In the previous chapter the concept of minority, ethnicity, ethnic group, nationalism and nation state were discussed at length to appreciate the complexity of ethnic minority issue. A brief sketch of the nature of minority protection that political theory provides was also highlighted. In this chapter we move on to examine protection provided to minorities in international documents and organisation. Given the rapid development of communication channels and ever increasing globalising trend, international norms and standards have gained added importance. No state can survive in 'splendid isolation' and none can afford to blatantly flout agreed code of conduct.

The medley of ethnic groups that Eastern Europe presents and the strategic consideration of great powers at the end of World War I meant that the reigning politico-moral principle of 'national self-determination found only partial application in this region. The Versailles settlement is said to have for the first time' made national majorities a
reality in East Europe.¹ Prior to Versailles East Europe was a minority populated society partitioned into empires. After World War I the dis-satisfaction of minorities who were forced to continue or suddenly found themselves to be part of states with whom they had little affinity was accentuated by the new governments' commitment to build nations after the image of the majority. The Versailles architects realised that the volatile question of national minority had been far from solved. An attempt was made to contain such situations through a series of minority protection treaties which each East European State had to sign. Besides the League of Nations was also entrusted with the task of minority protection.

i) League of Nations and Minority Protection

The League of Nations had a sound system of minority protection which today, in the heightened atmosphere of ethnic conflict is being rediscovered.²

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2. Hurst Hannum, Autonomy, Sovereignty and Self Determination: The Accommodation of Conflicting Rights (Philadelphia: University of Pennsylvania, 1990). Religion was certainly the most significant distinction among most groups until at least the eighteenth century and most of the early provisions for the protection of minorities were concerned with what now might be viewed as freedom of religion rather than group rights. One can
Before World War II altitude towards group rights was favourable. This added dimension of human rights received a carefully worded definition in a well known advisory opinion of the Permanent Court of International Justice.

"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 cooperating amicably with it while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs. In order to attain this object, two things were regarded as particularly necessary.

The first is to ensure that nationals belonging to racial religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state.

The second is to ensure for the minority elements suitable means for the preservation of their racial pecu-

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...Continued...

trace the international protection of minorities to the treaty of Westphalia in 1648. Under the terms of this treaty parties agreed to respect the right of certain, not all, religious minorities. A distinctive system of ensuring a certain degree of cultural and, religious autonomy was the 'Millet system' developed in the Ottoman Empire.
liarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority. ³

The same advisory opinion further stressed that: "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." ⁴

Coming back to the minority protection treaties, the regional states were obliged to guarantee all their subjects equal protection and equal civil rights. Minority populations were guaranteed the right to live in their homelands and the right to use their mother tongue in religious practice, in publications, in public meetings, charitable and


4. ibid, p.19 in Varady, p.5.
educational establishment at their own expenses.\textsuperscript{5}

At the League minority protection was the responsibility of the Council. Minorities could petition the council directly but petitions needed the support of a permanent member of the council, before they could be formally considered. When the Council took up a petition it tended to act as an arbiter. When arbitration failed the matter could be referred to the Permanent Court of International Justice for an advisory opinion or a ruling.

The legal status of the minorities and their rights to petition the League encouraged them to organise. The German and the Jewish groups were particularly effective. Minority groups organised to form the International Congress of European Minorities in 1925.\textsuperscript{6} The Congress held annual meetings and worked mainly to promote the cause of cultural autonomy and observance of international guarantees. By

\textsuperscript{5} Nicola Girasoli, \textit{National Minorities who are they?}, Budapest (1995), p. 12. The five special treaties expressly designed to ensure the protection of minorities were concluded with Poland, 28 June 1919, Versailles; Czechoslovakia and Yugoslavia 10 September 1919 St. Germain en Laye; Romania 4 June 1920, Trianon; Greece 10 August 1920, Sevres and the special provisions in the peace treaties concluded with Austria 10 September 1919 St. Germain en Laye; Bulgaria 27 November 1919, Nevilly; Hungary 4 June 1920 Trianon; Turkey 24 July 1923 Lausanne.

1930 membership expanded to Western Europe with Basques from Spain and Greeks from Italy sending in delegates.

The main weakness of this international movement was as Fedor Mediansky has observed, its failure to agree on strategic goals. Considering the varying circumstances they confronted, goals ranged from cultural autonomy to greater integration to territorial autonomy. The consensus in goals was at best a limited one. Pearson has argued that the League was meant to work basically by applying moral pressure and collapsed under the pressure of exaggerated hopes and demands. Hurst Hannum has rightly argued that the "fate of the League Minority System was largely determined by its international political context. The problem of minorities was not a technical matter which could be handled in routine isolation. It could be solved only in conjunction with other political problems. When the League failed to cope with the factors leading to the disintegration of the world order, the collapse of the minority system was inevitable.

7. Ibid. p. 104.
(ii) The United Nations - a shift in focus

"What the world needs now is not protection of minorities, but protection from minorities", remarked one diplomat during the process of framing the chartered of the United Nations. This aptly sums up the prevailing sentiment at the close of World War II towards minority issues. Minorities were not mentioned in the peace treaties concluding the war nor in the UN charter or in the Universal Declaration of Human Rights. The Secretariat in 1947 took the view that the League's minority system as a whole had ceased to exist in favour of a new Universal Declaration of Human Rights. Reflecting the liberal preoccupation with the individual the Universal Declaration of Human Rights describes rights which apply to 'everyone without distinction of any kind'.

States appeared to be guided by Jules Deschenes opinion that


11. With the exception of Italian Peace treaty. This attitude was largely a reaction to Hitler's abuse of the protection of minority rights.

12. Article 2. From classical contractualist as Hobbes, Locke to the modern John Rawls the thrust is 'towards individual. Hobbes spoke of a 'multitude of men' making a covenant Locke of 'any number of men'. Rawls also assumes the parties in the 'original position' who work out principles of justice for themselves are individuals and the justice they seek is justice for individuals.
'affording protection to minority as a group suggests the possibility of privilege, perhaps even secession, and endangers a nation's unity... Every minority undoubtedly constitutes a group, but where it is a question of determining its rights, it is on the individual as a member of the minority that emphasis should be placed'. This underlying apprehension that minority rights threaten existing state boundaries and the international order and the ravages of war resulted in the thin coverage to minority rights in the UN era compared to the treaties and declarations that the League safeguarded.

The UN Charter, 1945 upholds that the purpose of the UN is"... to achieve international cooperation in solving international problems of an economic, social, cultural, humanitarian character and to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.13 Article 2 of the Universal declaration of Human Rights in 1948 states 'everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion national or social origin, prop-

13. Chapter 1, Article 1.3 in Nicola Girasoli, n. 4, p.30.
The drafting papers of the Universal Declaration reveal a number of suggestions that were made to include minorities in the text. Of the various proposals submitted, the text of the division of Human Rights was most detailed. It was proposed that

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

The main support for minority rights came from Soviet Union, Denmark and Yugoslavia. Yugoslav representatives laid heavy emphasis on both collective and individual rights. They stated that, in order to secure the protection of individuals who formed a community that community must first of all be recognized and protected. Thus the principle of the recognition and protection of national minorities as communities must appear in the Declaration of Human Rights. The


15. Quoted in ibid, p.11.
cultural and ethnic rights of all persons belonging to a national minority ... depended upon the recognition of the minority itself as an ethnic group.\textsuperscript{16} They further asserted that individual human rights were, in fact, dependent on the position which the community enjoyed in the State in which it lived.\textsuperscript{17} The various proposals for minority rights were severely criticized by the Latin American countries who argued that minorities were not a problem in their part of the world. Minority rights they said thus had no universal significance and the best solution to the problem of minorities was to encourage respect for human rights.\textsuperscript{18}

In 1945 the General Assembly resolution 217c (iii) entitled 'Fate of Minorities' stated that the UN could not remain indifferent to the fate of minorities. The General Assembly invited the Commission of Human rights to undertake a detailed examination of the problem of minorities so that the august body could adopt effective measures to protect racial, national, religious and linguistic nationalities.

Years later in 1966 the tangible result of this study was the adoption of the International Covenant on Civil and

\begin{flushleft}
\textsuperscript{16} ibid, pp. 11-12.
\textsuperscript{17} ibid, p.12.
\textsuperscript{18} Mrs Roosevelt, for USA Quoted in ibid, p. 12.
\end{flushleft}
Political Rights and its companion treaty the International Covenant on Economic, Social and Cultural Rights which remain to date the most important human right instrument of universal application.

The main burden of minority rights in general international law is borne by Article 27 of the International Covenant on civil and Political rights. Article 27 states

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practise their own religion or to use their own language. 19

So far as minority rights are concerned Article 27 appears to be a weak one. In fact the opening phrase of Article 27 'in those states in which ethnic religious or linguistic minorities exist ...' have led many states to deny outright the existence of minorities under their jurisdiction. As noted many Latin American countries denied their existence. The article was according to a representative of Chile: 'neither general in scope nor universal in application ... and pertained only to certain regions of the world.' France

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went a step further declaring Article 27 is not applicable so far as the Republic was concerned.²⁰ It clearly reflects the reluctance of the international community to recognize minority rights. The article clearly refers to the right of persons belonging to such minorities thus limiting the collective aspect of the right. Moreover the members of minorities are not described as having those rights, rather the rights shall not be denied and the article does not clearly guarantee state action or use of resources for minority benefit.

Thornberry has argued that the evident limitation of the article can be overcome by treating the article not in isolation but along with other treaty obligations like freedom of religion, equality and non-discrimination. It then becomes mandatory for the states to create conditions conducive to the groups continuity and development, if the groups so deserve rather than be a mute spectator.²¹

Though the overall thrust of Article 27 appears to be individualistic proponents of collective rights argue that it sows the seed for rights with collective dimension. Persons of ethnic, religious or linguistic minority are seen

²¹ ibid, p.14.
enjoying the rights in community with other members of their group. In the opinion of Ermacora, art 27 seems to exclude direct protection of the minority as a group. He adds, however, the same article has elements of group protection.22 According to Sohn Article 27 avoided to accord international subjectivity to groups.23 Dinstein has stressed that if Article 27 is not to be rendered meaningless, it must go beyond the ambit of Article 18. He goes on to argue that the purpose of Article 27 is to grant collective human rights.24 Steener sums up the complexity of differentiating between individual and collective rights. He says, rights of members of minorities to use their own language to practice their religion or to associate are necessarily exercised jointly by individuals. In this respect such individual rights have an inherently collective character.25 Article 27 in other words appears to be a

22. F. Ermacora, "Collective Rights of Minorities and Majorities within the context of International Law", in Tibor Varady, n. 4, p. 7.

23. ibid, p. 8.

24. Dinstein, "Freedom of religion and the protection of religious Minorities" - paper submitted to the conference on minorities at the Tel Aviv Faculty of Law, March 1990 in ibid, p. 8.

fluid which takes the shape of the vessel in which it is put.

Apart from Article 27 there are some other provisions of the UN which do not directly refer to minorities but largely benefit them. One such convention indirectly referring to minorities is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. While genocide of a majority by a minority is not impossible, it is largely the minorities who are the victims in almost all cases. The convention provides as a minimum standard the 'right of existence' for human groups. Article 2 of the Genocide Convention specifies a range of acts which, when committed: with intent to destroy in whole or in part, a nation, ethnic, racial or religious group, as such amount to genocide. The Acts specified in Article 2 are (a) killing members of the group (b) causing serious bodily or mental harm to members to the group (c) deliberately inflicting on the group conditions. Conditions of life calculated to bring about its physical destruction in whole or in part;

26. The convention does not describe the right in such terms, but resolution 96 (1) of the General Assembly of the UN described genocide as 'a denial of the right of existence of entire human groups, and homicide is the denial of the right to live of individual human beings. Patrick Thornberry, n.14, p.13.

27. ibid, p. 13.
(d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group.\textsuperscript{28} It is evident that genocide is basically here seen in terms of physical or biological genocide. Existence is a somewhat circumscribed notion in this context. It is not genocide if a culture is destroyed but the carriers of culture are spared. Thus this convention appears to be silent on possibilities of forcible assimilation.

The International Convention on the Elimination of all forms of racial discrimination, 1966 upholds groups as beneficiaries of certain rights. Article 1.1 clearly states that the term racial discrimination on shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.\textsuperscript{29} Article 1.4 states

Special measures taken for the sole purpose of securing adequate advancement of certain

\textsuperscript{28} ibid.

\textsuperscript{29} ibid., p. 14.
racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2.2 states parties shall, when the circumstances so warrant, take in the social economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence, the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The Second World Conference to Combat Racism and Racial Discrimination, 1983 makes a very positive statement on minorities. The general thrust of the conference in which 128 states participated aimed at racial discrimination particularly apartheid but made specific mention of minori-

30. ibid, p. 13.
ties and cultural diversity at a number of points alluding both to groups and individuals.

The operative part of the Declaration states that: 'All peoples and all human groups have contributed to the progress of civilisation and cultures which constitute the common heritage of humanity.' Operative paragraph 21 of the Declaration rates the significant role persons belonging to national, ethnic and other minorities play in the promotion of international cooperation and understanding. The Conference stressed that special protection of the rights of persons belonging to minority groups may be required but cautions that in granting such rights there should be strict respect for the sovereignty, territorial integrity and political independence of the countries where they live and for non-interference in their internal affairs.

Rights that pertain to minorities in international law are couched in individualistic term which has occasioned much debate and many interpretations. Various scholars have referred to the collective or group dimension of the rights.


32. ibid. There is an instructive difference between the language of paragraph 21 on minorities and the paragraph on indigenous populations whereas the former paragraph, insists on the right of persons belonging to minorities paragraph 22 refer to indigenous populations as whole groups or entities.
available to minorities if they have to be meaningful. F. Capotorti holds that collective rights can be interpreted in two different ways.

On the one hand, it is conceivable that the actual holder of certain rights is a group which is granted protection. The same kind of protection would not make sense if it were granted to the individual members of that group. The clearest and the most classic example of such a situation is afforded by the two basic rights of peoples, set forth in Article 1 of both covenants on Human Rights: the right of self-determination and the right to freely dispose of natural wealth and resources.

On the other hand, it is conceivable that the individuals forming a group may be entitled to treatment based on advantages to be ensured to each member of the group. At the same time, this approach has significant repercussions on the status of the group as such. An example of this situation is provided by the 1948 United Nations Convention on the Prevention and Punishment of the crime of Genocide, while its main object and purpose is to protect the national ethnic, racial or religious groups from the risk of being physically destroyed, the convention ensures protection to each member of these groups (if the criminal intent aims to destroy a given group). The same situation does correspond,
I believe to the solution adopted in article 27 of the Covenant on Civil and Political rights.\textsuperscript{33}

Yoram Dinstein argues that two collective rights are accorded by general international law to every minority anywhere: the right to physical existence and the right to deserve a separate identity.\textsuperscript{34}

Nathan Glazer correctly points out that whether a multi-ethnic state opts for individual rights approach or the group rights approach depends on the way it perceives groups.

(If) it sees the different groups as remaining permanent and distinct constituents of a federated society or whether these groups as ideally integrating into eventually assimilating into a common society. If the state sets before itself the model that group membership is purely private, a shifting matter of personal choice and degree something that may be weakened and dissolved in time as other identities take over, then to place an emphasis on group rights is to hamper this development to change the course of the society, to make a statement to all its individuals and groups that people derive rights not only from a general citizenship but from another kind of citizenship within a group. And just as laws and regulations are


required to determine who is a citizen of a subsidiary group and who may exercise the rights of such a citizenship. If on the other hand, the model a society has for itself today and in the future is that it is a confederation of groups, that group membership is central and permanent and that the divisions between groups are such that it unrealistic or unjust to envisage these group indemnities weakening in time to be replaced by a common citizenship, then it must take the path of determining what the rights of each group shall be.\(^{35}\)

As difficult as it is to demarcate the quantum of rights available to minorities is the question of defining minorities inspite of the commendable efforts made by UN an agreeable definition of minorities is yet to be found. The most widely accepted definition is the one proposed by F. Capotorti, special Rapporteur of the Sub Commission (of the Commission of Human Rights) in 1977.

Capotorti defined a minority as a 'group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidar-

ity directed towards preserving their culture, traditions, religion or language.\textsuperscript{36}

Capotorti explains his definition by stating that it excludes foreigners residing in a country. The Special Rapporteur was not unaware of the problems encountered nowadays as a result of phenomena such as the migration of workers and the establishment of sometimes quite substantial groups of foreign workers in certain industrialized countries. The case of foreigners is different, however, from that of persons who possess the nationality of the country in which they live. As long as a person retains this status as a foreigner he has the right to benefit from the protection granted by customary international law to persons who are in a country other than their own, as well as from any other special rights which may be conferred upon him by treaties or other special agreements.\textsuperscript{37}

Capotorti's use of the term 'nationals' needs clarification. It is vital to recognize the marked differences in the way nations emerged in West and East Europe. In Western usage, nation is practically synonymous with state so much so that the international law or international

\textsuperscript{36} F. Capotorti in Patrick Thornberry, n. 31, p. 6.

\textsuperscript{37} ibid., p.8.
relation means law or relation between states. Both terms widely used in the west refer to the people who constitute the citizens of a state.

In Central and Eastern Europe on the other hand nation is defined mainly in ethnic terms. It is therefore, understandable, why Hungarians while being citizens of say Romania consider themselves part of Hungarian nation. They are 'national minorities' not in the sense of an ethnic minority within a nation but a minority whose nation or nationality is not of the state in which they reside. Capotorti seems to be using the term 'nationals', of the state in the sense of 'citizenship.'

A refinement of this definition has been proposed by Jules Deschenes. Minority is 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. 38

38. ibid, p. 7.
According to Hurst Hannum four socio-political realities have contributed to the difficulties in defining minorities and minority rights at the international level.

First, the concept of "minorities" does not fit easily within the theoretical paradigm of the state, whether that state is based on the individual social contract theory of western democracies or the class-based precepts of Marxism. The state is seen as a collection of shifting coalitions founded on self-interest or of economic classes yet the reality is that ethnic or linguistic ties are often much more influential than considerations of class or individual interest in provoking or dampening many conflicts. Thus, the existence of minorities (and by extension, minority rights) may contradict the philosophical basis of at least democratic and Marxist societies (although the existence of group or community rights and obligations is often better recognized on African and Asian societies). 39

Second the reality of minorities and largely heterogeneous states in the contemporary world is also at odds with the theory of the nation-state as it developed in the nineteenth century, and the rhetoric of one people-one state has carried over into the concept of self determination in the past-1945 period. At the same time, however, the paradigm of the 'nation-state' has been conveniently ignored, as former colonies have accepted without question the boundaries drawn by the colonial powers, despite the fact that those boundaries often bear no relevance to ethnic, religious, or linguistic

realities. 40

Third, there is a fundamental fear on the part of all countries and especially newer states, that the recognition of minority rights with encourage fragmentation or separatism and undermine national unity and the requirements of national development. The natural hypersensitivity of new states about their sovereignty and the imperfect implementation of the principle of national self-determination hated in the post Versailles period has been at least as problematic in the past colonial era. 41

Finally, one also must recognize the unpleasant social reality of widespread discrimination and intolerance based on religion and ethnicity. Such intolerance is found in all regions of the world and in states at all stages of economic development, it is fanned by dictators and democrats alike to serve narrow political interests. While the often violent conflicts that result from such psychological hatreds many will have strong political and economic components, it would be a mistake to conclude (as some analysts would prefer) that ethnic and religious discrimination is not often a major factor. 42

There is a measure of truth in Sieghart's remark that all human rights exist for the protection of minorities. Human rights in general exist for the weak, the vulnerable, the dispossessed, the inarticulate. The strong have little

40. ibid.
41. ibid.
42. ibid. p.72.
need for human rights, at least in democracies committed to majority rule. However, the resistance of states to meaningful pluralism has increased fear among minority groups and today they seek broader political and economic goals than the more limited cultural and linguistic rights traditionally accorded to them.

One look at the Yugoslav crisis for instance, establishes beyond doubt that the targeted victims are minority groups rather than citizens as individuals. Serbs, Croats, Moslem Slavs and others are driven out from particular regions precisely because they are Serbs, Croats or Moslem-Slavs. The denial of bilingual road signs, toponymy and minority schools can hardly be conceived otherwise but as an attitude and a gesture towards a group. Where groups are targets it is increasingly difficult to defend them by relying exclusively on individual rights.

Israeli author N. Lerner echoes this point. The international community became aware of the fact that the non-discrimination rule and the individual centered system alone were not enough to protect the rights of individuals as members of a group and certainly not of the group as

43. ibid, p. 385.
44. Tibor Varady, n. 3, p. 15.
such. 45 American author Adeno Addis has remarks, "... the only plausible way to understand the notion of ethnic rights is to conceive of it as being a right of a group." 46 The post World War I sentiment today the well dressed international lawyer wears human rights no longer holds true.

The shifting emphasis is evident today in the renewed interest and awareness of the minority problem that the international forums as U.N. Council of Europe and OSCE are showing. The states have resigned to the fact that the minority issue cannot be wished away and given the transparency which democracy demands, the way states deal with their minorities has high visibility.

The UN's progress on minority issues has been slow. A great deal of energy and resources were spent in defining minorities in the 70s and 80s but no universally acceptable definition could be agreed upon by member states. In 1979 an open ended working Group on the Rights of persons Belonging to National Ethnic Religious and Linguistic Minorities was created. The working Group's progress was slow until in 1986 it decided to postpone definitional questions. Rapid

45. ibid., p.6.

progress followed and the Working Group presented its final draft at the Commissions 1992 session.

The Declaration is in many respects a relatively conservative document. As the title indicates it is formally concerned, with the rights of persons belonging to minorities and thus continues the individualistic thrust of Article 27 of the Covenant on Civil and Political Rights. At the same time, however, the Declaration does address the protection and promotion of minority identity, linguistic rights, rights to establish and maintain associations and the right to participate effectively in cultural, religious, social, economic, and public life. States are also required to take measures to create favourable conditions so that minorities have the opportunity to express and develop their culture. The text can thus be regarded as a new international minimum standard for minority rights transcending some of the limitations of Article 27.

Besides this 'global' exercise in standard setting the various regional organizations have also been working to develop appropriate set of principles to deal with minorities. The efforts of OSCE and Council of Europe is of particular importance.
All OSCE work on minorities stem from the 1975 Helsinki Final Act signed by representatives of 34 states. It is one of the major documents of modern international relations which makes reference to minorities.

The Final Act is not a treaty. A paragraph in the concluding part of the document makes it clear that the signatories did not wish to bind themselves by an international treaty. The paragraph states 'The Government of the republic of Finland is requested to transmit to the Secretary General of the UN text of the Final Act, which is not eligible for registration under Article 102 of the Charter of the U.N...' Article 102 of the Charter provides that every treaty entered into by any member of the UN must be registered with the Secretariat and published by it. The fact that the Final Act's not a treaty has not deterred commentators to attribute legal significance to it. Many writers opt for the 'soft law' approach that the final Act or most of it distills some kind of moral or political obli-

47. P. Thornberry, n. 31, p.248.

48. According to Soviet scholars Ignatenko and Ostapenko, the provisions of this Act were officially recognised by all participating states as constituting a component part of the international law in force.
gation on states, if not a strictly legal one. 49

The Final Act contains a Declaration on Principles guiding relations between participating states which are stated to be in conformity with the Charter of United Nations and are also to be applied in conformity with the purposes and principles of the Charter of the United Nations.

The Final Act consists of a Preamble, four main parts, and the concluding part. The references to minorities are contained in the declaration on Principles and in the part of Cooperation in Humanitarian and other fields. The reference in the Declaration on Principles is contained in Principle VII: 'Respect for Human Rights and ... Freedoms, including the Freedom of Thought Conscience, Religion or Belief.'

The other reference to national minorities in the final Act is in the part of the Basket Three: National Minorities

49. Russell views the Final Act as consistent with international law and, given the level at which it was concluded many observers think that it may become in fact one of the most widely quoted sources of customary international law.

It appears that 'the participating states declined to give them agreed formulation the status of an international treaty but they seem to be saying rather clearly that these principles are normative in character. They are guides which ought to be followed in actual conduct of international relations. Van Dijk categorizes the Final Act as a 'non-binding international agreement.'
or Regional culture.' The participating states recognized the contribution of national minorities or regional cultures and pledged to facilitate their development. These paragraphs are not incorporated in Declaration on Principles and the language used clearly indicate it to be a part of the political 'soft law', a declaration of the will or intention of States rather than a statement of obligation. On the whole the provisions of the Helsinki final act are a welcome recognition of the relevance of minorities for the agenda of international relations.

The champion of minority rights in those days was Yugoslavia. Yugoslavia's perseverance helped the entry of minority issues in the Final Act. Most states preferred not to deal with the subject as a separate matter.

The first major change in this trend took place at the Vienna follow up meeting which began in 1986. The human rights catalogue was further elaborated. The concluding document adopted in January 1989 promised sustained efforts to implement the provisions of the Helsinki Final Act in respect of minorities. States were to refrain from any discrimination against such persons and contribute to the realisation of their legitimate interests and aspirations

in the field of human rights and fundamental freedoms. States would also protect and create conditions for the promotion of the ethnic cultural linguistic and religious identity of national minorities on their territory. These commitments which introduced to the OSCE the idea of positive action to assist minorities in the four areas generally recognized as indicating the existence of a separate group is noteworthy.

It also set up the Vienna Human Dimension Mechanism to monitor compliance with OSCE commitments. The Vienna Human Dimension Mechanism consists of the following four separate procedures:

1. Member states can exchange information on the OSCE human dimension and respond to requests for information by other participating member states.

2. Bilateral meetings with other member states can be requested in order to examine human dimension questions, such as individual cases of abuse with the aim of rectifying them.

3. Any member state can bring cases concerning the human dimension to the attention of other members states through diplomatic channels.

4. Any member state can bring the results of the bilateral meetings to the attention of subsequent OSCE meetings on the
human dimension and to OSCE follow-up conferences.51

These four complaint procedures have in effect expanded the OSCE's ability to intervene in participating states in cases of human dimension violations including those involving members of minorities.

That was as far as the process went before the fall of communism. The quantum leap took place at the Human Dimension Conferences in Paris (1990) Copenhagen (1990) and Moscow (1991).

The Copenhagen meeting reflected the new political climate in Europe and marked a qualitative advance in cataloguing rights of minorities. The OSCE recognised for the first time the need to adopt special measures for the purpose of ensuring to persons belonging to national full equality in the exercise and enjoyment of human rights and fundamental freedoms. Chapter IV of the Document is completely dedicated to the protection of minorities. The document deals with the problem of who decides who belongs to which minority by adopting the principle that 'to belong to a national minority is a matter of a persons individual

choice. Persons belonging to a minority should be assured basic guaranties including the right:

- to freely express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will
- to use their mother tongue in private and in public.
- To establish and maintain their own educational, cultural land religious institutions and organisations
- to maintain unimpeded contacts among themselves within their country and across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage or religious belief.
- To disseminate and exchange information in their mother tongue
- to participate un international NGOs.

The Paris Charter was signed on 21 November 1990 by all the heads of state or government in a spirit of optimism, it


53. ibid., pp. 62-63.
officially declared that the era of confrontation and division of Europe has ended and that ours is a time for fulfilling the hopes and expectations our peoples have cherished for decades. "The Chapter on Guidelines for the Future States: Determined to foster the rich contribution of national minorities to the life of our societies, we undertake further to improve their situation." In this context it was decided to convene an experts meeting on national minorities in Geneva in July 1991.54

In July 1991, a year after the Copenhagen meeting the situation of minorities in Europe seriously worried the delegations. The Yugoslav crisis threatening the very existence of the state had a negative impact on the Geneva Meeting. "The OSCE states could not reach agreement on the question whether national minorities should be granted collective rights. For a number of OSCE states this would have implied a danger of separation of their minorities from the state."55 However, not all was lost for minorities. The most significant achievement was that the states agreed that issues concerning national minorities as well as compliance with international obligations and commitments


55. ibid., p.60.
concerning the rights of persons belonging to them are matters of legitimate international concern. They, therefore, do not constitute exclusively internal affairs of states.\textsuperscript{56}

The Copenhagen - Geneva standards have been criticized for the 'escape clause' which dilute the strength of the normative commitments. For example, the question of language rights, an essential element of minority identity. Section 32, 3 reads (minorities have the right) to use freely their mother tongue in private as well as in public and Section 34 states 'the participating states will endeavour to ensure that persons belonging to national minorities notwithstanding the need to learn the official language or languages of the state concerned, have adequate opportunities for instruction of their mother or in their mother tongue, as well as wherever possible and necessary for its use before public authorities in conformity with applicable national legislation. The phrases 'wherever possible and necessary' and 'in conformity with applicable national legislation', provides states with considerable leeway to follow their specific policies. There is a vast difference also in saying instruction in or of the mother tongue. The

\textsuperscript{56} ibid.
continuing tension between minority rights and the claims of the unitary or national state is evident with the balance tilting towards the state.\textsuperscript{57}

Notwithstanding such limitations most analysts agree that the period of standard setting is largely over. The political limit of consensus has been reached. It has become abundantly clear that there exists a fundamental philosophical and political difference between two dominant approaches to the question of minority rights. Some states such as the US, UK, France, Germany, Spain, Bulgaria, Romania see the matter from a non-discrimination /equality /individual rights angle other states. Hungary, Austria, Italy and the Nordic countries favour a positive measure/ group rights/ particular qua group/ autonomous rule. Thus the consensus possible on the issue of minority rights is rather limited. The international community is a quarrelsome collection of states motivated by undiluted national interest to throw sufficient force behind the minority issue.

At its 1992 follow up Meeting in Helsinki the participating states appeared less interested in initiating new normative commitments. Incrementally OSCE had been approving a number of institutional tools, each of which sanc-

\textsuperscript{57} Koen Koch, n.10, pp. 257-259.
tioned greater and greater monitoring of and response to human rights development within participating states. The hitherto sacrosanct OSCE principle of consensus decision making was abandoned in certain instances. The OSCE monitoring system reached a new high with the establishment of the office of High Commissioner.\textsuperscript{58} The express role of the High Commissioner on National Minorities was to provide early warning and early action on ethnic tensions that could develop into a conflict threatening peace, stability or relations between participating states. The OSCE's mood matched the UN Secretary General's sentiment expressed in a report to General Assembly, 1991.

\begin{quote}
It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity... The case for not impinging on the sovereignty, territorial integrity and political independence of states is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.\textsuperscript{59}
\end{quote}

\textsuperscript{58} Konrad J. Huber, n.10, p.285.

\textsuperscript{59} Report of the Secretary-General on the Work of the Organization, UNDOC, GAOR, 46TH Session SUPPLEMENT NO. 1 (A/46/1) AT 5.
The High commissioner on National Minorities constitutes a pragmatic mechanism for early and effective response to potential ethnic conflicts. Originally proposed by the Dutch at the Prague Council of Ministers Meeting in January 1992, the idea for the High Commissioner gained wide support at the Helsinki II. At the level of normative commitments increasing cooperation among OSCE's states was as noted increasing. At the practical level, the Yugoslav crisis and numerous other actual and potential conflicts galvanized the OSCE to respond proactively to incipient hostilities with ethnic dimension. The establishment of the office of High Commissioner was an effort to check and possibly uproot the cause of such conflicts. Accordingly, the High commissioner was specified to provide early warning and early action (para 23). In subsequent sections, the Helsinki Document specified procedural and organizational guidelines for the functioning of the High commissioner. The High Commissioner is entrusted with considerable flex-

60. Emerging from the Netherland experience as European community (EC) president during the initial Yugoslav conflagration the then Foreign Minister Hans van den Broek put forth the idea of the High Commissioner.

61. Richard Dalton, 'The Race of the CSCE' in Hugh Miall n.19,
ibility / space to identify situations for potential involvement. It maintains its accountability to the OSCE through the Committee of Senior officials (CSO), the OSCE’s political body and through the chairman-in-office, the foreign minister chairing the Council of Ministers for Foreign Affairs, the OSCE’s Central decision making and governing body. For instance the High Commissioner consults with Chairman-in-office prior to an on-site visit and sends confidential report to him on findings and over all progress in situation.

Paragraphs 11-12 mandates the High commissioner to undertake the following activities. 62

- collecting and receiving information regarding national minority issues
- assessing situations for the potential threat to peace and stability in the OSCE area.
- obtaining first hand information about the situations of national minorities through on-site visits and personal meetings with all parties directly concerned with the tensions.
- promoting dialogue confidence and cooperation

between parties involved in the tensions during the course of the missions.

Paragraph 5(b) prevents the High commissioner from engaging in situations in which organized acts of terrorism are involved. Paragraph 5(c) prevents the High commissioner from considering violations of OSCE commitments pertaining to the human rights of individuals belonging to a national minority. Thus the High commissioner is not to act as human rights investigator or as an ombudsman for national minorities.

The widely felt scarcity and uncertainty of post communist life has propelled ethnic mistrust and hatred to an alarming degree. The OSCE could not remain immune and isolated from the new realities of a multipolar world. Though the OSCE principles are not legally binding but they are no less important political commitments. The OSCE perspective one could say has changed from conflict resolution and conflict management to conflict prevention. Vienna established the principle of more intrusive human rights monitoring, Paris laid the foundation for the necessary political and executive institutions and Helsinki II expanded this new approach and tried to develop it into a more

63. ibid.
The urgent need to overcome divisions and conflicts in Europe after the Second World War led to the creation of the Council of Europe. The basic aim of the council is to promote reconciliation, mutual understanding and increased cooperation, respecting the diversity of peoples and their traditions.

The approach of the council is very similar to that of the U.N. In line with the Universal Declaration of Human Rights, the Convention does not contain specific provisions for minorities, though unlike the Universal Declaration, the convention employs the term minority. The term national minority appears in Article 14 of the European Convention on Human Rights and Fundamental Freedoms, 1950, in the context of the protection of human rights. Article 14 states that "the enjoyment of the rights and the freedoms set forth in this convention shall be secured without discrimination on any grounds such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."^{64}

The importance of the convention lies in two main areas.

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in the scope of the rights protected and in the machinery of protection established to investigate alleged violations and to ensure respect for the obligations under the convention. Article 25 establishes that a group of individuals can also claim to be victim of a violation of human rights and avail the opportunity of the machinery of protection. This has been analysed by many as the Council's acknowledgement of the collective dimension of minority rights. A machinery of protection to investigate alleged violations and respect obligations was established in Strasbourg.

The term 'national minorities' in the convention in our opinion is ambiguous. Recommendation 285 (1961) provided some clarification. The draft of the Article runs as follows: Persons belonging to a national minority should not be denied the right in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to open their own schools and to receive education in the language of their choice and to profess and practise their own religion.65 This text which provided specific "collective rights" to be shared with other members of their group was not included in any protocol. Recommendation 285 of the

Parliamentary Assembly described the term national minorities as non-dominant groups being aware of belonging to a national minority.

During the 1970s and 80s no specific recommendation or declarations on national minorities were made. In mid 1970 the attention of the Council of Europe was drawn to the cultural aspect. Recommendation 814 (1977) of the Parliamentary Assembly on modern languages in Europe stated the principle that linguistic and cultural rights should be safeguarded because cultural diversity is an irreplaceable asset. Two reports, Arfe Report 1981 and Stauffenberg Report 1988⁶⁶ are particularly important so far as national minorities, minority languages and cultures are concerned.

In the spring and summer of 1990 Europe went through dramatic transformation. Heads of State and experts realised the only way peace and prosperity could be maintained in Europe was by enabling different ethnic linguistic and religious communities to live harmoniously within common frontiers.

What strikes one in studying the various Council of Europe Recommendations is the growing awareness or should one say, reluctant admission of the need to go beyond the

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⁶⁶. ibid., p. 73.
parameters of universal individual human rights. Thus for instance, the proposal for a European convention for the protection of minorities prepared by the European Commission for Democracy Through Law in Chapter I on General Principles stated the international protection of the rights of ethnic, linguistic, and religious minorities, as well as the rights of individuals belonging to those minorities, as guaranteed by the present convention, is a fundamental component of the international protection of Human Rights and as such falls within the scope of international cooperation.

Article 4.2 stated 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.

Article 14.1 stated that States shall favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them.

Article 14.2 stated as far as possible states shall take minorities into account when dividing the national territory into political and administrative sub divisions, as well as into constituencies.

A Recommendation which has generated much debate and discussion is Recommendation 1201. As we shall see in succeeding chapters interstate treaties have often reached an impasse over the inclusion of 1201. Article 1 of the Recommendation stated that "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 the state and are citizens thereof;

b) maintain longstanding 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 the state or of a 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."

A reading of the Recommendation reveals that whatever rights the minorities are given - right to form organisations and political parties (article 6), right to use their mother tongue in public and private (Article 7.1) right to use first name and surname in mother tongue (article 7.2), right to use mother tongue in contact with administrative and legal authorities (Article 7.3) right to display local names signs and inscriptions in their language (Article 7.4) right to receive education in mother tongue Article 8.1) right to have at their disposal appropriate local or autonomous authorities (Article 11) are couched in individualistic terms, such as every person belonging to a national minority. How is it then the recommendation has been seen by minorities as stressing collective rights. It is to our mind, perhaps because educational linguistic and cultural rights are by nature rights that have meaning only in association with others. These rights arguably are not of the same category as say right to life or say right to property. Thus recommendation 1201 may apparently be individualistic in approach but at the same time the collective dimension of the rights cannot be suppressed.
CONCLUSION;

Our discussion reveals that so far as minority rights are concerned international norms and principles have come a long way from the initial years after World War II. The persisting suspicion of states towards minorities as threat to their unified sovereign existence has stood in the way of open advocacy of group rights. The ambiguity of international norms is not, however, without merits. It keeps the issue of group rights open and alive and affords the state a certain flexibility in dealing with their minorities. The norms do not, in other words, hold states from implementing collective group rights at the same time it does not force the state to comply. Such pressure could in fact be disruptive and hence of the little aid to minority cause.

An argument which is often used to buttress the relevance of universal individual human rights against group rights is that group norms and requirements may at times restrict the freedom and choice of individual members and pressurize them to submit to the group’s vision.

However, it may be argued that minority group rights are rights which strengthen the groups vis-a-vis other groups and the dominant majority. It does not necessarily
call for the end of individual human rights. The individual human rights are important but where individuals are targets of harassment and discrimination by a virtue of belonging to certain group then the discrimination is not merely against the individual per say but against the group. In such cases sole reliance on individual human rights may not be an adequate answer.
Figure 30. Hungarian communities in Transylvania (1992)

Source: Romanian census 1992
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