MINORITY RIGHTS UNDER INTERNATIONAL LAW

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Abstract

The protection of minorities is one of the oldest concerns of international law. The root of the minority problem lies in discrimination, oppression, exclusion and denial of identity. These issues pertaining to minorities have been addressed by states individually and as part of larger international society by devising different systems. The protection of minority rights has perhaps never been as relevant as today. This paper seeks to understand the present state of minority rights in international law. It begins by addressing the central question of minority rights discourse as to who is a minority and why it is important to arrive at a consensus for the definition of the term. It then seeks to explore the need of minority rights. It also briefly traces the development of minority rights in international law and outlines its main content in detail.

I Introduction

THERE IS hardly any country in the world that does not have minorities within its territory characterised by their ethnic, religious or linguistic identity difference from that of the majority population. Although there are no accurate statistics, the United Nations (UN) estimates suggest that 10 to 20 percent of the world's population belongs to minority groups. In most cases minorities are among the most disadvantaged groups in society and their members are often subjected to injustice and socio-economic discrimination. Their exclusion from power is often combined with the denial of dignity, identities and cultures. They are also excluded from meaningful participation in public and political life.[1]

Even in this modern age, cases of genocide of minorities are being reported.[2] Although protection of minorities has been one of the oldest

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1 Li-ann Thio, "Battling Balkanization: Regional Approaches toward Minority Protection beyond Europe" 43 *Harvard International Law Journal* 410 (2002).

2 G. Alfredsson, "Minority Rights and Peace" in Snezna Trifunovska (ed.), *Minorities in Europe* 3 (TMC Asser, The Hague, 1999).

concerns of international law[3] but the need for their protection has perhaps never been as urgent as it is in our time.

II Who are minorities?

Any discussion on the current state of minority rights must precede a general understanding of the term 'minority' as it is full of complexities and controversies.[4] Surprisingly, until the present day, despite various attempts, there is no generally agreed definition of the term 'minority' in international law.[5] There are also no settled criteria for determining a minority. This situation has arisen due to a number of factors. There are strong conceptual differences and states often hold extremely politicised and uncompromising standpoints. The difficulty is also because of its inherent ambiguous nature. In fact each and every individual, in one form or other belongs to a minority.[6]

The failure to arrive at a consensus definition of the term minority certainly impinges on the substantive rights of minorities. States attempting to deny minorities their rights often take advantage of definitional difficulties.[7] Interestingly, however, the absence of a general definition of the term minority has not weighed on the standard-setting processes within the UN or at European level. On most occasions the framers lack consensus on the definition of minority and the adoption of the very instrument to protect their rights. In such a situation they have rather postponed the task for later consideration to avoid any further delay.[8]

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3 Patrick Thornberry, *International Law and the Rights of Minorities* 1 (Clarendon Press, Oxford, 1991) ; Andre L., "Minority as inferiority: minority rights in historical perspective" 34 *Rev. of Int. St* 243 (2008).

4 For a detailed discussion see, Aftab Alam, "The Concept of 'Minority' in International Law", 54 *Indian Journal of International Law* 92-124 (2014).

5 With the exception of the 1994 Convention of the Central European Initiative for the protection of minority rights (art. 1), not a single international legally binding document contains a definition of this concept, which is wrought with sensitivities. See also, A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International law* 69 (Intersentia, Antwerp, 2002).

6 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights* 14 (Kluwer Law International, The Hague, 2000).

7 *Id.* at 10.

8 During drafting of the UN declaration on minorities no consensus could be reached on the issue of defining minorities and thus, it was postponed for later consideration to avoid further delay. See United Nations Commission on Human Rights (UNCHR)

Notwithstanding definitional difficulties in most cases it is self-evident which groups constitute minorities. Although the existence of minorities does not depend on legal acts of recognition, such acts may benefit the people concerned. Still one can't completely undermine the significance of defining the term. Sohn asserts that a definition of the term 'minority' is not a question of only theoretical and academic influence. [9] It is a practical question, as it is likely to arise in the form of whether a particular group qualifies as a 'minority'.[10] Akermark stresses that the lack of definition gives states an excuse to refuse the existence of minorities in their own territories,[11] and Gilbert rightly argues that this is problematic from the point of view of law since it raises the fundamental question of the scope and application of the convention as one cannot accord rights to wholly nebulous concepts.[12]

In view of the legal significance, numerous attempts have been made over the years at different international forums to clarify the essence of the term 'minority'. One of the first 'official' attempts to define 'minority' was undertaken by the Permanent Court of International Justice (PCIJ) in its advisory opinion in connection with the immigration of the Greco-Bulgarian Communities. [13] The definition by the PCIJ refers to minority in the context of community as a "group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting

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Working Group,Report on Torture and other Cruel,Inhuman or Degrading Treatment or Punishment, UN Doc E/CN 4/1986/43, paras 9-10 (Feb 19, 1986). The working method was to proceed with the operative arts, returning to the definitional question after the full text was provisionally adopted.

9 L. Sohn, "The Rights of Minorities" in L. Henkin (ed.), *The International Bill of Rights* 280 (Columbia University Press, New York, 1981).

10 *Ibid.*

11 Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* 87 (Kluwer Law International, The Hague, 1997) .

12 G. Gilbert, "The Council of Europe and Minority Rights" 18 *Human Rights Quarterly* 162 (1996).

13 Greco-Bulgarian Communities, Advisory Opinion, 1930 PCIJ (ser. B). *Available at*: http://www.worldcourts.com/pcij/eng /decisions/1930.07.31 greco-bulgarian.htm (last visited on June 15, 2014).

one another."[14] The PCIJ definition employed two tests to determine minority status. *First*, the objective test, the existence of facts likes race, religion, language and tradition. *Second,* the subjective test, the 'sentiment of solidarity' and 'the desire to preserve traditions'. The PCIJ elaboration of the 'minority' concept did not contain a single reference to numerical factor, a requirement of non-dominance or a nationality requirement.

The most extensively cited definition of 'minority' is probably the one proposed by Francesco Capotorti who had carried out the most prestigious study for the UN on the question of minority.[15] He defined 'minority' as "a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[16] In 1984 the Commission on Human Rights (CHR) requested the sub-commission to explore once again the issue of defining 'minority' and the task was handed over to Jules Deschenes.[17] According to him, a minority is "[a] group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law."[18] There was nothing novel in the definition of minorities provided by Deschenes.

The above discussion clarifies that despite attempts from different corners in different phases of the history, an exhaustive and universally accepted definition of the term 'minority' is still eluding.[19] Our experiences also show that the task of reaching at such a definition is not in the offing either. In the

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14 *Ibid.*

15 Capotorti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN 4 Sub2/384/Rev 1 (1979).

16 *Id.*, para 568.

17 Jules Deschênes, Proposal concerning a definition of the term 'minority', UN Doc. E/CN.4/Sub.2/1985/31 (May 14, 1985).

18 *Id.*

19 The UN Secretariat has issued a compilation of definition proposals over a 40-year period, in document E/CN.4/1987/WG.5/WP.1.

absence of a clearly formulated definition, most scholars, however, agree that it is possible to find out some elements of the concept of minority endorsed by international law.[20] While analysing the different definitions proposed by academia and international organisations one can easily deduce certain objective and subjective elements for a possible agreed definition as most of the definition proposals have common components. Such definitional characteristics may cover most possible situations of minorities.[21] Nonetheless, some of these characteristics are not without any controversy, indicating our inability to arrive at a consensus definition. Still there seems general agreement about the requirement of a numerical inferior position, political non-dominance, ethnic, religious or linguistic characteristics which are different from the rest of the population, and the collective desire to preserve their distinct identity.[22] These elements certainly help clarifying the essence of the concept of minority in international law.

III Why do we need minority rights?

It is a matter of fact that in most multi-ethnic societies the majority communities tend to enjoy inherently dominant socio-economic and political position in comparison to that of the minorities. Minorities are often excluded from the decision making processes and power centres endangering their collective identity and the rights of their members. The non-dominant and inferior status of minorities renders them subject to discrimination at different stages by both state and private actors. The threat to minorities' distinct identities is also a reality of the day. Thornberry remarks that in many states, the culture, history, and traditions of minority groups are subject to "distorted representations, producing low self-esteem in the groups and negative stereotypes in the wider community."[23]

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20 Gaetano Pentassuglia, *Minorities in International Law* 55-66 (Council of Europe, Strasbourg, 2003).

21 *Id.* at 57-58.

22 For a more in depth discussion, see K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self Determination* 30-48 (Kluwer Law International, The Hague, 2000).

23 Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update" in A. Phillips and A. Rosas (eds.) *Universal Minority Rights* 49 (Minority Rights Group and Abo Akademi University, London and Abo, 1995).

In multi-ethnic societies, according to Kymlicka, states face a choice of pursuing either "integration" or "accommodation" while dealing with the question of minority rights.[24] This leaves the choice of either encouraging assimilation of minority groups to the mainstream culture or allowing minority groups to preserve their distinctiveness through separate institutions.[25] It is widely acknowledged that policy of accommodation can only help preserve the distinct identity of minorities. The policy of assimilation will destroy the identity and culture of minorities leading to their exclusion from the mainstream. Pursuant to the policy of accommodation, the need of a legal framework is always emphasised to protect the distinct identities of minority groups. It is because of their vulnerability in any given society that minority groups always need special status and protection to ensure that they also enjoy the same rights and protection as enjoyed by the majority. It is in the light of these facts that a consensus has been arrived both at international and national levels that minority groups need special rights and protections to save them from oppression, persecution and forceful assimilation, and special affirmative actions are also needed in their favour to achieve real and substantial equality in the society.[26]

Often minority rights are wrongly projected as special privileges for the minority groups. The rationale of minority rights is not to create a special pampered lot, rather it is to safeguard special needs of minority groups, preserve their distinct identity and culture and to achieve the goal of substantive equality as opposed to formal equality. In fact in *Minority Schools in Albania*[27] the PCIJ insisted on the notion of equality and held that there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which

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24 Will Kymlicka, "The Internationalization of Minority Rights" 6 *International Journal of Constitutional Law* 1-32 (2008); Yousef T. Jabareen, "Toward Participatory Equality: Protecting Minority Rights Under International Law" 41 *Israel Law Rev.* 640-41 (2008).

25 *Ibid.*

26 See Human Rights Committee, general comment 23, art. 27 (50th session, 1994); Natan Lerner, "The Evolution of Minority Rights in International Law" in Catherine Brolmann *et al.* (eds.), *Peoples and Minorities in International Law* 77 (Martinus Nijhoff, Dordrecht, 1993).

27 Minority Schools in Albania, advisory opinion, 1935 PCIJ (ser. A/B) No. 64 (Apr. 6),*available at*: http://www.worldcourts.com/pcij/eng/decisions/1935. 04.06_albania.htm (last visited on July 1, 2015).

constitutes the very essence of its being as a minority. The PCIJ stated that minority rights fall beyond purely anti-discrimination objectives rather they especially aim at preserving the characteristics which distinguish the minority from the majority, satisfying the ensuing special needs.[28]

IV Development of minority rights

The protection of minorities under international law is relatively new, although its origin can be traced back to the 17th century reforms regarding protection of religious minorities. One of the early attempts at protecting minorities was the Treaty of Westphalia, 1648 wherein state parties agreed to respect the rights of certain (not all) religious minorities within their jurisdiction. The Congress of Vienna of 1815 also dealt with the rights of minorities to some extent. The Treaty of Berlin, 1876 recognised the "traditional rights and liberties" of religious minority community of Mount Athos in Greece. In addition, the first Bulgarian Constitution of 1879 contained safeguards for its Greek and Turkish minorities.[29]

The minority protection system developed by the League of Nations through peace treaties adopted at the end of the first world war was the first remarkable, systematic and comprehensive attempt to offer legal protection to minorities at international level.[30] There were three categories of minority treaties, although substantive provisions in each were almost identical. The first one included those treaties which were imposed upon the defeated states of Austria, Hungary, Bulgaria, and Turkey. The second group of treaties included those imposed upon states like Czechoslovakia, Greece, Poland, Romania and Yugoslavia whose boundaries were altered under the self-determination principle. The third dealt with special internationalised regimes established in Aland, Danzig, the Memel Territory and Upper Silesia relating to their minorities. This also included unilateral declarations made by Albania, Lithuania, Latvia, Estonia and Iraq as a part of condition for their admission to the League of Nations.

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28 *Ibid.*

29 For more detailed historical overview see, Natan Lerner, *Group Rights and Discrimination in International Law* 22 (Martinus Nijhoff Publishers, Dordrecht/ Boston/London, 1991). An excellent survey of the early treatment of minorities is Muldoon, "The Development of Group Rights" in J. Sigler, *Minority Rights: A Comparative Analysis* 31-66 (Greenwood Press, Westport, 1983).

30 For more detailed overview see, Aftab Alam, "International Protection of Minorities: The League of Nations' Experience" 47 *Indian Journal of Politics* 18-46 (2013).

The League of Nations system created legally binding obligations through a set of international treaties formulating rules for minority protection enforced by the League Council and adjudicated by the PCIJ. This system was certainly a bold and innovative experiment and also represented an advance over the previous system not only in terms of content but also because of its guarantee system. It was, however, far from being perfect. It had significant limitations and weaknesses. Its scope embraced only the states on which the peace treaties imposed obligations. Further the system was primarily directed at achieving peace rather affording protection to minorities *per se*. The system was discriminatory as main powers like Germany, Italy *etc*., despite considerable number of minorities within their jurisdiction did not undertake any commitment to grant same rights to their minorities. Despite numerous shortcomings, merits in the League of Nations system continue to provide inspiration even today.

The UN succeeded the League of Nations as a new world organization immediately after the second world war. Unlike its predecessor, however, it took a completely different approach to the issue of the minority rights. For a long time since its creation the UN showed, if at all, little interest either to adopt the minority protection system of the league or to develop a new system of its own for the protection of minorities. One commentator wittily and aptly characterised the change of mood thus: "[a]t the end of the First World War international protection of minorities was the great fashion....Recently this fashion has become nearly obsolete. Today the well-dressed international lawyer wears human rights."[31] The UN, instead of further developing, internationalising and strengthening the existing system of protection of minorities, preferred to develop a universal system of protection of human rights for all. It was argued that a broad system of human rights supported by strong prohibition on discrimination based on race, ethnicity, language or religion would suffice to protect the legitimate interests of members of national minorities and no special measures for the rights of minorities would be required.[32] The western liberal individualism supplied the much needed philosophical succour to this approach as minority rights were viewed as counter to this philosophy.[33]

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31 Josef L. Kunz, "The Present Status of the International Law for the Protection of Minorities." 48 *American Journal of International Law* 282 (1954).

32 L Sohn, *supra* note 9 at 271; David Wippman, "The Evolution and Implementation of Minority Rights" 66 (2) *Fordham Law Rev.* 597-603 (1997).

33 *Id.* at 272.

It was against this backdrop that the issue of minorities remained excluded from the main agenda of the UN. The decline in the international concern for the protection of minorities was clearly visible. Neither the UN Charter nor the Universal Declaration of Human Rights (UDHR) did make any reference to minority rights. The demand for the universal respect for human rights and emphasis on non-discrimination remained the dominant discourse of the initial passé of the UN era. Nonetheless, efforts were made by some states to bring the issue of the protection of minorities on the main agenda of the UN. Denmark, the former Yugoslavia and the USSR proposed that a provision concerning minority rights to be included in the UDHR. The majority of member states, however, finally rejected such proposals arguing that recognition of minority rights will encourage fragmentation or separatism and undermine national unity.[34]

The UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (hereinafter, Genocide Convention), seemed to be the only exception of the post World War II trend of subsuming minority rights within the broader framework of human rights. Genocide Convention was directed against the destruction of national, racial, ethnic, and religious groups as such and accordingly guaranteed the most basic group right, the right to physical existence. Though the Genocide Convention did not directly mention minorities, they clearly stood to benefit from it. The post-cold war upsurge of ethnic conflicts in Europe and other parts of the globe sadly validated this claim.

Although no direct provision concerning protection of minority rights was inserted in the UDHR, soon the UN general assembly passed a resolution declaring that "the UN could not remain indifferent to the fate of minorities."[35] Later it was realised that further measures were needed in order to better protect persons belonging to minorities from discrimination and to promote their identity. This slight change in the UN approach was witnessed when the United Nations Commission on Human Rights (UNCHR) decided to establish a Sub-Commission on Prevention of Discrimination and Protection

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34 Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* 71 (University of Pennsylvania Press, Philadelphia, 1990).

35 See UN General Assembly Resolution adopted at its 3rd session on Dec. 10, 1948. Fate of Minorities, GA Resolution 217 C (III) (1948), *available at*: http://www.un-documents.net/a3r217c.htm (last visited on June 10, 2015).

of Minorities, although initial efforts of this sub-commission relating to minority protection were in fact rebuffed by the UNHCR itself. Until mid-1970s this sub-commission could not address the issue of minorities in some depth, when it finally succeeded in getting a provision on minority protection inserted in the draft of International Covenant on Civil and Political Rights (ICCPR) which finally became its article 27. Later in 1978 its special rapporteur, Francesco Capotorti completed the most seminal study on minorities and the sub-commission also recommended adoption of a Declaration on the Rights of Minorities.

The major UN breakthrough was the insertion of article 27 in the ICCPR. Today, in international law, article 27 is the most widely acknowledged provision affording protection to minorities. This is the first international norm that has universalized the concept of minority rights, which states:[36]

> 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 was, however, not until the 1980s and early 1990s, with the end of the cold war and with a number of highly visible and violent ethnic conflicts and with the potential for more violence that the UN and other international organizations started paying more serious attention to the fate of minorities. A strong move towards developing comprehensive minority rights regimes was clearly noticed. It was during this time that the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992[37] (hereinafter, the 1992 Declaration) was adopted by the UN general assembly in 1992. The declaration is the first instrument exclusively addressing minority rights at the international level. The declaration reflects, although not fully, an acknowledgement by the international community of the need to recognize the rights of minorities and provide for normative frameworks. It can be said that the adoption of the declaration marked the beginning of a new era in the development of international norms on minority issues, although the instrument still reflects the individualist orientation of the UN.

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36 Patrick Thornberry "Is there a phoenix in the Ashes? –International Law and Minority Rights" 15 *Texas Int'l L. J.* 443 (1980).

37 *Available at*: http://www.ohchr.org/Documents/Publications/GuideMinorities Declarationen.pdf (last visited on June 15, 2015).

The renewed interest of the international community in the field of minority rights resulted into adoption of a surprising number of international and regional especially European declarations, resolutions, reports and studies, and even treaties designed to further strengthen the legal protection of minorities.[38] The European institutions like the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) have done remarkable work in the field of minority protection in the recent past. The Council of Europe's Framework Convention for the Protection of National Minorities ('FCNM') of 1994 is of particular significance in the evolution of the international protection of minority rights.[39] It is not only the first but also, so far, the only multilateral treaty explicitly addressing minority rights in detail and corresponding state obligations with a monitoring system. These European advancements strongly influence the development of minority rights even at the international level.

V The content of minority rights

The right to physical existence

In any deliberation on the rights of minorities under international law, the right to physical existence is considered a necessary prerequisite,[40] and paramount to all other rights as it is only the living who could lay claim to other rights.[41] It is *sine qua non* to all other human rights. Existence, however, is a term with numerous implications and have different meaning for individuals and minorities. According to Thornberry:[42]

> 'Existence' is a notion which has a special sense for a collectivity such as a minority group. A collectivity such as a minority group exists in the individual lives of its members; the physical death of such member does not destroy the 'existence' of the group,

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38 See generally, Patrick Thornberry, María Amor Martín Estébanez, *Minority Rights In Europe: A Review of the Work and Standards of the Council of Europe* (Council of Europe, Strasbourg, 2004).

39 For detailed analysis see, Marc Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP, Oxford, 2005).

40 Patrick Thornberry, *supra* note 3 at 57.

41 Javaid Rehman, *supra* note 6 at 54.

42 Patrick Thornberry, *supra* note 3 at 57.

> though it may impair its health. There is, however, another existence of a minority through the shared consciousness of its members which is manifested perhaps through their language, culture, or religion, a shared sense of history, a common destiny. Without this 'existence' it is possible to say that individuals live but the group does not.

The right to existence of minorities was first recognised in the Genocide Convention which prohibits the physical or biological destruction of national, ethnic, religious or racial group. The convention formally recognised the right of minority groups to exist as group by outlawing such destruction.[43] It means right to existence here is viewed in terms of protection against genocide. Though no direct reference to minorities is found in the text of the convention, they are natural beneficiary of it. It is in this context the convention is considered as an integral part of minority rights.

The adoption of the 1992 Declaration was yet another important development explicitly recognising the right to existence of minorities. The declaration obliges the states to protect the 'existence' and 'identity' of minorities within their respective territories. The linkage of 'existence' with 'identity' in the declaration is considered a positive development as it will expand the meaning of 'existence' also to include a 'cultural existence'.[44] Asbjorn Eide supports a wider view of the right to existence. The right to existence, for him, also include the right to cultural, linguistic, economic and developmental existence.[45] It should, however, be noted that Eide's observations are based on the interpretation of the provisions of 1992 Declaration, which despite tremendous potential is nevertheless a non-binding instrument.[46]

The history and present events are testimony of the fact that the minorities are often vulnerable to physical destruction as a group. Many of them live under the shadow of annihilation. Almost a decade after the most horrendous

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43 Thomas Buergenthal, *International Human Rights in a Nutshell* 49 (West Publishing Co., Minnesota, 1988).

44 Javaid Rehman, *supra* note 6 at 62.

45 Asbjorn Eide, Final text of the Commentary to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2001/2 (2001), para 28.

46 *Ibid.*

genocides of our century in Rwanda, former UN secretary-general Kofi Annan remarked at the Stockholm International Forum in January 2004: "We must protect especially the rights of minorities, since they are genocide's most frequent targets."[47] The Genocide Convention defines 'genocide' as any act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Raphael Lemkin, who coined the term genocide, defined it as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups."[48] These acts include, in addition to physical destruction, prevention of births within a group and forcibly transferring children from one group to another.

Although the Genocide Convention speaks of physical and biological genocide, it does not recognize cultural genocide. During drafting of the convention, the issue of cultural genocide did come up but was rejected as it was considered too vague to be accepted. The International Law Commission has also made it clear that in genocide the destruction in question is the material destruction of a group either by physical or by biological means.[49] William Schabas also points out that in the light of the *travaux preparatoires* of the Genocide Convention, it seems impossible to consider acts of cultural genocide as punishable crimes if they are unrelated to physical or biological genocide.[50]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) encountered the task of determining the legal status of cultural genocide in *Prosecutor* v. *Radislav Krstiæ*.[51] The trial chamber acknowledged that, apart from physical acts, "one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual

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47 Minority Rights: International Standards and Guidance for Implementation 2010, *available at*: http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf (last visited on Jan. 15, 2015).

48 Raphael Lemkin, *Axis Rule in Occupied Europe* 79 (The Lawbook Exchange, Ltd., New Jersey, 2005).

49 International Law Commission, Report of the International Law Commission on the Work of its 48th Session, UN.GAOR, 51st Sess., Supp. No. 10 at 90, U.N. Doc. A/51/10 (1996).

50 William A. Schabas, *Genocide in International Law* 187 (Cambridge University Press, Cambridge, 2000).

51 Case No: IT-98-33-A, judgement dated Apr. 19, 2004, *available at*: http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf (last visited on June 15, 2015).

extinction of the group as an entity distinct from the remainder of the community."[52] Because of the narrow definition of the crime of genocide the court expressed its inability to include cultural genocide under genocide. The court, however, recognised that very often, physical and biological attacks are accompanied by destruction of "cultural and religious property and symbols of the targeted group," in an effort to obliterate all evidence of that group's identity.[53] The court also recognized that acts of cultural destruction should be weighed as heavily as the physical and biological acts in determining genocide. Despite these developments incorporation of the concept of cultural genocide has been withheld from international criminal conventions and statutes.

The right to enjoy one's own culture

Culture is a complex concept. The UNESCO study by Michel Leiris defines culture as being completely linked to tradition: "[a]s culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs, knowledge, sentiments and literature (and illiterate peoples often have an immensely rich oral literature), but the language or other systems of symbols which are their vehicles."[54] The UNESCO Universal Declaration on Cultural Diversity of November 2, 2001 declares that culture encompasses: "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[55] The UNESCO, thus, views the notion of culture from a broader perspective, considering it as a way of life.

According to the UN Committee on Economic, Social and Cultural Rights (CESCR) the notion of culture "encompasses, *inter alia*, ways of life, language, oral and written literature, music and songs, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning

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52 *Prosecutor* v. *Krstiæ*, case no. IT-98-33-T judgment (trial chamber).

53 *Id.* at 580.

54 Michel Leiris, *Race and Culture* 20-21 (UNESCO, Paris, 1951).

55 UNESCO, Universal Declaration on Cultural Diversity, 41 *International Legal Materials* 57 (2002).

they give to their existence, and build their world view representing their encounter with the external forces affecting their lives."[56] According to the UN Human Rights Committee, culture can manifest itself as a particular way of life associated with the use of land resources, especially in the case of indigenous peoples, which may include such traditional activities as fishing or hunting and the right to live on lands protected by law.[57] Thus the concept of culture is not only limited to traditions rather it also includes economic and social activities which are associated with the group.

The reference to cultural rights is found in almost all international human rights instruments in at least some of their aspects. "Everyone has the right freely to participate in the cultural life of the Community", states the UDHR.[58] The same has been also recognised in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[59] It provides for the right of everyone "to take part in cultural life", and "to enjoy the benefits of scientific progress and its applications'. Furthermore, article 15(2) provides that steps are to be taken by states to promote "the preservation, the development and the diffusion of science and culture." More specifically article 27 of the ICCPR recognizes the rights of people belonging to minorities to enjoy their own culture. The 1992 declaration proclaims more positive cultural rights by obliging states to 'create favourable conditions' for the development of minority cultures except where specific practices are in violation of national law and contrary to international standards.[60]

What entails the right to enjoy one's culture is not expressly provided in the text dealing with the cultural right of minorities. Based upon the conjunction of these provisions, cultural rights are taken to include the following elements: the right to take part in cultural life; the right to enjoy the benefits of scientific

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56 Committee on Economic, Social and Cultural Rights, General Comment No 21: The Right of Everyone to Take Part in Cultural Life, art. 15, para. 1 (a), E/C.12/GC/21 (Nov. 2009).

57 United Nations Human Rights Committee, general comment no.23 (1994).

58 UDHR, art. 27.

59 ICESCR, art. 15 stipulates: "The states parties to the present covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

60 *Supra* note 29, art. 4(2).

progress and its applications; the right of everyone to the benefits emanating from the protection of the moral and material interests deriving from any scientific, literary, or artistic production of which he/she is the author; and finally, the right to the freedom indispensable for scientific research and creative activity.[61] As culture encompasses a wide range of beliefs, values and practices that are intrinsic to most aspects of life, the right to culture has a broad scope. Substantively, this includes, among others: the rights of persons to engage in economic and social activities which are part of their culture; protection from forcible relocation; land and resource rights; guarantees against severe environmental degradation; and protection of sites of religious or cultural significance. For minority groups within nation states the protection and preservation of their cultural identity is also considered as one of the most significant aspects of cultural rights.

The UN Human Rights Committee has stated that article 27 of the ICCPR is directed towards "ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."[62] It includes the duties and obligations that are necessary for social life to continue and are fundamental to the collective identity and the distinctiveness of the group. The right to participate in cultural life is not confined to culture in any 'elitist' sense of access to and knowledge of the arts and sciences. UNESCO in its 1976 'Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It' stressed in its preamble that "culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within the reach of all . . . culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate."[63]

Based on the interpretation of the CESCR the right to take part in cultural life generally entails three things. *Firstly,* it enshrines the right to engage in one's own cultural practices and to express oneself in the language of one's

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61 See Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in Asbjørn Eide *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook* 21, 32 (Martinus Nijhoff, Dordrecht, 1995).

62 Human Rights Committee, general comment no. 23, art. 27, para 9 (50th session, 1994).

63 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (Nov. 26, 1976), *available at*: http://portal.unesco.org/en/ev.php-URL_ID=13097&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on June 15, 2014).

choice. It also includes the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity. *Secondly,* the right to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. The use of cultural resources such as language, institutions, and land, water biodiversity and also the enjoyment of benefits from the cultural heritage are also included therein. And *thirdly*, it entails the right to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This also includes the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.[64]

In addition to different aspects of cultural rights enumerated above, there are many more rights that are considered as its equally important dimensions especially in the context of the interdependence of human rights, as emphasised in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on June 25, 1993[65] and in the context of broader conceptual interpretation of the term culture. The right to education is one of such rights which are considered as an important requirement for the true and effective enjoyment of cultural rights.[66] This right is particularly vital for the preservation of the identity of distinct cultural groups.[67] The Convention against Discrimination in Education, 1960[68] recognises the right of minorities to carry on their own educational activities in article 5 which not only includes the right to the maintenance of schools

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64 See Committee on Economic, Social and Cultural Rights, General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a) 15 (Nov. 2-20, 2009).

65 *Available at*: http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (last visited on June 20, 2015).

66 Boutros Boutros Ghali, "The Right to Culture and the Universal Declaration of Human Rights" Cultural Rights as Human Rights 73 (UNESCO ed., 1970), *available at*: http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf. (last visited on June 15, 2014.

67 Vernon Van Dyke, "The Cultural Rights of Peoples" 2 *Universal Human Rights* 13 (1980).

68 *Available at*: http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on June 20, 2015).

but also the use of or instruction in their mother tongue as well. Similarly the ICESCR in its general comment on the right to education emphasises on securing a culturally appropriate education especially for minorities and indigenous peoples.[69]

The cultural rights of minorities are not absolute and are subject to other rights recognised under the ICCPR. According to the Human Rights Committee, these rights may not be legitimately exercised in any manner or to an extent inconsistent with other human rights recognised by the covenant. Generally cultural practices, which are inconsistent with national laws and contrary to international standards, are excluded from the ambit of cultural rights of minorities. Under article 5 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) states are obligated to modify or prohibit traditional or cultural practices harmful to women. Similarly the enjoyment of educational right must not deprive minorities from understanding the culture and language of the community as a whole. The participation in any activity which is detrimental to the sovereignty and security of the country is also not permissible. Thus, minority rights mainly aim at protecting minority groups from cultural assimilation into the dominant culture and securing minimum conditions required for the preservation of the cultural identity of minorities.

The right to profess and practice religion

Our world history is full of examples of religious intolerance and persecution based on religion, including religious wars. The contemporary response to this has mainly been in recognising democratic principle of religious freedom granting every individual citizen the right to adopt his or her own religious beliefs without fear of government and neutrality of governments on religious issues.[70] Although historically the protection of religious freedom preceded the protection of other rights,[71] an unparalleled progress toward the internationalisation of religious human rights was

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69 See Committee on Economic, Social and Cultural Rights, general comment no. 13, The Right to Education, UN Doc. E / C.12 / 1999 / 10, 50 (Dec. 8, 1999), *available at*: http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument (last visited on June 15, 2014).

70 Derek H. Davis, "The Evolution of Religious Freedom as a Universal Human Right" *Brigham Young University Law Review* 221 (2002).

71 N. Lerner, "The Nature and Minimum Standards of Freedom of Religion or Belief" *Brigham Young University Law Review* 908 (2000).

witnessed only in the 20th century. The UDHR was the first UN instrument to address the subject of religious freedom. Article 18 of the UDHR recognises that "everyone shall have the right to freedom of thought, conscience and religion." This right also includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. This provision basically promotes the democratic principle that individual religious differences must be respected .[72]

The 1959 UN study by Arcot Krishnaswami on discrimination in the matter of religious rights and practices was another important move in identification and protection of religious freedoms.[73] The study analyzed the concepts and contents of freedom of thought, conscience, and religion as legal rights with permissible limitations on it. It also covered the crucial issue of proselytizing and conversion. More importantly, Krishnaswami emphasised the collective aspects of religious rights including international ties and contacts. He dealt a vast array of issues within the ambit of religious rights including worship, religious processions, pilgrimages, equipments and symbols, disposal of dead, observance of holidays and days of rest, dietary practices, celebration and dissolution of marriage, dissemination of religious belief, and training of personnel *etc*.

The ICCPR recognised the religious rights without "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Several provisions of the covenant are relevant to religious rights. Article 18, for example, guarantees the same rights listed in article 18 of the UDHR, further including the right of parents "to ensure the religious and moral education of their children in conformity with their own convictions." The Human Rights Committee's general comment no. 22 on article 18 stresses that the right to freedom of thought, conscience, and religion is "far-reaching and profound" and protects theistic and atheistic beliefs, as well as the right not to profess any religion.

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72 For a comprehensive treatment of the subject see, Bahiyyih G. Tahzib, *Freedom of Religion or Belief Ensuring Effective International Legal Protection* (Martinus Nijhoff Publishers, The Hague, 1996).

73 Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, UN Doc E/CN.4/Sub.2, U.N. Sales No. 60.XIV.2 (1960), *available at*: http://www.religlaw.org/content/religlaw/documents/akstudy1960.htm (last visited on May 20, 2015).

Although article 18 does not explicitly refer to the right to change one's religion, experts interpret the provision as fully recognizing the same as proclaimed by the UDHR.[74] Article 20(2) imposes the duty upon states to prohibit by law the advocacy of religious hatred that incites to discrimination, hostility, or violence. Article 27, in the specific context of minorities, protects their members from being denied the right to enjoy their own culture, to profess and practise their own religion. Moreover, for the purpose of the covenant the religion is interpreted in broader sense so as to encompass both theistic and non-theistic religions as well as rare and virtually unknown faiths. For all practical purposes, the right set forth in article 27 for minorities "to profess and practise their own religion" has probably been subsumed into the similar guarantees included in the covenant and other human rights instruments.

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981 is another important international instrument protecting religious rights and prohibiting intolerance or discrimination based on religion or belief.[75] The declaration provides a comprehensive catalogue of rights which include the right to have a religion or belief of his choice and manifest the same in worship, observance, practice and teaching; to worship or assemble in connection with a religion or and to establish and maintain places for these purposes; to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; to write, issue and disseminate relevant publications in these areas; to teach a religion or belief in places suitable for these purposes; to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and to establish and maintain communications with individuals and communities in matters of religion and

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74 Karl Josef Partsch, Freedom of Conscience and Expression, and Political Freedoms" in Louis Henkin (ed.), *The International Bill of Rights*, *supra* note 9 at 210-211.

75 For an excellent discussion of the 1981 Declaration see, Natan Lerner, "Religious Human Rights Under the United Nations", in Johan D. van der Vyver & John Witte, Jr. (eds.), *Religious Human Rights in Global Perspective: Legal Perspectives* 114-127 (William B. Eerdmans Publishing, Michigan, 1996); Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination" 82 *American Journal of International Law* 487 (1988).

belief at the national and international levels.[76] Although the declaration is not, in itself, a legally binding instrument, it contains many basic principles and rights that are based on such standards enshrined in other international instruments which are legally binding including the ICCPR. Furthermore, it also carries the weight of solemn pledge of states and a great degree of moral persuasive value which also has an indefinable legal effect. On the whole, the 1981 declaration is seen as a reasonably good text which reflects our general understanding on religious rights.

The right to use one's own language

A major aspect of minority rights has been the right of minority groups to use their own language. In many states minorities speak languages different from that of the dominant group and they often face difficulties in using their language in the public sphere. The language occupies such an important place in human life as self-expression by an individual in his or her own language is considered as an essential element to the human personality. The language is also perceived as an essential marker of identity which is intrinsically related to culture and ethnicity and is also considered very vital for the survival of the minority as a cultural group.

The right to use one's own language is perhaps the most widely recognised minority rights in international law. The linguistic rights of minorities is not only limited to use one's language in day-to-day ordinary conversations, but it can extend to education being offered in the medium of that language, and the use of it in public and administrative services, judicial proceedings, and the media. Nevertheless, the protection of the linguistic rights of minorities is far from self-evident and often it is not clear how these rights will be applied to different situations of linguistic complexity.

Article 27 of the ICCPR is of great importance in protecting the linguistic rights of minorities. It provides that individuals belonging to a linguistic minority may use their language amongst themselves, and that the state must not seek to restrict their affairs because of their status as a linguistic minority. The affairs of minorities involving use of their language remain protected against state interference even if a state may have no obligation to recognize minority languages. For instance, minorities are allowed to maintain their schools

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76 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 6.

imparting instruction in their own languages, although a government is not obligated to financially support such schools. Thus, the right to establish and administer their own educational institutions is necessary concomitant to the rights of linguistic minorities to use their language amongst themselves especially where their language is used as the medium of instruction. Another situation in which the protection of article 27 could be raised is where public authorities prohibit private media or publications in a minority language, though such a practice would also likely to constitute a violation of freedom of expression. Unfortunately, such restrictions are not as uncommon as one might believe.

It is, however, not clear whether article 27 would entail positive obligations on states to protect or promote minority languages or merely a negative obligation to abstain from interfering with language use in the private sphere. In the opinion of many scholars this article could best be seen merely as a regime of linguistic tolerance rather than obliging states to undertake positive measures in favour of linguistic minorities. The UN Human Rights Committee, however, asserts that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language ... in community with other members of the group".[77] Many more pertinent issues concerning linguistic rights of minorities, like use of language in courts, in education, and in communication with public authorities, are also not explicitly dealt with in article 27.

More explicit provisions on linguistic minorities are contained in the 1992 declaration. For example, article 4 obliges states to create favourable conditions to enable persons belonging to minorities not only to express their characteristics but also develop their culture, language, religion, traditions and customs. It further provides that the state should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue. It also obliges states to promote the learning about history, traditions, language and culture of the minorities. Thus, the declaration encourages states to adopt appropriate legislative and other measures to protect and promote the linguistic identity of minorities.

The European instruments specify linguistic rights of minorities in greater details, although most are couched in terms which leave a great deal of

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77 Human Rights Committee, general comment 23, Apr. 8, 1994, para 6.2.

discretion to states.[78] As the first international legal instrument devoted to the protection of minority languages, the European Charter for Regional or Minority Languages has impressive achievements.[79] The charter significantly raises the standards of protection particularly in areas where international instruments are extremely deficient. Though it aims directly at the minority languages rather than the speakers, its implementation *vis-a-vis* a given language will naturally have repercussions for the lives of its speakers. The charter covers the provisions relating to use of minority languages in education and in media, in legal and administrative contexts, in economic and social life, for cultural activities and in trans-frontier exchanges.

The European Framework Convention for the Protection of National Minorities, 1995 also sets forth a number of significant principles relating to protection of linguistic minorities. It recognizes the right of individuals belonging to a linguistic minority to use their language among themselves, in private as well as in public. It also acknowledges the importance of the use of minority languages before public authorities particularly in areas where minorities traditionally reside, or are otherwise present in substantial number.[80] It also includes, during criminal proceedings, the right to be informed of the reasons of the arrest and of the nature and cause of any accusation brought against him or her in a language he or she understands. It also contains provisions regarding the right to use one's personal names in the minority language and the right to official recognition of them in accordance with their legal system.[81] It further adds the right to display minority language signs, inscriptions and other information of a private nature visible to the public. It also obliges states to 'display traditional local names, street names and other topographical indications intended for the public also in the minority language...' in areas traditionally inhabited by minorities provided there is a sufficient demand and taking into account their specific conditions.

The Framework Convention also contains many important provisions on minority languages which deal with education like guarantees for the teaching of the language itself, or of other subjects in that language without prejudice

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78 Hurst Hannum, "The Rights of Persons Belonging to Minorities" in Janusz Symonides (ed.), *Human Rights: Concepts and Standards* 292 (Ashgate/UNESCO, Aldershot, 2000).

79 For a detailed commentary see, Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe, Strasbourg, 2005).

80 The European Framework Convention for the Protection of National Minorities, art. 10.

81 *Id.*, art. 11.

to learning or teaching in the official language[82] and, the right to set up and manage their own independent educational and training institutions without any financial obligation on the part of the state[83] *etc.* apart from the general right 'to learn his or her minority language'.[84] The UNESCO Convention on the Elimination of Discrimination in Education also includes the possibility of establishment or maintenance of separate educational institutions because of linguistic reasons.[85]

The OSCE has also paid much attention to the issue of linguistic rights of the minorities. The Copenhagen document of 1990 contains important commitments on the linguistic protection of the minorities. Paragraph 32 of the Copenhagen document stresses that persons belonging to national minorities have the right to use freely their mother tongue in private as well as in public, to establish and maintain educational institutions, to conduct religious and educational activities in their mother tongue, to disseminate, have access to and exchange information in their mother tongue. In paragraph 43, it further obliges states to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language of their state, have adequate opportunities for instruction of their mother tongue and, where possible and necessary, for its use before public authorities.

VI Conclusion

The presence of one or more minority groups in almost all states is a reality of modern time. It is neither imperative nor possible for every state to be ethnically, religiously and linguistically pure. It is also a stark fact that minorities have suffered discrimination, deprivation, and forced assimilation. It is also clearly recognised that mere observance of equality rights and prohibition of discrimination may not be sufficient for an adequate protection of minorities and to address their concerns. It is in the light of these facts a consensus has arrived both at international and national levels that minority groups need special rights and protections. Therefore, states are required to take special measures to preserve the existence and identity of minorities. In most democratic states the protection of minority rights has emerged as an

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82 *Id.*, art. 14.

83 *Id.*, art. 13.

84 *Id.*, art. 14.

85 *Supra* note 69, art. 5(1)c.

important and effective legal and policy instrument in accommodating ethnic, religious and linguistic diversity. Minority rights are also considered necessary to achieve the goal of substantive equality as opposed to formal or legal equality. Moreover, is also an essential condition for greater political and social stability and peace within and across state borders.

Undoubtedly, there are various international legal instruments explicitly recognising minority rights, nevertheless their efficacy and adequacy are often doubted. The principles enunciated in various minority rights instruments are, for the most part, not only very general but are also subject to multiple interpretations. Implementation mechanisms are also very weak. Minority rights provisions are mostly couched in rather vague language, leaving state parties with a considerable amount of discretion in interpretation and implementation. The reluctance to recognise minority groups as holders of rights further weaken the situation. Most of the minority rights instruments are not legally binding. The international community has made significant strides in articulating minority rights. What is now required is to ensure that political and legal commitments accepted by states for their minorities are effectively monitored and enforced in good faith.