CHAPTER IV
MINORITY RIGHTS IN THE INTERNATIONAL ARENA

4.1 BRIEF INTRODUCTION
As has already been touched upon in the introduction, the two core concepts that are integral to the present study are minority rights and cosmopolitanism. The present chapter concentrates on the former, with reference to the prevailing situation under international law. This exercise of examining the contemporary understating of minority rights is multi-faceted. In order to establish a fair idea of what the concept of minority rights stands for, it is necessary at the very outset to delineate and define what a minority group is. Furthermore, it would be necessary to appreciate the various kinds of minority groups that are in existence. As to what exactly do minority rights amount to and what is the stated harm that they seek to address would be the next questions that would require an answer. The contemplated exercise would also require an enumeration of the contemporary minority rights mechanisms, preceded by a short history of the genesis and evolution of the concept through the ages. The study of the contemporary position of minority rights in the international legal arena has been undertaken in the context of the various United Nations conventions, treaties and declarations. The fundamental objective of the chapter is to discern the extent of minority rights protections under international law and to try and postulate the reasons for the bestowment of minority rights and the effect that it has on the minority groups themselves.
4.2 THE DEFINITION OF A MINORITY GROUP

The very meaning of the word ‘minority’ can often invoke the same level of contestation and debate that is witnessed in the provision and implementation of minority rights. Before embarking on an examination of the history of minority rights in international fora and the various facets of the phenomena called minority rights, it would thus be apt to try and arrive at a basic and widely accepted definition for the term itself.

The word ‘minority’, which owes its origin to the medieval Latin term ‘minōritās’, literally translates to the smaller of two numbers, sections or groups. However accepting this literal definition of the word ‘minority’ is problematic. The difficulty in doing so has been aptly summarized by the first Secretary General of the United Nations, Trygve Lie, in a memorandum submitted to the world body in 1950 wherein the following pertinent observation was made:

“The term minority cannot for practical purposes be defined simply by interpreting the word in its literal sense. If this were the case, nearly all communities existing within the state would be styled minorities including families, social classes, cultural groups and speakers of dialects, etc. Such a definition would be useless.”

377 Id. at 757.
378 Minorities and Minority Rights, in THE OXFORD ENCYCLOPEDIA OF AFRICAN THOUGHT, 126 (Abiola Irele & Biodun Jeyifo eds., 2010).
The evident impracticality of the literal meaning aside, it suffers from the further deficiency that it ignores the fact that when determining minority status a very important, or the most important, benchmark is that of the power balance that exists between the various groups in a society and which may, in several contexts, be completely independent of the numerical element. Therefore despite being numerically inferior, and which by itself is no doubt a very important factor, a group may not be said to be in a minority unless it is situated in an inferior or subordinate position of power when juxtaposed with another group within the same society or nation state. A definition based on mere numerical context alone is clearly insufficient. A more nuanced definition is therefore required.

When setting out in search of such a nuanced and widely accepted definition, the first place to look might logically seem to be in the vast expanse of international law. This is because there cannot be any quarrel with the proposition that right from the early years of the development of international law, it has grappled with the question of minority protection. Thus it could be logically presumed that a legally binding and universally accepted definition of the term minority would be found in international legal instruments as the existence of such a definition would be critical for

accomplishing the delicate and complex task of minority protection. However, as many a scholar in the field has noted, despite many attempts having been made on an international level to bring about a framework for the protection of minorities, beginning with the 1648 Peace of Westphalia, these efforts have always been bedeviled by the problem of defining and delineating minority identity, and this problem continues to exist in the contemporary day and age.\textsuperscript{382} Despite the term ‘minority’ finding mention in several international legal instruments there is no legally binding or standardized definition of the term, and the definition of who exactly the rights holders are is conspicuously absent from contemporary international legal instruments dealing with minority rights.\textsuperscript{383} In fact, the landmark instrument in this field i.e. the 1992 UN Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities quite curiously omits to provide a definition of the term ‘minority’.\textsuperscript{384}

It is however not as if no efforts have been made with regard to the codification of a precise definition of minority groups or communities. In fact, there have been various attempts made at various international organizations and forums with the aim of arriving at some consensus in

\textsuperscript{384} Errol P. Mendes, \textit{The Dialectic of International Law and the Contested Approaches to Minority Rights}, in \textit{ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW}, 353 (Anver M. Emon, Mark Ellis, & Benjamin Glahn eds., 2012).
relation to a widely-accepted definition but no conclusive outcome has been achieved.\textsuperscript{385} Political considerations aside, it has also been remarked that this inability to arrive at a commonly acceptable and uniform definition is quite possibly because the experiences of different groups who are claiming minority status in varied and diverse contexts is difficult to be articulated and condensed into universal principles.\textsuperscript{386}

To attempt get over the aforesaid difficulty, a broad definition of a minority group may be approached from the angle of the group being the ‘other’ i.e. being distinct from the wider society as seen from the point of view of the members of the particular group as well as the outsiders.\textsuperscript{387} However the moot question still remains as to whether a definition that encompasses certain vital characteristics and which can provide a normative bench mark, is available in international law? As has been noted, the importance of such a definition can be pitched at two levels, viz. at a practical level, since such a definition would focus attention on and specify the exact areas that are to dealt with, as also at a theoretical level, by bringing about a measure of certainty in the law through the establishment of over-arching standards and thus helping in the clear and categorical identification of minority groups and the resultant protections or rights bestowed upon them.\textsuperscript{388}

\textsuperscript{385} \textsc{Parliamentary Assembly Documents 2001 Ordinary Session (First Part), Volume III, 172.}\n\textsuperscript{386} Philip Vuciri Ramaga, \textit{Relativity of the Minority Concept}, 14 Hum. Rights Q. 104–119, 112 (1992).\n\textsuperscript{387} Wippman, supra note 383 at 597.\n\textsuperscript{388} Pentassuglia, supra note 12 at 56.
As has already been mentioned, there have been numerous concerted attempts on the international stage over the years to so arrive at a definition of the term ‘minority’. Something to this effect was attempted in a decision of the Permanent Court of International Justice in the Greco Bulgarian community’s case\textsuperscript{389} wherein the Court, dealing with the meaning of the word ‘community; in the context of minority communities in Bulgaria and Greece, opined as under:

“The community is a group of persons living in a given country or locality having a race, religion, language and traditions, in a sentiment of solidarity with a view to preserving their traditions, maintaining their form of worship, ensuring the instructions and upbringing of their children in accordance with this spirit and traditions of their race and rendering mutual assistance to each other”\textsuperscript{390}

As the Special Rapporteur on Prevention of Discrimination and Protection of Minorities, though Francesco Capotorti was not specifically mandated to embark upon a definition of the term ‘minority’ and he qualified his attempt at a definition with the caveat that a definition was not \textit{per se} essential for minority protection and that any widely acceptable definition would be akin to a utopian fantasy; in his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities within the context of Article 27 of the International Covenant on Political and Civil Rights (ICPCR),

\textsuperscript{389} Greco-Bulgarian Communities, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17 (July 31)

Capotorti produced what is generally considered to be the most widely accepted definition of the term minority despite the fact that even this definition did not achieve a widespread consensus when deliberated upon in the several UN bodies.\textsuperscript{391} Capotorti defined a minority group as under:

“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 - posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”\textsuperscript{392}

In the year 1985, Jules Deschenes, who was then a member of the Sub-Commission submitted to the Commission on Human Rights a text on the definition of ‘minority’ defining the same as:-

“A group of citizens of a state, consisting of 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 not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.”\textsuperscript{393}

\textsuperscript{391} KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 22 (2000).

\textsuperscript{392} PENTASSUGLIA, supra note12 at 57.

\textsuperscript{393} \textit{Id.} at 58.
Another ‘working definition’ was attempted by Stanislav Chernichenko in Article 1 of his working paper of 1997 wherein he defined the term ‘minority’ as:-

"Minority" denotes a group of persons in principle persons in principle permanently resident in the territory of a State, numerically fewer than the remaining population of that State, in other words constituting less than half of its population, endowed with national or ethnic, religious and linguistic and other related characteristics (culture, traditions and so forth) distinct from similar characteristics of the rest of the population, and displaying a will to preserve the existence and identity of the group. This shall not be interpreted as authorizing or encouraging any action aiming at depriving anyone of the status of citizen or permanent resident.\[^{394}\]

It would also be useful to refer to the definition proposed by UN Special Rapporteur Jose Martinez-Cobo in his 1986 ‘Study of the Problem of Discrimination against Indigenous Populations’ for indigenous peoples wherein he remarked as under:-

"Indigenous communities, peoples and nations, are those which, having a historical continuity with pre-invasion and pre-colonial societies that have 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,

\[^{394}\] Budislav, supra note390 at 81–82.
in accordance with their own cultural patterns, social institutions and legal systems.”

A survey of the aforesaid definitions would show some common fundamental features:

Firstly, the members of the group possess an element of fellowship/solidarity with each other based on some common characteristics/practices, or in other words a ‘collective group identity’.

Secondly, this collective group identity is also coupled with and results in them being distinct in some manner from other sections of society.

Thirdly, this distinct group must further be in an inferior or subordinate position in the particular state or territory.

Fourthly, there must be a will amongst the group members to preserve the existence and distinct identity of the group and transmit it to future generations.

As regards this last characteristic however, a note of caution has to be sounded. There has been some legitimate criticism that it can be quite possible for a hostile state to pressurize a community and to create such a hostile environment such that the minority community cannot make a positive statement as regards its desire to preserve its identity. However this criticism can be, and has been, met with the response that this desire or

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will can also be manifested implicitly, as opposed to an overt expression, and it is so manifested when a group has endeavored to preserve its distinctive characteristics over a period of time. 397

Further, it must be kept in mind that the desire to retain the distinctive identity will not be present in a ‘minority by force’. It is necessary at this point to draw a distinction between a ‘minority by force’ and a ‘minority by will’. A minority group that desires to be one with and assimilated into the majority but is forcibly stopped from doing so is a minority by force and, on the other hand, a minority that consciously rejects such assimilation into the majority is a minority by will. 398 Thus a minority by force would never have the desire to maintain a distinct identity and on the other hand would, in the absence of barriers, earnestly strive to obliterate the distinct identity and embrace assimilation.

4.3 KINDS OF MINORITY GROUPS

Considering the aforesaid four fundamental features that inform the general understanding of the term ‘minority’, it would now be appropriate to briefly examine the various types of minority groups that may exist. Ethnic, racial, religious and linguistic minorities can be found in almost every single country in the world and the sheer scale of their global presence can be

397 Id. at 45.
gauged from the fact that it has been estimated that between ten to twenty percent of the world’s population can be categorized as belonging to several thousand distinct minority groups and subgroups. Both in the domestic approach to identification as also in international minority rights jurisprudence there are certain classifications that have evolved over the years that categorize minorities based on certain wider parameters. These groupings or classifications are of several kinds and quite a few of them overlap with each other. A broad overview of the various kinds of minority groups, and the discrimination that they are afflicted by, is attempted hereunder:

(i) Ethnic Minority

An ethnic minority can be defined, in the simplest terms, as a group that exists within a society but has dissimilar national or cultural traditions as compared to the traditions of the majority population that inhabits the said society. Various criteria are used to define and classify ethnic minorities and thus the definitions of ethnic minority groups reflect this wide range. For instance, Martin Bulmer defines an ethnic minority as follows:

“Ethnic group is a collectivity within a larger population having real or putative common ancestry, memories of a shared past, and a cultural focus upon one or more symbolic elements which define the group’s identity, such as kinship,

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400 *OXFORD DICTIONARY OF ENGLISH*, 601 (Angus Stevenson ed., 2010).
Thus, an ethnic minority group can be defined on the basis of several identifying factors in varied situations and contexts. This diversity of inputs and considerations is representative of the complexity of the group that is sought to be demarcated and then defined. It has been remarked that the definition of ethnic minorities may involve several varied parameters based on biological, socio-economic, political and cultural indicators, and that a balanced definition would require an examination of both the terms ‘ethnic’ as well as ‘minority’.

A wide range of groups can thus be classified as ethnic minorities. One of the most widely cited examples are the Roma people in Europe. It has been observed that many of the differences between countries or societies can be explained by the different cultural and historical backgrounds from within which these countries or societies were birthed. It has been noted that this reference to the historical or cultural background explains why differentiation according to ethnic or cultural background is often used

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403 Jerilyn Smith, The Marginalization of Shadow Minorities (Roma) and Its Impact on Opportunities 160 (2008).
interchangeably as being the same as foreign origin in several societies.\footnote{153} However, reflecting the diversity of inputs and considerations that are at play while identifying a minority group, criteria based on historical background, like where a person was born, would be relatively irrelevant when considering the case of countries such as the U.S.A.\footnote{406} If one were to attempt to build a wider theory around this perceived inapplicability, then such a theory would posit the factors of origin, citizenship and country of birth as not being important for the determination of ethnic minorities in societies where they might be the original dwellers or where they may have been living for generations, in as much these factors have lost their relevance in light of the vast efflux of time.\footnote{407}

However, one thing is clear that whatever be the factors that are taken in account for the purpose of defining an ethnic minority group, one common underlying feature that can be identified is that there is a significant level of discrimination that is addressed towards these groups in most countries.\footnote{408}

(ii) Racial Minority

A racial minority, though similar to an ethnic minority in terms of criteria for identification, is categorized with more of an overt emphasis on ‘immutable

\footnote{153} Id. at 3.  
\footnote{406} Id. at 3.  
\footnote{407} Id. at 3.  
physical characteristics’ such as the color of the skin, certain facial features etc. African Americans and Asian Americans are examples of racial minorities. It has been said however that there are quite a number of varying, and at times opposing, opinions regarding the exact definition of the terms ‘racial’ and ‘ethnic’, which might be indicative of the fact that it is very difficult to scientifically delineate the dissimilarity between these two categories and it has therefore been suggested that it would be better to combine both concepts so as to ensure that there are no gray areas that may be left unaddressed by measures aimed at either category.

The immutable physical characteristics which seem to define racial identity, or the perception of one, ultimately result in setting apart members of this racial group from other dominant groups in society and these physical characteristics often lead to the creation of stereotypes about the individuals of certain racial groups which are premised entirely on these physical characteristics. Stereotyping in this context has been defined as the process by which people use social categories as ‘receptors’, and use them for the purpose of making an estimation about others and retaining that estimation for all future encounters with the said persons. Once again, this stereotyping is superficial, in the sense that it is based on the readily apparent or salient or immutable similarities, such as physical characteristics,

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409 STEVEN M. COX, WILLIAM P. MCCAMEY & GENE L. SCARAMELLA, INTRODUCTION TO POLICING 70 (2013).
410 HENRARD, supra note391 at 49.
412 Id. at 169.
associated with race.\footnote{Id. at 169.} This stereotyping is of particular concern however because these social stereotypes reflect prejudice and a pre-disposed mindset.\footnote{Id. at 169.}

Though it cannot be denied that human beings have a tendency to discern and note the differing features in the physical make up of fellow human beings and base their perceptions of these persons on the basis of these differing features, race however leads to problematic results when there is a segregation that is effected on this basis and a society is divided and torn asunder into strictly segregated groups based entirely on the possession of these physical characteristics.\footnote{MEASURING RACIAL DISCRIMINATION, 26 (Rebecca Blank, Marilyn Dabady, & Constance F. Citro eds., 2004).} This division results in categorizations that further result in producing opinions and consequent reactions towards each group and this process only becomes progressively stronger with time.\footnote{Id. at 26.} This can ultimately result in perceived notions about members of racial groups and this can have very debilitating consequences for members of such groups, such as negatively affecting access to resources and producing skewed power equations.\footnote{Id. at 27.} This is aside from the fact that racial classification over time results in the creation of severe barriers amongst racially defined groups that affects societal cohesion at large.\footnote{Id. at 27.}
The identity of a racial minority group therefore may be said to be based on or having originated from shared physical characteristics; however over time this identity, and the attendant discrimination that it may attract, seems to be determined far more by a subjective perception that other members of society have about the behavior or skills of all those who share these distinct physical characteristics.

(iii) Indigenous Peoples

Indigenous Peoples can be termed as ethnic minorities who have become increasingly marginalized as their historical territories have gradually become part of a state through the means of a process that is usually characterized by forced dispossession and oppression.419 Indigenous peoples trace their origin to the original inhabitants of a particular country or geographical region. These original inhabitants were usually the only, or predominant, ethnic group in that particular territory for a large period that extended till a point in time when their territory was ‘discovered’ or visited by persons belonging to different cultures or ethnic origins.420 These new arrivals later supplanted the original inhabitants in the power hierarchy and became dominant through primarily violent means such as conquest or occupation.421 Examples of indigenous peoples are the Aborigines and

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421 Id. at 1.
Torres Strait Islanders of Australia and the Maori of New Zealand, amongst others.\textsuperscript{422}

It has been argued that indigenous groups are required to be placed on a special pedestal and require differential treatment from other minority groups due to the fact that aside from facing adverse economic and political circumstances and being the recipients of insidious discrimination, the indigenous groups also have an original claim on the land on which the modern society that they live on the fringes of, is based.\textsuperscript{423} These groups were, in essence, usurped of their former dominant position and have now been economically, politically and socially subordinated in the new power structure that has been established. The disadvantaged position that indigenous groups suffer from can be squarely ascribed to the introduction of a foreign political and social structure which is otherwise alien to their ethnic and cultural context and has been forcibly implanted leading to the obliteration of their traditional way of life, which was in fact the dominant way before the arrival of the ‘outside’ groups.\textsuperscript{424}

As regards the typical forms of discrimination that indigenous peoples face, mention has frequently been made of the grinding levels of poverty experienced by indigenous groups and the cascading effect that this has on

\begin{footnotesize}
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\item \textsuperscript{422} Id. at 1.
\item \textsuperscript{423} Yousef T. Jabareen, \textit{Redefining Minority Rights: Successes and Shortcomings of the UN Declaration on the Rights of Indigenous Peoples}, 18 UC DAVIS J. INT. LAW POLICY, 125 (2012).
\item \textsuperscript{424} Id. at 130.
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the quality of everyday life of their members.\textsuperscript{425} Indigenous groups are also particularly susceptible to certain phenomenon such as environmental destruction and forced displacement.\textsuperscript{426}

(iv) Linguistic Minority

A linguistic minority, as the name suggests, is categorized entirely on the basis of language. Members of a linguistic minority group define themselves in terms of a shared language.\textsuperscript{427} A linguistic minority group may be speakers of a language which is an absolute minority i.e. not spoken by the majority of the population in any part of the territory of a country or they may be speakers of a language which is in a relative minority i.e. spoken by an overall minority in the country as a whole but by the majority in some parts of the country.\textsuperscript{428} In the latter case, the language can also be referred to as a ‘regional language’.\textsuperscript{429} To give a local example, in the Indian context, speakers of languages like Kinnauri, Kuki etc. can be labeled as absolute linguistic minorities whereas speakers of languages like Tamil, Oriya etc. can be labeled as relative linguistic minorities.

Discrimination against linguistic minorities is a direct off-shoot of the process of the marginalization of their language, which can take many forms.

\textsuperscript{425} \textsc{Indigenous Peoples’ Right to Adequate Housing: A Global Overview}, 27 (2005).
\textsuperscript{426} \textsc{Rodolfo Stavenhagen, The Emergence of Indigenous Peoples} 103 (2012).
\textsuperscript{427} \textsc{Monica Heller, Linguistic Minorities and Modernity: A Sociolinguistic Ethnography} 8 (2006).
\textsuperscript{428} \textsc{Jean-Marie Woehrling, The European Charter for Regional Or Minority Languages: A Critical Commentary} 55 (2005).
\textsuperscript{429} Id. at 55.
For instance, cases have been identified where employers have sought to implement unnecessarily high proficiency requirements in terms of language which are not really justified considering the nature of the job that is being applied for thus handicapping linguistic minorities; or as in some other cases, despite matching or exceeding the required standard in the language prospective job seekers belonging to minority groups have been refused employment on the basis of their different accent which would purportedly negatively affect their ability to perform the tasks assigned to them.\(^{430}\)

(v) Religious minority

A religious minority is identified by the minority religion practiced by its members. A Minority religion can be defined, quite simply, as the religion that is followed or adhered to by a minority of the population of a country or society. Aside from the difficulty in defining minorities in general, this difficulty is even further accentuated in the case of religious minorities in as much as it is not at all an easy endeavor to arrive at a precise definition of the term ‘religion’.\(^{431}\) It has further been remarked in this regard that minority religions are marked by significant internal heterogeneity and thus cannot be said to constitute a homogenous whole.\(^{432}\) Jews in the U.S.A. and Muslims and Christians in India are examples of religious minorities.

It has been argued that in modern parlance, a minority religion should be considered to mean two things.\textsuperscript{433}

Firstly, it can be viewed as a religion whose believers constitute a group that that is, or perceives itself to be, numerically inferior to some other group that has dominant numerical status in the said society.\textsuperscript{434} In such a context, the minority religion represents a bulwark or an instrument of protection against absorption by the majority group, and is central to and symbolizes the unique identity of its believers which must be conserved.\textsuperscript{435}

Secondly, it can be viewed as a religion which has been reduced to minority status, not by another majority religion, but by another set of beliefs or values that are, or are perceived to be, dominant, for instance atheism or rationalism.\textsuperscript{436} The juxtapositioning in this case is therefore not with another religion, but with a political or social doctrine or ideology.\textsuperscript{437}

Studies have shown that claims by religious minorities for the preservation of their religious practices is very often viewed as a challenge to the religious identity and authority of the dominant religious group, causing the dominant group to react unfavorably by discriminating against and suppressing the religious minority group.\textsuperscript{438} Such discrimination can take varied forms, such

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\item \textsuperscript{433} \textsc{Samim AkgönüL}, \textit{The Minority Concept in the Turkish Context: Practices and Perceptions in Turkey, Greece and France} 12 (2013).
\item \textsuperscript{434} \textit{Id.} at 12.
\item \textsuperscript{435} \textit{Id.} at 13.
\item \textsuperscript{436} \textit{Id.} at 15.
\item \textsuperscript{437} \textit{Id.} at 16.
\item \textsuperscript{438} \textsc{Jonathan Fox}, \textit{Ethnoreligious Conflict in the Late Twentieth Century: A General Theory} 179 (2002).
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as religious discrimination, economic discrimination, political discrimination and cultural discrimination.\footnote{Id. at 179.}

(vi) **National Minority**

National minorities can be defined as ethnic groups who are inhabitants of one state but are at the same time ethnically related to the dominant community or group of another, often neighboring, state.\footnote{Stefan Wolff, *Ethnic Minorities in Europe: The Basic Facts* 3, http://www.stefanwolff.com/files/min-eu.pdf (last visited Feb 21, 2013).} It has been said that on a broader level, a claim for national minority identity can be said to comprise of three broad aspects viz. (i) the existence of a public claim for membership of an ethnic group that is different from the ethnic group that is dominant in the particular territory (ii) the demand that there should be recognition by the state of the particular territory as to the existence of this distinct identity, and (iii) the demand for bestowment of certain collective rights to the national minority group on the basis of this distinct identity.\footnote{Rogers Brubaker, *National Minorities, Nationalizing States, and External National Homelands in the New Europe*, 124 DAEDALUS, 112 (1995).}

It may be noted that the term national minority is often used synonymously with ethnic minority under international law.\footnote{D. Raic, *Statehood and the Law of Self-Determination* 268 (2002).} Examples of national minorities are the Hungarian minorities in Romania and Slovakia, the Russian minorities in Estonia, Latvia and Ukraine, or the Serb minority in Croatia.\footnote{Id. at 268.}
It has been said that unlike ethnic, cultural or linguistic minorities which may be part of the systems and institutions of the nation to which they belong without suffering discrimination, a national minority almost always suffers discrimination because its access to the political channels is severely restricted on account of its overt identification with a different ethnic group.444

(vii) New markers of minority identity
The aforesaid examples of minority identity are the traditionally well know ones in international and domestic contexts. However, in the contemporary day and age, there several new emerging markers of minority identity have surfaced. These new minorities have emerged through two distinct processes.

The first process is one which is characterized by a marker of identity that had been previously considered as being outright ‘deviant’, over a period of time, with more progressive ideals dominating the discussion, being considered an acceptable aspect of individual identity. An example in this respect can be seen in the example of sexual minorities, including lesbian, gay, bisexual, and transgender (LGBT) people. Sexual minorities is a term than can be used to describe individuals who are subjected to discrimination and abuse based on their sexual practices with other consenting adults, or their understanding or outward manifestation of their own gender, which is

444 LIBERAL NATIONALISM FOR ISRAEL: TOWARDS AN ISRAELI NATIONAL IDENTITY, 130 (1999).
considered to be at odds with the sexual practices of the majority.\footnote{SCOTT LONG, \textit{SEXUAL MINORITIES AND THE WORK OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE} 1 (2001).} Over the past generation, the term ‘sexual minorities’ has been increasingly been used to refer to LGBT persons, and the call for protection of their rights has gained significant visibility in the public arena.

The second process, and one which is more relevant for the purpose of the present study, is one by means of which groups which may otherwise have been in a dominant position in their territory have now been relegated to a subservient or dependent status on account of the operation of certain global forces, particularly globalization. This process also extends to existing minorities which have been rendered even worse off as a result of this process. Globalization, as has been noted in the previous chapter, affects groups of people unequally. With its focus on the free market and profit maximization, it firstly creates new sections of marginalized and vulnerable groups. The best example in this regard are migrant workers, who emigrate from their homelands which are now a part of the global economy and hence ‘dependent’ on the same, and travel to far off countries for better economic prospects where they are immediately rendered as minorities and subjected to hostility and discrimination.\footnote{JOHN CONNELL, \textit{MIGRATION AND THE GLOBALISATION OF HEALTH CARE: THE HEALTH WORKER EXODUS} 154 (2010).} Research carried out by the International Labor Organization has found that immigrant workers suffer from a high discrimination rate of 35% in the countries of Western Europe.\footnote{Patrick A. Taran, \textit{The Need for a Rights Based Approach to Migration in the Age of Globalization}, in \textit{MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON...}}
This process of increasing marginalization and exclusion of already vulnerable groups is being felt in India as well. It has been noted that the market-driven economy is increasingly coming into conflict with the customary community rights of the Scheduled Tribes.\textsuperscript{448} The opening up of the Indian market, increasing privatization and the withdrawal of the Indian state from several segments of the economy has also led to even fewer employment opportunities for the Backward Classes.\textsuperscript{449}

Therefore, it may be noted that the categorization of minority groups and the markers that are used to identify them cannot be reduced to a rigid parameters especially in the 21\textsuperscript{st} century when the forces of globalization melt away established notions of state sovereignty and invert traditional power equations, and new markers of minority identity continue to emerge and evolve.

4.4 WHAT ARE MINORITY RIGHTS?

Minority rights, at their most basic, can be defined as rights enjoyed by a minority group or an individual member of such a minority group on the basis of the minority status. These rights are usually ‘special’; in the sense that they are distinct from, or in cases in addition to, the rights enjoyed by

\textsuperscript{448} Baljit S. Mann, Globalization and the Politics of Identities in India, in GLOBALIZATION AND THE POLITICS OF IDENTITY IN INDIA , 71 (Bhupinder Brar, Ashutosh Kumar, & Ronki Ram eds., 2008).
\textsuperscript{449} Id. at 71.
the majority/non-minority populace. Minority rights may combine elements of both individual-centric rights and collective rights. For instance, an individual centric minority might be one in which an individual person is given the benefit of reservation or differential treatment on account of his or her membership in a minority group. A collective minority right on the other hand would be something like a minority group being given a special right to preserve its religious customs or the right to autonomy in governance.

Minority rights are granted with the purpose of reducing discrimination faced by minority groups and for making it possible for minorities to preserve their identity and culture as it is only when minorities are able to use their own cultural tools such as language or religious practices, as well as take part in the social, political and economic life of their countries can they begin to achieve a status of true equality with the majority populace. Minority rights measures are therefore many a times directed towards the protection of minority language, religion and education rights. As regards this ‘differential’ treatment of minority groups, it is said that it is justified if the same is exercised in order to achieve the ultimate end of promoting effective equality and the wellbeing of the larger community as a whole. This differential treatment is also validated by the ground reality that there

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450 ATHANASIA SPILOPOULOU ÅKERMARK, JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW 46 (1997).
452 LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA, 73 (Frederick Lee Morton ed., 2002).
453 FACT SHEET NO. 18 (REV.1), MINORITY RIGHTS, supra note451 at 3.
remains a wide difference between equality in law and equality in fact, and therefore differential treatment is essential in order to bring about a state of true non-discrimination and equality.454

The justificatory basis for minority rights in legal theory and jurisprudence shall be studied in detail in the next chapter of the present study and hence focus may now be shifted to the main areas of concern that minority rights seek to address.

4.5 MAIN AREAS OF CONCERN REGARDING THE PROTECTION OF THE RIGHTS OF MINORITIES

Minority rights, much like human rights, are ultimately concerned with the protection and welfare of people.455 However, the protection in this case is also directed towards the social or cultural dimension of the human experience in as much as it is the way of life of the minority groups, of great value to its individual constituents as a marker of identity, which is sought to be protected as opposed to only the individual persons.456 Minority rights would thus seek to ensure that a group of persons sufficiently organized, and with a shared sense of identity, to make up a religious, cultural, ethnic or linguistic society would have an entitlement to have their shared way of life

455 ULRIKE BARTEN, MINORITIES, MINORITY RIGHTS AND INTERNAL SELF-DETERMINATION 137 (2015).
protected against assimilation or discrimination by the majority. Based on the global experiences of minority communities, the Office of the United Nations High Commissioner for Human Rights has pithily identified the following issues as major concerns of minority rights:

“a) Protecting a minority’s survival and existence within a territory or State, including through preventing and combating violence against them, forced expulsion and genocide;
b) Protecting and promoting cultural and social identity, including the right of individuals to choose which ethnic, linguistic or religious groups they wish to be identified with, and the right of those groups to affirm and protect their collective identity and to reject forced assimilation;
c) Ensuring effective non-discrimination and equality, including ending structural or systemic discrimination and the promotion of affirmative action when required; and
d) Ensuring effective participation of members of minorities in public life, especially with regard to decisions that affect them.”

4.6 THE GENESIS AND EVOLUTION OF INTERNATIONAL MINORITY RIGHTS MECHANISMS THROUGH THE AGES

As has already been mentioned, though the attempts to define certain crucial terms has met with mixed success, International Law has from its very inception been concerned with issues relating to minorities and this process

457 Id. at 261.
has only gained momentum in the recent past.\(^{459}\) Therefore to fully understand the current international legal regime relating to minority rights, it would be necessary to look at certain important historical events that over the years shaped the current understanding of the concept of minority rights.

(i) **Peace of Westphalia**

In its earliest form, bestowment of minority rights can be found in situations when a territory was acquired or invaded by a ruler who then had to contend with ruling over groups or communities which did not follow the same religious or cultural practices as the ruler and his society.\(^{460}\) The granting of special exemptions of religious or cultural practice to these communities can be considered the first manifestation of minority rights.\(^{461}\)

However, it has been observed that aside from these localized and ad-hoc bestowments of minority rights, the first concrete formulation of such a principle on a more universal level can be seen in the 1648 peace of Westphalia. It is said that the first development of a basic mechanism for the protection of minority rights was the 1648 peace of Westphalia which was not the result of any deep underlying theoretical or normative push for minority protections but rather was the result of the political ground realities of the relevant time.\(^{462}\) A reading of the text of the Treaty does seem to bear

\[^{459}\text{Abdulrahim P. Vijapur, International Protection of Minority Rights, 43 INT. STUD. 367–394, 371 (2006).}\]
\[^{460}\text{JENNIFER JACKSON PREECE, NATIONAL MINORITIES AND THE EUROPEAN NATION-STATES SYSTEM 56 (1998).}\]
\[^{461}\text{Id. at 56.}\]
\[^{462}\text{PENTASSUGLIA, supra note12 at 25.}\]
out this observation in as much as the same is concerned with issues which are more territorial and political, rather than legal.\textsuperscript{463}

The background to the coming about of the 1648 peace of Westphalia was dominated by the significant weakening of the Catholic Church’s power and influence in Europe in the light of the Protestant Reformation and the Thirty Years War. This led to the need to engage with those of a different religious affiliation, in this case Protestantism, and thereby resulted in the acceptance of the need for toleration and openness in dealing with internecine conflicts.\textsuperscript{464} The results of the peace of Westphalia are significant in this regard in as much as it accepted differentiated group-identity on the basis of religion in the form of Catholic, Protestant and Calvinist beliefs, and provided for special rights based on the same.\textsuperscript{465}

It can therefore be seen that the recognition of these distinct religious communities and the consequently accorded protection was a novel development.

(ii) Millet System

Before moving onto the further developments in Europe, it would be apt to consider the \textit{Millet} system at this stage in as much as the said system
represents the method of minority protection that was followed in medieval
times under Islam. The best example of this system can be found in the
Ottoman Empire.

The Millet system was concerned only with the aspect of religious identity,
rather than other markers such as nationality or language. The Millet status
was therefore, on the basis of this religious identification, granted to all non-
Muslim communities. The spheres of influence were clearly demarcated. The
Ottoman state had absolute control over the fundamental aspects of
governance such as taxation and the military while the millets had the
jurisdiction over more personal aspects such as religious affairs and family
laws.

To ensure a fully localized and self-sustained legal system, each
millet community was given the authority to set up its own judicial
institutions with which the Ottoman state would not interfere.

It has been noted that the provision of all these facilities was founded on the
promise of peace and non-Muslim communities were permitted to practice
their religion so long as they did not revolt or launch an insurrection against
the Ottoman ruler. Such an arrangement secured the life and liberty of the
adherents of the minority religions, and in return they undertook to pay a tax

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466 Muhudin Mulalic, Multi-culturalism and EU Enlargement: The case of Turkey and
Bosnia-Herzegovina, in The Islamic World and the West: Managing Religious and
Cultural Identities in the Age of Globalisation, 114 (Christoph Marcinkowski ed.,
2009).
467 Id. at 114.
468 Id. at 114.
469 Aryeh Shmuelevitz, The Jews of the Ottoman Empire in the Late Fifteenth and
the Sixteenth Centuries: Administrative, Economic, Legal, and Social Relations
called *jizah* and to obey certain commands such as being forbidden to ring church bells.\(^{470}\) Though this system was practiced in the Ottoman empire for several centuries, however a subsequent, and in hindsight misguided, push for a stronger nationalism based on ‘Pan-Ottamanism’ whereby it was desired that the divisions in the society between Muslim and non-Muslim would gradually disappear, contributed to the rapid decline of the Ottoman empire in the nineteenth and early twentieth century.\(^{471}\)

Though the Millet system was far from perfect in the sense that it did postulate a subordinate position for non-Muslim minorities in the eyes of the state, there was nonetheless a significant element of toleration, albeit conditional, in this approach which tolerated group-differentiated religious and cultural practices.

(iii) **Post-Westphalian developments**

Coming back to the treaties that were being established in Europe, it is clear that till this point in history the basis of community-specific rights in international treaties, as represented in the Westphalia peace settlement, was primarily religion. However there occurred a gradual shift in this pattern with wide reaching ramifications. It has been noted that at this point in history, the influence of religion began to decline radically and in its place came an

\(^{470}\) Id. at 16.

\(^{471}\) Mulalic, *supra* note466 at 115.
ever increasing emphasis on nationalism, thereby positioning the problems of minority protections away from a religious context to within one born out of the rise of nationalistic fervor.\textsuperscript{472}

Contemporaneous to this development, with the coming about of the French Revolution in the 18\textsuperscript{th} century there arose a newfound interest in the concept of inalienable individual rights which were not bestowed by means of religious sanction but through the instruments and organizations of the state.\textsuperscript{473} Even though the treaty provisions and the implementation mechanism developed under them left much to be desired, the Congress of Vienna of 1815 and the Congress of Berlin in 1878 construed the identity of minority groups and the protections to be provided to them primarily on the basis of the national origin of the groups in question.\textsuperscript{474} This marked a clear break from the past where the marker of identity was almost exclusively religion.

(iv) The League of Nations system

Subsequent to the Congress of Berlin in 1878, the most widely accepted ‘next-step’ in international minority rights protection is stated to be the formal mechanism set up under the League of Nations.

\textsuperscript{472} \textsc{Preece}, supra note460 at 56.
\textsuperscript{473} \textsc{Pentassuglia}, supra note12 at 26.
\textsuperscript{474} \textit{Id.} at 26.
After the conclusion of the First World War, the Peace Conference that followed, and the League of Nations that was set up as a result of the deliberations conducted therein, was concerned with the question of minimizing the negative fallout of the possible friction between the majority populace of nation states and the minority groups for the reason that a failure to do so would obviously endanger international peace. A system of minority protections was therefore imposed over the defeated or reconfigured states that would guarantee the rights of the minority groups living within their territories.\textsuperscript{475} It can therefore be said that the effectiveness of these treaties was at the very outset going to be benchmarked against how well they would serve the political goal of peace-keeping rather than by how well they protected the minorities,\textsuperscript{476} though the two aims could be said to be tied-together at some level.

Having been born from the aforesaid complex political confabulations, the minority treaties that came about sought to achieve two larger goals, starting with a guarantee for equality amongst all individuals in a nation state by ensuring non-discrimination provisions and thereafter moving onto positive measures directed at individual members of vulnerable minority groups in order to help them overcome inherent disabilities.\textsuperscript{477} It is crucial to note at this stage that the framework that was intended to be put in place in order to ensure this goal was committed to providing minority groups the right to

\textsuperscript{475} Wippman, \textit{supra} note383 at 600.
\textsuperscript{476} BARTEN, \textit{supra} note455 at 141.
\textsuperscript{477} Wippman, \textit{supra} note383 at 600.
cultural preservation, though the same were couched in the language of individual rights.\textsuperscript{478}

The system of minority protections adopted by the League of Nations however met an unceremonious demise with the onset of hostilities leading all the way upto the Second World War. Though the failure of the League of Nations has been attributed to a number of reasons, from the non-participation of the United States of America\textsuperscript{479} to the inability of the League to arrange for an international military force to thwart acts of aggression,\textsuperscript{480} significant emphasis has also been placed by scholars on the contribution of the minority rights regime towards this failure. Two reasons have been articulated, in particular.

\textit{First}, the League totally failed to establish a general jurisprudence which would lay down normative standards for minority rights protection across the board. On the other hand, it simply relied on \textit{ad-hoc} treaties with individual states for the protection of whatsoever nature of the minorities that existed within those states based on the prevailing political circumstances of the time.\textsuperscript{481} This ad-hoc arrangement led to a feeling of resentment amongst several of the countries affected by the restrictions in as much as they viewed the restrictions as having severely compromised their sovereignty as having been arbitrarily imposed at the ipse-dixit of the victorious nations.\textsuperscript{482}

\textsuperscript{478} \textit{Id.} at 600.
\textsuperscript{480} J. KREITMANN, BREAD, PEACE AND LIBERTY 56 (1996).
\textsuperscript{481} Wippman, supra note383 at 601.
\textsuperscript{482} \textit{Id.} at 601.
Secondly, this ad-hoc arrangement did not mollify even the minority groups that were sought to be protected in as much as many of the relevant minority groups viewed the safeguards as being extremely insufficient.483

In line with the main political aims of the League of Nations that have been noted above, it has also been said that another major reason for the failure of the minority protection system of the League of Nations was that the system of minority protection was too readily compromised whenever there arose a situation when doing so would avoid the break-out of war. 484

(v) The Second World War and the rise of Human Rights

Defects and short-comings aside, it may be seen that the concept of minority rights was central and critical to the developing dynamic of the international legal order up to the time of the League of Nations. However, certain momentous events that were to eventually culminate into the Second World War created a situation wherein the primacy accorded to minority rights for centuries abruptly nose-dived to be replaced with the rapid ascendancy of the concept of ‘human rights’. There has been an identification of three critical reasons why this shift from a minority rights-based approach to a human rights-based approach took place.485 These may be considered briefly.

483 Id. at 601.
Firstly, the Nazis grossly manipulated the principle of minority rights and subverted it for their own narrow political aims when they used the German origin national minorities in Europe as an excuse for their acts of aggression against neighboring countries.\textsuperscript{486} In the same breath the Nazis showed contempt for, and brutalized, the rights of individuals wherever they held sway.\textsuperscript{487} As a counter-blast to the aforesaid tendency of the Nazis, the Western powers strove to reaffirm and reiterate the principles of liberal democracy which led to an overt emphasis on human rights at the expense of minority rights.\textsuperscript{488}

Second, there arose a general belief in the United States of America that a policy of isolationism no longer served its interests, and along with this newfound desire to engage on the world stage came a question as to what was to be the characteristic or defining feature of this engagement.\textsuperscript{489} The eventual identification of this defining feature settled on a championing of the supremacy of human rights.\textsuperscript{490} Thus a human rights discourse soon became the face of the American involvement in the War.

Thirdly, human rights quickly became an acceptable, and less controversial and contested, alternative to minority rights and supporters of the latter quickly dried up.\textsuperscript{491} The failure of the League of Nations and it system of

\textsuperscript{486} Id. at 386.  
\textsuperscript{487} Id. at 386.  
\textsuperscript{488} Id. at 386.  
\textsuperscript{489} Id. at 387.  
\textsuperscript{490} Id. at 387.  
\textsuperscript{491} Id. at 387.
minority protection, albeit the watered down form that existed, also cast a dark shadow on the concept of minority rights as a whole in as much as minority rights were also seen as symptomatic of all that was wrong with the League.\textsuperscript{492} It has been noted that this trend had support from the other victorious powers as well in as much as providing for minority rights in the international legal system came with the attendant risk of the need for accountability and the foreign interference that it might bring about, which could be significantly reduced by catering to basic individual human rights.\textsuperscript{493}

Thus it can be seen that the disillusionment with the policies and mechanisms prevailing in the years leading up to the Second World War led in particular to a lack of faith in the traditional concept of minority rights protection. Therefore, in the aftermath of the Second World War, the succeeding United Nations system chose to tackle the issue of minority protections in a very different manner.\textsuperscript{494} There was a clear disillusionment with minority rights owing to its association with the League.\textsuperscript{495}

The framers of the United Nations Charter therefore adopted a course of action that devised a more generally acceptable and implementable mechanism which was based on universal human rights bestowed upon

\textsuperscript{492} Id. at 387.
\textsuperscript{493} Id. at 389.
\textsuperscript{494} Wippman, \textit{supra} note 383 at 602.
individuals. There was another factor that contributed to such a shift, namely the normative belief that minority rights, by reason of their inherently ‘collective’ nature, were opposed to the fundamental values of liberal individualism.

As a result of all the above circumstances and thought processes, minority rights were pushed to the back-burner in the United Nations legal framework. This is perhaps one of the reasons why the post-League of Nations international order as represented by the United Nations is seen by many as a complete re-boot and a break from the past for the international system. The United Nations Charter does not have any reference to minority rights and the same is the case with Universal Declaration of Human Rights. It is widely accepted that following the creation of the United Nations, there has been a paradigm shift, away from minority rights to human rights.

(vi) A minority rights resurgence?
As can be seen from the aforesaid discussion, there is definitely a marked shift away from minority rights protections in the international legal sphere. This post-Second World War shift to an individual rights philosophy

496 Wippman, supra note383 at 602.
497 Id. at 603.
498 Id. at 603.
500 Wippman, supra note383 at 603.
however has not been absolute or irreversible. As has been noted in this regard, since the end of the Cold War, the international legal framework has increasingly incorporated and adopted a minority rights driven approach for the protection of minority groups worldwide.\textsuperscript{502} This shift in emphasis can be established in the form of various international legal instruments and declarations such as the United Nations Draft Declaration on the Rights of Indigenous Peoples, 1994 and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.\textsuperscript{503}

It can therefore be said that the framework of the United Nations also offers recognition of the importance of minority rights though the same may often be couched in an ‘individual rights’ paradigm. Even this paradigm can be said to have witnessed a shift in recent times in as much as minority rights are now being once again seen in the light of ‘collective protections’. In order to better appreciate this aspect, it would be pertinent to examine the various legal instruments pertaining to minority rights in the international fora and the legal regime that they exemplify.


\textsuperscript{503} \textit{Id.} at 89.
4.7 MINORITY RIGHTS PROTECTIONS UNDER THE UNITED NATIONS FRAMEWORK

The present status of global minority rights protection can be best examined by reference to the United Nations and its myriad off-shoot organizations.\(^{504}\) A useful over-view of the various mechanisms of minority rights protection has been provided by the UN Office of the High Commissioner for Human Rights in a detailed report published in 2010.\(^{505}\) This report is quite comprehensive and has been utilized as the primary reference point for the present sub-chapter, whilst additional sources have also been referred to for supplementing the same wherever required.

(i) United Nations Minorities Declaration, 1992

To being with, the main source of minority rights in the present international legal framework would undoubtedly be the United Nations Minorities Declaration, 1992. In 1992, the United Nations General Assembly adopted the United Nations Minorities Declaration by consensus.\(^{506}\) It is said that the Minorities Declaration represents the first port of call for any discussion relating to the rights of minorities within the United Nations system.\(^{507}\) It has

\(^{504}\) Aside from the United Nations mechanism, several regional human rights treaties include provisions which advance the cause of minority rights. The Council of Europe’s Framework Convention for the Protection of National Minorities contains detailed provisions for instance. However for the sake of brevity and for a better juxtaposition between the pre and post-Second World War scenario, the focus is maintained solely on the United Nations mechanisms.


\(^{506}\) Id. at 14.

also been pointedly noted that the passing of the Minorities Declaration shattered the silence that had prevailed in the arena of minority rights under the international legal framework.  

The Minorities Declaration grants to persons belonging to minorities the following protections:

“Protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity (article 1);
The right to enjoy their own culture, to profess and practice their own religion, and to use their own language in private and in public (article 2(1));
The right to participate effectively in cultural, religious, social, economic and public life (article 2 (2));
The right to participate effectively in decisions which affect them on the national and regional levels (article 2 (3));
The right to establish and maintain their own associations (article 2 (4));
The right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their own country and across State borders (article 2 (5)); and
The freedom to exercise their rights, individually as well as in community with other members of their group, without discrimination (article 3).”

508 Id. at 164.
509 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 14.
It is important to note that in order to ensure the realization of these protections, obligations have been imposed upon nation states.\textsuperscript{510} The states are to protect and promote the rights of persons belonging to minorities by taking measures to:

“Create favorable conditions to enable them to express their characteristics and to develop their culture, language, religion, traditions and customs (article 4 (2)); Allow them adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (article 4 (3)).”\textsuperscript{511}

It has been said that the Minorities Declaration is a significant in its recognition of the fact that special measures are necessary to protect and promote the rights of minorities, particularly their unique identity, apart from non-discrimination provisions.\textsuperscript{512}

Though there are criticisms directed at the Minorities Declaration for it not being ambitious enough and for being ambiguous at certain places, it is however widely accepted that it has at least clearly posited the difference between individual human rights, on the one hand, and the rights of the group, on the other, and also reaffirmed the fact that these dissimilar rights serve distinctive purposes.\textsuperscript{513}

\textsuperscript{510}\textsc{Barth, supra} note484 at 16.
\textsuperscript{511}\textsc{Minority Rights: International Standards and Guidance for Implementation, supra} note505 at 14–15.
\textsuperscript{512}\textsc{Ramesh Chandra, 2 Minority: Social and Political Conflict 255} (2004).
\textsuperscript{513}\textsc{Natan Lerner, Religion, Secular Beliefs and Human Rights 128} (2012).
(ii) **International Covenant on Civil and Political Rights, 1966**

The next international legal instrument pertaining to minorities that requires to be noted is the International Covenant on Civil and Political Rights, 1966 and, in particular, article 27 which states as under:

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

It is said that from the date of its passing in the year 1966 till the promulgation of the Minorities Declaration in 1992, Article 27 of the International Covenant on Civil and Political Rights remained the singular extant international provision which was concerned with the protection of the rights of minorities. This Article can be said to recognize and protect the right of cultural preservation in as much as it stresses on the need to enable minority groups to preserve and to continue to develop their way of life. The Covenant enjoins the states that have ratified it to ensure that all individuals under their jurisdiction enjoy these rights conferred by the Covenant, and if required the states are required to take specific corrective action to remedy the discrimination that the minorities might be subjected to.

The Human Rights Committee’s general comment No. 23 (1994) on the

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514 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 15.
515 ÅKERMARK, supra note450 at 127.
rights of minorities provides an insight into how this Article is to be interpreted and it states as under:

“…this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.” 516

Going even further, the Human Rights Committee has been categorical in its stand that citizenship is an irrelevant criterion in determining the applicability of article 27 and that these rights can therefore not be confined in their application to citizens alone.517

Though article 27 has been categorized as only protecting the individual person and not the minority group,518 it is significant for enunciating, in line with what was subsequently adopted in the Minorities Declaration of 1992, the notion that minority protection means not just eliminating negative discrimination but also putting in places positive discrimination measures when the situation demands it.519

516 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 16.
(iii) International Covenant on Economic, Social and Cultural Rights, 1966

For a non-discrimination mandate, reference may also be made to the International Covenant on Economic, Social and Cultural Rights, 1966 which states explicitly in article 2 (2) as under:

“…the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

(iv) General comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health

In the context of equal access to public resources, in this case health, reference may also be made to the General comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health which states that safe and practicable physical access should be ensured to health facilities for all sections of the population, especially minority groups. There is a further requirement that these health facilities should not offend the practices and sentiments of the

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520 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 16.
minority groups. The right to health in this context is thus transposed as essential to bringing about a true state of non-discrimination.

(v) International Convention on the Elimination of All Forms of Racial Discrimination, 1965

References to minorities can also be found in the context of anti-discrimination legal instruments. For instance, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 defines discrimination as:

“any distinction, exclusion, restriction or preference based on race, color, 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.”

The reference to anti-discrimination is quite important. This is because discrimination is defined as occurring when an individual is subjected to unfair treatment as compared to another individual in a similar situation, and it is this unfair treatment which then determines the eligibility to partake of the protection or benefit offered by a right that seeks to remedy this unfair treatment. This exercise would then necessarily involve the identification

521 Id. at 16.
523 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note 505 at 16.
and acceptance of the existence of a discriminated minority group as distinct from the majority.\textsuperscript{525}

\textbf{(vi) Convention on the Rights of the Child, 1989}

Specific provisions for minority protection might also be found in international legal instruments that already seek to address disadvantaged groups or sections. In this regard, reference may be made to article 30 of the Convention on the Rights of the Child, 1989 which provides that:

“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”\textsuperscript{526}

The Convention on the Rights of the Child, 1989 is unusual in that it has received widespread international support,\textsuperscript{527} being ratified by 194 states as of 2014\textsuperscript{528}.

\begin{footnotesize}
\textsuperscript{525} Id. at 114.
\textsuperscript{526} MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 16–17.
\textsuperscript{527} O’NIONS, supra note454 at 204.
\end{footnotesize}

Instruments that seek to prohibit extreme targeted violence directed towards a group of persons also incorporate an implicit recognition of minority protection. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 finds mention in the United Nations Minorities Declaration.\(^{529}\) Article II of the Convention defines genocide as under:

“All of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.”\(^{530}\)

This emphasis that the Convention places on the protection of the group as a whole is interesting in as much as it recognizes the fact that there might be the victimization of a ‘community’ as a whole as distinct from the discrimination felt by its individual members. It has been remarked that the United Nations' support for international conventions addressing state abuses, such as the Genocide Convention, illustrates that the rights

\(^{529}\) MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note505 at 17.

\(^{530}\) Id. at 17.
mechanism in the international legal order indeed incorporates a collective dimension as well, and that it is not solely individual-centric.\(^{531}\)

**(viii) Rome Statute of the International Criminal Court, 1998**

International legal instruments that aim to put in place a system of international responsibility for crimes against humanity also make explicit mention of the protection of minorities. For instance, the Rome Statute of the International Criminal Court, 1998 provides for the prosecution of crimes against humanity.\(^{532}\) The Rome Statute makes explicit mention of groups or collectivities, in article 7(h), and criminalizes their persecution. It states as under:

“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court,”\(^{533}\)


To once again make reference to an anti-discrimination instrument, this time pertaining to the labor sector, the International Labor Organization

\(^{531}\) Barth, supra note 484 at 79.

\(^{532}\) Minority Rights: International Standards and Guidance for Implementation, supra note 505 at 17.

Discrimination (Employment and Occupation) Convention, 1958 requires, under Articles 1 and 2, that national policies should ensure that equality is guaranteed to individuals in the areas of employment and occupation and that no discrimination should be permitted on the grounds of color, sex race, religion, political opinion, national extraction or social origin. The ambit of these proposed national policies is required to be quite comprehensive in as much as they are required to fight discrimination and uphold equality in a wide range of employment related areas.

(ix) International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998

In a similar vein, the International Labor Organization Declaration on Fundamental Principles and Rights at Work, 1998 provides that all members of the Organization have an obligation to aim for the achievement of certain basic labor standards. These standards not only require the elimination of all forms of discrimination but go further and delve into areas like the freedom of association. It can be said that this emphasis on a non-discrimination regime within the International Labor Organization is not out of place in as much as it has been observed in several countries that the experience of immigrant and ethnic minority groups is characterized by

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534 MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra note 505 at 18.
535 Id. at 18.
536 Id. at 18.
537 Id. at 18.
higher levels of unemployment than workers who originally belong to these countries because they face significant discrimination in the job market.\textsuperscript{538}


In the areas of heritage and culture as well, minority group protection has been given its due importance. In this regard, the United Nations Educational, Scientific and Cultural Organization Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 provides for the protection of cultural heritage of communities and groups.\textsuperscript{539} This Convention is important in the sense that cultural heritage is seen as valuable and something worthy of preservation \textit{per-se} and not on account of its utilitarian value in the modern day and age.


Similarly, the United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 reiterates the importance of culture and encourages states to, amongst other things, adopt measures which protect and

\textsuperscript{538} \textit{INTERNATIONAL LABOUR CONFERENCE, 87TH SESSION, 1999: THE ROLE OF THE ILO IN TECHNICAL COOPERATION: SIXTH ITEM ON THE AGENDA, REPORT 6, 40 (1999).}

\textsuperscript{539} \textit{MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, supra} note 505 at 18.
promote cultural diversity.\textsuperscript{540} It reiterates the need for respecting the distinct cultures that may exist within a society or a nation state, including those belonging to minority groups, and asks the states to not only ensure that the free practice and enjoyment of such cultural practices is not curtailed but to go further and create conditions which promote the same.\textsuperscript{541} This Convention is said to be noteworthy because it specifically makes reference to minority groups, who have otherwise rarely been referred to in documents emanating from the United Nations Educational, Scientific and Cultural Organization.\textsuperscript{542}

**(xii) United Nations Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief, 1981**

Before concluding with the enumeration of the relevant international legal instruments, one last United Nations Declaration may be considered which surprisingly does not find mention in the 2010 report of the United Nations Office of the High Commissioner for Human Rights. This is the United Nations Declaration on the Elimination of Intolerance and Discrimination on the Basis of Religion or Belief, 1981. The Declaration’s most important feature is contained in Article 6, which offer guidelines regarding the scope of freedom of religion or belief.\textsuperscript{543} These guidelines, which postulates the

\textsuperscript{540} \textit{Id.} at 18.
\textsuperscript{541} \textit{Id.} at 18.
freedoms which should be guaranteed to achieve the aims of the Declaration, can be summarized as under:

“Assembling for worship and maintaining places of worship (6a); establishing and maintaining charitable institutions (6b); acquiring and using articles required for customs and rites (6c); publishing and distributing publications (6d); teaching religion or belief (6e); receiving financial and other contributions (6f); training leaders and calling into being the leadership of the religion or belief (6g); celebrating holidays and ceremonies (6h); communicating regarding the religion or belief with individuals and institutions, at national or international levels (6i).”

Though there is no specific mention made of religious minorities in the aforesaid freedoms, however it has been remarked that almost all the examples of the protected freedoms in the aforesaid Article 6 are of a collective nature thereby extending in application to minority groups as a whole. The Declaration aims to provide for minority rights geared towards the prevention of discrimination and persecution which result from religious belief or membership. The safeguards envisaged by the Declaration extend to religious minorities that might be witnessing discrimination from the majority religious community or group in the nation state or society that they inhabit.

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544 Id. at 307.
545 Id. at 307.
547 Id. at 56.
4.9 CONCLUDING REMARKS

Minority rights are basically concerned with the identification and protection of a group, and by extension its individual constituents, that occupies a vulnerable or unequal power position when compared to other groups in the society or nation state that it inhabits. Such protections based on group identity and membership are legitimate and in tune with human reality, in as far as it is widely accepted that the evolution of mankind occurred within social groups and this continues to be the case. The requirement for such protections is further cemented by the fact that the vast majority of inter-group relationships are characterized by the existence of a minority or majority position as between each other.

The aforesaid reality is also reflected in the significant discourse and contestation that the aspect of minority rights has witnessed in documented human history and its centrality in the deliberations that occurred between nation states in the early years of the development of international law. The broad review of minority rights protections in the contemporary international legal arena would show that though there has been a loss of significance as compared to previous eras on account of the emergence of the concept of human rights, the normative underpinnings of the contemporary international legal order still profess a significant level of adherence to the tenets of minority protections as also recognize the value of group based protections.


Id. at 303.
The development of human rights therefore need not be seen as representing the waterloo of minority rights protections. This is for the reasons that minority group protections strengthen and reinforce the concept of human rights by means of filling in the gaps that would arise from a purely individual rights based approach. There is no gainsaying the fact that human rights protections are a revolutionary, and one may say cosmopolitan, development in as much as they posit the individual as the bearer of unalienable rights and as worthy of basic dignity and respect on that account. However, despite the same, the need for minority group based protections is still relevant.

As regards the question of the need for minority rights, the answer to the same is two-pronged.

First, minority rights are intended to safeguard or insulate minority groups from the discrimination that they are ever so frequently made a target of, and which can have debilitating consequences that are experienced over generations.⁵⁵⁰ Such a situation is difficult to combat through the mere provision of individual rights in as much as the discrimination faced by different groups varies widely and in most contexts is oblivious of the universal rights enjoyed by the individual member of the minority group.

Secondly, minority rights seek to enable minority groups to preserve their distinct cultures or ways of life from assimilation or obliteration. This aspect of minority rights acknowledges the fact that the continued existence of their cultures are fundamental to the survival of minority groups. This is not an aspect that can be safeguarded by universal individual rights alone.

As regards the effect that the provision of minority rights has on a minority groups itself, the answer that logically follows from the above, is that while guaranteeing equality in terms of opportunities for its individual members as compared to the wider society, they also allow guarantee the ability for minority groups to be able to provide their individual members with a cultural framework that inculcates a sense of identity and belonging without fear of this framework being assimilated or otherwise wiped out.