation N°R(83)1 on Stateless Nomads and Nomads of Undetermined Nationality.³¹¹ This Committee recommended that the governments of member States take all measures necessary to give effect to the principles set out relating to: non-discrimination; some kind of relationship with the State administration; residence and movement of nomads; reunification of families; and, extended protection and some general measures.³¹²

In May 1992, a further recommendation (N°R(92)10) on the implementation of the rights of persons belonging to national minorities was adopted.³¹³ In this instrument, the Committee of Ministers recommended that member States should, as a matter of urgency, ensure that they implement all their obligations and commitments under international instruments to persons belonging to national minorities and use the existing mechanisms to alleviate the problems facing those persons.³¹⁴ In addition, the Committee of Ministers opened the European Charter for Regional Minority Languages for signature.³¹⁵ However, most of the provisions of Part III of the Charter ("Measures to promote the use of regional or minority languages in public life") do not apply to languages which lack a territorial base, such as the Romany language. "Non-territorial languages" means languages which cannot be associated with a particular area of a State (article 1.c.).

311 Recommendation No. R (83) 1 of the Committee of Ministers to Member States on Stateless Nomads and Nomads of Undetermined Nationality, adopted by the Committee of Ministers on February 22, 1983 at the 356th meeting of the Ministers' Deputies.

312 *Ibid.*

313 Recommendation N° R (92) 10 on The Implementation of Persons belonging to National Minorities, adopted By the Committee of Ministers on May 21, 1992, at the 476 meeting of the Ministers' Deputies.

314 Council of Europe Information Document No. CDMG(94) 15, *Council of Europe Activities Concerning Roma, Gypsies and Travelers*, Strasbourg, August 19, 1994, at 7.

315 The European Charter for Regional or Minority Languages, The Committee of Ministers decision on 91st Session on November 5, 1992.

Following the summit of Heads of State and Government of the Council of Europe's 32 member States (October 1993), the Committee of Ministers, at their Deputies' 508th meeting, confirmed the Council of Europe's responsibilities for promoting confidence-building measures relating to minorities through local pilot projects.³¹⁶ The objective was, first, to help those concerned to cope more effectively with the diversity and pluralism which resulted from the presence of minorities, and, second, to encourage an interdisciplinary approach to issues affecting minorities that takes account of social, economic, political, legal and institutional issues. The confidence-building measures, which are designed to prevent potential conflicts, apply essentially at the local level and are intended to include all those involved in the field.³¹⁷

The Parliamentary Assembly of the Council of Europe adopted Recommendation 563(1969) on the situation of Gypsies and other travellers in Europe, dealing with discrimination, construction of caravan sites, children's education, consultative bodies, social security provisions and medical care.³¹⁸

Recommendation 1203(1993), on Gypsies in Europe,³¹⁹ has also been adopted. This recommendation notes that the number of Gypsies living in the Council of Europe area has increased significantly with the admission of new member states from Central and Eastern Europe. Although the Council of Europe has adopted a number of resolutions and recommendations concerning minorities, Gypsies require special protection because of their unusual status in Europe as a non-territorial minority.³²⁰ The Assembly also considered that "the

316 *Ibid.*

317 *Ibid.*

318 *Ibid.*

319 Recommendation 1203 (1993) on Gypsies in Europe, adopted by the Parliamentary Assembly on February, 2 1993, (44th Ordinary Session - 4th part, 1-5 February 1993)

320 *Ibid.*

provisions of any additional protocol or convention relating to minorities should apply to non-territorial minorities."³²¹

The Assembly recommended that, through proposals to governments or the local and regional authorities of member states, the Committee of Ministers initiate, where appropriate, measures dealing with culture, education, information, equal rights and everyday life. Among the more general measures, the Assembly recommended that the Council of Europe grant consultative status to representative international Roma organizations and appoint a mediator for Roma.³²²

The initiatives of the Council of Europe taken during the past two decades have led to better levels of protection and understanding of the Roma communities. Council of Europe programs in the area of education have improved multicultural interaction between Roma and majority groups. The Council of Europe, together with other international organizations has, for the first time in decades, been able to make positive change in improving the legal and social protection of Roma throughout Europe.³²³

4.3. Roma in Europe: A Special Test of Minority Protection

The situation of the Roma in Europe is very serious.³²⁴ In their daily lives they are subjected to racial discrimination, and exposed to deeply rooted

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Lingeois, J.P, Gheorghe, N., "Roma/Gypsies: A European Minority," *Minority Rights Group International Report* (London: Minority Rights Group, 1995) at 24.

³²⁴ Report of the High Commissioner on National Minorities, *Roma(Gypsies) in the CSCE Region* (presented at meeting of the Committee of Senior Officials, September 21-23, 1993) at i.

prejudice. They also face many social, economic, and humanitarian problems, because of their traditional migratory way of life.

Roma, who number between 7-8 million in Europe, form a distinctive society. In some European countries, they have been present for more than 600 years.³²⁵ Historically, relations between the Roma and non-Roma have not been easy. The Roma were (and still are) subject to numerous discriminatory policies and practices based on their distinctive socio-cultural characteristics.³²⁶ The Roma people have been subject to both popular and official prejudice. Anti-Roma authorities have actively promoted such policies as forced settlement, assimilation, sterilization of Roma women, mass deportations, and even systematic extermination.³²⁷

During World War II the Roma, as well as the Jewish people, were targets of the Nazis genocide and "final solution." In the territories of occupied Poland, the Nazis exterminated Roma people in Auschwitz, Lodz, Chelm, and other concentration camps. Many Roma were held in the Warsaw Ghetto, together with Polish Jews.³²⁸ In Auschwitz, the Nazis created a special section for the Roma people - "Zigteunerlager," and gassed approximately 20,000 Roma before the end of the war.³²⁹

Their distinctive physical characteristics and cultural practices made it easy for the Roma to be regarded as "aliens," "inferiors," or "undesirables" who should be treated with suspicion and forced to change their culture and way of life. By and large, they were actively excluded from mainstream life. In addition,

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.* at 4.

³²⁸ J. Ficowski, *Cyganie w Polsce , Dzieje i Obyczaje* (Warszawa: Interpress, 1983) at 39-47.

³²⁹ *Ibid.*

anti-Roma prejudice often served to justify inaction by governmental authorities in preventing, investigating, or prosecuting crimes committed against Roma.

As a consequence, the Roma have historically experienced, and continue to experience, grave challenges to their enjoyment of basic rights and to full participation in the social, economic, and political life of European countries.

Presently, the Roma in Europe are extremely vulnerable. As a result of the recent political changes in Central and Eastern Europe, changing borders, and rapid economic transformations, the Roma are suffering from widespread poverty, unemployment, illiteracy, lack of formal education opportunities, and substandard housing. In addition, years of persistent anti-Roma prejudice have led to a revival of scapegoating – blaming the Roma as a group for the ills of society at large. This has given rise to numerous physical attacks on the Roma.

Although the Roma are now mostly settled, their migrations have left them dispersed and intermingled with other communities throughout the region, without a "kin-state" to act as a safe-haven or protector. Recent economic and political changes have generally exacerbated their structural legal vulnerability. Current Roma migration may, therefore be a search for enhanced personal security and better quality of life, rather than the expression of traditional nomadic patterns. But those migrations have nevertheless led to further difficulties for the Roma.³³⁰

Various intergovernmental bodies in Europe have given increased attention to the problems of Roma during last three years. It should be noted that almost every major document of the Conference on Security and Cooperation in Europe since 1990 mentions their situation.³³¹ In addition, their

330 HCNM Report, *supra*, note 324 at 3.

331 Including the Documents of the Meetings of the Conference on the Human Dimension in Copenhagen (1990), and Moscow (1991), the Report of the Geneva Meeting of Experts on National Minorities (1991), and the Document of the Helsinki Follow-up Meeting (1992).

problems have been raised at each of the Human Dimension Seminars organized by the Office for Democratic Institutions and Human Rights (ODIHR). These include sessions on "Tolerance," "Migration, Including Refugees and Displaced Persons," and "Case Studies on National Minority Issues: Positive Results." This sustained interest in the situation of the Roma illustrates not only the persistence of the problems confronting them, but also a willingness by both participating States and non-governmental organizations to use the OSCE process to address Roma issues.³³² This underscores the need for greater coordination in order to ensure complementarity and non-duplication of efforts.

Despite these international (or multi-national) measures, both governments and the national, domestic legislators of the European countries have failed to address adequately the problems of the Roma. It is not by accident that entrenched discriminatory practices still exist in European countries, and that European States have been slow to recognize the rights of the Roma minority.

The one way of ensuring that Roma have their rights respected and protected is for them to develop their political actions and organizations. The recent positive climate towards Roma minorities has produced intensive dialogue, and some concrete advances (mainly educational) have been achieved.³³³ The books and curricula for Roma children has been published in many of European countries, and some changes has been made to national laws discriminating Roma.

A political and legal space for Roma has emerged. The legal recognition of Roma as a minority throughout Europe has led to better participation of their representatives in bodies making decisions related to their rights. However, it is

³³² HCNM Report, *supra*, note 324 at 2.

³³³ Council of Europe Information Document, *supra*, note 301 at 32.

far too early to make a statement that all the problems of Roma have disappeared from European fora. There is still a need for international institutions to coordinate efforts to fight discrimination and racism toward Roma.

5. The New Framework Convention for the Protection of National Minorities Adopted by the Council of Europe (November, 1994)

The adoption by the Council of Europe of the Framework Convention for the Protection of National Minorities (CPNM)³³⁴ became a reality after long discussion and numerous contradictory proposals.³³⁵ The arguments in favour of a separate instrument from The European Convention on Human Rights finally prevailed.³³⁶ The CPNM is the first legally binding multilateral instrument solely devoted to the protection of national minorities. Its aim is to set out the legal principles which States undertake in order to ensure the protection of national minorities. The Council of Europe has thereby given effect to the call of the Vienna Declaration (of the Heads of State and Government of members states of the Council of Europe, adopted in October 1993) that political commitments of the Conference on Security and Co-operation in Europe (CSCE) be transformed, to the greatest possible extent, into legal obligations.

The process leading to adoption of the CPNM³³⁷ started in November 1993. The Committee of Ministers established an ad-hoc Committee for the Protection of National Minorities (CAHMIN). Its terms of reference reflected the decisions taken in Vienna. The Committee, made up of experts from the Council

³³⁴ The Framework Convention for the Protection of National Minorities (CPNM) was adopted by the Committee of Ministers of Council of Europe on November 10, 1994, and opened for signature by the member States of the Council of Europe on February 1, 1995, and 21 states signed on Feb.1, 1995 and a further one on Feb., 2, 1995, text of the Framework Convention for the Protection of National Minorities, Council of Europe Press, 1995 [hereinafter *CPNM*].

³³⁵ Venice Commission, "Proposal for a Convention for the Protection of Minorities" (1991) 12:6-7 Human Rights Law Journal at 270 [hereinafter *Venice Commission Proposal*]; also, S. Breitenmoser & D. Richter "Proposal for an Additional Protocol to the European Convention on Human Rights Concerning the Protection of Minorities in the Participating States of the CSCE" (1991) 12:6-7 Human Rights Law Journal at 262 .

³³⁶ Baka, *supra*, note 265 at 237.

³³⁷ Breitenmoser and Richter, *supra*, note 335.

of Europe's member States, started work in late January 1994 with the participation of representatives of the Council of Europe Steering Committee for Human Rights (CDDH), the Council for Cultural Co-operation (CDCC), the Steering Committee on the Mass Media (CDMM) and the European Commission for Democracy through Law. The High Commissioner on National Minorities of the CSCE and the Commission of the European Communities also took part as observers. On April 15, 1994, CAHMIN submitted an interim report to the Committee of Ministers, which then forwarded it to the Parliamentary Assembly.³³⁸ At its 94th session, in May 1994, the Committee of Ministers expressed satisfaction with the progress achieved under the terms of reference flowing from the Vienna Declaration. A number of provisions of the CPNM requiring political arbitration, as well as those concerning the monitoring of implementation, were drafted by the Committee of Ministers.³³⁹ At its meeting of October 10-14, 1994, CAHAMIN decided to submit the draft Framework Convention to the Committee of Ministers. The latter adopted the text at the 95th Ministerial Session on November 10, 1994.

It should be noted that the CPNM was adopted after a number of texts on the protection of minority rights had been considered by Council of Europe organs.³⁴⁰ Therefore, before analyzing provisions of the CPNM, it will be useful to examine some of these draft proposals and the arguments contained in them.

338 Document 7109, of April 15, 1994.

339 Meeting of Ministers' Deputies No 517 bis of October 7, 1994.

340 *Klebes Introduction, supra*, note 21 at 141.

5.1. Draft European Convention for the Protection of Minorities (by the Commission for Democracy through Law [Venice Commission] 1991)

One of the early proposals was a Draft European Convention for the Protection of Minorities presented on February 8, 1991, by the Commission for Democracy through Law (Venice Commission³⁴¹ — a consultative body of the Council of Europe on matters regarding constitutional law). The proposal was an attempt to find a non-judicial alternative to the settlement of conflicts and disputes involving minorities.

The Draft Convention for the Protection of Minorities prohibits state to use negative methods, to resolve the problem of minorities.³⁴² Article 3 (1) of the draft is devoted to the fundamental rights of minorities, and States:

"Minorities shall have the rights to be protected against any activity capable of threatening their existence."³⁴³

Forced assimilation of minorities was also prohibited by two provisions of the draft³⁴⁴. The first is article 3(2), which states that: "They [Minorities] shall have the right to respect, safeguard and development of their ethnic religious, or linguistic identity."³⁴⁵ The second is article 13, which imposes the obligation on States to refrain from pursuing or encouraging policies aimed at the assimilation of minorities or aimed at intentionally altering the proportions of the population in the regions inhabited by minorities.³⁴⁶

³⁴¹ *Venice Commission Proposal, supra*, note 336 at 270-273.

³⁴² G. Malinverini, "Introduction to a Draft Convention for the Protection of Minorities. The Proposal of the European Commission for Democracy through Law" (1991) 12:6-7 *Human Rights Law Journal* at 266 [hereinafter *Malinverini Introduction*].

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.* at 270.

³⁴⁶ *Venice Commission Proposal, supra*, note 335 at 271.

The next provision of the proposal discusses the prohibition on secession. Contemporary international law does not, in fact, go so far as to recognize a right of minorities to secession.³⁴⁷ For that reason, article 1(2) of the proposal provides that the international protection of the minorities sanctions no activity contrary to the fundamental principles of international law, notably those of sovereignty, territorial integrity and the political independence of States.³⁴⁸ The authors of the draft Convention set limits to the recognition of minorities in the sense that the Convention would not allow changes in national borders.³⁴⁹ This idea is reinforced in article 1 (3) which states that: "It [protection] must be carried out in good faith, in a spirit of understanding, tolerance and good neighborliness between States."³⁵⁰

The principal rights claimed by minorities are the fundamental rights enunciated in the constitutions of the states or in the ECHR. It is important in this regard to remember that by virtue of article 14 the ECHR, the enjoyment of the rights and freedoms set forth in this Convention shall be assured without discrimination on any ground, including notably association with a national minority.³⁵¹ Equal protection is provided in article 4(1) of the draft, which states: "Any person belonging to a minority shall have right to enjoy the same rights as any other citizen, without distinction and on an equal footing."³⁵²

Article 4 (2) of the draft provides for the adoption of special measures in favour of minorities and aims at promoting equal standing between them and the rest of the population. It states that:

³⁴⁷ Malinvelini *Introduction*, *supra*, note 342 at 266.

³⁴⁸ *Venice Commission Proposal*, *supra*, note 335.

³⁴⁹ Malinvelini *Introduction*, *supra*, note 342 at 266.

³⁵⁰ *Venice Commission Proposal*, *supra*, note 335 at 270.

³⁵¹ Malinvelini *Introduction*, *supra*, note 342 at 266.

³⁵² *Venice Commission Proposal*, *supra*, note 335 at 270.

The adoption of special measures in favour of minorities or of individuals belonging to minorities and aimed at promoting equality between them and the rest of the population or at taking due account of their specific conditions shall not be considered as an act of discrimination.³⁵³

Here we have one possible answer to the problem of reverse discrimination. Measures employed in favour of minorities must not be viewed as privileges, but rather as compensation for certain weakness in the situation of minorities.³⁵⁴ The draft not only attributes rights to the individuals belonging to minorities, but also collective rights to the minorities themselves. Recognition of the collective right of minorities may be found in articles 3, 13 and 14 of the draft ECPM.³⁵⁵

The goal for a national system should be respect for all rights, but the same time, an international monitoring body is desirable in order to supervise protection of minorities. In order to ensure respect for the rights of minorities, the draft, in article 18, establishes a European Committee for the Protection of Minorities.³⁵⁶ The aim of the draft of Convention was to create another European organ of protection which would add to those already in existence.

The proposal was aimed at creating an open system of protection of minorities, i.e., non-member states of the Council of Europe could become party to it. This element of the draft was included in the latter text of the framework Convention (article 29). The advantage of creating an open system lies in the possibility for the protection of minorities in states not (yet) belonging to the

³⁵³ *Ibid.*

³⁵⁴ *Malinvelini Introduction, supra*, note 342 at 267.

³⁵⁵ *Ibid.* at 266.

³⁵⁶ *Venice Commission Proposal, supra*, note 335 at 270.

Council of Europe system.³⁵⁷ This approach was motivated by the hope that "softer" control mechanism would be more acceptable for some States.³⁵⁸

5.2. Parliamentary Assembly of the Council of Europe, the Draft Additional Protocol on Minority Rights (1993)

Another proposal for an instrument to regulate protection of minorities in Europe was the draft additional Protocol on Minority Rights, adopted on February 1, 1993 by the Parliamentary Assembly of the Council of Europe in Recommendation 1201.³⁵⁹ This Recommendation was not, however, legally binding on the Council of Europe and, in its final decision, the Council chose instead to adopt the CPNM.

The rationale behind the additional Protocol adoption was that, under its regime, the existing control mechanisms (Human Rights Commission, Human Rights Court, and Committee of Ministers) of the European Convention on Human Rights would be used.³⁶⁰ The proposal includes the following definition of a minority in article 1:

For the purposes of this Convention (ECHR) the expression "national minority" refers to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof,
- b. maintain long standing, firm and lasting ties with that state,
- c. display distinctive ethnic, cultural, religious or linguistic characteristics,

³⁵⁷ *Klebes Introduction, supra*, note 21 at 141.

³⁵⁸ *Ibid.*

³⁵⁹ The Parliamentary Assembly of the Council of Europe in Recommendation No. 1201 (1993) "The Draft Protocol on Minority Rights to the ECHR" (1993) 14:3-4 Human Rights Law Journal at 145.

³⁶⁰ *Klebes Introduction, supra*, note 21 at 141.

d. are sufficiently representative, although smaller in number than the rest of the population of that state or of the region of that state,
 e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.³⁶¹

The requirement of citizenship was included to meet the concerns of some states relating to the position of migrant workers.³⁶² Some of proposals of this protocol were included in later the CPNM adopted by Council of Europe.

5.3. Additional Protocol to the Convention on Human Rights and Fundamental Freedoms (ECHR) concerning the Protection of Minorities in the Participating States of the Conference on Security and Co-operation in Europe (CSCE) proposed by Breitenmoser and Richter (1991)

In the context of various proposals for protection of minorities, Breitenmoser and Richter proposed an Additional Protocol to the ECHR concerning the Protection of Minorities in the Participating States of the Conference on Security and Co-operation in Europe (CSCE).

The main aim of this draft proposition was to tie together membership in the Council of Europe and the OSCE. The new political situation in Eastern and Central Europe highlighted the urgent need for action for protection of minorities. The OSCE, after a phase of the non-formalized inter-state conference, transformed itself into an international organization.³⁶³ The main goal of the OSCE has changed from achieving international security to securing organized co-operation. The OSCE is presently in the process of discussing its protection

³⁶¹ Malinvelini *Introduction, supra*, note 342 at 262.

³⁶² Klebes *Introduction, supra*, note 21 at 142.

³⁶³ Malinvelini *Introduction, supra*, note 342 at 262.

machinery and the legal remedies for minorities.³⁶⁴ The Additional Protocol was intended as an alternative to the proposal for the draft European Convention for the Protection of Minorities.

The substantial guarantees in the draft Additional Protocol proposed by Breitenmoser and Richter were derived from Part IV of the CSCE Copenhagen Document (CD) and article 27 of the ICCPR; they also derive from the ECHR provisions. Article 5 of the draft Additional Protocol guarantees the right to affiliate with a minority. It states: "To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice."³⁶⁵ Article 6 of the Additional Protocol guarantees individual rights for persons belonging to national minorities. It states:

Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.³⁶⁶

Article 7 of the Additional Protocol includes certain collective rights of minorities, and states that:

- (1) Minorities shall have the right to be protected against any activity capable of threatening their existence.
- (2) Minorities shall have the right of an effective participation in public affairs, in particular in decisions affecting the regions where they live or in the matters affecting them.³⁶⁷

The authors of the draft Protocol assumed that minority rights could be effectively protected by already existing machinery in Europe.³⁶⁸ From this supposition, the authors of the Additional Protocol constructed the idea of

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.* Article 6 of the Protocol at 264.

³⁶⁷ *Ibid.*

³⁶⁸ The ECHR, the European Commission on Human Rights, the European Court of Human Rights.

"organ-lending."³⁶⁹ By this they meant that the ECHR organs would be "lent" to the OSCE with their role limited for the purpose of offering justifiably enforceable minority rights.³⁷⁰ In the practice, the European Commission on Human Rights and the European Court on Human Rights would sit as "the OSCE Commission" and "the OSCE Court." The proposal of "organ-lending" could be applicable only by unanimous consent of the states party to the ECHR (all of them are party to OSCE). According to the Additional Protocol, different States would be treated differently.³⁷¹ The differentiation would be made on the basis of the relation of the each state to the ECHR and the OSCE. The whole concept would provide a flexible, step-by-step adaptation period before States acceded to the ECHR.

The draft Additional Protocol has an important role to play in stimulating positive discussions on instruments needed for the effective protection of minorities in Europe. Not all proposals in the draft the Framework Convention were accepted in the final work of the Council of Europe.

5.4. The Material Provisions of the Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (CPNM)³⁷² was a product of a political compromise by members states of the

³⁶⁹ The term of "*organ-lending*" came from the institution of "*Organleihe*" in German administrative law. That mean an assignment of an organ of one juridical person of public law, to another such person for the purpose of performing certain of the latter functions. The organ "lent" may only act within the powers of the "borrowing" body, and its actions will be fully attributed to this body.

³⁷⁰ Malinvelini Introduction, *supra*, note 342 at 262.

³⁷¹ *Ibid.* at 264.

³⁷² Text of the CPNM, Appendix No.IV, of this work.

Council of Europe. In order to achieve this compromise many of the provisions of earlier proposals were omitted, thereby weakening the instrument. For example, the definition proposed in the draft Additional Protocol on Minority Rights to the ECHR³⁷³ was not included in the final text of the CPNM. The CPNM contains no definition of a "national minority." The drafters decided to adopt a pragmatic approach based on the recognition that, at this stage, it is impossible to arrive at a definition capable of attracting the general support of all Council of Europe member states. Moreover, the elaborate system of supervisory bodies included in the proposals³⁷⁴ was substantially reduced.

The CPNM contains mostly programme-type provisions, setting out objectives which the members states undertake to pursue. These provisions, which will not be directly applicable, leave the states concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.

Implementation of the principles set out in this CPNM is to be done through national legislation and appropriate governmental policies. The Convention does not imply recognition of collective rights. The emphasis is placed on the protection of persons belonging to national minorities, who may exercise their rights individually and in community with others.³⁷⁵ In this respect, the CPNM follows the approach of the texts adopted by other international organizations.

The CPNM is divided into five sections.³⁷⁶ The preamble expresses the concern of the Council of Europe and its member states with the vulnerability of

³⁷³ *Klebes Introduction, supra*, note 21 at 142.

³⁷⁴ *Venice Commission Proposal, supra*, note 335.

³⁷⁵ Article 3, paragraph 2 of the Framework Convention (CPNM)

³⁷⁶ Section I contains provisions which, in general fashion, stipulate certain fundamental principles which may serve to elucidate the other substantive provisions of the Framework Convention; Section II, contains a catalogue of specific principles; Section III contains

national minorities and is inspired by article 1, paragraph 1 of the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.³⁷⁷

In the Preamble to the CPNM one finds references to the statutory aim of the Council of Europe, namely the maintenance and further realization of human rights and freedoms.³⁷⁸ The Preamble is greatly influenced by the Vienna Declaration of Heads of State and Government of the member States of the Council of Europe.³⁷⁹ The Preamble also makes reference to other sources of inspiration: the ECHR, the United Nations instruments with regard to minorities, and the OSCE commitments.³⁸⁰ The main aim of the CPNM is set out in the Preamble: "the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within rule of law, respecting the territorial integrity and national sovereignty of states."³⁸¹

Article 1 of the CPNM specifies that the protection of national minorities does not fall within the reserved domain of states. Specifically, it states:

The protection of national minorities and the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international cooperation.³⁸²

various provisions concerning the interpretation and application of the framework Convention. Section IV contains provisions on the monitoring of the implementation of the framework Convention. Section V contains the final clauses which are based on the model final clauses for conventions and agreements concluded within the Council of Europe.

377 UN Declaration on Minority Rights, UN Doc. /G.A. Res. 47/135, dec 1992, Annex, adopted by the General Assembly on December 18, 1992.

378 CPNM, *supra*, note 334 at 23.

379 *Ibid.* at 24.

380 *Ibid.*

381 *Ibid.* text of the Preamble of the CPNM, par. 12.

382 CPNM, *supra*, note 334, article 1, at 6.

Article 1 of the CPNM refers to the protection of national minorities as such, and to the rights and freedoms of persons belonging to minorities.³⁸³ This distinction and the difference in wording makes it clear that no collective rights of national minorities are envisaged.³⁸⁴

The Parties do, however, recognize that protection of a national minority can be achieved through protection of the rights of individuals belonging to a minority. Furthermore, paragraph 2 of article 3 provides that the rights and freedoms flowing from the principles of the CPNM may be exercised individually or in community with others. It thus recognizes the possibility of joint exercise of those rights and freedoms, a notion distinct from that of collective rights.³⁸⁵ The term "others" is to be understood in the widest possible sense and includes persons belonging to the same national minority, to another national minority, or to the majority.³⁸⁶

In article 4 one finds a classic declaration regarding the principles of equality and non-discrimination.³⁸⁷ The text of the CPNM in this respect follows the general approach of international law in this matter and promotes special measures to achieve effective equality between persons belonging to a national minority and those belonging to the majority.³⁸⁸

The main purpose of article 5 is to guarantee the preservation of culture and identity by members of a minority.³⁸⁹ The reference to "traditions" in

383 *Ibid.* at 25.

384 *Ibid.* at 6.

385 *Ibid.* at 24.

386 CPNM, *supra*, note 334, article 3, Paragraph 2.

387 *Ibid.* at 25.

388 *Ibid.* at 27.

389 *Ibid.*

paragraph 1 of this article is not an endorsement or acceptance of practices which are contrary to national law or international standards.³⁹⁰

In article 6 of the CPNM one may find expression of the concerns related to racism, xenophobia, anti-Semitism and intolerance. This article places an obligation on participating States to promote tolerance and inter-cultural dialogue.³⁹¹

The purpose of article 7 of the CPNM is to guarantee respect for the right of every person belonging to a national minority to the fundamental freedoms. It states:

The Parties shall ensure respect for the rights of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.³⁹²

This article may imply that parties to the CPNM assume certain positive obligations to protect the freedoms mentioned against violations which do not emanate from the State. As such, it is a move away from the traditional resistance of the States to accept responsibility for non-state human rights violators.³⁹³

Section III of the CPNM includes provisions related to obligations on minorities to respect the national constitutions and other relevant legislation.

Article 20 states:

In the exercise of the rights and freedoms flowing from the principles enshrined in the present Framework Convention, any person belonging to a national minority shall respect the national legislation and rights of

390 *Ibid.* at 39.

391 *Ibid.* at 28.

392 *Ibid.* at 8.

393 *Ibid.* at 29.

others, in particular those of persons belonging to the majority or to other national minorities.³⁹⁴

Section IV of the CPNM describes the supervision machinery. The Committee of Ministers is responsible for monitoring the implementation by the Contracting Parties.³⁹⁵ By comparison with other proposals for protection of minorities,³⁹⁶ the provisions of this CPNM are more political in nature.

The importance of the CPNM should not be underestimated. The fact that 22 states signed this instrument within six months of its adoption by the Council of Europe suggests that European States have begun to accord high priority to the protection of minorities in their regions.

This additional legal international instrument, solely dedicated to minorities, could be very helpful in providing practical protection to them. At the same time, the effectiveness of this instrument can be only measured by its application in specific cases. It is too early to fully assess the impact that this new instrument may have on issues related to minorities.

394 *Ibid.* at 28.

395 *Ibid.* at 12.

396 Breitenmoser and Richter, Proposal for an Additional Protocol to the European Convention on Human Rights Concerning the Protection of Minorities in the Participating States of the CSCE; Draft Protocol on Minority Rights to the ECHR, adopted by the Parliamentary Assembly; and a Draft of a European Convention for the Protection of Minorities presented on February 8, 1991, by the Commission for Democracy through Law (Venice Commission).

6. The Organization for Security and Cooperation in Europe (OSCE):³⁹⁷ Protection of Minorities

The OSCE recently increased its role in the international protection of minorities. One of its important institutions, devoted solely to protecting minority rights, is the Office of High Commissioner on National Minorities. A second important element for protecting minorities is the Human Dimension Mechanism. Other OSCE procedures include: the Valletta Mechanism (peaceful settlement of disputes); the Berlin Mechanism (consultations and cooperation in emergency situations); the OSCE Court of Conciliation and Arbitration; and the OSCE Conciliation Commission.

The Conference on Security and Cooperation in Europe (CSCE) originated in the mid-1970s. It underwent constant changes to accommodate political, social, and economic challenges. At the end of the Cold War, the "Helsinki Process" was transformed into practice with the creation of CSCE institutions: the Secretariat in Prague, the Conflict Prevention Center in Vienna, and the Office for Free Elections in Warsaw. In 1994 the CSCE changed into the Organization for Security and Cooperation in Europe (OSCE). The OSCE is a strictly political body, unlike the more conventional international organizations like the United Nations and the Council of Europe. This means that the final documents of the OSCE do not have status as international legally binding treaties. They represent a set of political obligations rather inconsistently related to customary international law. They appear to represent less demanding regime compared to that of the Council of Europe. Their immediate advantages in a minority context are as follows.

³⁹⁷ From the last CSCE Summit Meeting in December 1994 in Budapest, the Conference has changed name to the Organization for Security and Cooperation in Europe (OSCE) effective on January 1, 1995.

First, 'political' agreements or not, they commit States to broad prospect of obligations to minorities, while other standard setting global or regional regimes have not been finalized. Second, the OSCE includes a much broader range of states, including the United States of America and Canada, than does the Council of Europe which has only European³⁹⁸ member states.

6.1. Human Dimension Mechanism (Vienna and Moscow Mechanisms)

The single most important mechanism for the protection of minorities is the OSCE Human Dimension Mechanism. The OSCE Human Dimension commitments originated in 1975 in the Principles Section of Basket I of the Helsinki Process (questions relating to security in Europe), and Basket III (cooperation in humanitarian and other fields). The Human Dimension Mechanism was redefined and expanded in a series of meetings (Paris 1989, Copenhagen 1990 and Moscow 1991) as well as at the Paris Summit of 1990 and the second Helsinki Summit of 1992. Adopting the "Charter of Paris for a New Europe,"³⁹⁹ the OSCE States committed themselves to ensuring full respect for human rights and fundamental freedoms, abiding by the rule of law and promoting principles of democracy and democratic institutions, including free elections, and the protection of minorities and religious freedoms.

The original mechanism, negotiated at CSCE Conferences on the Human Dimension in 1990-91, mandates an effective exchange of information and extensive bilateral meetings on cases of potential human dimension conflict.

³⁹⁸ This argument was weakened by admission in February 1996, of the Russian Federation to the Council of Europe.

³⁹⁹ CSCE, the *Charter of Paris for A New Europe*, Paris 1990.

Following activation of the Mechanism by the concerned State or other participating States, a mission drawn from an official list of experts appointed by OSCE participating States may be sent to investigate human rights cases. If a "good offices" mission is regarded as unsatisfactory or if a State refuses a mission on its territory, a mandatory mission from nine other OSCE states may be dispatched if it has the support required. In emergency cases, ten States may dispatch a compulsory mission without first using the good offices phase. In addition, individual States may request the services of these experts to assist in establishing human rights standards in their countries.

The Human Dimension commitments relevant to minorities are included in the following CSCE/OSCE documents: Principle VII of the Final Act of Helsinki; Principles under the "Questions relating to security in Europe" in the Madrid Document; Principle 19 under "Questions relating to Security in Europe" and Par., 31, under "Co-operation in Humanitarian and Other Fields" in the Vienna Document; Chapter IV of the Copenhagen Document; Principles under "Human Rights, Democracy and Rule of Law" in the Charter of Paris; Report of the CSCE Meeting of Experts on National Minorities; Par., 37 of the Moscow Document; Par., 23 to 27 of Chapter VI of the Helsinki Document; Chapter III of the Prague Meeting of the CSCE Council; and Par., 21-22 of Chapter VIII of the Budapest Document.⁴⁰⁰

The Human Dimension Mechanism has been activated five times: first, by 12 States of the European Community and the United States on Croatia; second, in Bosnia-Herzegovina, with regard to reports of atrocities and attacks on unarmed civilians; third, by Estonia, to study Estonian legislation and compare it with universally accepted human rights norms; fourth, by Moldova, to

⁴⁰⁰ All relevant documents are official documents of the OSCE.

investigate current legislation and minorities' rights and inter-ethnic relations in Moldova; and fifth, by the 22nd meeting of the CSCE Committee of Senior Officials to investigate reports of human rights violations in Serbia-Montenegro, in particular the beating and imprisonment of human rights activists Vuk and Danica Draskovic and the reported banning of the Serbian Renewal Movement.

The Human Dimension mechanism appears at this time to be more flexible than the United Nations system in addressing issues of violations of the rights of minorities. For example, appointment of an expert mission to the Chechnya Republic was possible, and was accepted by the State in question – the Russian Federation. During the Chechnya crisis the OSCE organized three expert trips to the region. The Government of the Russian Federation agreed to a permanent OSCE presence in Chechnya as well as to OSCE involvement in the short- and long-term political negotiating processes.⁴⁰¹

At the forum of the 51st session of the UNCHR in February-March 1995, the participating states paid little attention to gross violations of human rights in the Chechnya Republic. Moreover, positions taken by the Russian Federation in the international arena have prevented any significant attempt to focus attention on the human rights situation in Chechnya. During the Commission Session the Chairman of the UNCHR made a statement on Chechnya, and in this statement the Commission requested the Secretary General to report on the situation of human rights in Chechnya. The Russian delegation, through diplomatic and procedural maneuvers, was able to prevent any serious and comprehensive examination of the Russian response to the attempted secession of Chechnya. The Commission on its fifty-second session (1996) on the basis of the Secretary-

⁴⁰¹ The OSCE Secretariat, Department for Chairman-In-Office Support, Press Release, No. 19/95, March 20, 1995.

General report⁴⁰² adopted the consensus statement of Chechnya situation, and again requesting report from the Secretary General on the situation of human rights on its next session. This new development prove again the inability of UN system to condemn grave violations of human rights and international law done by one of the "super power."

The advantage of the OSCE procedures over the formalized United Nations system may be their non-confrontational character. There is, however, a possible negative side of the Human Dimension mechanism: participating States may use it to evade questioning by the UNCHR (or by another UN human rights body or procedure). The State in question may manipulate the confidential nature of Human Dimension mechanisms to present itself in a positive light in the international arena.

In general terms, OSCE standards regarding the human dimension cover wider area than those of the United Nations.⁴⁰³ Another important point is that the OSCE's "intervention threshold" in response to possible violations of its standards is lower than that of the United Nations. No OSCE state can reject intervention by another OSCE state by arguing that what is involved is an "internal affair." The application of this principle was shown in the case of the Chechnya⁴⁰⁴ in two ways. First, the principle laid down for the OSCE by the 1992 Helsinki Summit⁴⁰⁵ stated that observance of commitments in the area of the human dimension is a matter of "direct and legitimate concern to all participating States and does not belong exclusively to the internal affairs of the

402 Secretary-General Report, UN Doc. E/CN.4/1996/13 of March 26, 1996.

403 W. Hoyneck, "Contributions of the OSCE to the New Stability" (Speech of the Secretary General of the OSCE to the German Society for Foreign Policy and the German Atlantic Society, Bonn, January 26, 1995) at 5 [unpublished].

404 *Ibid.*

405 Conference on Security and Cooperation in Europe (CSCE), "Helsinki Document 1992/ The Challenges of Change" (1993) 13:7-8 Human Rights Law Journal at 288.

State concerned."⁴⁰⁶ Second, the principles of the Code of Conduct,⁴⁰⁷ included in the Budapest Summit⁴⁰⁸ decisions, limit the use of armed forces within the State.⁴⁰⁹

6.2. The OSCE High Commissioner on National Minorities

The new institution of the OSCE High Commissioner on National Minorities (HCNM) has proven to be a challenge to the established ways of dealing with national minorities. This institution is more flexible and more political in its approach to problems. Its main task is to provide advance warning to states participating in the OSCE of possible eruptions of ethnic violence.

The Office of High Commissioner functions as a protective body. The OSCE in Europe, facing tremendous changes in Eastern and Central Europe, decided to approach growing national minority tensions and possible violent conflicts by creating a new system for the protection of national minorities. The institution of the HCNM has a supplementary role to that of the other existing systems of international protection of minority rights described above.

The High Commissioner's Office has two main instruments at its disposal for conflict settlement. Under Chapter One, paragraph 23 of the Helsinki Decisions, (July 10, 1992) the CSCE⁴¹⁰ High Commissioner can provide "early warning" and "early action" regarding tensions involving a national minority

⁴⁰⁶ *Ibid.*

⁴⁰⁷ The Code of Conduct on Politico-Military Aspects of Security in CSCE Budapest Document 1994, *Towards a Genuine partnership in a New Era*, part V.

⁴⁰⁸ CSCE Budapest Document 1994, *Towards a Genuine Partnership in a New Era*.

⁴⁰⁹ *Ibid.*, part V, para. 36.

⁴¹⁰ Helsinki Document 1992, *supra*, note 405.

that have the potential to develop into a conflict within the OSCE area affecting peace, stability, or relations between participating States. The organizational base of the High Commissioner is the Office for Democratic Institutions and Human Rights (ODIHR) located in Warsaw. The detailed functions of the HCNM are set out in Chapter II of the Helsinki Document (1992). The position of High Commissioner is established by the participating States.⁴¹¹ The mandate of the High Commissioner is to act under the aegis of the Committee of Senior Officials and his or her role is to prevent conflict at the earliest possible stage.⁴¹²

The activities of the High Commissioner are subjected to two limits: first, the High Commissioner may not consider national minority issues in situations involving organized acts of terrorism;⁴¹³ second, the High Commissioner may not consider violations of OSCE guarantees of rights with regard to an individual person belonging to a national minority.⁴¹⁴ The main objective of the Office is to deal with the protection of collective rights in the OSCE system. This makes the High Commissioner a unique international institution, because most international protection mechanisms are devoted solely to the protection of individual rights.

The "early warning" is based on an exchange of communications and contacts with the relevant parties in reaction to tensions and dangerous developments with respect to minorities. If the High Commissioner concludes that there is a *prima facie* risk of potential conflict (a conflict within the OSCE area affecting peace, stability or relations between participating States) he or she may issue an "early warning" which will be communicated promptly by the

411 *Ibid.*

412 *Ibid.* Chapter 2, p. 289.

413 *Ibid.* Chapter 2, § 5(b) at 290.

414 *Ibid.* Chapter 2, § 5(c) at 290.

Chairman-in-Office.⁴¹⁵ The "early action" is an activity of the High Commissioner connected proposed solutions to the ethnic conflict by participating states, following the information included in the "early warning."⁴¹⁶

The High Commissioner's first recommendations (on April 6, 1993)⁴¹⁷ were directed to the Baltic States, where the ethnic tension between the large Russian minority and the majority populations threatened to transform itself into open ethnic conflict. The OSCE High Commissioner on National Minorities, Max van der Stoep,⁴¹⁸ presented recommendations during his visits to Estonia, Latvia and Lithuania (on January 12-13, and March 30-31, 1993). In his communication to Trivimi Veliste, Minister for Foreign Affairs of the Republic of Estonia, he recommended that the Estonian Government: "... implement a visible policy of dialogue and integration towards the non-Estonian population..."⁴¹⁹

In the past two years the High Commissioner has become engaged in more than ten countries in the OSCE region: Albania, Estonia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, (former Yugoslav Republic of) Macedonia, Romania, Slovakia and Ukraine. In addition the High Commissioner prepared a study on the situation of Roma.

The High Commissioner does not function as a national minorities ombudsman, nor as an investigator of individual human rights violations;

415 *Ibid.* Chapter 2, §§ 11,12,13,14,15 at 290.

416 *Ibid.* Chapter 2, § 16 at 290.

417 Recommendations by the CSCE High Commissioner on National Minorities, Mr. Max van der Stoep, upon his visits to Estonia, Latvia, and Lithuania, HCNM Doc. No. 206/93/L/Rev., as cited in (1994) 14:5-6 Human Rights Law Journal at 216-221.

418 Max van der Stoep, formerly the Netherlands' Foreign Minister and Permanent Representative to the UN, was appointed CSCE High Commissioner effective January 1, 1993, and reappointed for another term in office in 1995.

419 HCNM Recommendations, *supra*, note 417 at 217.

instead, the High Commissioner functions as an instrument to identify ethnic tensions that might erupt into a larger conflict.

The work of the HCNM is not highly visible. The main aim of the office is to achieve positive results, and to forestall the possibility of an eruption of inter-ethnic hostilities. The diplomatic nature of the work of the HCNM requires that he maintain a low profile and controlled relations with the mass media. Nonetheless, non-governmental organizations representing national minorities have criticized the office of the HCNM. Their main argument is that there is a lack of transparency in the proceedings of the office, and that the High Commissioner has not acted rapidly and decisively in situations of violent inter-ethnic conflict. The first argument is difficult to avoid because the Commissioner operates on a firm principle of confidentiality, and does not provide any information to third parties. The second results from misunderstanding of the mandate of the High Commissioner's Office. The main task of the Office is to prevent possible conflicts, not extinguish them. In support of confidentiality, the High Commissioner has stated:

early involvement might actually escalate the dispute if parties are encouraged to exploit outside attention. This risk can be considerably reduced if a low profile is adopted. Indeed, the aspect of confidentiality which is characteristic of my mandate serves precisely this purpose.⁴²⁰

The High Commissioner strongly encourages parties involved in conflicts to lay grievances before outside, third-party conciliators. He stated:

Specifically for the High Commissioner's involvement, they [the parties] should feel that his role is non-coercive, exploratory and low-key. The goal is to start and enhance a process of exchanges views and

⁴²⁰ Max van der Stoep, (Key-Note Address of the CSCE High Commissioner on National Minorities to the Human Dimension Seminar Case Studies on National Minorities Issues: Positive Results, Warsaw, 24-28 May, 1993), (1993)1:3 CSCE ODIHR Bulletin at 21.

cooperation between the parties, leading to concrete steps which would de-escalate tensions and, if possible, address underlying issues.⁴²¹

It should be stressed that the new OSCE institution of High Commissioner on National Minorities is a development in a fresh direction, namely, the institutional protection of collective minority rights. The protection of minorities has political dimensions that strike at the heart of State sovereignty. For example, when a minority claims greater autonomy, it raises a political problem rather than one which can readily be addressed by a tribunal. Hence a non-judicial body may be in a better position to find a compromise. The High Commissioner's activities have been regarded by some governments as one of the "success stories" of the post-Cold War OSCE process.⁴²² This attitude may impede a serious attempts to evaluate the impact of the Office on the protection of minorities. However, it is still too early to completely assess the functioning of the office of the HCNM. It has only existed for two years, under one incumbent. In addition, almost all the documentation on specific cases dealt with by the High Commissioner is still confidential and there is no access to it; the Office of the HCNM maintains a high level of confidentiality and is not willing to provide any material on past cases to parties not involved in negotiations.⁴²³ The actions of the High Commissioner are accountable only to the OSCE institutions and OSCE governments. This lack of transparency of the office may in the future bring accusations of the political manipulation.

⁴²¹ *Ibid.*

⁴²² A. Bloed, "The CSCE Conflict Prevention. Mechanisms and Procedures" (1994) 2:3 CSCE ODIHR Bulletin at 32.

⁴²³ Author of this work enquired at the Office of OSCE High Commissioner on National Minorities on the issue of information on work of the HCNM, and received following response from the Office of HCNM dated March 28, 1995: "It is not possible to send documentation which NGOs provided to the High Commissioner. Confidentiality is fundamental principle underlying the mandate of the HCNM, and we wish to apply that principle in the strictest possible terms."

6.3. The Role of the Office for Democratic Institutions and Human Rights (ODIHR)

At the end of the Cold War, the Helsinki Process was transformed with the creation of OSCE institutions: a Secretariat in Prague, a Conflict Prevention Center in Vienna, and an Office for Free Elections in Warsaw. In 1992, the OSCE States, then numbering 53, decided to transform the Office for Free Elections into the Office for Democratic Institutions and Human Rights (ODIHR). The decision was formalized by the Helsinki Document in 1992.⁴²⁴

The ODIHR is the OSCE institution responsible for furthering human rights, democracy and the rule of law. The Helsinki Summit (1992) gave the Office a broad mandate, including: monitoring implementation of the OSCE human dimension commitments; managing the "Human Dimension Mechanism;" organizing international seminars on Human Dimension topics, including seminars for newly admitted participating States; supporting the OSCE High Commissioner on National Minorities; serving as a clearinghouse for information on democracy - building programs in all OSCE countries; and assisting the holding of democratic elections in the region through international observers, seminars, and exchanges of experts.

All of the activities of the ODIHR have direct implications for the protection of minorities and conflict prevention. For example, the creation of the Contact Point for the Roma at ODIHR was suggested during the Human Dimension seminar on Roma People in the OSCE Region.

Among ODIHR's most challenging new tasks is responsibility for managing the Human Dimension Mechanism. One of the important elements

⁴²⁴ Helsinki Summit Declaration, CSCE Helsinki Document 1992, "The Challenges of Change."

is to organize seminars on Human Dimension issues requested by the OSCE, various States, and institutions. The large seminars - for 53 States, plus international organizations, non-governmental organizations, observers and media, are held in Warsaw. Smaller seminars may be organized or co-sponsored with others in Warsaw or elsewhere, at the request of interested States. The ODIHR has already organized Human Dimension Seminars on the following topics: Tolerance (1993); Migration, including Refugees and Displaced Persons (1993); Case Studies on National Minorities Issues: Positive Results (1993); Early Warning and Preventive Diplomacy (1994); Local Democracy (1994); and Roma in the OSCE Region (1994). These seminars, had an important role in the process of focusing the attention of governments on minority rights issues. In 1995 the ODIHR organized the following activities: (1) Human Dimension Seminars on: Building Blocks for Civic Society; Freedom of Association and NGOs; Rule of Law. (2) Other seminars on: Drafting Human Rights Legislation; Prevention of Drug Trafficking, and Media Management.

NGOs have more access to the proceedings than they do in the United Nations system, and in many cases they have been invited to join official state delegations. Inclusion in official state delegations is, however questioned by some NGOs, because they view it as potentially compromising their independence.⁴²⁵ For example, Nicolae Gheorge, from Romani Crisis and Centre de Reserches Tsiganes, in his presentation at the Human Dimension Seminar on Roma in the CSCE Region, questioned the independence of NGOs participating in the CSCE Human Dimension seminars as members of official government delegations.⁴²⁶

⁴²⁵ Statement of Nicolae Gheorghe and Jean-Pierre Ligeois at the Human Dimension Seminar on Roma in the CSCE Region, Warsaw, September 20-23, 1994 [unpublished].

⁴²⁶ *Ibid.*

The ODIHR has also expanded its clearinghouse function to include a broad range of human rights topics. It now collects information from OSCE states for its Warsaw database on NGOs and other organizations involved in the human dimension process. This information is available to interested governments, NGOs, research institutions, and individuals. Thematic issues include: democratic institution building (governmental and non-governmental programs, publications and studies); and human rights (reports on compliance, information on programs promoting human rights).

The recently admitted participating States in the OSCE are offered special programs, seminars, and meetings designed to assist them in writing constitutions, modernizing judicial systems, revising fundamental laws, and their coordination with related bodies like the Council of Europe or the United Nations. Those activities are grouped under the Program of Coordinated Support for Recently Admitted Participating States, and there is a real possibility that this program may play an effective role in defusing the possibility of future national or ethnic conflicts.

Finally, the ODIHR provides support for OSCE missions. There are currently eight Missions of the OSCE working in Latvia, Estonia, Tajikistan, Moldova, the former Yugoslav Republic of Macedonia, Georgia, and most recently in the Ukraine and Sarajevo.⁴²⁷ These missions serve as instruments of conflict prevention and crisis management, and support the actions of OSCE in the prevention of tensions between minorities and majority population.⁴²⁸ The HCNM missions shows that he has taken an expansive view on his responsibilities. Moreover, HCNM expended his mandate to various population

⁴²⁷ Secretariat, Department for Chairman-in-Office Support OSCE, information document on OSCE Missions.

⁴²⁸ *Ibid.*

groups, not only to national minorities.⁴²⁹ In his recommendations to Estonia he spoke of his mandate to "promote dialogue and mutual understanding between various population groups."⁴³⁰

⁴²⁹ J. Wright, "The OSCE and the Protection of Minority Rights" (1996) 18:1 Human Rights Quarterly at 205.

⁴³⁰ *Ibid.*

7. The Role of Non-Governmental Organizations (NGOs) in the Protection of Minorities

NGOs have performed a very important function in focusing international attention on the problems of minorities. Many minorities have used the structure and position of NGOs to advance their cause in the international arena after exhausting domestic remedies. However, at present the United Nations and other international bodies are not readily accessible to many national NGOs for a variety of reasons, including economic, structural, and procedural barriers. Those NGOs which represent the interests of minorities need to resort to a variety of methods in order to alleviate oppression.

The NGOs' contribution to the international protection of minority and human rights has been the subject of numerous publications.⁴³¹ The Minority Rights Group, a leading international minority protection NGO, has formulated its main goals as: challenging prejudice and promoting public understanding through information and education; identifying and monitoring conflict between communities; advocating preventive measures to avoid the escalation of conflict; and encouraging positive action to build trust between majority and minority communities. Most of the minority NGOs have similar policies with regard to the protection of minorities.

⁴³¹ For example, D. Weissbrodt, "The Contribution of International Non-Governmental Organizations to the Protection of Human Rights," in Meron, ed., *Human Rights in International Law* (Oxford: Clarendon Press, 1984); H.J. Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* (Cambridge: Harvard Law School Program, 1991).

7.1. Advocacy by NGOs to Protect Minorities

Most governments try to present themselves as states which respect human rights. Public exposure of the maltreatment of minorities has in many cases helped achieve positive results. Thus, the threat of publicly exposing human rights abuses is still a strong weapon for NGOs and has served as a deterrent to human rights abuses when wielded against states with a record of violations.⁴³²

NGO activists have developed a large number of specific tactics: fact finding missions and reports; urgent action networks; human rights awards to activists at risk; and accompaniment and provision of access to mass media to NGO activists at risk.⁴³³ These methods have in many cases had more practical impact than traditional approaches using formal international procedures.

In its presentation at the fifty-first session of the UN Commission on Human Rights the Minority Rights Group recommended that the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities give close attention to minority issues; that a working group of the Sub-Commission be established; and, that a special rapporteur on minorities be appointed by the Commission.⁴³⁴ Subsequently, the Commission decided to appoint a rapporteur at its fifty-first session. This positive example of the influence of NGOs on international organizations underlines the importance of access to the proceedings of inter-governmental organizations (IGOs). Other NGOs such as Amnesty International or Human Rights Watch constantly

⁴³² L. S. Wiseberg, "Protecting Human Rights Activists and NGOs" (1991) 13:4 Human Rights Quarterly at 531.

⁴³³ *Ibid.* at 534.

⁴³⁴ Presentation by Minority Rights Group at fifty-first Session of UN Commission on Human Rights, on item 19: *Report on the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, February, 1995 [unpublished].

prepare reports and appeals for action to the international community on behalf of oppressed minorities around the world.

7.2. Participation in the Proceedings of Inter-Governmental Organizations (IGOs)

Non-governmental organizations have various opportunities to participate in the regular proceedings of the inter-governmental organizations, but some of these organizations set limitations on NGOs. The resistance of states to allowing an increased role for representatives of NGOs has its roots in the theory and practice of international law. Despite numerous efforts to provide NGOs with a legal status in international law, they still remain legally subordinated to states.⁴³⁵ In many cases, NGOs must respect national laws on associations, taxes, and other internal regulations, despite the non-democratic nature of their countries. Some governments equate "non-governmental" organizations with "anti-government" organizations that are threats to security and stability.⁴³⁶ Local human rights groups are often faced with limitations imposed on their activities by governments.⁴³⁷ Governments with poor human rights records are especially active in obstructing the activities of human rights NGOs. NGOs in these states are constantly plagued with financial, legal and administrative restrictions. In some cases, government reaction to public human rights campaigns goes beyond persecution to killing of human rights activists.⁴³⁸

⁴³⁵ A. Drzemczewski, "The Role of NGOs in Human Rights Matters in the Council of Europe" (1987) 8:2-4 Human Rights Law Journal at 274.

⁴³⁶ *Ibid.* at 273.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

The inability of local NGOs to achieve changes in their societies forces them to seek redress through international organizations. This in turn provokes increasingly hostile government reaction at the level of international organizations and official attempts to weaken the position of NGOs.⁴³⁹

The structures of the United Nations were primarily designed for participating states, not non-governmental organizations. NGOs interested in the work of the United Nations can apply for "consultative status" with the ECOSOC. For NGOs which work in the fields of human and minority rights, the consultative status is particularly valuable. Without being accredited to ECOSOC, an NGO representative cannot even enter the room where the Commission on Human Rights is in session.

Three categories United Nations consultative status can be granted to organizations.⁴⁴⁰ The first is granted to organizations concerned with most of ECOSOC's activities. These organizations may submit written statements, be granted hearings and propose agenda items for consideration by ECOSOC and its subsidiary bodies (including the Human Rights Commission and its Sub-Commission). The second category may be granted to organizations internationally recognized for specific competence in some areas of ECOSOC's activities. These may submit written statements and be accorded hearings. Organizations in the third category, known as the Roster, are viewed as making occasional useful contributions to the work of ECOSOC. They are normally limited to submitting written statements, although in practice the Commission and Sub-Commission have drawn no distinction between Roster and other NGOs with respect to making oral statements.

⁴³⁹ *Ibid.* at 275.

⁴⁴⁰ UN/ ECOSOC/Res. 1296 (XLIV) on Consultative Agreements, UN Doc. E/4548/Supp.1. (1968).

The process is lengthy: NGOs must fill in a questionnaire, provide detailed information on their organization, and pass scrutiny by the ECOSOC Committee on NGOs. The consultative status review process has clear criteria, but its application policy has been politically interpreted. Therefore, there is increasing pressure from the NGO community for transparency in ECOSOC Committee decisions.⁴⁴¹ The basis for granting consultative status is governed by ECOSOC Resolution 1296.⁴⁴² The criteria it sets out require that the aims of the NGO applying for status be in conformity with the spirit, purposes and principles of the UN Charter; that the NGO be of recognized international standing; represent a substantial proportion of the population or of the organized persons within the particular field of its competence, covering where possible a substantial number of countries in different regions of the world; and be concerned with matters within the competence of ECOSOC.⁴⁴³

To this point, the United Nations has yet to succeed to address adequately all the concerns with regard to the role of NGOs. For example, the lack of access for NGOs to the drafting sessions at the Vienna World Conference on Human Rights has given rise to criticism.⁴⁴⁴ Another concern is the effectiveness of the right to present oral statements at the UN Commission on Human Rights. This right is very limited, since the usual procedure is to allocate time for speech delivery late at night when a majority of the states delegates are not present in the meeting room.⁴⁴⁵

441 L. S. Wiseberg, "Consultative Status Review Stalled. NGO Disharmony Cause for Concern" (1995) 3:2 Human Rights Tribune at 36.

442 *Ibid.*

443 *Ibid.*

444 Drzemczewski, *supra*, note 435 at 286.

445 *Ibid.*

The present role of NGOs in the consultative process is undergoing major changes. The ECOSOC has created an open-ended Working Group on the Review of Arrangements for consultations with Non-Governmental Organizations,⁴⁴⁶ with a mandate to update the 27-year-old rules of participation for NGOs in the United Nations system. At the same time, however, there is a real threat by governments hostile to human rights to limit some of the consultative rights of NGOs.⁴⁴⁷ Moreover, the disharmony amongst NGOs themselves could injure their cause and have a negative overall impact on international human rights protection.⁴⁴⁸

The new ideas advanced by the Working Group can be summarized as follows. First, enhancement of the relationship between the UN and NGOs is necessary. Second, UN Resolution 1296⁴⁴⁹ should be updated and adapted to meet present-day requirements and include the key issues for minorities. Third, there is a need to develop uniform rules for the participation of NGOs in UN Conferences. Fourth, the UN Committee on NGOs should have wider membership⁴⁵⁰ and its mandate should be broadened. Fifth, the role of national and specialized NGOs should be expanded in the proceedings of the UN. Sixth, there is a need to eliminate distinctions between different categories of NGO. Finally, there are suggestions for stronger financial and material support to foster relations between the UN and NGOs.⁴⁵¹

446 M. H. Posner & C. Whittome, "Status of Human Rights NGOs" (1994) 25:2 Columbia Human Rights Law Review at 275.

447 *Ibid.*

448 Wiseberg, *supra*, note 441 at 32.

449 ECOSOC Resolution, UN Doc. ECOSOC/Res. 1296.

450 Some of NGOs are not supporting this view.

451 P. Comeau, "Mood is Positive as the UN Begins Review of NGO Status" (1994) 2:4 Human Rights Tribune at 24-26.

In the opinion of L.Wiseberg, the third meeting⁴⁵² of the open-ended Working Group (WG) created to review the consultative status of NGOs at the United Nations failed to produce satisfactory results.⁴⁵³ The successful outcome of the Working Group will need coordinated and negotiated compromise amongst NGOs themselves,⁴⁵⁴ increasing the importance of NGOs in the consultative process, and enhancing Government-NGO dialogue. At the same time, the process of review of NGOs' consultative status with the United Nations is on-going and the final version of the working document of the Working Group is almost complete (April 1996).

One example of positive trends at the proceedings of the UN human rights body is the involvement of NGOs representing indigenous peoples in drafting the UN Declaration on Indigenous People. Under the leadership of A.Eide, the working group, adopted a policy of allowing active participation for all NGOs representing indigenous peoples regardless of their official UN status.⁴⁵⁵ Effective measures for the participation of representatives of indigenous peoples have been included in Sub-Commission resolution No. 1994/45 and 1994/49.⁴⁵⁶ Those measures are strongly supported by NGOs representing indigenous peoples. For example, in his presentation at the fifty-first session of the UN Commission on Human Rights, Lars-Anders Bær, vice-president of the Saami Council stated as follows on February 16, 1995: "We want to emphasize the invaluable importance that indigenous representatives still are

452 May 1995.

453 Wiseberg, *supra*, note 441 at 35.

454 *Ibid.* at 36.

455 Drzemczewski, *supra*, note 435.

456 UN Doc. E/CN.4/ Sub.2/1994/45, and 49.

able to participate in the consideration of the draft declaration."⁴⁵⁷ The key element of the indigenous NGO representation at UN is the creation of an indigenous forum. During the fifty-first session of the Commission on Human Rights there were various proposals and discussion on the need to establish such a permanent forum. That being said, however, care must be taken to ensure that a permanent forum of this nature doesn't weaken the recognition of the rights of indigenous peoples or the existing procedures of the United Nations system. According to the proposals presented so far, establishing a permanent forum will have to be a gradual process that builds on shared understandings among the interested parties: indigenous peoples, the United Nations, and governments. The mandate of any such permanent forum must be characterized by openness, and cover all matters of concern to indigenous peoples. Participation in the forum should be open for indigenous representatives, governments and other United Nations bodies and organizations.⁴⁵⁸

Another important issue is the consultative status of NGOs in the structures of regional inter-governmental organizations. For example, relations between the Council of Europe and international non-governmental organizations are set out in its rules for consultative status.⁴⁵⁹ This status may be granted to any NGO capable of contributing to the goals of the Council of Europe.⁴⁶⁰ However, the process leading to consultative status is not clear.

⁴⁵⁷ Lars-Anders Bær, (Statement by vice-president of the Saami Council [the Saami Council represents the Saami Nation of Finland, Norway, Sweden and Russia], to the UN Commission on Human Rights on its fifty-first session, February, 1995) [Unpublished].

⁴⁵⁸ Government of Denmark, "A Permanent Forum in the United Nations for Indigenous Peoples: Discussion Paper" UN Doc. E/CN.4/1995/141 February 9, 1995 at 3.

⁴⁵⁹ Council of Europe, Relations between the Council of Europe and international Non-governmental Organizations (Consultative status) Resolution (72) of the Committee of Ministers with effect from January 1, 1973.

⁴⁶⁰ *Ibid.* para. 2.

The Organization for Security and Cooperation in Europe has become increasingly open to NGOs over the past several years. It recognizes that NGOs can bring considerable expertise and information to OSCE processes, both directly and indirectly, insofar as their own activities complement and support those of the OSCE. It is also recognized that NGOs play an important role in establishing and sustaining democratic society. The OSCE has been applying a non-selective and non-discriminatory approach to NGOs. In OSCE terms, "NGO" means any organization declaring itself as such. As a result, the NGO community co-operating with the OSCE is a very heterogeneous group. The only restrictive, understandably provision excludes contact with NGOs that resort to the use of violence or publicly condone terrorism or the use of violence.

One example of the open OSCE policy is the organization by the ODIHR of regional workshops, human dimension seminars, and other activities which are open to NGOs representing minorities.⁴⁶¹ The new policy of including NGOs in the process of intergovernmental contact is slowly being adopted by various states. At the same time, government representatives strongly emphasize that in formal inter-governmental processes, decision-making remains the prerogative of governments.⁴⁶² The same position was taken by the "group 77 states plus China."⁴⁶³

Governments participating in the OSCE process still remain the key actors, and the principal decision-making bodies of the OSCE (Council of Ministers, Committee of Senior Officials, Permanent Committee) remain closed

⁴⁶¹ For example NGOs participation in the CSCE Meeting of Experts on National Minorities in Geneva, 1991, or the Human Dimension Seminars: Human Dimension Seminar on Case Studies on National Minorities Issues: Positive Result, Warsaw, 24-28, May 1993; the Human Dimension Seminar on Roma in the CSCE Region, Warsaw, 20-23 September, 1994

⁴⁶² The Canadian Department of Foreign Affairs and International Trade (DFAIT), "Report on Consultations held on the Human Dimension of CSCE," (Statement presented in Ottawa September, 1994) at 2 [unpublished].

⁴⁶³ This position was expressed at May 6, 1995 at the UN NGO consultative status review.

to NGOs. The institutions of the OSCE (Secretariat, Conflict Prevention Centre, ODIHR, High Commissioner on National Minorities) exist primarily to serve CSCE States. During the recent Budapest Review Conference and Summit, all Plenary Meetings of the Review Conference were open to NGOs, and NGOs participated in sessions of the Human Dimension Working Group. The only exception was the first Working Group, which was examining the general question of "the role of NGOs and contact with them."

The International Helsinki Federation for Human Rights, an NGO that monitors compliance with the human rights provisions of the Helsinki Final Act and its Follow-up Documents, has a long history of focusing attention on and documenting, many minority problems. For example, in its last Report to the OSCE Implementation Meeting on Human Dimension Issues (Warsaw, October 2-19, 1995) this organization presented several minority cases in the OSCE Region. Among other human dimension issues, the Report addressed the situation of the Greek minority in Albania,⁴⁶⁴ discrimination against the Armenian minority in Azerbaijan,⁴⁶⁵ violations of the rights of Roma in Bulgaria,⁴⁶⁶ and the problems of the Turkish and Macedonian minorities in Bulgaria.⁴⁶⁷ The Report also described in great detail minority problems in Greece,⁴⁶⁸ Latvia, Macedonia,⁴⁶⁹ Norway, Poland,⁴⁷⁰ Romania,⁴⁷¹ Russia, Slovakia, Slovenia,⁴⁷² Turkey, Turkmenistan, and Ukraine.⁴⁷³ Those activities

⁴⁶⁴ International Helsinki Federation for Human Rights, *Report to the OSCE Implementation Meeting on Human Dimension Issues, Warsaw, October 2-19, 1995*, (Vienna: International Helsinki Federation for Human Rights, 1995) at 79.

⁴⁶⁵ *Ibid.* at 80.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.* at 82.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.* at 84.

⁴⁷⁰ *Ibid.* at 85-86.

⁴⁷¹ *Ibid.* at 87-88.

⁴⁷² *Ibid.* at 89-92.

of minority oriented NGOs have helped improve the level of recognition of protection of minorities in the international fora.

Recently, there have been recommendations and proposals for establishing more systematic ways for NGOs to communicate serious violations of the rights of minorities to international organizations.⁴⁷⁴

Practical achievements in supporting the rights of national and ethnic minorities can be seen in the activities of some internationally recognized NGOs. For example, Amnesty International representatives have made numerous interventions exposing crimes against minorities to the UN Human Rights Commission, European Commission on Human Rights, OSCE Human Dimension Seminars, and other international fora.⁴⁷⁵ Human Rights Watch/Helsinki delivered a statement at the fifty-first session of the UN Commission on Human Rights regarding the situation in the Republic of Chechnya, expressing concern regarding the failure of the Commission to adopt a statement condemning the Russian government for its conduct in the war in Chechnya.⁴⁷⁶ In this communication, Human Rights Watch stated: "Remaining silent for so long in the face of Russian forces' well-documented brutal, vicious and illegal treatment of civilians, seriously undermines its credentials as a body dedicated to human rights."⁴⁷⁷

⁴⁷³ *Ibid.* at 92-93.

⁴⁷⁴ Amnesty International, "Role of NGOs in the CSCE Human Dimension Process," (Statement presented on CSCE Human Dimension Implementation Meeting, Warsaw, October 1993) [unpublished].

⁴⁷⁵ For example statement of I.Fiser, representative of Amnesty International, International Secretariat, presented at the Human Dimension Seminar on Roma in the CSCE Region, Warsaw, September 20-23, 1994.

⁴⁷⁶ Human Rights Watch/Helsinki, "Human Rights Watch/Helsinki Decries Failure by UN Commission on Human Rights to take Action on Chechnya" (Statement at the fifty-first session of UN Commission on Human Rights, Geneva, March 23, 1995) [unpublished].

⁴⁷⁷ *Ibid.*

During the fifty-first session of the UN Commission on Human Rights another NGO, the Slovenska Skupnost/Unione Slovenia, distributed a statement regarding the situation of the Slovene minority in Italy. It charged that the Slovene minority is the subject to a policy of assimilation, despite internal and international commitments by Italian government,⁴⁷⁸ and that: "Such a policy of assimilation represents a blatant injustice towards the Slovene minority in Italy as well towards its individual members."⁴⁷⁹

The successful participation of NGOs in international organizations depends on rapid and flexible reaction to new human rights developments. NGOs can raise fresh issues and lobby in favour of new ideas. NGOs are not hindered by considerations which prevent State representatives from speaking out on specific or delicate human rights issues. The participation in the UN monitoring procedures of persons representing minority groups is an essential factor in the conduct of constructive discussions at international forums. Today, such participation does not exist, except on an *ad hoc* basis under umbrellas offered by government delegations and non-governmental organizations.

7.3. Data Gathering and Monitoring Role

The continuous monitoring role of NGOs has even more importance in fighting human rights abuses. The development of solid, reliable data on the treatment of vulnerable groups in society is helping achieve positive

⁴⁷⁸ The Slovenska Skupnost/Unione Slovenia, "The Slovene Minority in Italy: An Example of 'Tacit' Assimilation" (Statement at the fifty-first session of the UN Commission on Human Rights, Geneva, February, 1995) [unpublished].

⁴⁷⁹ *Ibid.*

compromises between majorities and minorities. Even those governments with a history of human rights abuse treat NGOs with more respect when they are able to produce reliable and comprehensive data. Many international bodies and mechanisms act on the basis of the information gathered by NGOs.

The UN human rights bodies largely depend on information provided by NGOs as well as on the large amount of good will and cooperation between government experts and NGOs (in the areas of thematic studies, development of new standards and new areas of work, and country-specific studies). NGOs play a leading role in formulating new standards, and presenting directions for new developments in the field of human rights.

NGO activists have developed extensive expertise in the protection of human rights. Often, such expertise is not available within government bureaucracies. NGOs can play a very important role in the dissemination of accurate, updated information about incidents, or patterns of government abuse of power. For many NGOs, their first objective and the driving force that motivates them is to ensure that vulnerable groups have access to important information on civil, political, and social rights. Examples of this can be found in the activities of Charter 77 in Czechoslovakia, the Helsinki Watch Committees in many Central and Eastern European countries, and the Movement for Defence of Civilian and Human Rights (ROPCIO) in Poland.

Information on the situation of minorities gathered by NGOs could be valuable as a basis for early warning systems. Before ethnic violence occurs on a large scale, there are usually symptoms of increasing tension between minority and majority such as media attacks, negative stereotyping of a vulnerable group, or examples of employment discrimination. In the task of identifying and communicating those dangers, the role of NGOs should not be underestimated.

One of the main challenges for international human rights activists is to find a way to best utilize the information of local NGOs which represent racial and ethnic minorities. Despite the presence of international NGOs which focus some of their attention on minority rights (e.g., the Minority Rights Group, Human Rights Watch, Amnesty International), there is a lack of coordination between these NGOs and the efforts of locally-focused NGOs. This communication problem may be the main reason for the under-representation of problems specific to minorities in the formal international consultative process. This is a key issue for the ECOSOC consultative status review.

Another challenge for NGOs is finding a way to transform the present system of excessively crisis-oriented activities into a permanent human rights monitoring movement.⁴⁸⁰

Some NGO activists argue that an informal division of fields of interest may help to keep international attention continuously focused on the work of various local NGOs. Another idea is to assist underdeveloped countries' NGOs with technological expertise, especially the practical use of fast global communications.⁴⁸¹

The future role of NGOs representing minorities could include the following elements: effective advocacy for protection of minorities; increased participation in the proceedings of inter-governmental organizations; and permanent monitoring and information-gathering in the area of the minority rights. One can only hope that at some point in the future a constructive dialogue between NGOs and their national and local governments will eliminate the need to address human rights grievances in international fora.

480 Wiseberg, *supra*, note 432 at 540.

481 *Ibid.* at 541.

8. Intervention to Protect Minorities? A Change in the Principle of Non-Intervention in International Law

Grave and systematic human rights violations demand that inter-governmental organizations provide effective protection measures.

Humanitarian military intervention to protect minorities in another country from serious and widespread violations of their individual rights is the object of intense debate.⁴⁸² While this debate is not new, there have been significant developments in recent years: the era of a "New World Order"⁴⁸³ presented partial solutions to the challenges of humanitarian intervention. The end of the Cold War allowed political cooperation at the United Nations, and for the first time the UN Security Council was able to agree on multinational humanitarian interventions in Iraq, Rwanda, and the former Yugoslavia.

Two questions arise in relation to humanitarian intervention. First, what is its legal basis? Second, what changes in current international law suggest that humanitarian intervention may be one answer to situations in which fundamental human rights are violated on a large scale?

The issue of humanitarian intervention is closely related to fundamental principles of international law: the principle of state sovereignty and the principle of non-intervention.⁴⁸⁴ The first principle, which has its roots in the notion of the equality and independence of states, asserts that no state may intervene in the internal affairs of another.⁴⁸⁵ At the same time, the process of internationalization of human rights and widening acceptance of international

482 D.P. Forsythe & K.K. Pease, "Human Rights, Humanitarian Intervention, and World Politics" (1993) 15:2 Human Rights Quarterly at 290.

483 *Ibid.*

484 *Ibid.* at 291.

485 J. Delbrück, "A Fresh Look At Humanitarian Intervention Under the Authority of the United Nations" (1992) 67:4 Indiana Law Journal at 889.

standards for protection of minorities have resulted in a change in the traditional view that the relationship between a state and its citizens is a domestic matter. In some parts of the World, regional human rights systems have been developed, and their monitoring organs are empowered to enforce on the State party the observation of human rights standards. This limits to some extent state authority over its territory and citizens.⁴⁸⁶

The principle of non-intervention is a cornerstone of contemporary international law and broader international relations. It can be found in key United Nations documents such as the UN Charter⁴⁸⁷ and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.⁴⁸⁸ It was also included in Principles VI and VII of the Helsinki Final Act.

Despite the strict limitations on intervention, there are some exceptions. At the same time as the UN practices were evolving, changes in international practice also took place. The increasing internationalization of human rights has meant that it is no longer possible to regard human rights violators as "essentially within the domestic jurisdiction of a State."⁴⁸⁹

The legal foundations for humanitarian intervention may be found in the UN Charter. Article 2, paragraph 4 prohibits the threat or use of force in

⁴⁸⁶ Forsythe & Pease, *supra*, note 482 at 296.

⁴⁸⁷ U N Charter, Article 2(7).

⁴⁸⁸ U N Resolution 2625-XXV (Dec 14, 1970), this declaration contains the following: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the cultural elements, are in violation of international law no State shall organize, assist, foment, finance, invite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another state or interfere in civil strife in another State. ... Every state has an inalienable right to choose its political , economic and cultural systems, without interference in any form by another State."

⁴⁸⁹ J. Fawcett, "Intervention to Protect Minorities" in B. Whitaker, ed., *Minorities: A Question of Human Rights?* (Oxford: Pergamon Press, 1984) at 71.

international relations.⁴⁹⁰ The Charter itself allows for three⁴⁹¹ exceptions to this ban. The first is in article 42, which gives the Security Council authority to use force. The second is mentioned in article 51, in the form of the right to individual or collective self-defence. Third, the United Nations Security Council, in response to large-scale human rights violations, may also take action pursuant to Chapter VII of the UN Charter.

International law and various UN General Assembly resolutions reinforce the ban on the use or threat of force. At the same time, the norms and obligations of the UN Charter assumed by the states, especially those flowing from articles 55 and 56 of the UN Charter relating to international protection and promotion of international standards of human rights, have served as the basis for significant action to support human rights.

There are a number of International Court of Justice (ICJ) cases addressing the issue of human rights and humanitarian intervention. In its judgment in *Military Activities in Nicaragua*,⁴⁹² the Court confirmed international doctrine that unilateral armed humanitarian intervention has no justification in international law.⁴⁹³ The Court reasoned that violations of human rights cannot justify unilateral armed humanitarian intervention. At the same time, the Court observed that fundamental human rights must be respected under

490 Article 2, paragraphs 4 of the UN Charter reads: "All Members shall refrain their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

491 Article 107 of the Charter contains the third exception, allowing the use of the force against the enemies of any signatories to the UN Charter during the Second World War, but this last exception has no real significance.

492 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits [1986] I.C.J. rep. 14, as cited in N. Rodley, "Human Right and Humanitarian Intervention: The Case Law of the World Court" (1989) 38:2 International and Comparative Law Quarterly at 321.

493 *Ibid.* at 328.

general international law.⁴⁹⁴ According to academic commentators there is no legal foundation for unilateral humanitarian intervention.⁴⁹⁵

Practical application of the theory shows the inability of the United Nations to address vigorously human rights violations. This is illustrated by the Pakistani, Ugandan, and Kampuchean cases. In the first case, the UN Security Council did not hold informal consultations until July and August of 1971, following full scale-conflict between India and Pakistan. After the Indian invasion, the Security Council was unable to act because the Soviet Union vetoed any substantial resolutions.⁴⁹⁶ In the second case of unilateral intervention, Ugandan forces attacked Tanzania in 1979, claiming that they were previously attacked. In return, Tanzania captured the Ugandan capital. In this case, neither the Organization for African Unity (OAU) nor the United Nations took any substantial action to stop the conflict. Nor had they acted to protect endangered minorities during the preceding years of brutality under the regime of Idi Amin in Uganda.⁴⁹⁷ In the third case, during three years of planned genocide by the Khmer Rouge Regime in Kampuchea, the United Nations was again unable to take effective action to stop human rights abuses.⁴⁹⁸ In 1979 the Vietnamese Army, with the help of Kampuchean expatriates, invaded Kampuchea. Again, attempts by the UN Security Council to act were vetoed by the Soviet Union.⁴⁹⁹

⁴⁹⁴ *Ibid.* at 333.

⁴⁹⁵ O. Schachter, "In Defense of International Rules on the Use of Force" (1986) 28:53 *University of Chicago Law Review* at 191-124.

⁴⁹⁶ B.F. Brumester, "On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights" (1994) 24:1 *Utah Law Review* at 287.

⁴⁹⁷ *Ibid.* at 288.

⁴⁹⁸ *Ibid.* at 292.

⁴⁹⁹ *Ibid.* at 293.

Why in these three cases was the United Nations unable to take effective action? The answer lies in political division. During the Cold War, the UN very occasionally discussed humanitarian problems. During the last decade, after changes in the Central and Eastern Europe, the UN Security Council was able to put aside its permanent members' divergent interests and implement successful multinational operations. The first example was the Iraq-Kuwait conflict. Support for this humanitarian intervention from the international community was almost unanimous (in contrast with the United States interventions in Grenada and Panama).⁵⁰⁰

Other limited examples of new humanitarian interventions related to the Iraqi Kurds,⁵⁰¹ and Somalia.⁵⁰² In these cases, the UN was initially able to achieve the political consensus necessary for practical action, but political differences stalled its actions shortly thereafter.

Under the current system, the Security Council is entitled to take any kind of enforcement action for humanitarian purposes as soon as it judges a situation to be at a level that poses a threat to international peace and security.⁵⁰³ The relationship between the maintenance of international peace and security and the protection and promotion of human rights has not been clearly defined by international practice. However, recent decisions of the Security Council in the cases of Iraq, Yugoslavia and Somalia suggest that, in its view, gross violations of human rights do pose a serious threat to the peace and security of a region.⁵⁰⁴

⁵⁰⁰ *Ibid.* at 312.

⁵⁰¹ Security Council, Resolution No. 688, U.N. Doc. S/RES/688, 1991.

⁵⁰² Brumester, *supra*, note 496 at 313.

⁵⁰³ Article 39 of the UN Charter reads: "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.* "

⁵⁰⁴ Security Council Resolutions on Iraq UN Doc. S/RES/688, 1991; Yugoslavia, and Somalia, UN Doc. S/RES/733, 1992.

The failed intervention in Somalia, prompted legal scholar T.J. Farer to propose three basic rules for future humanitarian interventions.⁵⁰⁵ First, the United Nations in its peace and humanitarian interventions should maintain strict impartiality. Second, the UN should not hastily try to rebuild representative democracy in failed states. Third, international organizations should be very careful in not mixing peace enforcement and confidence building measures.⁵⁰⁶

One positive example of an initial ability to achieve some progress in protecting minorities may be seen in the Security Council's creation of UN peacekeeping forces in six "safe areas" in Bosnia-Herzegovina (UNPROFOR). Those "safe areas" were: Tuzla,⁵⁰⁷ Srebrenica,⁵⁰⁸ Bihac,⁵⁰⁹ Sarajevo,⁵¹⁰ Zepa,⁵¹¹ and Gorazde.⁵¹² After Srebrenica fell to Bosnian Serbs forces on July 11, 1995, the "safe areas" policy came under extreme pressure. The original mandate of the UNPROFOR was "peace keeping," and humanitarian help, not "peace enforcement." The recent developments in Bosnia-Herzegovina have highlighted the main element of the concept of multinational humanitarian intervention -- the need for multinational consensus. The short window of opportunity which followed the end of Cold War for the principal World Powers to act together through the UN Security Council now appears to be closed. The present crisis situation in Bosnia-Herzegovina puts at risk the future of the United Nations and North Atlantic Treaty Organization (NATO).

505 T.J. Farer, "Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase" (1996) 18:1 Human Rights Quarterly at 3.

506 *Ibid.*

507 In this area there are estimated to be 223, 000 refugees, and 233, 000 residents.

508 In this area there are estimated to be 40, 000 refugees.

509 In this area there are estimated to be 61, 000 refugees, and 166, 000 residents.

510 In this area there are estimated to be 130, 000 refugees, and 300,000 residents.

511 In this area there are estimated to be 30, 000 refugees.

512 In this area there are estimated to be 60, 000 refugees.

Legal theory does not yet recognize humanitarian intervention as a rule of customary international law. Present international law offers no clear legal basis for the use or threat of force by states, without reference to chapter VII of the UN Charter, namely, to combat gross violations of human rights.⁵¹³ Although, developments in international law have produced some recognition of the need to use force to stop gross violations of human rights, the international community now needs to reorient international law towards a more active and responsive system of international security. It should be pointed out that effective multinational humanitarian intervention depends more on the political will of the intervening states than on the UN Charter. The examples of recent humanitarian interventions cited above illustrate the difficulties facing the international community when it decides on armed action to protect fundamental human rights. These difficulties were mostly of a political nature. It was (and still is) very difficult to reach firm decisions in the UN Security Council.

It must also be noted that despite arguments for the legality of humanitarian intervention, states may not act very vigorously even when a legal basis does exist. Many states simply wish to avoid placing their nationals at risk. What might this mean for minorities? First, when minorities are threatened with the possibility of violent attacks, or mass violations of their rights, the United Nations is not able to provide a timely and meaningful response. The cases of Pakistan, Somalia, and Kampuchea show that the United Nations was unable to stop the actual killings and other acts of inter-ethnic violence. Secondly, the cases discussed above also seem to show that minorities are more likely to receive relief and effective protection in the form of

⁵¹³ Delbrück, *supra*, note 485 at 892.

humanitarian intervention from a neighboring state than from a multinational force.

The goals of the United Nations with regard to humanitarian intervention were stated in the Security Council declaration of January 31, 1992. It presented the following interpretation of Chapter VII of the UN Charter:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The UN membership as whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.⁵¹⁴

This statement may be used as a guideline for humanitarian intervention in the future.

⁵¹⁴ Provisional verbatim record of the Session of the Security Council, on January 31, 1992, UN S/PV.3046, 1992 at 143.

9. Conclusions

"Ethnic revival" has been one of the surprises of the last thirty years. The violence of the ethnic disturbances in the former Yugoslavia and the Soviet Union was unexpected by most of the states. However, the reappearance of ethnic conflict is a fact of life that will probably continue.

The universal protection system has not prevented the many injustices committed against minorities. The United Nations system of protection of minorities is legalistic, formal and not flexible enough to accommodate many of the problems of minority protection. Despite recent changes to the UN system (see the UN Declaration on National Minorities) it is still unable to address ethnic conflicts in a timely way. The United Nations still fails to take enforcement action to ensure peace and security to minorities in need.

Contemporary governments still object to positive measures for minorities' protection. They fear that giving minorities strong political representation and legal recognition may threaten state security and stability. At the same time, a majority of states strongly oppose recognition of collective minority rights. Those states are of the opinion that the fact of granting collective rights to the minority will increase dangerous state-minority confrontations. The present post-cold-war international political situation is far from good for minorities. Intolerance, xenophobia, anti-Semitism, attacks on foreigners, difficult economic times, and the revival of neo-Nazism make it difficult to promote the rights of minorities.

The history of defining "minority" is a history of failed attempts. Numerous proposals for a definition have been put forward by the United Nations bodies and other inter-governmental organizations as well as by non-governmental organizations and academics. Unfortunately, none has won

enough support to become a universally used definition. At the same time, it is illusionary to imagine that a universal definition of "minority" will be accepted by a majority of states in the near future. And even the usefulness of defining "minority" is itself still actively debated.

Some help in arriving at a definition of minorities may come from comparing "minorities" with "indigenous populations." In the United Nations fora, a clear distinction is drawn between the two groups.

Minorities often turn in their struggle to the right to self-determination. They are faced with the present interpretation of international law, which accords the right to "peoples," with strict limits on application. The United Nations supported the right to external self-determination only in the context of decolonization. Despite the limitations, the idea of self-determination as a human right will continue to be a major political force in international relations.

European human rights institutions have been extremely active in attempting to find the right solution to each specific inter-ethnic conflict. Within the Council of Europe, and the OSCE, the issue of minorities has received a lot of attention, and new protection instruments have been crafted. Europe has a genuine self-interest in developing positive relations with minorities. It is impossible to imagine a peaceful and harmonious Europe with persecuted minorities. In order to fulfill its goal of protecting human rights, the Council of Europe needs to implement effective measures to address "minority problems." The violent eruption of war in Yugoslavia exposed the inherent weakness of protective institutions created by the European Convention on Human Rights.

The fate of minorities protection lies in the Framework Convention on Protection of Minorities. This central legal instrument is specifically dedicated to the protection of minorities, and is helpful in providing them with state

assistance and responsibility. The effectiveness of this instrument will be measured in the near future.

Inter-ethnic conflict is another issue which has been addressed by the Organization for Security and Cooperation in Europe. The Office of the High Commissioner on National Minorities is an important institution for protecting minority rights, but it remains to be seen how effective it will be. A second one is the Human Dimension Mechanism, and the Office for Democratic Institutions and Human Rights, in Warsaw. These institutions and mechanisms appear to be playing an increasing role in furthering human rights, democracy and the rule of law in Central and Eastern Europe; but again their effectiveness has not yet been fully tested. The OSCE today appear as a security organization with a comprehensive concept of security on which military aspects of security are no longer the dominant element. This is an innovative element for protection of minorities in the framework of OSCE. The Organization's main focus is on early warning, conflict prevention and crisis management. Those are very important elements of international protection of minorities. OSCE is working hard to strengthen human rights, consolidate democracy and rule of law and to promote all aspects of civil society.⁵¹⁵

The OSCE has comparative advantages in the Human Dimension area and in preventive diplomacy and post-conflict rehabilitation. The OSCE missions in areas of potential or real crisis and the activities of the OSCE's High Commissioner on National Minorities are instruments readily available for coping with conflicts in the OSCE area.

⁵¹⁵ W. Hoyneck, "The Current Situation of Regional Security Co-operation and Its Future, From the European Viewpoint"(Speech delivered in Tokyo on Feb., 12, 1996), OSCE Doc. REF. SEC/81/96 February 22, 1996 at 3-4.

Positive solutions for enriching the rights of minorities would require multi-instrumental, custom-made approaches to each individual conflict situation. Fifty years of standard-setting by United Nations bodies has produced some guidance for resolving ethnic conflict, but the main work of preventing them remains to be done.

The United Nations system of protection for minorities could be more effective than it presently is. There is a consensus that more attention to minorities issues is needed. Some proposals from international NGOs to improve the effectiveness of the United Nations have already been accepted. A working group on minorities of the UN Commission has been created. Other proposals still await a positive decision, including: a more generous allocation of time to discuss minority issues at the Sub-Commission; creation of a specific agenda item and a debate on minority issues at the UN Commission; more coordination and reporting on minority issues within the United Nations by the High Commissioner on Human Rights.

Non-governmental organizations have proposed structural changes in the United Nations system of protection of minorities, and implementation measures for adoption by Governments and the United Nations. Those measures include creation of an effective communication system, which will enable a better dialogue between minorities and Governments at local and international levels. Models for implementation of international standards on minorities in domestic legal systems should be set. The alternative is to emphasize the quality, not the quantity of international mechanisms related to minorities, and ensure those mechanisms have sufficient priority and resources.

Seventy years after the first attempt to regulate the international protection of minority rights, we are still faced with similar problems and

attempts are still being made to find a positive solution to guarantee full enjoyment of equal treatment by minorities.

The international community is experiencing a social, political, historical, and legal *déjà-vu*. There is hope that a new multi-level system for the protection of minority rights may work better than its predecessors.

10. Appendices

Appendix I

The International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

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

Appendix II

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)

Rome, 4.XI.1950.

Article 14

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

The American Convention on Human Rights

San Jose, 22.XI.1969

Article 1. *Obligation to respect rights*

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24. *Right to equal protection*

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Appendix III

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

United Nations General Assembly, New York,
UN Doc./Res. 47/135/ Dec 18, 1992.

Preamble (omitted)

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within the their respective territories, and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have 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 they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in this Declaration, individually as well as in community with other members of their group, without any discrimination.

2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in this Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. 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 territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of society as whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, including exchange of information and experiences, in order to promote mutual understanding and confidence.

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Article 7

States should cooperate in order to promote respect for the rights set forth in this Declaration.

Article 8

1. Nothing in this Declaration shall prevent the fulfillment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.

2. The exercise of the rights set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in this Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in this declaration, within their respective fields of competence.

Appendix IV**The Framework Convention for the Protection of National Minorities**
(adopted by the Council of Europe on November 10, 1994)**Preamble.**

The member states of the Council of Europe and the other States, signatories to the present framework Convention;

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of human rights and fundamental freedoms;

Wishing to follow-up the Declaration of the Heads of State and Government of the member States of Council of Europe adopted in Vienna on 9 October 1993;

Being resolved to protect within their respective territories the existence of national minorities;

Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent;

Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity;

Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division but of enrichment for each society;

Considering that the realization of a tolerant and prosperous Europe does not depend solely on co-operation between States but also requires transfrontier co-operation between local and regional authorities without prejudice to the constitution and territorial integrity of each State;

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto;

Having regard to the commitments concerning the protection of national minorities in United Nations conventions and declarations and in the

documents of the Conference on Security and Co-operation in Europe, particularly the Copenhagen Document of 29 June 1990;

Being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states;

Being determined to implement the principles set out in this framework Convention through national legislation and appropriate governmental policies,

Have agreed as follows:

Section I

Article 1

The protection of national minorities and the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international cooperation.

Article 2

The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States.

Article 3

- 1 Every person belonging to a national minority shall have rights freely to choose to be treated or not be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.
- 2 Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well in community with others.

Section II

Article 4

- 1 The parties undertake to guarantee to persons belonging to national minorities the rights of equality before the law and equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
- 2 The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
- 3 The measures adopted in accordance with paragraph 2 shall not be considered an act of discrimination.

Article 5

- 1 The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.
- 2 Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

Article 6

- 1 The parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding, and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.
- 2 The Parties undertake to take appropriate measures to protect persons who may be subject to treats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Article 7

The Parties shall ensure respect for the rights of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.

Article 8

The parties undertake to recognize that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organizations and associations.

Article 9

- 1 The Parties undertake to recognize that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.
- 2 Paragraph 1 shall not prevent Party from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.
- 3 The parties shall not hinder the creation and use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible and taking into account the provisions of paragraph 1, that persons belonging to national minorities are guaranteed the possibility of creating and using their own media.
- 4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to media for persons belonging to national minorities and in order to promote tolerance and permit cultural tolerance.

Article 10

- 1 The Parties undertake to recognize that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

- 2 In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use minority language in relations between those persons and the administrative authorities.
- 3 The parties undertake guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of and interpreter.

Article 11

- 1 The Parties undertake to recognize that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system.
- 2 The Parties undertake to recognize that every person belonging to national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.
- 3 In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for public also in the minority language when there is a sufficient demand for such indications.

Article 12

- 1 The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.
- 2 In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.

- 3 The parties undertake to promote equal opportunities for access to textbooks, and facilitate contacts among students and teachers of different communities.

Article 13

- 1 Within the framework of their education systems, the Parties shall recognize that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.
- 2 The exercise of this right shall not entail any financial obligation for the Parties.

Article 14

- 1 The Parties undertake to recognize that every person belonging to a national minority has the right to learn his or her minority language.
- 2 In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
- 3 Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Article 15

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Article 16

The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.

Article 17

- 1 The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethic, cultural, linguistic or religious identity, or a common cultural heritage.
- 2 The parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organizations, both at the national and international levels.

Article 18

- 1 The parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.
- 2 Where relevant, the Parties shall take measures to encourage transfrontier co-operation.

Article 19

The Parties undertake to respect and implement the principles enshrined in the present framework Convention making, where necessary, only those limitations, restrictions or derogations which are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, in so far as they are relevant to the rights and freedoms flowing from the said principles.

Section III**Article 20**

In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and rights of others, in particular those of persons belonging to the majority or to other national minorities.

Article 21

Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

Article 22

Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

Article 23

The rights and freedoms flowing from the principles enshrined in the present framework Convention, in so far as they are the subject of corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as conform to the latter provisions.

Section IV**Article 24**

- 1 The Committee of Ministers of the Council of Europe shall monitor the implementation of this framework Convention by the Contracting Parties.
- 2 The Parties which are not members of the Council of Europe shall participate in the implementation mechanism, according to modalities to be determined.

Article 25

- 1 Within a period of one year following the entry into force of this framework Convention in respect of a Contracting Party, the latter shall transmit to the Secretary General of the Council of Europe full information on the Legislative and other measures taken to give effect to the principles set out in this framework Convention.

- 2 Thereafter, each Party shall transmit to the Secretary General on a periodical basis and whenever the Committee of Ministers so requests any further information of relevance to the implementation of this framework Convention.
- 3 The Secretary general shall forward to the Committee of Ministers the information transmitted under the terms of this Article.

Article 26

- 1 In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognized expertise in the field of the protection of national minorities.
- 2 The composition of this advisory committee and its procedure shall be determined by the Committee of Ministers within a period of one year following the entry into force of this framework Convention.

Section V

Article 27

This framework Convention shall be open for signature by the member State of the Council of Europe. Up until the date when the Convention enters into force, it shall also be open for signature by any other State so invited by the Committee of Ministers. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 28

- 1 This framework Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which twelve member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 27.
- 2 In respect of any member State which subsequently express its consent to be bound by it, the framework Convention shall enter into force on the first day of the month following expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 29

- 1 After the entry into force of this framework Convention and after consulting the Contracting States, the Committee of Ministers of the Council of Europe may invite to accede to the Convention, by a decision taken by the majority provided for in Article 20.d of the Statue of the Council of Europe, any non-member State of the Council of Europe which, invited to sign in accordance with the provisions of Article 27, has not yet done so, and any other non-member State.
- 2 In respect of any acceding State, the framework Convention shall enter into force on the first day of the month following the expiration of a period on three months after the date of the deposit of the instrument of accession with the Secretary general of the Council of Europe.

Article 30

- 1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories for whose international relations it is responsible to which this framework Convention shall apply.
- 2 Any State may at any later date, by a declaration addressed to the Secretary general of the Council of Europe, extend the application of this framework Convention to any other territory specified in its declaration. In respect of such territory the framework Convention shall enter into force on the first day of the month following the expiration of a period on three months after the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period on three months after the date of receipt of such notification by the Secretary General.

Article 31

- 1 Any Party may at any time denounce this framework Convention by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall become effective on the first day of the month following the expiration of the period of six months after the date of receipt of the notification by the Secretary General.

Article 32

The Secretary General of the Council of Europe shall notify the members States of the Council, other signatory States and any State which has acceded to this framework Convention, of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance, approval or accession;
- c any date of entry into force of this framework Convention in accordance with Articles 28, 29, and 30;
- d any other act, notification or communication relating to this Convention.

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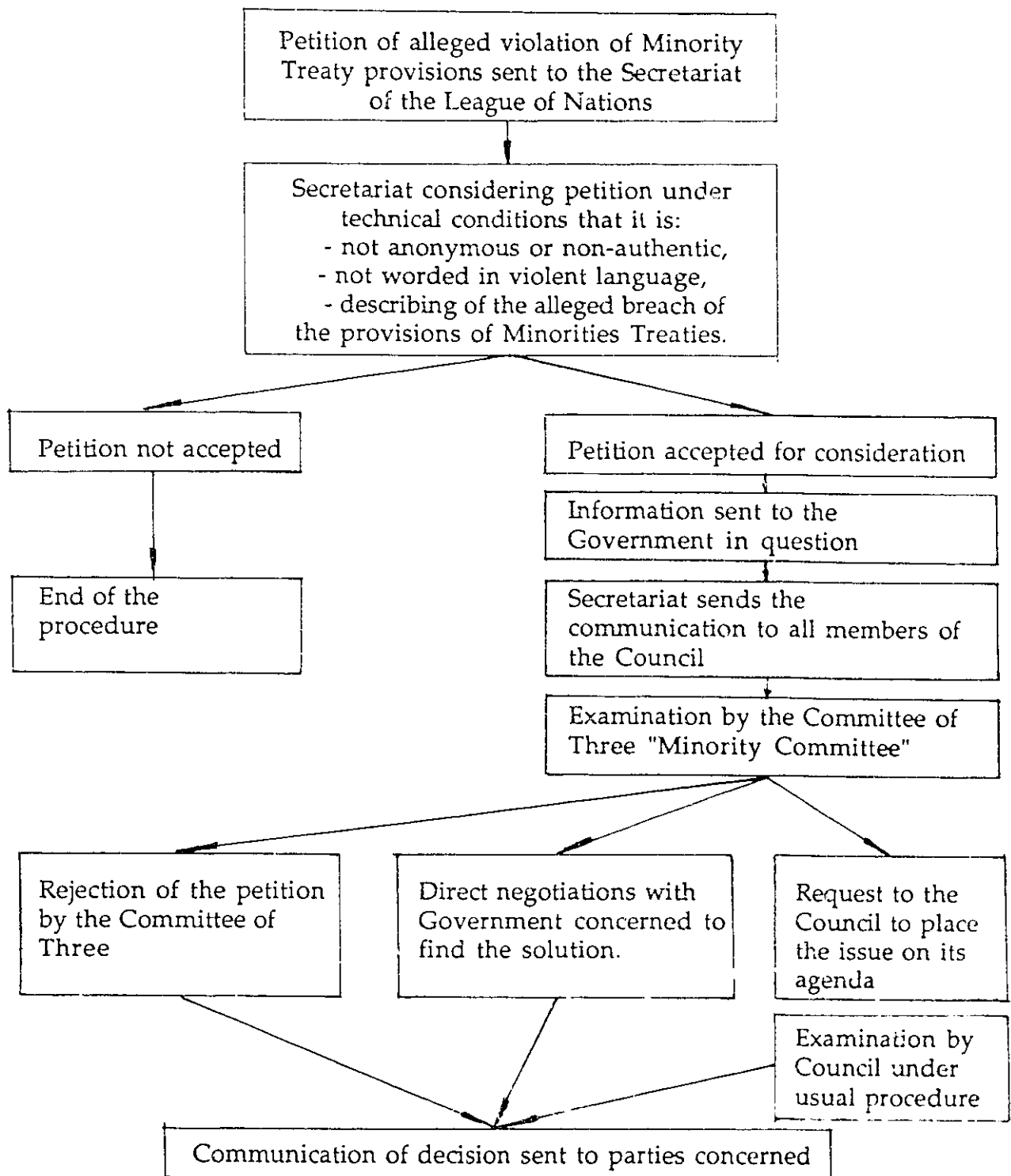
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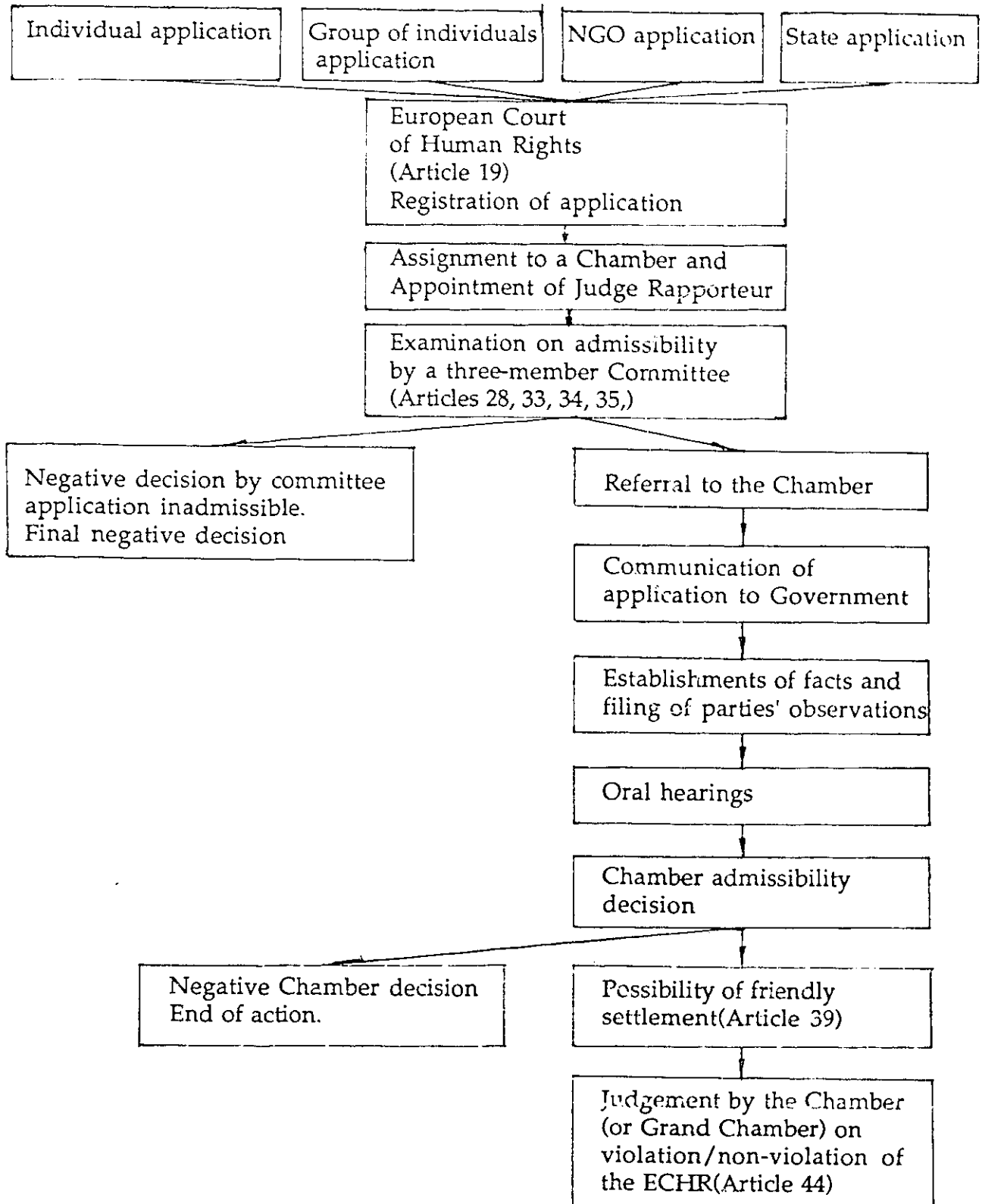
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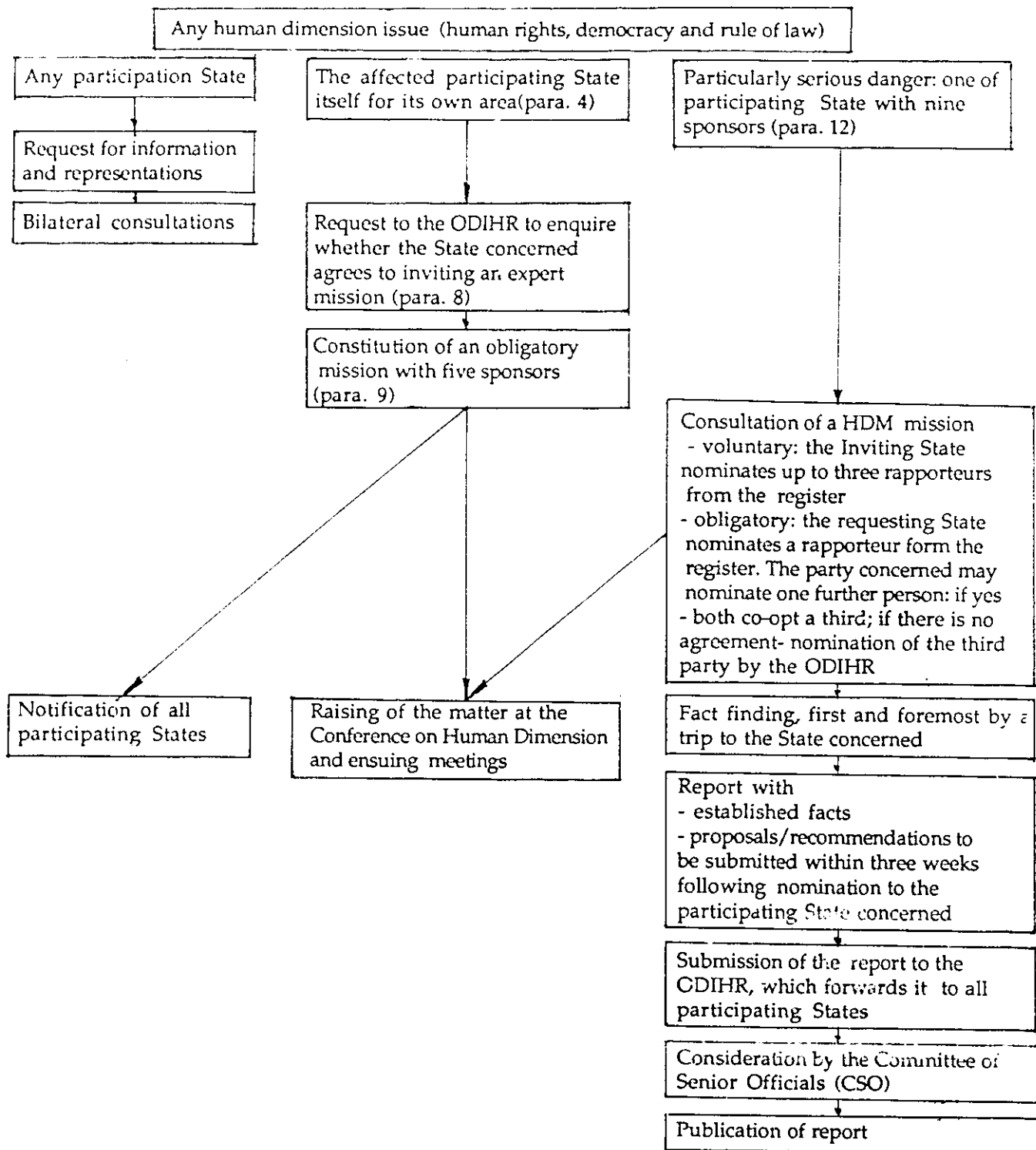


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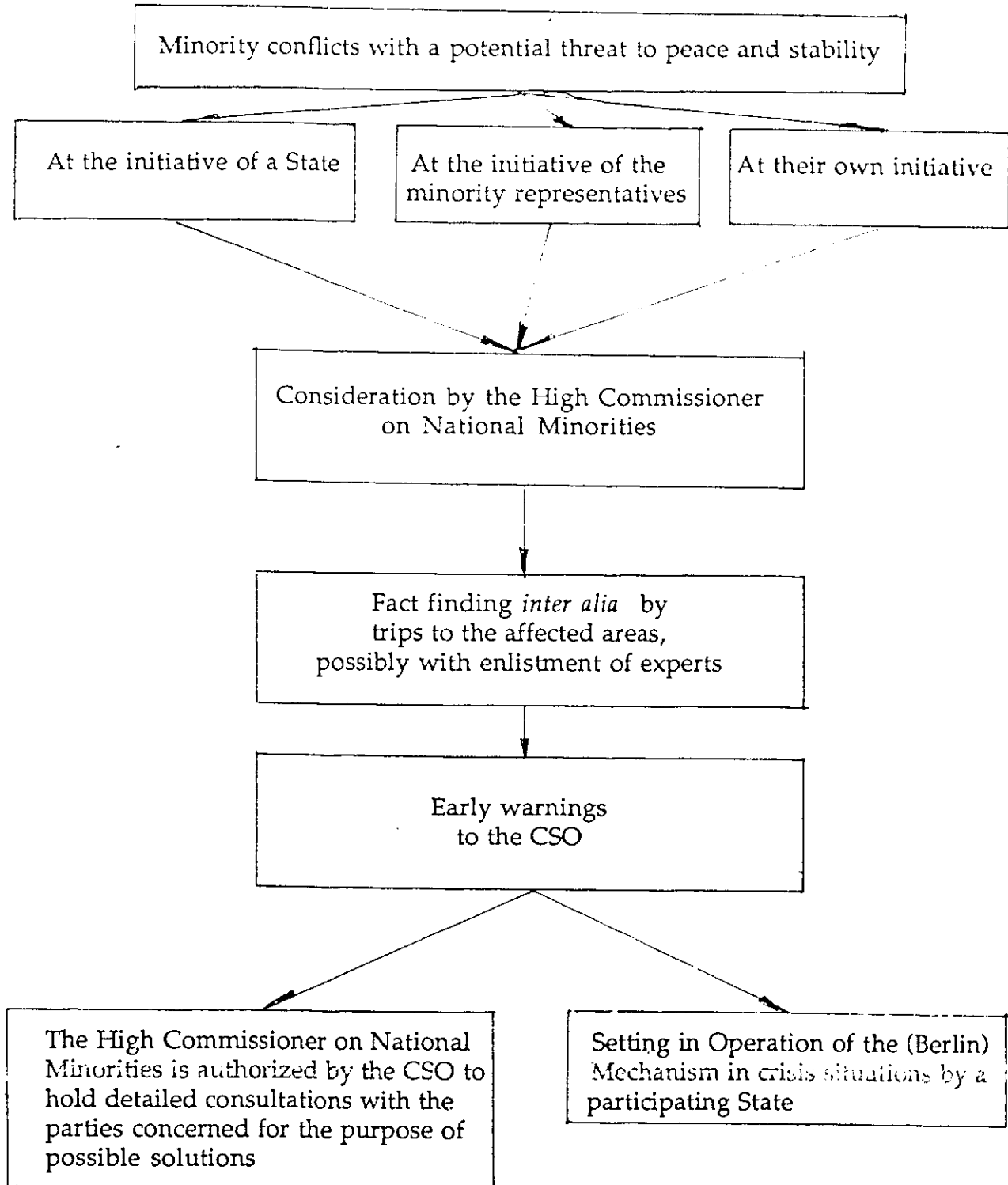
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- Section 1 of the Moscow Document of October 3, 1991
- Paragraph 14 of the Prague Document of January 30-31, 1992



CSCE High Commissioner on National Minorities

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