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## Contemporary Developments in the International Protection of the Rights of Minorities

Hurst Hannum\*

All but the smallest and most cohesive of societies include numerically inferior groups which may be distinguished—and which may distinguish themselves—from the majority. As noted below, no proposed definition of “minority” has yet been widely accepted by international lawyers, but a common-sense definition of a numerically smaller, nondominant group distinguished by shared ethnic, racial, religious, or linguistic attributes will suffice for present purposes.

One can trace the international protection of minorities at least to the Treaty of Westphalia in 1648, under the terms of which the parties agreed to respect the rights of certain (not all) religious minorities within their jurisdiction. Given the historical congruence of religious and secular authority prior to this period, however, such agreements could just as easily be seen as recognizing the power of certain political groups rather than religious rights per se.<sup>1</sup> 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 today might be viewed as freedom of religion rather than group rights.

The Congress of Vienna, which dismembered the Napoleonic empire in 1815, also considered the rights of national minorities to some extent. The 1876 Treaty of Berlin included protection for the “traditional rights and liberties” enjoyed by the religious community of Mount Athos in Greece. In addition, the Bulgarian constitution of 1879 contained guarantees for its Greek and Turkish minorities.<sup>2</sup>

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1 An excellent survey of the early treatment of minorities is Muldoon, *The Development of Group Rights*, in J. SIGLER, *MINORITY RIGHTS: A COMPARATIVE ANALYSIS* 31 (1983).

2 The Bulgarian Constitution of 1879 is reprinted in C. BLACK, *THE ESTABLISHMENT*

To date, the most conscious and comprehensive attempt to protect ethnic and other minorities through international legal means was through the so-called minority treaties adopted at the end of the First World War and subsequently overseen by the League of Nations.<sup>3</sup> These treaties fell within three categories, although the substantive protections included in each were relatively similar.<sup>4</sup> The first group of treaties included those imposed upon the defeated states of Austria, Hungary, Bulgaria, and Turkey. The second included either new states created out of the dissolution of the Ottoman Empire or states whose boundaries were altered specifically to respond to what President Wilson referred to as "self-determination"; in this group were Czechoslovakia, Greece, Poland, Romania, and Yugoslavia. Finally, special provisions relating to minorities were included in the international regimes established in Åland, Danzig, the Memel Territory, and Upper Silesia.

Among the protections commonly included in the first two categories of treaties were the right to equality of treatment and nondiscrimination; the right to citizenship, although a minority group member could opt to retain another citizenship if desired; the right to use one's own language; the right of minorities to establish and control their own charitable, religious, and social institutions; a state obligation to provide "equitable" financial support to minority schools (in which instruction at the primary level would be in the minority language) and other institutions; and recognition of the supremacy of laws protecting minority rights over other statutes.<sup>5</sup> A certain degree of territorial autonomy was

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OF CONSTITUTIONAL GOVERNMENT IN BULGARIA 291 (1943).

3 Perhaps the best and most detailed treatment of the adoption and implementation of the treaties is C. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 212-423 (1934); see also F. CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES at 16-26, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1, U.N. Sales No. E.78.XIV.1 (1979).

4 The unilateral declarations to guarantee minority rights made by states before the League of Nations might be considered to constitute a fourth category. See F. CAPOTORTI, *supra* note 3, at 18; Ermacora, *The Protection of Minorities Before the United Nations*, 182 RECUEIL DES COURS 247, 258-59 (1983).

5 See generally I. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 17-20 (1955); O. JANOWSKY, NATIONALITIES AND NATIONAL MINORITIES 112-15 (1945); C. MACARTNEY, *supra* note 3, at 273-94, 502-06; F. CAPOTORTI, *supra* note 3, at 18-19; U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, TREATIES AND INTERNATIONAL INSTRUMENTS CONCERNING THE PROTECTION OF MINORITIES 1919-1951 Paras. 2-12, U.N. Doc. E/CN.4/Sub.2/133 (1951) [hereinafter TREATIES AND INTERNATIONAL INSTRUMENTS].

provided for the Åland Islands,<sup>6</sup> Ruthenia in Czechoslovakia,<sup>7</sup> the Valachs of Pindus in Greece,<sup>8</sup> and the Transylvanian Saxons and Szeklers in Romania.<sup>9</sup>

The minority guarantees built into the various post-1919 treaties were not inserted to redress earlier depredations by empires (despite such atrocities as the Armenian genocide in 1915-16), but rather to assuage and protect those "national" minorities whose claims to self-determination were not recognized by the victorious Great Powers. Extensive critiques of the minority treaties have been written and need not be repeated here; there can be little doubt about their ultimate failure.<sup>10</sup> Nevertheless, the result of the Versailles Treaty was a map of Europe that more closely approached the theoretical goal of a collection of true "nation states" than did pre-war Europe, and often cumbersome supervisory mechanisms adopted by the League of Nations to examine minority questions did, on occasion, serve their intended purposes.<sup>11</sup>

Three aspects of the League of Nations treaties should be underscored. First, the minority protections set forth therein were imposed only on a few selected states; no suggestion was made that the Great Powers should be bound by similar obligations. Secondly, the treaties guaranteed what by that time had come to be viewed as traditional minority rights dealing with religion, language, and cultural activities. They did not imply any broader economic or political autonomy, except in the special cases of Danzig,

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6 See *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question*, LEAGUE OF NATIONS O.J. Spec. Supp. 3 (1920); *The Åland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921).

7 The Treaty of St. Germain-en-Laye provided for the "fullest degree of self-government compatible with the unity of Czechoslovakia" in Ruthenia, including local legislative power over all linguistic, scholastic, and religious questions, local administration, and such other matters as might be delegated by the Czechoslovakian government. Cf. TREATIES AND INTERNATIONAL INSTRUMENTS, *supra* note 5, at para. 16.

8 The 1920 Treaty of Sèvres granted the Valachs authority over religious, charitable, and scholastic matters and also confirmed Greece's recognition of the autonomy of Mt. Athos guaranteed under the Treaty of Berlin. *Id.* at para. 14.

9 Article 11 of the Treaty of Paris granted local autonomy in scholastic and religious matters, "subject to control of the Romanian State." *Id.* at para. 17.

10 See, e.g., I. CLAUDE, *supra* note 5, at 31-50; F. CAPOTORTI, *supra* note 3, at 25-26.

11 See generally C. MACARTNEY, *supra* note 3, at 308-69; L. SOHN and T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 213-306 (1973); F. CAPOTORTI, *supra* note 3, at 20-24.

Memel, and Upper Silesia. Third, the purported "self-determination" of certain nationalities resulted, in fact, from the dictates of the Great Powers; the minorities involved were permitted to lobby in Paris, but not to vote at home.

It was primarily in the European arena that concepts of minority rights and nationalism developed in the nineteenth and early twentieth centuries. The colonial empires were notorious for ignoring ethnic, linguistic, or other "national" considerations, leaving such complexities to be dealt with by the independent states that emerged from decolonization.<sup>12</sup> While African and Asian nations or ethnic groups may often have been set against one another by colonial powers, there seems to have been no concern for the protection of "minorities"—unless it was the consolidation and protection of the privileges of the white colonist.

The individualistic orientation of anglophone countries such as Australia, Canada, and the United States left little room for concern with the rights of minority groups. The American "melting pot" was concerned only (and rarely) with individual equality and nondiscrimination. Indigenous groups were given no recognition in the Western Hemisphere by the settler populations.<sup>13</sup>

The new United Nations had little difficulty ignoring the preoccupation with minority issues that was the hallmark of its predecessor. The United Nations Charter contains no provision specifically addressing the issue of minority rights. Instead of adopting the League of Nations approach of attempting to resolve the territorial-political problems posed by the existence of minority groups within a state (particularly those which had linguistic or ethnic ties to neighboring states) by boundary adjustments that might more accurately reflect a true nation state, the drafters of the United Nations Charter seemed to assume: 1) that European and other minorities would be satisfied if their individual rights,

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12 *But cf.* D. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 75, 76 (1985):

The boundary-drawing process [in colonial territories] frequently took ethnic interests into account, and boundaries were often redrawn later by colonial powers in response to ethnic demands . . . . What the colonialists did that was truly profound, and far more important for ethnicity, was to change the scale of the polity by several fold. The colonies were artificial, not because their borders were indifferent to their ethnic composition, but because they were, on the average, many times larger than the political systems they displaced or encapsulated.

*Cf. id.* at 149-60.

13 *See generally* Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649 (1988).

particularly those of equality and nondiscrimination, were respected; and 2) that reference to the principle of self-determination would be adequate to resolve the problem of colonialism.

While the Universal Declaration of Human Rights,<sup>14</sup> adopted by the United Nations General Assembly in 1948, makes no specific mention of minority rights, the United Nations became actively involved in minority issues during the 1950s. The ultimately unimplemented proposal for a Free Territory of Trieste and the United Nations-approved establishment of an autonomous Eritrea federated with Ethiopia both addressed minority situations, although each envisioned a greater degree of political autonomy than would traditionally have been reserved to a minority group. The United Nations Commission on Human Rights soon established a Sub-Commission on Prevention of Discrimination and Protection of Minorities, although early attempts by the Sub-Commission to address minority issues were essentially rebuffed by the Commission.<sup>15</sup>

In 1960, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention Against Discrimination in Education,<sup>16</sup> which generally recognized the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and the use or teaching of their own language. However, the latter right was dependent upon "the educational policy of each State," and the general right to minority education was not to prevent minority group members "from understanding the culture and

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14 G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). A separate part of the same resolution noted accurately, if somewhat disingenuously, that "it is difficult to adopt a uniform solution of this complex and delicate question [of minorities], which has special aspects in each State in which it arises." *Id.* at 77.

15 It requires only two pages of a 350-page report on the United Nation's human rights activities to describe the United Nation's work in the area of minority rights (apart from questions of discrimination). See UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS at 245-43, U.N. Doc. ST/HR/2/Rev.3, U.N. Sales No. E.88.XIV.2 (1988); see also F. CAPORTI, *supra* note 3, at 27-29; Humphrey, *The United Nations Sub-Commission on Prevention of Discrimination and The Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968). However, the Sub-Commission was responsible for publishing a very helpful booklet which contains excerpts from international texts for the protection of minorities and an analytical survey of the kinds of protection provided. PROTECTION OF MINORITIES, U.N. Docs. E/CN.4/Sub.2/214/Rev.1, E/CN.4/Sub.2/221/Rev.1, U.N. Sales No. 67.XIV.3 (1967). See also UNITED NATIONS SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, ACTIVITIES OF THE UNITED NATIONS RELATING TO THE PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/194 (1958).

16 Adopted Dec. 14, 1960, 429 U.N.T.S. 93.

language of the community as a whole and from participating in its activities, or . . . prejudice[] national sovereignty."<sup>17</sup>

The drafting of binding international agreements to implement the Universal Declaration began soon after the Declaration's adoption, and article 27 of the International Covenant on Civil and Political Rights specifically addresses the issue of minority rights.<sup>18</sup> However, the Covenant addresses only minimal, traditional minority rights, i.e., cultural, religious, and linguistic rights.<sup>19</sup> In addition, rights are granted to "persons belonging to such minorities" rather than to minority groups themselves. While this latter distinction may not be important in practice, it is an indication of the individualistic orientation of the Covenant on Civil and Political Rights, as well as the reluctance to recognize the rights of groups which have not yet been satisfactorily defined.<sup>20</sup>

Unfortunately, neither the country reports filed with the Human Rights Committee under article 40 of the Covenant on Civil and Political Rights, the discussion of those reports by the Committee, nor its consideration of individual complaints filed under the Optional Protocol to the Covenant are of much help in defining the current content of minority rights under article 27 of the Covenant. Thus far, the Committee has been unable to agree on formulation of a "general comment" with respect to article 27, again underscoring the sensitivity of the subject.<sup>21</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination entered into force in 1969 and has

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17 *Id.* at art. 5(1)(c).

18 *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 56, U.N. Doc. A/6316 (1966): "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."

19 *Cf.* Sohn, *The Rights of Minorities*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 270-75, 282-87* (L. Henkin ed. 1981).

20 Perhaps it should be noted that neither the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, nor the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, refers to minority rights; the African Charter on Human and Peoples' Rights, concluded June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), reprinted in 21 I.L.M. 59, contains several references to "peoples," but none to minorities.

21 *See, e.g.*, HUMAN RIGHTS COMMITTEE, SUMMARY RECORD OF THE 607TH MEETING, U.N. Doc. CCPR/C/SR.607 (1985); HUMAN RIGHTS COMMITTEE, SUMMARY RECORD OF THE 618TH MEETING, U.N. Doc. CCPR/C/SR.618 (1985); HUMAN RIGHTS COMMITTEE, SUMMARY RECORD OF THE 624TH MEETING, U.N. Doc. CCPR/C/SR.624 (1985).

been ratified by over 100 states.<sup>22</sup> "Racial discrimination" under the convention is defined in article 1 as any distinction "based on race, colour, descent, or *national or ethnic origin*"<sup>23</sup> which impairs the exercise of human rights. Article 2 of the convention requires, inter alia, that parties take, in appropriate circumstances, "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."<sup>24</sup>

States are obligated under article 9 to submit periodic reports on their implementation of the convention to the Committee on the Elimination of Racial Discrimination (CERD),<sup>25</sup> and some of these reports discuss issues related to minorities in some detail.<sup>26</sup>

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities was finally able to address the issue of minorities in some depth in the mid-1970s. Its Special Rapporteur, Francesco Capotorti, completed in 1978 what has remained the leading study on discrimination against minorities.<sup>27</sup> The Sub-Commission subsequently suggested preparation of a Declaration on the Rights of Minorities, and a draft declaration was submitted to the United Nations Commission on Human Rights by Yugoslavia in 1979.<sup>28</sup> A revised Yugoslav draft—which became the basic working draft—was put forward in 1981,<sup>29</sup> and since 1979 the Commission has been considering the draft declaration in an "open-ended" working group which meets during the Commission's annual sessions.

22 *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969).

23 *Id.* at 216 (emphasis added).

24 *Id.* at 218.

25 *Id.* at 224-26.

26 A summary of many of these reports may be found in H. HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 64-69 (1990). See also T. MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 36-44 (1986).

27 F. CAPOTORTI, *supra* note 3. Capotorti offered what is probably the most commonly cited definition of a minority:

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

*Id.* at 96.

28 U.N. Doc. E/CN.4/L.1367/Rev.1 (1979).

29 U.N. Doc. E/CN.4/Sub.2/L.734 (1981).



The Commission's working group completed a first reading of its draft declaration in 1990<sup>30</sup> and completed work on the second reading of the Preamble and the first two articles in 1991;<sup>31</sup> a special meeting of the working group was to be held in late 1991, and the full Commission may consider the final text at its 1992 session. By any estimate, the draft is a relatively conservative document, and there are numerous clauses upon which full agreement has not been reached. Nevertheless, the declaration represents the first attempt by the international community in over 60 years to set forth detailed norms relating to minorities.

The Preamble recognizes that protecting minority rights will "contribute to the political and social stability of States in which they live" and, in turn, "contribute to the strengthening of friendship and cooperation among peoples and States."<sup>32</sup>

At its 1991 session, the Commission's working group decided that it did not need to make a formal choice between recognizing the individual rights of *members* of minority groups or the collective rights of groups per se, although the title and first article of the declaration refer to "persons belonging to . . . minorities."<sup>33</sup> The working group also decided that no definition of "minority" was necessary, although disagreements over whether the declaration should concern only "national" as opposed to "ethnic, linguistic, and religious" minorities occupied much of the working group's time.<sup>34</sup> The not entirely satisfactory decision reached was to utilize the expression "national or ethnic, religious and linguistic minorities" in all provisions of the draft, rather than equating the four qualifying terms or eliminating any of them.<sup>35</sup>

Other recent United Nations initiatives of relevance to developing standards for the protection of minorities include adoption

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30 REPORT OF THE WORKING GROUP ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES at 11 U.N. Doc. E/CN.4/1990/41 (1990).

31 See REPORT OF THE WORKING GROUP ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES at 20, U.N. Doc. E/CN.4/1991/53 (1991).

32 *Id.*

33 *Id.* at paras. 11-13. While this distinction may be of some theoretical interest, it would seem to have greater implications for jurisdictional questions and access to international monitoring mechanisms than for the substance of the rights guaranteed.

34 See *id.* at paras. 7-10, 28-30. Only "ethnic, religious, and linguistic" minorities are referred to in article 27 of the International Covenant on Civil and Political Rights, *supra* note 18, at 56, while only "national" minorities have been formally included within the concerns of the Conference on Security and Cooperation in Europe.

35 *Id.* at para. 29.

by the General Assembly in 1981 of a Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief;<sup>36</sup> appointment of special rapporteurs by the Commission on Human Rights and its Sub-Commission to consider more concrete aspects of religious intolerance and discrimination;<sup>37</sup> and a 1988 decision by the Sub-Commission to consider "the possible mechanisms and procedures which the Sub-Commission might establish to facilitate the peaceful and constructive resolution of situations involving racial, national, religious, and linguistic minorities."<sup>38</sup>

The most recent and most progressive intergovernmental formulation of principles of minority rights was adopted in June 1990, during the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE). This rather cumbersome title reflects the fact that the meeting was the second in a series of three meetings agreed to at the last full-scale CSCE follow-up meeting, which concluded in Vienna in January 1989.

While the 1975 Helsinki Final Act<sup>39</sup> and subsequent CSCE documents<sup>40</sup> referred very generally to the rights of "national minorities," the movements toward democratization in Eastern Europe in 1989—and the attendant resurgence of ethnic conflict in the Soviet Union and elsewhere—created a surprising sense of

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36 G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1981), reprinted in 21 I.L.M. 205. Cf. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

37 See *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Comm'n on Hum. Rts. Res. 1986/20, U.N. ESCOR Supp. (No. 2) at 67, U.N. Doc. E/1986/22 (1986); *Elimination of All Forms of Religious Intolerance*, Sub-Comm'n Res. 1983/31, U.N. Doc. E/CN.4/1984/3 (1983) at 98.

38 *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Fortieth Session*, Sub-Comm'n Res. 1988/36, U.N. Doc. E/CN.4/1989/3 at 64. Subsequent reports have considered national experience regarding peaceful solutions of minority problems and ways and means to facilitate such peaceful solutions. See PROGRESS REPORT SUBMITTED BY MR. ASBJØRN EIDE TO THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1990/46 (1990).

39 Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, reprinted in 14 I.L.M. 1292.

40 See, e.g., Concluding Document of the Madrid Session of the Conference on Security and Co-Operation in Europe, Nov. 11, 1980-Sept. 9, 1983, reprinted in 22 I.L.M. 1398 (Remarks made to the session by U.S. Secretary of State George Schultz may be found *id.* at 1395.); Concluding Document of the Vienna Meeting of the Conference on Security and Co-Operation in Europe, Nov. 4, 1986-Jan. 17, 1989, at paras. 18 and 19, reprinted in 28 I.L.M. 527.

urgency and willingness to address minority issues at the Copenhagen meeting in 1990. The final document dealt in some detail with principles of democracy, the rule of law, and a variety of other human rights issues, including a section on the rights of national minorities.<sup>41</sup>

While the Copenhagen principles are vague in many respects and leave a great deal of discretion to governments in considering minority questions, they do represent a significant advance over efforts to define minority rights in other international forums, including the United Nations. Of course, some provisions, such as those relating to equality and nondiscrimination, essentially repeat existing human rights norms, although their reiteration in the context of minority rights is welcome. A similar observation might be made with respect to various provisions relating to religious rights and freedom of information and expression.

The three areas in which the Copenhagen principles contribute most significantly to minority rights are the use of minority languages, education, and political participation.

The denial of linguistic rights has practically been a hallmark of the repression of minorities, despite the fact that the right to use one's own language falls within the scope of contemporary norms concerning freedom of expression. Paragraph 32 of the Copenhagen Principles states that persons belonging to national minorities "have the right freely to express, preserve and develop their . . . linguistic . . . identity," while subsequent provisions mandate free use of one's mother tongue in private as well as in public;<sup>42</sup> freedom to conduct religious educational activities in one's mother tongue;<sup>43</sup> freedom to disseminate, have access to and exchange information in one's mother tongue;<sup>44</sup> and "wherever possible and necessary," the opportunity to use one's mother tongue before public authorities, "in conformity with applicable national legislation."<sup>45</sup>

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41 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, June 29, 1990, at paras. 30-40.7, *reprinted in* 11 HUM. RTS. L.J. 232 (1990) [hereinafter Copenhagen Document]. A three-week CSCE meeting of experts on minority rights was held in Geneva in July 1991, but its conclusions added little to the Copenhagen principles.

42 *Id.* at para. 32.1.

43 *Id.* at para. 32.3.

44 *Id.* at para. 32.5.

45 *Id.* at para. 34.

The last-mentioned provision does not require a state to provide translation services for every member of a linguistic minority within its territory. Nevertheless, it should be read to imply a good faith obligation on the part of every state to make public services and information available at least to major segments of the population who may not speak the "official" language of the country.<sup>46</sup> In any event, no one should suffer discrimination for speaking his or her own language, as has been the case with Kurds in Turkey, Turks in Bulgaria, and Native Americans in our own country.

Education is fundamental to the preservation of any culture, minority or majority. It has been the primary vehicle through which majority societies have attempted to assimilate minorities, and it should not be surprising that minority communities view the right to maintain their own educational institutions as essential for self-preservation. The right to education is inextricably linked to the right of minorities "to develop their culture in all its aspects, free of any attempts at assimilation against their will."<sup>47</sup> The Copenhagen Principles specifically recognize the right of national minorities "to establish and maintain their own educational . . . institutions, . . . which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation."<sup>48</sup>

Of course, the state retains the right to require that schools within its jurisdiction meet certain universal standards, so long as those standards do not violate fundamental religious, linguistic, or other rights. The Copenhagen Principles define the obligations of states in this respect quite carefully:

States will endeavor 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 tongue or in their mother tongue . . . .

In the context of the teaching of history and culture in educational establishments, they will also take account of the

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46 In some respects, this obligation might be compared to that placed upon public authorities to ensure access for disabled members of society, although a given individual may be more able to learn a second language than to overcome a physical or mental disability. The principle of equal and effective access is the same.

47 Copenhagen Document, *supra* note 41, at para. 32.

48 *Id.* at para. 32.2.

history and culture of national minorities.<sup>49</sup>

These provisions may not guarantee the right of minority communities to establish their own unilingual schools (unless students attend such schools in addition to any required attendance at public schools), nor do they mandate bilingual education in public schools. The principle at stake is not use of language per se; it is rather the ability of a minority to preserve its cultural distinctiveness, including its language, in a manner that is compatible with its relationship with the majority society in which it lives.

Potentially the most far-reaching paragraph in the Copenhagen Principles is paragraph 35, which concerns the participation of minorities in public affairs. While the very weak formulation of this principle—the efforts by states to establish “appropriate local or autonomous administrations” are merely “note[d]”<sup>50</sup>—may be read as requiring little more than one person-one vote, a more appropriate reading would underscore the notion of *effective* participation in political life. This suggests meaningful de facto participation, which may include certain “special measures” comparable to those required to ensure “full equality” for minorities in the exercise of human rights.<sup>51</sup> The formulation adopted certainly does not require that minorities or their members be given a veto over the democratic decisions of the majority, but it does mean that “mere” democracy may not be enough.<sup>52</sup>

“Autonomy” is not a term of art, nor can its adoption resolve every minority-majority conflict.<sup>53</sup> Nevertheless, the reference to “appropriate local or autonomous administrations”<sup>54</sup> in paragraph 35 is an important indicator of the kinds of solutions that the CSCE States may be willing to envisage, while continuing to respect the principle of “territorial integrity” referred to in paragraph 37.<sup>55</sup> This pragmatic approach (critics might call it mini-

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49 *Id.* at para. 34.

50 *Id.* at para. 35.

51 *Id.* at para. 31.

52 For example, there were few credible allegations (apart from the time-honored practice of gerrymandering) that elections in Northern Ireland between 1920 and 1972 were technically unfair, yet the unchallenged dominance of a single (democratically elected) party resulted in the total exclusion from power of members of the Catholic-Nationalist minority.

53 See generally H. HANNUM, *supra* note 26.

54 Copenhagen Document, *supra* note 41, at para. 35.

55 See also Proposal For a European Convention For the Protection of Minorities, art. 14, reprinted in 12 HUM. RTS. L.J. 270 (1991):

malist) is preferable to the contentious incantation of a purported "people's" right to self-determination, with the latter's implied endorsement of secession in at least some circumstances.

Finally, mention should be made of a proposed European Convention for the Protection of Minorities, a draft of which has been prepared by a nongovernmental consultative body of the Council of Europe, the European Commission for Democracy through Law.<sup>56</sup> Noting that "an adequate solution to the problem of minorities in Europe is an essential factor for democracy, justice, stability and peace,"<sup>57</sup> the draft proclaims a fairly extensive set of substantive protections, including, *inter alia*, provisions relating to use of language before public authorities and education.<sup>58</sup> The draft concerns only ethnic, religious, and linguistic minorities, defined as

a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion, or language.<sup>59</sup>

The draft European Convention also would create a European Committee for the Protection of Minorities (separate from the existing European Commission of Human Rights). States would be obligated to submit periodic reports to the Committee, which could (upon a two-thirds vote) make "any necessary recommendations" to a state party.<sup>60</sup> States could, but need not, grant jurisdiction to the Committee to receive complaints from other states and/or individuals alleging violations of the convention.<sup>61</sup> The draft has not yet been considered by the member states of the

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1. 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.

2. 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.

*Id.*

56 *Id.*

57 *Id.*, Preamble.

58 *Id.* at arts. 8-9.

59 *Id.* at art. 2.

60 *Id.* at art. 24.

61 *Id.* at arts. 25, 26.

Council of Europe, and one might anticipate substantial changes prior to its adoption.

Despite the contemporary initiatives outlined herein, the substantive development since 1945 of international law related to minorities has been minimal. Positive conventional obligations are found only in article 27 of the Covenant on Civil and Political Rights<sup>62</sup> and as part of the prohibition of racial discrimination contained in the Convention on the Elimination of All Forms of Racial Discrimination.<sup>63</sup> Nevertheless, there does seem to be a consensus about at least the minimum content of international minority rights.

Fundamental, of course, are the principles of equality before the law and nondiscrimination, which have by now acquired the status of customary international law binding on all states.<sup>64</sup>

The right "to profess and practise their own religion" set forth in article 27 of the Covenant on Civil and Political Rights has probably been subsumed for all practical purposes into the guarantees of religious freedom included in the covenant and other human rights instruments. While the growing attention to the issue of religious intolerance in recent years is sad testimony to violations of the right to practice one's religion, the right's legal status has not been questioned.<sup>65</sup>

The right to enjoy one's own culture also seems to be well accepted, although its meaning is less clear. One leading commentator concludes that this "includes the right to have schools and cultural institutions,"<sup>66</sup> but the extent of protection for other cultural manifestations and of any positive obligation on states to promote or support minority cultures is rather murky.<sup>67</sup> While

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62 *Supra* note 18.

63 *Supra* note 22.

64 *See, e.g.*, Lillich, *Civil Rights*, in I HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 132-33 (T. Meron ed. 1984); Ramcharan, *Equality and Nondiscrimination*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1984) 249-50.

65 *See* Sullivan, *supra* note 36.

66 Sohn, *supra* note 19, at 284.

67 F. CAPOTORTI, *supra* note 3, at 36-37, concludes that there is a positive obligation on states to intervene on behalf of or provide support to minorities. "The reading is logical, but has not as yet become part of any subsequent instrument, nor does it command universal assent." P. THORNBERRY, *MINORITIES AND HUMAN RIGHTS LAW* 7 (Minority Rights Group Report No. 73, 1987). The Norwegian government has accepted that it has affirmative obligations with respect to aiding the preservation and development of Sami culture; *see* Statement by the Observer Delegation of Norway to the Fifth Session of the U.N. Working Group on Indigenous Populations. *Cf.* Sohn, *supra* note 19, at 284-85;

societies vary greatly in their degree of cultural tolerance, most do forbid cultural and/or religious practices that offend fundamental community beliefs (e.g., polygamy, divorce, use of alcohol) or which are deemed to be outweighed by health or safety concerns (e.g., restrictions on Sikhs' carrying of the short dagger known as the *kirpan* or the provision of medical treatment to minors despite the religious objections of their parents).<sup>68</sup>

Use of language is one of the most divisive issues in minority-majority relations, although the right to use one's own language is perhaps the most widely guaranteed minority right in international law.<sup>69</sup> "Many factors have to be taken into account in the formulation of a language policy and the question is so complex that any solution given to it may contain in itself the seeds of a potential conflict."<sup>70</sup> Restrictions on the private use of language would seem to be clearly unjustifiable, and specific provisions for use of minority languages in court also are common.

The reluctance of international law to address minority rights reflects a continuing lack of consensus among states as to the most appropriate means to resolve minority-majority conflicts. At least five socio-political realities have contributed to these difficulties in defining minorities and minority rights.

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 ideally viewed 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

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Burtscher, *Les Lacunes de L'Ordre Juridique International en Matière de Protection de Minorités*, 5 *EUROPA ETHNICA* 57 (1986).

68 See generally T. FRANCK, III *HUMAN RIGHTS IN THIRD WORLD PERSPECTIVE* 455-510 (1982); J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 1053-81 (1986); S. POULTER, *ENGLISH LAW AND ETHNIC MINORITY CUSTOMS* (1986); P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 321-26 (1983).

69 See the list of "special protective measures of an international character" dealing with language, in *PROTECTION OF MINORITIES*, *supra* note 15, at 50-55. A compilation of constitutional provisions relating to linguistic rights may be found in A. BLAUSTEIN & D. BLAUSTEIN-EPSTEIN, *RESOLVING LANGUAGE CONFLICTS: A STUDY OF THE WORLD'S CONSTITUTIONS* (1986).

70 F. CAPOTORTI, *supra* note 3, at 39.



Marxist societies (although the existence of group or community rights and obligations is often better recognized in African and Asian societies).

Second, the reality of minorities and largely heterogeneous states in the contemporary world is similarly at odds with the theory of the nation state as it developed in the nineteenth century. While the rhetoric of one-people-one-state was not abandoned as the concept of self-determination developed in the post-1945 period, the paradigm of the nation state was conveniently ignored in practice. Former colonies have accepted without question the boundaries drawn by the colonial powers, despite the fact that those boundaries often bear little relevance to ethnic, religious, or linguistic realities.

Third, there is a fundamental fear on the part of *all* countries, and especially newer states, that the recognition of minority rights will encourage fragmentation or separatism and undermine national unity and the requirements of national development. While Bangladesh stands as the only example of a successful secession since 1945, the violent conflicts in the Congo, Biafra, Punjab, Sri Lanka, Yugoslavia, and Northern Ireland (as well as more peaceful secessionist movements in Canada and the USSR), underscore that this fear remains well-founded.

Fourth, 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 may well 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.

Finally, the difficulties faced by states in recognizing minority rights have their counterpart in increasing fears among minority groups themselves. As noted in a recent U.N. report, in typically understated fashion:

In many countries there are ethnic or religious groups that feel that they are being discriminated against indirectly, for instance; through inadequate resources being directed to their part of the country; in the award of government jobs or housing; or through a failure by society to make every allowance for their customs and traditions. Even though the justice

of their grievances might not be apparent to neutral observers, to those involved the supposed injustices can be sufficient to justify violence and terrorism. It has proved difficult for society to deal with these internal problems while continuing to safeguard the human rights of all their [sic] members.<sup>71</sup>

These fears are in part a reaction to the nonrecognition of minority rights as such since the Second World War, as the concept of minorities has been sacrificed to state-building despite the fact that ethnicity and/or religion continues to define many internal conflicts.

In addition, ethnic or linguistic groups may fear losing their identity due to increased pressures from dominant modern society (often, though not necessarily, Western), intensified by developments in telecommunications and other technologies. This has led to a cultural resurgence and reaffirmation of minority differences within many such groups.

By refusing to recognize even the limited "traditional" rights of minorities to religion, language, and culture, many states have been themselves primarily responsible for the resurgence of minority demands in recent years. Without underestimating the role that domestic and foreign political opponents may play in fanning minority discontent, that discontent need rarely be fabricated. Indeed, many so-called "minority" problems could be resolved through the effective guarantee of "ordinary" human rights, such as the rights to life, personal security, nondiscrimination, and participation in a democratic political process.

However, given the highly emotional domestic context of most minority-majority conflicts, international law may be able to formulate principles which could guide the new partnerships which need to be created between minorities and the majority. It is not clear whether these principles should be general and declaratory or whether an attempt should be made to develop binding international guarantees and enforcement mechanisms. Perhaps the best solution—and the one most likely to be acceptable to most countries—would be to proclaim nonbinding principles, along the lines of the declaration being considered by the Conference on Security and Cooperation in Europe, but to create at the same time an effective international mechanism for monitoring and/or

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71 REPORT OF THE SECRETARY-GENERAL TO THE INTERREGIONAL CONSULTATION ON DEVELOPMENTAL SOCIAL WELFARE POLICIES AND PROGRAMMES: SOCIAL POLICY IN THE CONTEXT OF CHANGING NEEDS AND CONDITIONS, at 31, U.N. Doc. E/CONF.80/2 (1987).

mediating conflicts. In any event, it may be too late for international norms to be limited solely to guarantees for a few minority schools and newspapers.

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