THE UNIVERSITY OF HULL

AN ANALYSIS OF THE RIGHTS OF MINORITIES IN INTERNATIONAL LAW

BEING A THESIS SUBMITTED FOR THE DEGREE OF

Doctor of Philosophy

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by

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"Each nation has a unique tone to sound in the symphony of human culture; each nation is an indispensable and irreplaceable player in the orchestra of humanity"

I L Claude Jr., *National Minorities An International Problem* (Cambridge: Harvard University Press) 1955, 85.

"No man is an island, entire to itself; every man is a piece of the main.....Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee".

John Donne cited in M C Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: M.Nijhoff) 1992, *Preface.*

To,

MINORITIES

PREFACE

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Javaid Rehman
Hull, July 1995.

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1957	Treaty Establishing the European Economic Community (Rome)
	ILO Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal Populations and Semi-Tribal Populations
1960	Convention concerning discrimination in Education
	Treaty Guarantee between Cyprus, Greece and Turkey and the United Kingdom
1966	International Convention on the Elimination of All Forms of Racial Discrimination
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	First Optional Protocol to the International Covenant on Civil and Political Rights
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1969	American Convention on Human Rights
	Vienna Convention on the Law of Treaties
1973	International Convention on the Suppression and Punishment of the Crime of Apartheid
1981	African Charter on Human and People's Rights
1983	Sixth Protocol to ECHR
1989	Convention Concerning the protection of Indigenous and Tribal Peoples in Independent Countries
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TABLE OF ABBREVIATIONS

AI	Amnesty International
AJIL	American Journal of International Law
As.YIL	Asian Yearbook of International Law
AYIL	Australian Yearbook on International Law
Buff.LR	Buffalo Law Review
BYIL	British Year Book of International Law
Cal.WestILJ	California Western International Law Journal
CBR	Canadian Bar Review
CCPR	International Convenient on Civil and Political Rights
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CLP	Current Legal Problems
CP	Comparative Politics
DLJ	Denver Law Journal
Duke.LJ	Duke Law Journal
E&PW	Economic and Political Weekly
ECHR	European Convention on Human Rights
ECOSOCOR	UN Economic and Social Council Official Records
EJIL	European Journal of International Law
FAffs	Foreign Affairs
Ga.JIL	Georgia Journal of International Law
GAOR	UN General Assembly Official Records
GYIL	German Yearbook of International Law
Harvard.LJ	Harvard Law Journal
HRCP	Human Rights Commission of Pakistan
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICoJ	International Commission of Jurists
IJIL	Indian Journal of International Law
IJRL	International Journal of Refugee Law
IL	International Lawyer
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IO	International Organisation
IYHR	Israel Year Book on Human Rights
IYIL	Italian Year Book on International Law
JAAAffs	Journal of Asian and African Affairs
JIAffs	Journal of International Affairs
JILP	Journal of International Law and Politics
LNTS	League of Nations Treaty Series

LQR	Law Quarterly Review
MAS	Modern Asian Studies
McGill LR	McGill Law Review
MEJ	The Middle East Journal
Melbourne.ULR	Melbourne University Law Review
MLR	Modern Law Review
MRG	Minority Rights Group
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJHR	Nordic Journal on Human Rights
NYLSLR	New York Law School Law Review
NYUJILP	New York University Journal of International Law and Politics
OAS	Organisation of American States
OAU	Organisation of African Unity
OLR	Oregon Law Review
PCIJ	Permanent Court of International Justice
Procs. ASIL	Proceedings of the American Society of International Law
PSQ	Political Science Quarterly
PYIL	Pace Year Book of International law
RDH	Revue des Droits de l'Homme
Rec des Cours	Recueil des Cours de l'Academie de Droit International
Rev. ICJ	The Review of the International Commission of Jurists
RIAA	Reports of International Arbitral Awards
SCOR	UN Security Council Official Records
SUILJ	Southern Illinois University Law Journal
Tex.ILJ	Texas International Law Journal
TWQ	Third World Quarterly
UN Review	United Nations Review
UNCIO	United Nations Conference on International Organisation
UNTS	United Nations Treaty Series
Va.JIL	Virginia Journal of International Law
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
WP	World Politics
Yale LJ	Yale Law Journal
Yale.JIL	Yale Journal of International Law
YBILC	Year Book of the International Law Commission
YBUN	Year Book of the United Nation

BIBLIOGRAPHY

A. BOOKS

Ahmed, F., *Muslim Separatism in British India* (Lahore: Ferozsons Limited, 1991).

Ahmed, I., *The Concept of an Islamic State in Pakistan,* (Lahore: Vanguard Press, 1991).

Akehurst, M., *A Modern Introduction to International law,* 6th edn, (London: George Allen and Unwin, 1987).

Ali, K., *A New History of India and Pakistan,* (Karachi: Pakistan Book Centre 1992).

Alston, P., *The United Nations and Human Rights A Critical Appraisal* (Oxford: OUP, 1992).

Andreopolous, G., *Genocide: Conceptual and Historical Dimensions,* (Philadelphia: University of Pennsylvania Press, 1994).

Andrysek, O., *Report on the Definition of Minorities,* (Utrecht: Institute of Human Rights Studie-en Informatiecentium Mensenrechten, 1993).

Aziz, K., *The Making of Pakistan A Study in Nationalism,* (Lahore: Islamic Book Service, 1989).

Azkin, B., (ed.) *Scripta Hiersolyminitana v Studies in Law,* (Jerusalem: Magnes Press, 1958).

Azmi, A., *Kashmir An Unparalleled Curfew,* (Karachi: Panfwain printing press 1990).

Banuazizi, A and Weiner, M., (eds.), *The State, Religion and Ethnic Politics, Afghanistan, Iran and Pakistan* (Lahore: Vanguard, 1987).

Bassiouni, M, C, and Nanda, V, P., (eds.) *A Treatise on International Criminal Law* vol. i. (Illinois: Charles C. Thomas, 1973).

Bassiouni, M, C., *Crimes against Humanity in International Criminal Law* (Dodrecht: M. Nijhoff, 1992).

Bassiouni, M, C., *International Criminal Law A Draft International Criminal Code,* (Netherlands: Sijthoff, 1980).

Bennet, A., *International Organisation Principles and Issues,* 5th edn. (New Jersey: Prentice-Hall, 1991).

Binder, L., *Religion and Politics in Pakistan,* (Berkeley: University of California Press, 1963).

Blaustein, A and Flanz G., *Constitutions of the Countries of the World,* (Dobbs Ferry: Oceana Publications, 1973-).

Brett, R and Eddison, E., *Minorities A Report on the CSCE Human Dimensions Seminar on Case Studies on National Minority Issues: Positive Results (Warsaw 24-28 May, 1993)* (Essex: Human Rights Centre, 1984) Papers in the theory and practice of Human Rights No 5.

Brolmann, C., Lefeber, R., Zieck, M., (eds.), *Peoples and Minorities in International Law,* (Dordrecht: M. Nijhoff, 1993).

Brownlie, I., (ed.) *Basic Documents on Human Rights,* 3rd edn. (Oxford: OUP 1992).

Brownlie, I., *Treaties and Indigenous Peoples* (ed.) Brookfield, F., *The Robb Lectures* (Oxford: OUP, 1991).

Brownlie, I., *System of the Law of Nations State Responsibility,* (Oxford: OUP, 1983).

Brownlie, I., *(ed.) Basic Documents on Human Rights,* 2nd edn. (Oxford: OUP 1981).

Brownlie, I., *International Law and the Use of force by States* (Oxford: OUP 1963).

Burkey, R., *Discrimination and Racial Relations, Report on the International Research Conference on Race Relations,* (Aspen: Colorado, 1970).

Burki, S. J and Baxter, C., *Pakistan under the Military 11 years of Zia-ul-haq* (Lahore: West view Press Pakistan Book Corporation, 1991).

Callard, K., *Pakistan A Political Study,* (London: Allen and Unwin,1957).

Cassese, A., *International law in a Divided World,* (Oxford: OUP 1986).

Cassese, A., *UN Law. Fundamental Rights: Two Topics in International Law,* (Alpen aan den Rijn: Sijthof and Noordhoff, 1979).

Cheng, B and Brown, E, D., (eds.) *Essays in the Honour of Georg Schwarzenburger on his Eightieth Birthday Contemporary Problems of International Law,* (London: Stevens and Sons Ltd, 1988).

Chowdhury, S, Denters, E, and de Warrt, P, J, I, M., *The Right to Development in international law,* (Dordrecht: M. Nijhoff, 1992).

Claude, I. L. Jr., *National Minorities: An International Problem* (Cambridge, Mass: Harvard University Press, 1955).

Collins, L and Lapierre, D., *Freedom at Midnight,* (London: Collins, 1975).

Constantapolous, D., (ed.) *Peace and Human Rights,* (Thessaloniki: Institute of International Public Laws and International Relations 1994).

Constantapolous, D., (ed.) *National and International Boundaries,* (Thessaloniki: Institute of International Public Laws and International Relations 1985).

Cooper, R., *The Bahá'ís of Iran,* (London: MRG, 1991).

Crawford, J., *(ed.) Rights of Peoples,* (Oxford: OUP, 1988).

Crawford, J., *The Creation of States in International Law,* (Oxford: OUP 1979).

Crery, I., *The Inuit (Eskimos) of Canada* (London: Minority Rights Group, 1983).

Cullen, H., Kritsiotis, D., and Wheeler, N., *Politics and Law of Former Yugoslavia,* (Hull: University Press, 1993).

D'souza, F, ***et al.,*** *The Refugee Dilemma,* (London: MRG, 1984).

Daes, E., *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels,* (New York: United Nations 1992).

Dinstein, Y and Tabory, M., (eds.) *The Protection of Minorities and Human Rights,* (Dordrecht: M. Nijhoff, 1992).

Dinstein, Y., (ed.)., *International Law at a time of Perplexity, Essays in Honour of Shabtai Rosenne,* (Dordrecht: M. Nijhoff, 1989).

Dinstein, Y., (ed.) *Models of Autonomy,* (New Brunswick and London: Transaction Books, 1981).

Donnelly, J., *International Human Rights,* (Oxford: Westview 1993).

Drost, P,. *The Crimes of States volume I,* (Leiden: Sijthoff 1959).

Drost, P., *The Crimes of State* Book II, Genocide, (Leiden: Sijthoff 1959).

Eddison, E., *The Protection of Minorities at the Conference on Security and Co-operation in Europe,* (Essex: Human Rights Centre, 1994) Papers in the theory and Practice of Human Rights, No 6

Engineer, A. A., (ed.) *Ethnic Conflict in South Asia,* (Dehli: Ajanta Publication, 1987).

Enloe, C., *Ethnic Conflict and Political development* (Boston: Little, Brown and Company 1973).

Falk, R., *Human Rights and State Sovereignty* (New York: Holmes and Meier, 1981).

Fatehpuri, F., *Pakistan movement and Hindi-Urdu Conflict,* (Lahore: Sangeemeel Publications, 1987).

Fawcett, J., *The International Protection of Minorities,* (London: MRG, 1979).

Fien, H., *Genocide Watch* (New Haven and London: Yale University Press, 1992).

Fitzmaurice, G., Some Problems regards the formal sources of international law, Symbolae Verzijl (La Haye: Nijhoff, 1988).

Freestone, D., (ed.), *Children and the Law: Essays in honour of Professor H.K. Bevan* (Hull: University Press, 1990).

Gledhill, A., *Pakistan, The Development of its Laws* (London: Stevens and Sons Limited 1957).

Goodwin-Gill, G. S., *The Refugees in International Law,* (Oxford: OUP 1991).

Government of Pakistan., *The Constitution of Islamic Republic of Pakistan 1956,* (Karachi: Government of Pakistan Press, 1956).

Government of Pakistan., *The Constitution of Pakistan,* (Karachi: Government of Pakistan Press, 1962).

Government of Pakistan., *The Constitution of the Islamic Republic of Pakistan, 1973,* (Karachi: Government of Pakistan Press, 1973).

Government of the Punjab., *Report of the court of inquiry constituted under the Punjab Act II of 1954 to inquire in to the Punjab disturbances of 1953,* (Lahore: Superintendent of the Government printing press) 1954.

Hannum, H., (ed.) *Documents on Autonomy and Minority Rights,* (Dordrecht: M. Nijhoff, 1993).

Hannum, H., *Guide to International Human Rights* Practice, (London: Macmillan, 1984).

Harris, D. J., *Cases and Materials on International law*, 4th edn., (London: Sweet and Maxwell, 1990).

Freedman, L., and Karsh, E., *The Gulf Conflict 1990-91 Diplomacy in the New World Order* (Princeton, N.J: Princeton University Press).

Harris, J., *Legal Philosophies,* (London: Butterworths, 1980).

Harrison, S. S., *In Afghanistan's Shadow Baluch Nationalism and Soviet Temptations* (New York: Carnegie Endowment for International peace, 1981)

Hasan, K., *Pakistan and the United Nations,* (New York: Manhatten Publishing Co, 1960).

Heffernam, L, and Kingston J., (eds.) *Human Rights A European Perspective* (Blackrock Co Dublin: Round Hall Press, 1994).

Heinz, H., *Indigenous Populations, Ethnic Minorities and Human Rights,* (Berlin: Quorum Verlag, 1988).

Higgins, R., *The New United Nations: Appearance and Reality,* Josphine Onoh Lecture (Hull: University Press, 1993).

Hussain, I., *Issues in Pakistan's Foreign Policy An International Law Perspective,* (Lahore: Progressive publishers, 1988).

Hussain, M., *Pakistan's Politics: The Zia Years,* (Lahore: Progressive Publishers, 1990).

ICoJ, *Pakistan, Human Rights after Martial law, Report of a Mission* (Geneva, 1987).

ICoJ, *The Events of East Pakistan 1971,* (Geneva, 1972).

ICoJ, *The Question of Tibet and the Rule of Law,* (Geneva, 1959).

Jackson, H, and McHardy, H., *The Two Irelands: The Problem of a Double minority,* (London: MRG, 1984).

Jahan, R., *Failure in National Integration,* (New York: Columbia University Press, 1972).

Janis, M., *The Influence of Religion on the Development of International Law,* (Dordrecht: M.Nijhoff, 1991).

Jennings, I., *Constitutional Problems in Pakistan,* (Cambridge: University Press 1957).

Jennings, I., *The Approach to Self-Government,* (Cambridge: University Press, 1955).

Jennings, R and Watts, A., (eds.) *Oppenheim's International law, Peace,* 9th edn. 2 volumes (Harlow: Longman, 1992).

Jihangir, A and Jilani, H., *The Hudood Ordinance A Divine Sanction?* (Lahore: Rhotas Books, 1990).

Kamal, A., *Political and Constitutional Dilemmas* (Karachi: Pakistan Law House 1987).

Kazi, A., *Ethnicity and Education in Nation-Building: The case of Pakistan,* (Lanham University Press of America, 1987).

Kennedy, C., (ed.) *Pakistan 1992,* (Karachi: Oxford University Press, 1993).

Kennedy, C., *Bureaucracy in Pakistan,* (Karachi: Oxford University Press 1987).

Kennedy, C., *Ethnic Preference and Public Policy in Developing States* (Lynne Reinner Publishers Inc, 1986).

Khan, A., (ed.) *Islam, Politics and the State: The Pakistan experience* (Lahore: Zed Press 1985).

Khan, M. A., *Friends not Masters* (London, Oxford: University Press, 1967).

Khosla, G., *Stern Reckoning A Survey of the Events Leading up to and following the Partition of India* (Dehli: OUP, 1989).

Khuhro, H., *Sind through Centuries* (Karachi: OUP, 1981)

Khuro, H., *The Making of Modern Sind,* (Karachi: Indus Publishers, 1978).

Kuper, L., *International action against Genocide,* (London: MRG, 1984).

Kuper, L., *The Pity of it All, Polarisation of Racial and Ethnic Relations,* (London: Duckworth, 1977).

Lamb, A., *Kashmir: A Disputed Legacy, 1846-1990,* (Hertfordshire: Roxford Books, 1991).

Lauterpacht, H., *An International Bill of Rights of Man,* (New York: Columbia University Press, 1945).

LeBlanc, L., *The United States and the Genocide Convention,* (Durham, N.C: Duke University, 1991).

Lekwitz, J, *et al.*, *Des Menshen Recht Zwischen Freicheit und Verantwortung, Festschrift fur Karl Josef Partsch zum 75 Geburstag,* (Berlin: Dunker and Humblot, 1989).

Lemkin, R., *Axis Rule in Occupied Europe,* (Washington: Carneige Endowment for International Peace, 1944).

Lerner, N., *Group Rights and Discrimination in International Law,* (Dordrecht: M. Nijhoff, 1991).

Lerner, N., *The United Nations Convention on the Elimination of All Forms of Racial Discrimination,* 2nd edn. (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980).

Lillich, R. B., (ed.) *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973).

Lillich, R., *The Human Rights of Aliens in Contemporary International Law,* (Manchester: University Press 1984).

Lyal, S., *Individual Responsibility in International Law for Serious Human Rights Violations,* (Dordrecht: M. Nijhoff, 1992).

Mahmmood, S., *Pakistan: Political Roots and Development,* (Lahore: Vanguard Limited, 1990).

Mahmmood, S., *Constitutional Foundations of Pakistan,* (Lahore: Jang Publishers, 1990).

Malanczuk, P., *Humanitarian Intervention and the Legitimacy of the Use of Force,* Inaugural lecture at the University of Amsterdam 22 January 1993 (Amsterdam: Het Spinhuis,1993).

Mascarenhas, A., *The Rape of Bangladesh* (Dehli: Vikas Publications, 1971).

McCoubrey, H., *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot: Dartmouth, 1990).

McDougal, M.S., Laswell, H.D., and Chen, L-C., *Human Rights and World Public Order* (New Haven and London: Yale University Press, 1980).

McDowall, D., *Lebanon A Conflict of Minorities* rev edn. (London: MRG, 1987).

McDowall, D., *The Kurds,* Rev 6th edn. (London: MRG, 1991).

McGoldrick, D., *The Human Rights Committee,* (Oxford: OUP, 1991).

Meron, T (ed.) *Human Rights in International Law: Legal and Policy Issues,* (Oxford: OUP, 1984).

Meron, T., *Human Rights Law-Making in the United Nations: A Critique of Instruments and Processes,* (Oxford: OUP, 1986).

Miller, D, H., *The Drafting of the Covenant,* (New York: G.B. Putnam and Sons, 1928).

Modeen, T., *The International Protection of National Minorities in Europe,* (Abo: Abo Akandmi, 1969).

Moon, P., *Divide and Quit,* (London: Chatto and Windus, 1961).

Moore, J., (ed.)., *Law and Civil War in the Modern World* (Baltimore: John Hopkins University Press, 1974).

Moore, F., *Thailand, Its People, Its Society, Its Culture,* (New Haven: Yale University Press, 1974).

Morrison, G., *The Southern Sudan and Eriteria: Aspects of Wider African problem,* (London: MRG, 1973).

Mullen, C and Wangyal, P., *The Tibetans, Two Perspectives on Tibet-Chinese Relations,* (London: Minority Rights Group, 1983).

Munir, M., *From Jinnah to Zia* 2nd edn (Lahore: Vanguard, 1980).

Nogaard, C., *The Position of Individual under International Law,* (Copenhagen: Munksgaard 1962).

Noman, O., *Pakistan A Political and Economic History since 1947,* (London: Kegan Paul International 1990).

Nowak, M., *United Nations Covenant on Civil and Political Rights /CCPR Commentary* (Strasbroug: Kehl am Rhien 1993).

O'Shaugnnessy and Corry, S., *What future for the Armidians of South America* (London: MRG, 1972).

Owen, R., *Migrant Workers in the Gulf,* (London: MRG, 1985).

Page, D., *Prelude to Partition: The Indian Muslims and the imperial system of control 1920-32* (Dehli, OUP 1982).

Pajic, Z., *Violations of Fundamental Human Rights in the Former Yugoslavia, The Conflict of Bosnia-Herzegovina* (London: Institute of International

Studies) Occasional Paper No 2, 1993.

Parker, K., *Human Rights in Pakistan,* (New York, and San Francisco: Human Rights Advocates Inc 1987).

Parry, C., *The Consolidated Treaty Series,* (Dobbs Ferry, New York: Oceana 1969-81, 1969).

Pasha, A., *Pakistan: A Political Profile,* (Lahore: Progressive Publishers, 1988).

Phillips, A., and Rosas A., *The UN Minority Rights Declaration* (London:Turku/Abo 1993).

Phillips, A., and Rosas A., *Universal Minority Rights* (London;Turku/Abo: University Institute for Human Rights; MRG 1995).

Pomerance, M., *Self-Determination in Law and Practice: The New Doctrine at the United Nations,* (The Hague: M. Nijhoff, 1982).

Ramcharan, B. G. (ed.) *Human Rights Thirty years after the Universal Declaration,* (The Hague: M. Nijhoff, 1979).

Rashidi, M., *Islami Jammuhira Pakistan Mee Quadianiat 1947-83* (Lahore: Muktabuni Bisath) (Urdu) 1983.

Rigo-Sureda, A., *The Evolution of the Right of Self-Determination,* (Leiden: Sijthoff, 1973).

Rizvi, H. A., *The Military and Politics in Pakistan* (Lahore: Progressive Publishers 1986).

Roberts, A and Kingsbury, B., *United Nations, Divided World, The United Nations Role in International Relations,* (Oxford: OUP, 1988).

Robertson, A. H and Merrills, J. G., *Human Rights in the World, An Introduction to the Study of International Protection of Human Rights,* 3rd edn. (Manchester: Manchester University Press, 1989).

Robinson, F., *Separatism among Indian Muslims The Politics of UP 1860-1923,* (Cambridge University Press, 1974).

Robinson, J., *Were the Minorities Treaties a Failure?* (New York: Institute of Jewish Affairs, 1943).

Robinson, N., *The Genocide Convention A Commentary* (New York: Institute of Jewish Affairs, 1960).

Ross, J. A. and Cotterell, A. B., (eds.) *The Mobilization of Collective Identity:*

Comparative Perspectives (University Press of America, Inc 1980).

Rowe, P., *The Gulf War 1990-91 in International and English Law 1991* (London: Routledge, 1993).

Salim, A., *Sulagta Howa Sind (Urdu),* (Lahore: Jang Publishers, 1990).

Sayeed, K, B., *Pakistan, the Formative Phase,* (Karachi: Pakistan Publishing house, 1960).

Sayeed, K. B., *The Political System of Pakistan* (Boston: Houghton Miffin Company, 1967).

Schachter, O., *International Law in Theory and Practice,* (Dordrecht: M. Nijhoff, 1991).

Schwarz, W., *The Tamils of Sri Lanka,* (London: MRG, 1988)

Seighart, P., *The Lawful Rights Of Mankind,* (Oxford: OUP, 1985).

Shackle, C., *The Sikhs,* (London: MRG, 1986).

Shaw, M., *Title to Territory in Africa,* (Oxford: OUP, 1986).

Shaw, M., *International law,* 3rd edn. (Cambridge: Grotius Publication, 1991).

Shivji, I., *The Concept of Human Rights in Africa,* (London: Codesria Book series 1991).

Sigler, J.A., *Minority Rights, A Comparative Analysis,* (London: Greenwood Press, 1983).

Simmonds, N., *Central Issues in Jurisprudence, Law and Rights,* (London: Sweet and Maxwell, 1986).

Sipe, K., *Karachi's Refugee Crises: The Political, Economic and Social Consequences of Partition Related Migration* (Ann Arbor microfilms, 1984).

Sohn, L and Burgenthal, T., *International Law of Human Rights* vol i-iii (Indianapolis: The Bob- Merrill Co., 1973).

Stephen, D., and Wearne, P., *Central America's Indians* (London: MRG, 1984)

Sunga, L., *Individual Responsibility In International Law for Serious Human Rights Violations* (Dordrecht: M.Nijhoff) 1992.

Syed, G. M., *Struggle for the New Sind* (Karachi: 1949).

Sztucki, J., *Interim Measures in the Hague Court An Attempt at a Scrutiny,* (Deventer: Kluwer, 1983).

Taseer, S., *Bhutto, A Political Biography,* (London: Ithaca Press 1979).

Thornberry, P., *Minorities and Human Rights Law,* (London: MRG 1987).

Van Langenhove, F., *The Question of Aborigines before the United Nations: The Belgian Thesis* (Brussels: Royal Colonial Institute, 1954).

Verzijil, J., *International Law in Historical Perspective* vol. ii (Leydon: Sijthoff, 1986).

Vierdag, E. W., *The Concept of Discrimination in International Law-with Special Reference to Human Rights,* (The Hague: M. Nijhoff, 1973).

Von Prondzynski, F., *Freedom of Association and Industrial Relations: A Comparative Study,* (London: Mansell Publishing Limited, 1987).

Von Prondzynski, F., *Law, Sovereignty and Democracy,* Inaugural Lecture, (Hull: University of Hull press, 1992).

Weiler, J., Cassese, A.. and Spinedi, M., *International Crimes of State A Critical Analysis of the ILC's Draft Article 19 on State Responsibility,* (Berlin: Walter de Gryter, 1989).

Weis, P., *Nationality and Statelessness in International Law,* 2nd ed. (Alhen aan de Rijn: Sijthoff and Noordhoff 1986).

Weiss, A., (ed.) *Islamic Re-assertion in Pakistan* (Syracuse, NY: University Press 1986).

Wheeler, S., *The Politics of Pakistan* (Ithaca New York: Cornell University Press, 1970).

Whitaker, B., (ed.), *Minorities A Question of Human Rights* (London: Pergomon Press 1984).

Whitaker, B., *et al, The Biharis of Bangladesh,* (London: MRG 1977).

Whitman, M., *Digest of International Law,* (Washington: Department of State 1963-65).

Wilcox, W., *Pakistan The Consolidation of a Nation,* (New York and London: Columbia University Press, 1963).

Wilson, J., *Canada's Indian* (London: MRG, 1982).

Wriggins, H and Guyot, J. F., (eds.) *Population, Politics and the Future of Southern Asia* (New York: Columbia University Press 1973).

Wrising, R. G., *Protection of Minorities. Comparative Perspectives,* (New York: Pergamon Press, 1981).

Wrising, R., *The Baluchis and the Pathans,* MRG, rev edn. (London: MRG, 1987).

Zaidi, S.A., (ed.) *Regional Imbalances and the National Question in Pakistan* (Lahore: Vanguard Press, 1992).

Zingel, W, P., *et al* (eds.) *Pakistan in its Fourth Decade* (Deutshes Orient-Institut 1983).

Ziring, L., *Pakistan The Enigma of Political Development,* (Dawson: Westview 1980).

B. ARTICLES

Ahmad, F., "The Rise of Muhajir Separatism" 1 *JAAAffs,* (1989), 97-129.

Ahmed, A., "Memories of Partition day" 3 *JRS* (1990), 262-264.

Akehurst, M., "Equity and General Principles of Law" 25 *ICLQ* (1976), 801-825.

Akehurst, M., "Custom as a Source of International Law" 47 *BYIL* (1974-5), 1-53.

Akehurst, M., "The Hierarchy of the Sources of International Law" 47 *BYIL* (1974-5) 273-285.

Akhavan, P., "Punishing War Crimes in the former Yugoslavia: A Critical Juncture for the New World Order" 15 *HRQ* (1993), 262-289

Alexandrowicz, C., "The Afro-Asian World and the law of Nations" 123 *Rec des Cours,* (1968-I) 125-210.

Alferdson, G and De Zayas, A., "Minority Rights: Protection by the United Nations" 14 *HRLJ* (1993), 1-9.

Ali, B., "Sind and Struggle for Liberation" 22 *E&PW* (1987a) 402-405.

Alston, P., "The Security Council and Human Rights: Lessons to be learned from the Iraq-Kuwait crises and its aftermath" 13 *AYBIL* (1990-91), 107-176.

An'Na'im, A, A., "Religious Minorities under Islamic Law and the Limits of Cultural Relativism" 9 *HRQ* (1987), 1-18

Anaya, M., "The capacity of International Law to advance Ethnic or Nationality Rights Claims" 13 *HRQ* (1991) 403-411.

Armour, J., "Compensatory Discrimination: The Indian Constitution and Judicial Review" 16 *Melbourne ULR* (1987), 126-138.

Barsh, R., "Indigenous Peoples: An Emerging Object of International Law" 80 *AJIL* (1986), 369-385.

Barsh, R., "Revision of the ILO Convention No 107", 81 *AJIL* (1987), 756-762.

Barsh, R., "United Nations Seminar on Indigenous Peoples and States" 83 *AJIL* (1989), 599-604.

Bassiouni, C., "Crimes against Humanity" 31 *Col.JTL* (1992), 457-494.

Bassiouni, M., "International Law and the Holocaust" 9 *Cal.WesILJ*, (1979), 201-298.

Baxter, C., "Multilateral Treaties as evidence of Customary Law" 41 *BYIL* (1965-66), 275-300.

Behanuik, E., "The law of Unilateral Humanitarian Intervention by armed force: A Legal Survey" 79 *Military LR* (1978), 157-191.

Bernhardt, R., "Reform of the control Machinery under the European Convention on Human Rights: Protocol 11" 89 *AJIL* (1995), 145-154.

Birch, A., "Minority Nationalist Movements and theories of Political Integration" *WP* (1978), 324-344.

Bitker, V., "The International treaty against Racial Discrimination" *53 Marquette Law Review* (1970), 68-93.

Bleicher, S. "The Legal Significance of Recitation of General Assembly Resolutions" 63 *AJIL* (1969), 444-477.

Blum, Z "Reflections on the changing content of Self-Determination" 10 *Israel LR*, (1975), 509-514.

Bowett, D., "Self-Determination and Political Rights in the Developing Countries" *Pros. ASIL*, (1966), 129-135.

Brand, J., "Crimes against Humanity and the Nuremberg" 28 *OLR* (1949), 93-119.

Brass, P., "Muslim Separatism in the United Provinces" *E&PW* (1970), 167-187.

Brass, P., "Muslim Separatism in the United Provinces" *E&PW* Annual number (1970), 167-187.

Bridge, J., "The Case of an International Court of Criminal Justice and the formulation of International Criminal Law" 13 *ICLQ* (1964), 1255-1281.

Brilmayer, L., "Secession and Self-Determination: A Territorial Interpretation" *Yale JIL* (1991) 177-202.

Brugel, W., "A Neglected Field, the Protection of Minorities" 4 *RDH*, (1971), 413-442.

Bunch, C., "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights" 12 *HRQ* (1990), 486-498.

Capotorti, F., "The Protection of Minorities under Multilateral Agreements on Human Rights" 2 *IYIL*, (1976), 3-32.

Carneigie, R., "Jurisdiction over violations of the Laws and Customs of War" 39 *BYIL*, (1963), 402-424.

Cary, J., "Political Organisation of the refugees and Expellees in West Germany" 66 *PSQ* (1951), 191-215.

Cassese, A., "How could Non-Governmental Organizations Use UN Bodies more effectively" 1 *UHR* (1979), 73-80.

Charney, J., "The Persistent Objector Rule and The Development of Customary International law" 56 *BYIL* (1985), 1-24.

Cheng, B., "United Nations Resolution on Outer Space `Instant' International Customary Law" 5 *IJIL* (1965), 23-45.

Chinkin, C., "Rape and Sexual Abuse of Women in International Law" 5 *EJIL* (1994), 326-341.

Clapham, A., "Creating the High Commissioner for Human Rights: The Outside Story" 5 *EJIL* (1994), 556-568

Clark, R., "The International League for Human Rights and South West Africa 1947-1957: The Human Rights NGO as Catalyst in the International legal Process" 3 *HRQ* (1981) 101-136.

Clark, R., "The United Nations and Religious freedom" 11 *NYUJILP* (1978-79), 197-225.

Claude, I. L. Jr., "Just wars: Doctrines and institutions" 95 *PSQ* (1980), 83-96.

Claydon, J., "Internationally Uprooted people and the transnational Protection of Minority Culture" 24 *NYLSLR*, (1978), 125-151.

Clinebell, J and Thomson, J "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law" 27 *Buff LR* (1978), 669-714.

Cohen, C., "The Role of Non-governmental Organisations in the Drafting of the Convention on the Rights of the Child" 12 *HRQ* (1990), 137-147.

Conner, W., "Nation building or Nation destroying" 24 *WP*, (1971-2), 319-355.

Crawford, J., "The ILC adopts a Statute for an International Criminal Court" 89 AJIL (1995), 405-416.

Crawford, J., "The Forty-Fifth Session of the ILC" 88 *AJIL* (1994), 134-152.

Cullen, H., "Education Rights or Minority Rights" 7 *International Journal of Law and Family* (1993), 143-177.

D'Sa, R., "Human and Peoples' Rights: Distinctive features of the African Charter" 29 *JAL* (1985), 72-81.

De Jonge, H., "Democracy and Economic Development in the Asia-Pacific Region" 14 *HRLJ* (1993), 301-306.

De Nova, R., "The International Protection of National Minorities and Human Rights" 11 *Howard LJ* (1965), 275.-290.

de Zayas, A., "International law and Mass Population Transfers" 16 *Harvard ILJ* (1975), 207-258.

de Zayas, A., and Opsahal. T., "Applicability of the International Covenant on Civil and Political Rights under the Optional Protocol of the Human Rights Committee" 28 *GYIL* (1985), 9-64.

Dickson, B., "The United Nations and Freedom of Religion" 44 *ICLQ* (1995), 327-357.

Dinstein, Y., "International Law as a Primitive Legal System" 19 *NYUJILP* (1986-7), 1-32.

Dinstein, Y., "Collective Human Rights of Peoples and Minorities" 25 *ICLQ* (1976), 102-120.

Emerson, R., "Colonialism, Political Development and the United Nations" 19 *IO* (1965), 484-503.

Emerson, R., "Self-Determination" 65 *AJIL* (1971), 459-479.

Emerson, R., "The Fate of Human Rights in the World" 27 *WP* (1975), 201-226.

Ermacora, F., "The Protection of Minorities before the United Nations" 182 *Rec des cours* (1983), 251-366.

Farer, T., "Human Rights and Foreign Policy: What the Kurds learned (A Drama in One Act)" 14 *HRQ* (1992) 62-77.

Fawcett, J., "The Eichmann Case" 38 *BYIL* (1962), 181-215

Fonteyne, J-P., "The Customary International Law doctrine of Humanitarian Intervention: Its current validity under the UN Charter" 4 *Cal.WILJ* (1974), 203-270.

Ford, M., "Non-Governmental interference's with human rights" 56 *BYIL* (1985) 253-280.

Franck, T and Rodley, N., "After Bangladesh: The Law of International Humanitarian Intervention by Military Force" 67 *AJIL* (1973), 275-305.

Franck, T and Rodley, N., "The Law, the United Nations and Bangladesh" 2 *IYHR* (1972), 142-175.

Franck, T., "Legitimacy in International System" 82 *AJIL* (1988), 705-759.

Franck, T., "The Emerging Right to Democratic Governance" 86 *AJIL,* (1992) 46-91.

Gamble, J, Jr., "Reservations to Multi-Lateral Treaties: A Macroscopic view of State Practice" 74 *AJIL* (1980), 372-394.

Ganguly, S., "Avoiding war in Kashmir" 69(5) *FAffs* (1990), 57-73.

Ganz, G., "The War Crimes Act 1991 Why no Constitutional Crisis" 55 *MLR* (1992), 87-95.

Garet, R., "Communality and Existence The Rights of Groups" 5 *Southern California Law Review* (1983), 1001-1075.

Ghandhi, S., "The Human Rights Committee and the Right of individual communications" 57 *BYIL* 1986, 201-251.

Ghosal, A and Crowly, T., "Refugees and Immigrants: A Human Rights Dilemma" 3 *HRQ* (1983) 327-347.

Gittleman, R., "The African Charter on Human and Peoples' Rights: A Legal Analysis" 22 *Va. JIL* (1982), 667-714.

Gray, C., "Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina) v (Serbia and Montenegro) Orders of Provision Measures of 8 April 1993 and 13 September 1993", 43 *ICLQ* (1994), 704-714.

Greenwood, C., "Is there a Right of Humanitarian Intervention" *World Today*, (1993), 34-40.

Greig, D., "The Protection of Refugees and Customary International Law" 8 *AYBIL* (1978-80), 108-141.

Gross. L., "The Peace of Westphalia 1648-1948" 42 *AJIL* (1948), 20-41.

Gurr, T and Scarrit, J., "Minorities at Risk: A Global Survey" 11 *HRQ* (1989), 375-405.

Hannum, H., "International Law and the Cambodian Genocide: The Sounds of Silence" 11 *HRQ* (1989), 82-138.

Hannum, H and Lillich, R., "The Concept of Autonomy in International law" 74 *AJIL* (1980), 858-887.

Hannum, H., "Re-thinking Self-Determination" 34 *Va.JIL* (1993), 1-69.

Hettne, B., "Ethnicity and Development-an Elusive Relationship" 2 *CSA* (1993) 123-149.

Higgins, R., "Conceptual thinking about the Individual in International Law" 28 *NYLSL Rev* (1978), 11-29.

Higgins, R., "General Course on Public International law" 1991 *Rec des Cours* 10-341.

Howard, R., "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons" 6 *HRQ* (1984), 160-179.

Hyndman, P., "Developing Refugee Law in Asia Pacific Region Some issues and prognosis" 1 *As.YBIL* (1990), 19-44.

Hyndman, P., "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the case of Sri Lankan Tamil Applicants" 9 *HRQ* (1987), 49-73.

Iyer, V., "Mass Expulsion as violations of Human Rights" 13 *IJIL* (1973), 169-175.

Kelly, J., "National Minorities in International Law" 3 *JILP* (1973), 253-273.

Kennedy, C., "The Politics of Ethnicity in Sindh" 31 *AS* (1991), 938-955.

Kennedy, C., "Islamiztion and Legal reforms in Pakistan 1979-1989" 61 *PAffs* (1989), 62-77.

Kennedy, C., "Policies of Ethnic Preferences in Pakistan" 24 *AS* (1984), 688-703.

Kennedy, C., "Analysis of the lateral Recruitment program to the Federal Bureaucracy of Pakistan 1973-9" 3 *Journal of South Asian and Middle Eastern Studies* (1980), 42-65.

Kennedy, C., "Repugnancy to Islam-Who decides: Islam and Legal Reform in Pakistan" 41 *ICLQ* (1992), 769-787.

Kimminich, O., "The functions of the law of Ethnic Groups in international system" 23 *Law and State,* (1981), 33-51.

Kirgis, F, Jr., "The Degrees of Self-Determination in the United Nations Era" 88 *AJIL* (1994), 304-310.

Kiss, C, A., "The People's Right to Self-Determination" 7 *HRLJ* (1986) 165-75.

Kiwanuka, R, N., "The meaning of `People' in the African Charter of Human and Peoples' Rights" 82 *AJIL* (1988), 80-101.

Korengold, M., "Lessons in confronting Racist speech: Good intentions, bad results and Article 4(a) of the Convention on the Elimination of All forms of Racial Discrimination" 77 *Min LR* (1993), 719-737.

Koskeniemi, M., "National self-determination Today: Problems of legal theory and practice" 43 *ICLQ* (1994), 241-269.

Kunz, J., "The Present Status of International Law for the Protection of Minorities" 48 *AJIL* (1954), 282-287.

Kunz, J., "Bellum Justum and Bellum Legale" 45 *AJIL* (1951), 528-34.

Kunz, J., "Chapter XI of United Nations Chapter" 48 *AJIL* (1954), 108-118.

Kunz, J., "The UN Convention on Genocide" 43 *AJIL* (1949), 738-746.

Lauren, P., "First Principles of Racial Equality" 3 *HRQ,* (1983), 1-26.

Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes" 21 *BYIL* (1948), 58-95.

Lemkin, R., "Genocide as a Crime in international law" 43 *AJIL* 1949, 145-151.

Lemkin, R., "Terrisme Actes de la Ve Conference Internationale pour l'Unification du Droit Penal", Paris, (1935), 48-56.

Lerner, N., "Curbing Racial Discrimination- 15 Years CERD" 13 *IYHR* (1983), 170-188.

Lerner, N., "The Final Text of the United Nations Declaration against Intolerance and Discrimination based on Religion or Belief" 12 *IYHR* (1982) 185-194.

Levie, H., "Legal Aspects of the continued detention of Pakistani Prisoners of War by India" 67 *AJIL* (1973), 512-516.

Levie, H., "The Indo-Pakistani agreement of August 28, 1973" 68 *AJIL,* (1973), 95-97.

Lillich, R., "Intervention to Protect Human Rights" 15 *McGill LR* (1969), 205-219.

Macdermot, N., "Crimes against Humanity" *IL* (1973) 746-484.

Maguire, J., "The Decolonization of Belize: Self-determination and territorial integrity" 22 *Va. JIL* (1982), 850-881.

Marie, J., "Relations Between People's and Human Rights: Semantic and Methodolgic Distinction" 7 *HRLJ* (1986) 195-204.

McDougal, M., Lasswell, H and Chen, L-C., "Freedom of Discrimination in Choice of Language and International Human Rights" *SIULJ* (1976) 151-174.

McGoldrick, D., and Warbrick, C., "International Criminal Law" 44 *ICLQ* (1995), 466-479.

Mckean, W., "The Meaning of Discrimination in International and Municipal law" 44 *BYIL* (1970), 177-192.

Meron, T., "The Meaning and Reach of the International Convention on the Elimination of all forms of Racial Discrimination" 79 *AJIL* (1985), 283-317.

Meron, T., "The case of war crimes trials in Yugoslavia" *FAffs* (1993), 122-135.

Mistral, G., "An Appeal to World Conscience-The Genocide Convention" *UN Review,* June (1956), 14-15.

Mullerson, R., "Human Rights and the Individual as subject of International Law: A Soviet view" 1 *EJIL* (1990), 36-43.

Naldi, G., "The Case concerning Frontier Dispute (Burkina Faso v Mali) *Uti Possidetis* in an African Perspective" 36 *ICLQ* (1987), 893-903.

Naldi, G., "United Nations seeks to abolish the Death Penalty" 40 *ICLQ,* (1991), 948-952.

Nanda, V, P., "A Critique of the United Nations inaction in Bangladesh" 49 *DenLJ* (1976), 53-67.

Nanda, V, P., "Self-Determination in International Law: the tragic tale of two

Cities Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *AJIL* (1972), 321-336.

Nanda, V, P., "Tragedies in Northern Ireland, Liberia, Yugoslavia and Haiti, Revisiting the validity of Humanitarian Intervention- Part I" 20 *Den JIL* (1992), 305-334.

Nawaz, M., "The Meaning and Range of the Principle of Self-Determination" 82 *Duke LJ* (1965), 82-101.

Nayar, M., "Human Rights and Economic Development: the Legal Foundations" 2 *UHR* (1980), 63-81.

Neff, S., "An Evolving International Norm of Religious Freedom: Problems and Prospects" 7 *Cal.WILJ* (1973), 543-590.

Nitzora, P., "The Bosnian Crisis: Anatomy of the Conflict" 19(3) *New Community* (1993) 507-512.

Noman, O., "Pakistan and General Zia: Era and Legacy" 11 *TWQ* (1989), 28-54.

O' Brien, J., "The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia" 87 *AJIL* (1993), 639-659.

Miller, R., "The Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity" 65 *AJIL* (1971), 476-501.

Oja, O and Sesay, A., "The OAU and Human Rights: Prospects for the 1980s and Beyond" 8 *HRQ* (1986) 89-103.

Okere, B., "The Protection of Human Rights in Africa and the African Charter on Human and People's Rights: A Comparative Analysis with the European and American Systems" 6 *HRQ* (1984) 141-159.

Paradis, J, B., "Language Rights in Multicultural States: A Comparative Analysis" 48 *CBR* (1970), 651-697.

Partsch, K., "Recent Developments in the field of People's Rights" 7 *HRLJ* (1986) 177-182.

Paust, J and Blaustein, A., "War Crimes Jurisdiction and Due Process: The Bangladesh Experience" 11 *Vanderbilt JTL,* (1978), 1-37.

Pease, K and Forsythe, K., "Human Rights, Humanitarian Intervention and World Politics" 15 *HRQ* (1993), 290-314.

Petrovic, D., "Ethnic Cleansing An attempt at Methodology" 5 *EJIL* (1994), 326-341.

Pogany, I., "Humanitarian Intervention Revisited: French Intervention in Syria"

35 *ICLQ* (1986), 182-190.

Ramaga, R., "Relativity of the Minority Concept" 14 *HRQ* (1992), 104-119.

Reanda, L., "Human Rights and Women's Rights: The United Nations Approach" 3 *HRQ* (1981) 11-31.

Redgwell, C., "Universality or integrity: Some Reflections on Reservations to General Multilateral Treaties" 64 *BYIL* (1993), 245-383.

Rehman, J., "State-building, Self-Determination and the Mohajirs The Role of the Indian Muslim Refugees in the constitutional developments of Pakistan" 3 *CSA* (1994), 111-129.

Rehman, J., "The Role of the Human Rights Committee in dealing with Individual Petitions under the Optional Protocol" 11 *JLS* (1992), 13-22.

Reisman, W., "Responses to Crimes of Discrimination and Genocide An appraisal of the Convention on Elimination of All forms of Racial Discrimination" 1 *DenJILP* (1971), 29-64.

Reisman, W., "The Struggle for the Falklands" 93 *YaleLJ* (1983), 28-58.

Richardson, A., "War Crimes Act 1991" 55 *MLR* (1992), 73-87.

Robinson, J., "International Protection of Minorities A Global view" 1 *IYHR* (1971), 61-91.

Rodley, N., "Human Rights and Humanitarian Intervention The Case Law of the World Court" 38 *ICLQ* (1989) 321-333.

Rodley, N., "Conceptual Problems in the Protection of Minorities: International Legal Analysis" 17 *HRQ* (1995), 48-71.

Rogers, T., "Two Dimensions of a National Crises: Population Growth and Refugees in Pakistan" 26 *MAS* (1992), 735-761.

Rosenstock, R., "The Declaration of Principles of International law Concerning Friendly Relations: A Survey" 65 *AJIL* (1971), 713-735.

Rosting, H., "Protection of Minorities by League of Nations" 17 *AJIL* (1923), 641-660.

Rumpf, C., "The Protection of Human Rights in Turkey and the Significance of International Human Rights instruments" 14 *HRLJ* (1993), 394-408.

Sadurski, W., "On Legal Definitions of `Religion'", 63 *AustLJ* (1989), 834-843.

Salzburg, J., "United Nation's Prevention of Human Rights Violations The Case

of Bangladesh" 27 *IO* (1973), 115-127.

Sanders, D., "Collective Rights" 13 *HRQ* (1991), 368-386.

Schacter, O., "Just War and Human Rights" 1 *PYIL* (1989), 1-19.

Schacter, O., "Legality of Pro-Democratic Invasion" 78 *AJIL* (1984), 645-652.

Schwarzenberger, G., "The Problem of International Criminal Court" 3 *CLP*, 1950, 263-296.

Schwelb, E., "Crimes against Humanity" 23 *BYIL* (1946), 178.-225.

Schwelb, E., "International Court of Justice and the Human Rights Clauses of the United Nations Charter" 66 *AJIL* (1972), 337-351.

Schwelb, E., "Some Aspects of International Jus Cogens as Formulated by the International law Commission" 61 *AJIL* (1967), 946-975.

Schwelb, E., "The Austrian State Treaty and Human Rights" 5 ICLQ (1956), 265-272.

Schwelb, E., "The International Convention on the Elimination of All forms of Racial Discrimination", 15 *ICLQ* (1966), 996-1068.

Shraga, D., and Zackin, R., "The International Criminal Court for the former Yugoslavia" 5 *EJIL* (1994), 360-380.

Sloan, B., "General Assembly Resolutions Revisited" 58 *BYIL* (1987), 39-150.

Stamatoppulou, E., "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic" 16 *HRQ* (1994), 58-81.

Stavengham, R., "Human Rights or Peoples Rights-The Question of Minorities" 3 *NJHR* (1987) 16-26.

Sullvian, D., "Advancing the freedom of Religion on Belief through the UN Declaration on the Elimination of Religious intolerance and Discrimination" 82 *AJIL* (1988) 487-502.

Suzuki, E., "Self-Determination and World Public Order" 16 *Va.JIL* (1976), 779-862.

Syed, A. H., "The Pakistan People's Party and the Punjab - National Assembly elections 1988 & 1990" 31 *AS* (1991), 581-597.

Tabory, M., "Language Rights as Human Rights" 10 *IYBHR* (1980), 167-223.

Thornberry, P., "Is There a Phoenix in the Ashes? International Law and Minority Rights" 15 *Texas ILJ* (1980), 421-458.

Tomuschat, C., "Article 27 of the Covenant on Civil and Political Rights" *Volkerrecht als Rechsordnung Menchernrechte Fetschnft fur Herman Mosler,* (1983).

Van Boven, T., "Advances and Obstacles in building Understanding and Respect between People of diverse Religions and Beliefs" 13 *HRQ* (1991) 437-452.

Varshney, A., "India, Pakistan and Kashmir: Antinomies of Nationalism" 31 *AS* (1991), 997-1019.

Weil, P., "Towards Relative normativity in International Law" 77 *AJIL* 1983, 413-442.

Weller, M., "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" 86 *AJIL* (1992), 569-607.

White, R., "Self-Determination: Time for a Reassessment" 28 *NILR* (1981), 147-170.

White, N., "Humanitarian Intervention" 1 *International Law and Armed Conflict Commentary* (1994), 13-27.

Whiteman, M., "*Jus Cogens* In International Law, with a Projected List" 7 *Ga.JICL* (1977), 609-626.

Wright, T, Jr., "Center-Periphery relations and Ethnic conflict in Pakistan-Sindhis, Muhajirs and Punjabis" *CP* (1991), 299-312.

Wright, T, P, Jr., "Indian Muslim Refugees in the Politics of Pakistan" *Journal of Commonwealth and Comparative Politics* (1974), 199-205.

Zaidi, S, A., "Contradictions between Smaller Nationalities in Pakistan" 22 *E&PW* (1987), 1746-1747.

Zaidi, S, A., "Sindhis v Mohajirs in Pakistan: Contradictions, Conflicts, Compromise" *E&PW* (1991), 1295-1302.

Zaidi, S, A., "Regional Imbalance and the National Question in Pakistan-Some Indications" 11 *E&PW* (1989), 300-314.

Ziring, L., "Pakistan in 1990 - The fall of Benazir Bhutto" 31 *AS,* (1991), 113-124.

C. MISCELLANEOUS

1. AMNESTY INTERNATIONAL DOCUMENTS:

AI, *Sri Lanka An Assessment of Human Rights Situation* Index: ASA 37/1/93, February 1993.

AI, *China Amnesty International fears of mass arrest in Tibet as Military surround villages* Index ASA 17/WU10/93 External August 1993.

AI, *Greece C Siderapolous Ethnic identity on trial* Index EUR 25/04/94 June 1994.

AI, *Greece Violations of the Right to Freedom of Expression: Further Cases of Concern,* Index: EUR 25/01/94.

AI, *India "An Unnatural fate" Disappearances and Impunity in the Indian States of Jammu and Kashmir and Punjab,* 1993, Index: ASA 20/42/93.

AI, *Pakistan Arrests of Political opponents in Sindh province, August 1990-early 1992* Index ASA 33/003/92 June 1992.

AI, *Pakistan Open Letter to the Political Parties,* 93, Index: ASA 33/04/93.

AI, *Pakistan: Human Rights violations and the Decline of Rule of Law,* London 1982.

AI, *People's Republic of China Prison terms increased for nuns in Tibet* Index: ASA 17/11/94 24 Feb. 1994.

AI, *Peoples Republic of China Repression of Tibet 1987-1992,* (1993), AI 17/19/92.

AI, *Sudan The Ravages of War: Political Killings and humanitarian disaster,* (1993), Index: AFR 54/29/93.

AI, *Turkey, More people "Disappear" following Detention* AI Index: EUR 44/15/94.

AI, *Turkey, Selahattin Sinek: 12 years in prison after unfair trial* AI Index EUR 44/09/93.

AI, *Turkey Student Soner Onder still held 1993,* AI Index EUR 44/66/93.

AI, *Turkey A Time for Action, 1994,* Index: EUR 44/13/94.

AI, *Turkey Escalation in human rights abuses against Kurdish villagers* Index:

EUR 44/64/93 July, 1993.

AI, *Use and abuse of the Blasphemy laws Index: ASA 33/08/94,* July 1994.

II. HRCP DOCUMENTS

State of Human Rights in Pakistan, (Lahore: Makataba Jadeed Press Pvt. Ltd) *Reports 1990-1993.*

State of Human Rights Interim Report 1994.

HRCP News Letters Quarterly January 1991-

Sindh Inquiry 1990

III. BAHÁ'Í INTERNATIONAL COMMUNITY,

The Bah'a'is of Iran, A Report on the Persecution of a Religious Minority, (New York) June 1981.

One Country, Quarterly Newsletters, various issues (New York)

IV. MÉDECÍNS SANS FRONTÌÈRES

Populations in Danger (London: John Libby 1992)

Genocide in Rwanda, July 1994.

V. TIBET SUPPORT GROUP, UK.

When will Tibet be Free, (London: 1994)

Tibet File, various issues.

VI. UNPUBLISHED WORKS

Paust, J., and Blaustien, A., *War Crimes Jurisdiction and Due Process A Case Study of Bangladesh, A Legal Memorandum to the People's Republic of Bangladesh* (Unpublished, 1974).

Banuri, T., "Democratic Decentralisation", Unpublished paper, Islamabad, 1990.

Haque, C., *The Dilemma of Nationhood and Religion Unpublished paper Presented at the Fourth International Research and Advisory panel conference on forced migration,* Oxford, England, 1994.

Daud, C., *Violations of Human Rights in Pakistan: The Case of Ahmadiyya Community,* Unpublished LLM Dissertation University of London, 1992.

Mohabbat, A., *Pakhtun National Self-Determination: The Partition of India and Relations with Pakistan* Unpublished Ph.D. Dissertation Saint Louis University, 1979.

Mozaffar, S., *The Politics of Elite Transformation in Pakistan: A Study of Recruitment to the Central Cabinet 1947-1977,* Unpublished Ph.D. Dissertation, Miami University Oxford, Ohio, 1981.

Rehman, J., *Minority Rights, Assimilation or Segregation,* Unpublished LL.M Dissertation, University of Hull, England, 1991.

Tolbert, D., Global Climate Change and the Role of the Non-Governmental Organisations (Unpublished, 1991).

VII. KEESINGS CONTEMPORARY ARCHIVES

"Afghanistan Escalation in fighting" May 1994, 40009.

"Bangladesh-Developments in Chittagong Hill Tracts" July 1986, 34483.

"Cambodia" November 1992, 39195.

"Passing of Death Sentence for Blasphemy" November 1992, 39193.

"President Bhutto's visits to Moslem and African Countries" August 1972, 19-26, 25429.

"Recognition of Bangladesh by Pakistan" March 25-31, 1974, 26423

"Sri Lanka Conflicting casually claims" July 1992, 39007.

"The New Delhi agreement-Beginning of Repatriation of Prisoners of War...." 22-28 October 1973, 26162.

"The New Delhi Tripartite Agreement" 1974, May 13-19, 26509.

"Trial of `Collaborators'", 9-15 April 1972, 25822.

VIII. PRESS ARTICLES

"Fear of civilians grows as Turks advance in to Iraq" Times 23 March 1995

"Turks ignore EU and harry Kurds" 24 March 1995

"Nation States Recipe for International disasters" Guardian 23 February, 1993.

"Ugly face of a new world order" Sunday Times 7 November 1993

"Boy escapes hanging in Pakistan" Times 24-2-95.

"Boy 14 escapes death" Independent 24 February 95.

"Qadianis not to preach amongst Muslims-Zia" Muslim 15 April, 1984.

"Major asked to pressurise Pakistan for repatriation of Biharis" Daily Jang, 15 November, 1994.

"Bangladesh barred from membership by China" The Times, 26 August, 1972.

"Kremlin backs war to protect ethnic Russians" Independent 19 April 95.

"Kozyrev threatens force to protect ethnic Russians" The Times 19 April 95.

"Teenage Tigresses inside the Tamil Suicide squads" Independent on Sunday 26 February 1995.

"Recipe for international disasters The doctrine of national self-determination" Guardian Education 22 February 1993.

TABLE OF ABBREVIATED REFERENCES

Benito: *Elimination of All forms of Intolerance and Discrimination based on Religion of Belief* (Geneva: United Nations, 1989).

Brownlie: *Principles of Public International Law,* 4th edn. (Oxford: OUP, 1990).

Capotorti: *Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities,* UN Sales No E.78.XIV.I (1978) Reprinted in 1991 by the United Nations Centre for Human Rights, UN Sales NoE.91.XIV.2.

Gurr, T.,: *Minorities at Risk A Global view of Ethnopolitical Conflicts,* (Washington: US Institution of Peace Press, 1993).

Hannum: *Autonomy, Sovereignty and Self-Determination The Accommodation of Conflicting Interests* (Philadelphia: University of Philadelphia, 1990).

Henkin (ed.): *International Bill of Human Rights The Covenant on Civil and Political Rights,* (New York: Columbia UP, 1981).

Higgins: *The Development of International Law through the Political Organs of the United Nations,* (London: Oxford University Press, 1963).

Kritsiotis (ed.): *Self-Determination Cases of Crises* (Hull: University Press, 1994).

Kuper, *Genocide*: *Genocide Its Political Use in the Twentieth Century* (New Haven and London: Yale University Press 1981).

Kuper, ***Prevention of Genocide:*** *The Prevention of Genocide* (New Haven: Yale UP, 1985).

Laponce: *The Protection of Minorities,* (Berkeley and Los Angeles: University of California Press, 1960).

Maill (ed.): *Minority Rights in Europe, The Scope for a Transnational Regime* (London: Pinter, 1994).

Mckean: *Equality and Discrimination in International Law* (Oxford: OUP, 1983).

Palley: *Constitutional Law and Minorities* (London: MRG 1987).

Potter (ed.): *Genocide and Human Rights A Global anthology* (London: University Press of America 1982).

Thornberry "Self-determination": "Self-determination, Minorities and Human Rights: A Review of International Instruments" 38 *ICLQ* (1989), 867-889.

Thornberry: *International Law and the Rights of Minorities,* (Oxford: OUP, 1991)

Vajpeyi and Malik (eds.): *Religious and Ethnic Minority Politics in South Asia,* (Glenn Dale: Riverdale Company Publishers, 1989).

Van Dyke: *Human Rights, Ethnicity and Discrimination* (Westport, Conn and London: Greenwood Press 1985).

PART I

INTRODUCTION

CHAPTER ONE

INTRODUCTION

1.1 THE PROBLEM OF PROTECTION OF MINORITIES AND INTERNATIONAL LAW

The concern for the plight of the minorities and an attempt to safeguard their interests has been an ideal which has contributed towards the growth and expansion of international law.[1] Although international law primarily operates through the medium of States, and minorities generally have no *locus standi*, the treatment which the minorities receive from their States has occasionally become a matter of international concern.[2] International law, however, has historically found it difficult to deal with the issue of minorities. Like the poor, the weak and the inarticulate, they have, since time immemorial been the natural victims of persecution and genocide.[3] In an age when wars were "just", religious repression legitimate, and cultural or political dissidence unacceptable, minorities remained the prime target of repression.[4]

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1 *Infra* chapter 4; "The protection of ethnic, religious and linguistic minorities is one of the oldest concerns of international law" Thornberry, 1.

2 This concern has sometimes been translated in to an armed intervention to protect members of these communities although the humanitarian motives have been open to suspicion. *Infra* chapter 4.

3 Kuper *Genocide*, 11-18. Potter; Kuper, *International Action against Genocide*, (London: MRG),1984; Kuper, *Prevention of Genocide*.

4 B Whitaker, *Report on the Question of the Preservation and Punishment of the Crime of Genocide* UN Doc E/CN.4/Sub.2/1985/6 "Through out recorded human history, War has been the predominant cause or pretext for massacres of nationals, ethnic, racial or religious groups. Wars in ancient and classical era's frequently aimed to exterminate if not enslave other peoples. Religious intolerance could also be a predisposing factor: in religious wars of middle ages as well as in places in the old testament, some genocide was sanctioned by the Holy Writ" *ibid.* 6-7. For an exposition of the concept of "just war" see I Brownlie, *International Law and the Use of Force*, (Oxford: OUP) 1963, 3-18. According to Brownlie "The examination of materials of ancient civilisations for nascent concepts of international law proves to be a somewhat barren pursuit, and even societies which had achieved a high degree of civilisation were ready to resort to war against other societies and groups for reasons which were often slight. Lack of close contact between groups, contrast in levels of culture and ways of thought, and rivalry over access to resources or trade led to conflicts which were frequent and vicious, and which commonly resulted in slavery or death of the vanquished" (footnotes omitted) Brownlie *ibid.* 3; also see O Schacter, "Just War and Human Rights" 1 *PYIL* (1989), 1-19; J Elbe, "The Evolution of the concept of Just Wars in International Law" 33 *AJIL* (1939), 665-688; J Kunz, "Bellum Justum and Bellum Legale" 45 *AJIL* (1951), 528-534; I Claude Jr, "Just Wars: Doctrine and institutions" 95 *PSQ* (1980), 83-96.

Even in this contemporary period of relative tolerance and rationality, minorities are often subjected to persecution, discrimination and genocide.[5] The stance of international law remains tentative and extremely cautious, for minorities pose questions of a serious nature, existing in myriad forms with their own social, political, cultural and religious peculiarities.[6] Often transcending national frontiers minorities are extremely capable of appealing to the sensitivities of their international sympathisers. Most national boundaries are arbitrarily drawn, and a number of States contain turbulent factions artificially placed within their borders, often cutting across frontiers.[7] Many regions continue to witness a perpetual and infinite struggle between the minority groups on the one hand and the State on the other, sometimes to a point where the very fabric of the institution of the State comes under threat.

A consideration of many of the contemporary disputes including those involving the Kurds of Iraq, Turkey and Iran,[8] the Kashmiris of Pakistan and India,[9] the Sikhs of Indian Punjab,[10] the Tamils of Sri Lanka,[11] the Biharis of Bangladesh,[12] the Tibetans of China,[13] the Catholics of Northern Ireland,[14] the non-Arab indigenous Africans of Southern

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5 *Op.cit* note 3; Whitaker *op.cit note* 4, 7-10; Mckean; Van Dyke; Benito.

6 J Robinson, "International Protection of Minorities A Global view" 1 *IYHR* (1971), 61-91, 61.

7 For an excellent survey see Gurr *et al.*

8 Smaller Kurdish communities could also be found in Syria, Lebanon and states of former Soviet Union; D McDowall, *The Kurds*, (London: MRG), 1991; Hannum, 178-202.

9 A Lamb, *Kashmir: A Disputed Legacy, 1846-1990,* (Hertfordshire: Roxford Books), 1991; S Ganguly, "Avoiding war in Kashmir" 69(5) *FAffs,* (1990), 57-73; A Azmi, *Kashmir An Unparalleled Curfew,* (Karachi: Panfwain), 1990; A Varshney, "India, Pakistan and Kashmir: Antinomies of Nationalism" 31 *AS,* (1991), 997-1019; R Wrising, "Kashmir Conflict" in C Kennedy (ed.) *Pakistan 1992* (Karachi: OUP), 1993, 133-165; A Khan, "The Kashmir Dispute A plan for regional co-operation" 31 *Col.JTL* (1994) 495-550.

10 Y Malik, "Democracy, the Akali Party and the Sikhs in Indian Politics" in D Vajpeyi and Y Malik, 19-49; C Shakle, *The Sikhs* (London: MRG) 1986; Hannum, 151-177; also see AI "An Unnatural fate" *ASA 20/42/93.*

11 W Schwarz, *The Tamils of Sri Lanka,* (London: MRG) 1988; Hannum, 280-307; P Hyndman, "The 1951 Convention Definition of a Refugee: An Appraisal with particular reference to the case of Sri Lankan Tamil Applicants" 9 *HRQ* (1987), 49-73; R Oberst, "Tamil Militancy and Youth insurgency in Sri Lanka" in Vajpeyi and Malik, 175-198; AI, *Sri Lanka, ASA 37/1/93,1993.*

12 B Whitaker *et al, The Biharis of Bangladesh,* (London: MRG) 1977; for a background analysis of the issues see J Rehman, "State-building, self-determination and Mohajirs" 3(2) *CSA* (1994), 111-129.

13 S Subedi, "The Right of self-determination and the Tibetan People" in Kritsitotis, 1-16; ICoJ, *The Question of Tibet and the Rule of Law* (Geneva), 1959; C Mullin and P Wangyal, *The Tibetans Two*

Sudan,[15] and protagonists in civil wars of the former Yugoslavia and the Soviet Union, reveals the widespread nature of the conflict. While a number of governments attempt to hide behind Article 2(7) of the United Nations Charter and take refuge in the "citadel" of State sovereignty and sovereign equality, the minorities may take to heart the revolutionary indoctrination of secession in the name of self-determination. A significant number of States that emerged from the rubble of decolonisation have, in particular, faced serious challenges from their minorities. The emphasis on the principle of *Uti Possidetis*, though redolent of the colonial past, meant arbitrary divisions of peoples belonging to the same tribe, race, or religion. In the face of these challenges a number of States attempted to introduce constitutional devices including integration and pluralism,[16] while others, insensitive to minority aspirations and unwilling to compromise, concentrated on the building of a nation-state with one dominant culture, language, politics and religion.[17] Consequences of some of these policies have been severe, resulting in enduring and painful conflict.

The issue of minority rights has and continues to occupy a sensitive position in inter-State relations. Historical as well as current events show that the subject is also capable of engulfing the international community as a whole. The ending of the "Cold-war" has brought with it a need for urgent revision of many areas of international law and

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Perspectives on Tibet-Chinese Relations (London: MRG), 1983, AI *Peoples' Republic of China Repression of Tibet 1987-1992, ASA 17/19/92, 1993.*

[14] Hannum, 226-246. H Jackson and A McHardy, *The Two Irelands: the Problem of a Double Minority*, (London: MRG), 1972; T Hadden, "Northern Ireland" in Miall, 22-45.

[15] C Eprile, *Sudan :The Long War*, (London: Institute for the study of conflicts) 1972; G Morrison, *The Southern Sudan and Eritrea: Aspects of wider African problem* (London: MRG), 1973; Hannum 308-327; see also AI, *Sudan*, AFR 54/29/93, 1993; D Kritsiotis, "Uti Possidetis in the Sudan: An African crisis in perspective" in Kritsiotis, 71-81.

[16] See United Nations, *Special study on Racial Discrimination in the Political, Economic, Social and Cultural Sphere*, (New York: United Nations) 1971, 103-105; paras 373-379; P Thornberry, *Minorities and Human Rights Law*, 1987, (London: MRG); Palley, 6.

[17] Palley, *ibid.*; also see R Emerson, "The Fate of Human Rights in the Third World" 27 *WP* (1975), 201-226; for the position in Africa see O Oja and A Sesay "The OAU and Human Rights: Prospects for the 1980's and Beyond" 8 *HRQ* (1989), 89-103; R Howard "Evaluating Human Rights in Africa: Some problems of implicit comparison" 6 *HRQ* (1987), 160-179.

international relations. The subject of the rights of minorities in international law, it is submitted, is worthy of an extremely thorough reconsideration.

1.2 SCOPE AND OBJECTIVES OF THE STUDY

Contemporary international law provides limited rights to minorities, and there remains a strong perception that it affords recognition only to those rights that are capable of being accommodated within the general framework of individual human rights.[18] While the right to "existence" and to "equality and non-discrimination" may be seen as being accorded to members of minority groups *qua* individuals,[19] international law remains inadequate in preserving the cultural, linguistic and religious identity of these groups.[20]

Members of a minority group often feel that in the clash of cultures, religions or languages it is their will and aspirations which are marginalized, and in this respect the

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[18] See the discussion on the United Nations General Assembly *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* UN Doc. A/Res. 47/135 and *Article 27 of ICCPR, infra* chapter 7; N Rodley, "Conceptual problems in the protection of Minorities: International Legal Analysis" 17 *HRQ* (1995), 48-71, 64; "In a general way, the assumption lying behind the classical formulations of standards of human rights...has been that group rights would be taken care of automatically as the result of the protection of the rights of individuals" I Brownlie, "Rights of Peoples in International law" (ed.) J Crawford, *Rights of Peoples*, (Oxford: OUP) 1988, 1-16, 2; "Is the almost exclusive emphasis on individual human rights in international law since 1945 enough?.." J Crawford, "The Rights of Peoples some conclusions" *ibid.* 159-175, 159; "Under the League of Nations, human rights and minority rights, though limited in their application, formed a coherent package. Human beings were dealt atomistically and as members of particular communities held together by a common consciousness or cultural, religious or linguistic tradition. The new human rights has been advancing to universal status, while virtually abandoning community rights. This is a great loss and oversight" P Thornberry, "Is there a phoenix in the Ashes International Law and Minority Rights" 15 *Tex.JIL* (1980), 421-458, 453-454; J Kunz "The Present Status of International Law for the Protection of Minorities" 48 *AJIL* (1954) 282-287, 282.

[19] "The purpose of the Genocide Convention is to affirm the rights of minorities to live, but not to give them the right to live as members of minority" Laponce, 34; "In practice...the [Genocide] Convention has been interpreted as guaranteeing members of minorities the right to exist, and not necessarily as assuring the existence of the group itself" K Kelly, "National minorities in international law" 3 *JILP* (1973), 253-273, 269; *infra* chapter 5; On the subject of non-discrimination see references *op.cit* note 5; *infra* chapter 6.

[20] Thornberry; F Ermacora "The Protection of Minorities before the United Nations" 182 *Rec. des Cours* (1983), 251-366; "...existing norms on the rights of minorities are limited, and inadequate to the task of ensuring that minorities do not have assimilation or integration forced upon them as a threat to their existence and identity" Thornberry "Self-determination", 888.

individualistic and universalistic tone of international law of human rights is deficient. International laws which could be related to minorities are not only seen as being attenuated and indirect in nature but there is considerable evidence to suggest that they are largely ineffective in safeguarding whatever rights that are granted to minorities.

The contention of the present study is that international law is in itself a difficult medium for providing adequate rights for minorities and for effectively safeguarding those rights. In conducting the analysis, the study identifies and examines the existing international legal norms relating to the rights of ethnic, linguistic and religious minorities, and in so doing highlights both the weaknesses in substance of these rights and the problems associated with their effective implementation. State practice has varied considerably in relation to minority rights, with a wide variety of factors influencing and determining their behaviour, and it is submitted that a general survey may not be adequate. Hence, in order to analyse properly the inherent difficulties and weaknesses associated with the issue of minority rights in international law, the case of Pakistan is used as an example.

1.3 STRUCTURAL FRAMEWORK OF THE STUDY

The study is divided into five parts consisting of twelve Chapters in total. The present part, Part I, in introducing the subject has provided the scope and objectives of the present work. Part II is entitled: "The Conceptual Analysis of the Rights of Ethnic, Linguistic and Religious Minorities". As its rubric indicates, this Part attempts to deal with a number of conceptual difficulties relating to the meaning of "rights of ethnic, linguistic and religious minorities". The term "rights" has often been used in a wide and indiscriminate manner, and such usage has sometimes resulted in confusion and

ambiguity.[21] The meaning of "rights" of minorities in international law can generate a number of complexities, a subject we shall be considering in chapter two. Apart from the term "rights", the concept of "minority" itself remains controversial and complex and our analysis in this chapter attempts to highlight a number of these complexities.

The next Chapter, Chapter three, compares the concept of "minority" with the other analogous collectivities of "peoples" and "indigenous peoples or populations" in international law. The subject of "the right all peoples to self-determination" particularly in the post-colonial context has generated considerable controversy. Self-determination, as a legal right under international law is accorded to "peoples", although as our discussion would reveal, in many instances the distinction between "peoples", "minorities" and "indigenous peoples" is not necessarily a straightforward exercise.

Part III analyses the substantive rights of minorities under international law. A natural and convenient starting point for this exercise is a brief overview of the historical evolution of the concept of protection of minorities, a subject which is dealt with in Chapter four. The remaining chapters of Part III focus on the contemporary position. In view of the submission that neither the substantive rights to which minorities could lay claim to, nor their implementation mechanisms are monolithic, the remainder of Part III itself has been divided into Sections A and B.

Section A consists of Chapters five and six and considers what have been termed as "established" rights of minority groups. Section B deals with what is called "emerging" rights. Under the established rights of minorities, Chapter five analyses the "right to

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[21] W Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (ed.) W Cook, *Fundamental Legal Conceptions as Applied in Judicial Reasoning Essays by Wesley Newcomb Hohfeld,* (New Haven: Yale University Press) 1919, 23-64; F Von Prondzynski, *Freedom of Association and Industrial Relations A Comparative Study,* (London: Mansell Publishing Limited), 1987, 10-15; J Shestask, "The Jurisprudence of Human Rights" in T Meron, (ed.) *Human Rights and International Law,* (Oxford: OUP), 1984, 69-113; F Barker, *Private Property, Public Access: A Critique of the Legal Framework Governing the Enforcement and Exercise of Public Rights of Access to land,* 1994, Unpublished Ph.D. Thesis, University of Hull, 20-28.

physical existence" as accorded to minority groups under international law.[22] Chapter six considers the "right to equality and non-discrimination". This right, although granted to individuals, nonetheless benefits members of minority groups as well as the majority in their capacity as individuals; its examination remains indispensable in the contemporary paradigm of individual human rights law.[23] Chapter seven provides a consideration of what is called the "emerging right of autonomy" for minorities in international law.

In order to validate an analysis of the possible rights of minorities, article 38(1) of the Statute of the International Court of Justice[24] has been relied upon since it provides the most authoritative interpretation of the sources of international law.[25] The analysis of the provision of the article in so far as it is relevant to our research is conducted in the substantive parts of the study. The article provides:

> The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognised by civilised nations
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of publicists of the various nations, as subsidiary means for the determination of rules of law.[26]

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22 Y Dinstein, "Collective Human Rights of Peoples and Minorities" 25 *ICLQ* (1976), 102-120, 118; Thornberry treats the substance of the right as "right to existence" 57. Also see "a tentative minimal catalogue of rights of the group" of Lerner, N Lerner, *Group Rights and Discrimination in International Law*, (Dordrecht: M.Nijhoff), 1991, 34-36.

23 Hence while the focus of the present work is on the rights of minorities as collectivities or groups, it is submitted that the undoubtedly significant impact which human rights norms have on members of minorities and the majority also deserve our attention. See also Thornberry, 10.

24 (1945) UKTS 67 (1946) Cmnd 7015.

25 Brownlie, 3; Brierly, *The Law of Nations* (ed.) H Waldock 6th edn. (Oxford: OUP), 1963, 56.

26 In municipal law, it is possible to maintain a distinction between formal and material sources with relative ease, as is the identification of hierarchy of various sources of law. The same can not be said with equal certainty in the case of international law. While discussing the provisions of Article 38 Brownlie opines "They are not stated to represent a hierarchy, but draftsmen intended to give an order and in one draft the word 'successively' appeared. In practice the Court may be expected to observe the order in which they appear: (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. Source (a) is thus not primarily a source of rules of general application, although treaties may provide evidence of the formation of custom. Source (b) and, perhaps (c) are formal sources, at least for those who care for such classifications. Source (d), with its reference 'as subsidiary means for the determination of rules of law' relates to material sources. Yet some jurists regard (d), as a reference to formal sources,

The substantive weaknesses and problems of implementation of the rights belonging to minorities under international law that have been identified in Part III, are exemplified in Part IV through the case of Pakistan. The exercise is based on the submission that a global overview of the inherent complexities relating to the issue of minority rights may be inadequate and merely vacuous; hence this Part while focusing on the case of Pakistan, highlights the difficulties and weaknesses in international law in providing adequate rights for minorities and effectively safeguarding those rights. Chapter eight analyses the historical considerations in the evolution of minority rights in the context of the Indian Sub-Continent. Chapter nine considers the substantive weaknesses in the current laws relating to physical existence and the difficulties in safeguarding this right, particularly in the context of events during the civil war in East Pakistan. Chapter ten provides an analysis of the issues that are generated in the application of the norms relating to equality and non-discrimination, and its application to the various ethnic and religious groups of Pakistan. Chapter eleven considers the problems generated when confronted with the issue of autonomy for minorities. The final part, Part V which consists of the concluding chapter, presents the conclusions drawn from this study.

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and Fitzmaurice has criticised the classification of Judicial decision as "subsidiary means"..... "In general Article 38 does not rest upon a distinction between formal and material sources, and a system of priority of application depends simply on the order (a) to (d), and the reference to subsidiary means. Moreover, it is probably unwise to think in terms of hierarchy dictated by the order (a) to (d) in all cases." (Footnotes omitted) Brownlie *ibid.*, 3-4; on the subject of formal sources see G Fitzmaurice, *Some Problems regarding the Formal Sources of International Law*, Symbolae Verzijl, 1958, 153-176.

PART II

CONCEPTUAL ANALYSIS OF THE RIGHTS OF ETHNIC, LINGUISTIC AND RELIGIOUS MINORITIES

INTRODUCTION TO PART II

A consideration of the conceptual analysis of "the rights of ethnic, linguistic and religious minorities" is required as an essential pre-requisite for analysing the present subject for a number of reasons. The substantive debate on the issue of "rights of minorities" may not prove extremely helpful without a clarification on the meaning and scope of the concept of "rights". The term "rights", as we shall shortly consider in Chapter two, has often been used indiscriminately so as to engender considerable confusion; its application in international law poses particular complexities.

Similarly, the debate on substantive rights of minorities may not be meaningful without an identification as to what constitutes a "minority" for the purposes of according international legal protection. Minorities can and do exist in all forms and sizes; there are many complexities involved in arriving at a consensus definition, and it is not surprising to note that such definition has not been forthcoming.[1] In the absence of a universally endorsed definition of "minority", Special Rapporteur Francesco Capotorti's definition which he presented in his *Study on the Rights of Persons belonging to Ethnic, Linguistic and Religious Minorities* is generally regarded as an authoritative expression.[2] Chapter two, while recognising its authoritative position, reveals a number of possible shortcomings in the definition.

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1 "The definition of minority has also pre-occupied many scholars and leading experts in international law, despite the fact that there have been countless attempts to formulate a widely acceptable definition of minorities they all lack success", O Andrysek, *Report on the Definition of Minorities*, (Utrecht: Netherlands Institute of Human Rights: Studie-en-Informatiecentium) 1993, 13; "Despite recent interest in the rights of minorities, there is still no agreed definition of a minority" H Cullen, "A Response to William Lawton" in Kritsiotis, 34-39, 35; "There is no generally accepted definition of minorities in international law" P Thornberry in Miall, 14-21, 20.

2 Capotorti, 96.

Chapter three attempts to disentangle the complex web of "minorities", "indigenous peoples" and "peoples". Indigenous peoples in general parlance and in most ways epitomise characteristically the minority syndrome; the annals of history testify to their systematic persecution, discrimination, extermination and genocide. Indigenous peoples deserve all that international law has to offer in protecting the weaker elements of the State. On the other hand their is an insistent desire on the part of the indigenous peoples themselves to be accorded a status distinct from other minorities. International law is increasingly distinguishing them from ordinary minorities and has to some to extent recognised the collective nature of their existence.

A greater test is presented to international lawyers in ascertaining the meaning of the concept of "the right of Peoples to self-determination". It is not proposed to provide a detailed examination of the subject, for such an exercise, it is submitted, is not called for when analysing in *lex lata*, the rights of minorities. The subject itself has generated considerable and often inconclusive debates. Precision is not the primary attribute of international law; repletion of ambiguity characterises a number of areas. As our analysis in chapter three would reveal, the issue of "the rights of Peoples to self-determination", particularly in the post-colonial context cannot exactly be treated as a model of clarity.[3]

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[3] Professor Freestone's views are instructive as well as indicative of the inherent complexities when he writes "There can be few areas,...where the search for common values presents more difficulties than the doctrine of self-determination, a poignant political slogan as well as a loudly acclaimed principle of international law.....self-determination is indeed an unruly horse. Shaped by the processes of decolonisation rather than the UN Charter it has been harnessed by, amongst others, national liberation movements, secessionists and irredentists and driven forward for all manner of reasons including race, tribe, religion and language as well as simple geography. Its headlong course takes in issues of minority rights, human rights, collective verses individual rights, as well as justice, democracy and even the concept of governance with in the international legal order" D Freestone, *Forward* in Kritsiotis, vi.

CHAPTER TWO

THE CONCEPT OF "RIGHTS" AND "MINORITIES" IN INTERNATIONAL LAW

2.1 INTRODUCTION

An attempt to analyse the substance of rights of minorities in international law is immediately confronted with a number of issues of fundamental importance. A question of prime significance that arises, relates to the meaning of the term "rights", that "chameleon-hued" expression, against the arbitrary and indiscriminate usage of which Professor Wesley Newcomb Hohfeld warned us so strenuously.[1]

The complexities and confusion that the term could generate is exacerbated when the meaning of "rights of minorities in international law" is debated. Furthermore, if international law is to provide rights for minorities, the issue of their identification becomes a matter of international concern. The elements of human nature are infinite; each individual is different from others and in this respect, each one of us could be regarded as a minority. Such an exercise may however blur the vision; the conception of "minority" may become far too elastic for international law to bear a proper focus.

As noted in the introduction to the present Part, Special Rapporteur's definition which he presented in pursuance to Article 27 of ICCPR, although generally treated as authoritative, is not completely immune from criticism. The present chapter makes an attempt to analyse the various facets of this definition. The definition also reflects a noticeable weakness of international law in failing to provide any precise meaning to the concepts of "ethnicity", "religion" and "language". Certain States revel in this

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[1] "One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arise from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests...Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort towards improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear though and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding, paucity and confusion as regards actual legal conceptions" W Hohfeld "Some fundamental Legal Conceptions as Applied in Judicial Reasoning", (ed.)., W Cook, *Fundamental Legal Conceptions as Applied in Judicial Reasoning Essays by Wesley Newcomb Hohfeld,* (New Haven: Yale University Press) 1919, 23-64, 35-36.

ambiguity, denying the existence or the numerical strength of minorities within their boundaries.

2.2 MEANING AND NATURE OF RIGHTS

The term "rights" is used in a wide variety of circumstances; an often arbitrary usage of the term creates confusion as to the form of the relationship that is sought to be established. This arbitrariness has been a constant source of irritation to a number of lawyers, though a detailed analysis in the exposure of the weaknesses in the general usage of the term is attributed to Professor Wesley Hohfeld.[2] It is not intended in the present work to examine in detail and critically analyse Hohfeld's theory of the distinctions between different types of rights; neither would such an exercise, it is submitted, be extremely helpful, since our primary focus of interest is in international law as opposed to the various facets of municipal law. On the other hand, Hohfeld's views could be deployed to highlight the complexities which the term "rights" could generate in its application to international law.

According to his view, the term "right" has been used to identify the existence of a number of varied relationships. It has sometimes been used in its strict sense, reflecting that the right-holder is entitled to something with a co-relative duty on an other person. Equally, the term "right" has been used to refer to an immunity from having a legal status altered, or to indicate a privilege to do something, or a power to create and alter legal relationships.

In his essay, *Fundamental Legal Conceptions as Applied in Judicial Reasoning I,* Professor Hohfeld presented eight fundamental conceptions which in his view, while serving as the "lowest common denominators" could be used to analyse all

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[2] *Ibid.*; F Von Prondzynski, *Freedom of Associations and Industrial Relations A Comparative Study,* (London: Mansell Publishing Limited),1987, 10; J Shestack "The Jurisprudence of Human Rights" in Meron (ed.) *Human Rights and International Law,* (Oxford: OUP)1984, 69-113; N Simmonds, *Central Issues in Jurisprudence, Law and Rights* (London: Sweet and Maxwell), 1986, 129-130; F Barker, *Private Property, Public Access: A Critique of the Legal Framework Governing the Enforcement and Exercise of Public Rights of Access to land,* 1994, Unpublished Ph.D. Thesis, University of Hull, 20-28.

legal problems; his answer to the confusion generated by the rather indiscriminate usage of term "rights" lay primarily in the application of a scheme of correlatives and opposites. In this scheme, the Jural Correlatives of rights, privilege, power and immunity were duty, no-right, liability and disability respectively and their Jural opposites were no-rights, duty, disability and liability.[3]

A major concern of Hohfeld was that of maintaining a distinction between rights in the strict sense and privileges. In this regard, he proposed that while the existence of a right in the strict sense could be identified through the presence of a duty owed to the right-holder, the identification of a privilege (or a "liberty" or "freedom") was possible through the absence of rights of others to prevent the exercise of the privilege.[4] Similarly in Hohfeld's terminology any person, who by his acts could produce a change in the legal relations of another, had a legal power, and the person whose legal relations would be altered if the power to be exercised was under a "liability". Hohfeld used the term "immunity" to describe the case where one person's legal relations could not be changed by acts of another. In this situation, the former could be said to be enjoying an immunity, much in the sense where a person could not be deprived of his liberty or property without due process of law by the government in power.[5]

> "[Summarising the analysis] a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom, from the right or claim of another. Similarly, a power is one's affirmative `control' over a given legal relation as against another, whereas an immunity is one's freedom from the legal power or `control' of another as regards some legal relation".[6]

As indicated earlier, the main question which attracts our attention is the possible application of the Hohfeldian paradigm of "rights" in international law of

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[3] *Op.cit note 1*, 36.
[4] *Ibid.* 39; Von Prondzynski *op.cit*, note 2, 10-11.
[5] W Cook, "Introduction, Hohfeld's contribution to the Science of Law", *op.cit note 1*, 8-9.
[6] Hohfeld, *op.cit note 1*, 60.

human rights with its contemporary focus on rights of the individual. As Shestack correctly points out

> "the question is not trivial. Particularly in the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are non-existent or fragile, the issue of definition can be crucial".[7]

His highly pertinent comments provide more food for thought:

> "some of the civil and political rights [as provided in the International Covenant for Civil and Political Rights] are in the nature of immunities meaning that governments cannot derogate from them. But are there any absolute rights? Surely the right to life guaranteed by article 6(1) of that Covenant would seem to be so basic as to be considered absolute. Yet, article 6(1) only offers protection against 'arbitrary' deprivation of life. What is the effect of this qualification on the nature of the right involved?
>
> When we speak of inalienable rights, what do we mean? Do we mean a right to which no exceptions or limitations are valid? or do we mean a 'prima-facie' right with a special burden on the proponent of any defeasance? Or do we mean a principle which must be followed unless some other principle weighty enough to allow abridgement arises? Must considerations which justify an exception be of the same moral category as those that underlie the right?"[8]

If there is uncertainty as to the nature of the more fundamental rights, what are we to make of the rights which may be derogable in certain circumstances? Are they in the Hohfeldian scheme, rights in the strict sense, immunities or privileges? In other

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7 Shestack *op.cit* note 2, 70.

8 *Ibid.*, 71; see the Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty, 1989, 29 *ILM*, 1464. Also see Human Rights Committee's first General Comment on Article 6 Human Rights Committee Report GAOR, 37th Session Supp 40, 93, 1982. Naldi's views are instructive when commenting on the abolishment of death penalty he says "Article 3 of the Universal Declaration has not been interpreted as proscribing the death penalty. Article 6 of the International Covenant clearly envisages its continued use, although it does limit its imposition, and the United Nations Human Rights committee has declared that the death penalty *per se* does not breach the International Covenant, but para 6 there of does suggest the desirability of its abolition. In that sense the protocol may be seen as the fruition of the hope expressed in Article 6 of the International Covenant"...."It would seem that it can not be postulated that a norm of customary international law exists precluding death penalty. This is evident by the retention of death penalty by a large number of States and also by considerable opposition to the adoption of the United Nations second protocol" G Naldi "United Nations seeks to abolish the Death Penalty" 40 *ICLQ* (1991), 948-952, 949, 951. also see Article 4 ACHR; see the Advisory Opinion with regard to questions relating to the interpretation of provisions in the American Convention on Human Rights concerning death penalty 231 ILM, 1984, 320; 6th Protocol to the ECHR 1983; Also see *Soering v UK ECHR Ser.A, No 161, 1989*, para 103.

words, if there exists a power of derogation on the part of the State from the rights as provided in an international covenant, could we not legitimately question the precise nature of the "rights" that have been granted[9]?

In a number of States, constitutional rights that have been accorded to individuals are more in the nature of privileges rather than immunities. This certainly has been the case of the former Soviet Union and other socialist States. Even in the case of Britain, since there remains the possibility of abridgement by Parliament at any time, many of the "freedoms"- such as the freedom of speech can be regarded more in the nature of Hohfeldian liberty and not as an immunity.[10]

Further confusion arises in relation to the position of economic, social and cultural rights which carry no obligations of immediate implementation and are more in the nature of aspirations or goals.[11] Considering their attenuated nature, could they at all be regarded as "claim-rights" and if so on whom is the co-relative duty? Still greater confusion would ensue if we were to bracket the so called "third generation

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9 T Burgenthal "To Respect and to Ensure: State Obligations and Permissible Derogations" in Henkin, 72-91.

10 Simmonds, *op.cit note* 2, 132.

11 This aspirational approach is reflected by the terms of the International Covenant on Economic, Social and Cultural Rights. According to Trubek "The Economic Covenant is oriented around the principle of 'progressive realisation'. The principle has several elements. First, the rights which are exclusively dealt with in the Economic Covenant are said to be 'recognised' rather than 'declared' or 'ensured'. This implies that a party's obligations in the areas of work, education, health etc. differ from its obligations in areas like the right to form trade unions, which right is 'ensured'. Further, article 2(1) of the Economic Covenant, which states the principal obligation undertaken by parties in the social area, commits them 'to take steps' toward the realization of the rights that are 'recognised in the present covenant'. Trubeck "Economic, Social and Cultural Rights in the Third World" in (ed.) Meron, *op.cit* note 2, 205-271, 213. In his treatment of the nature of the obligations imposed by the Convention Mckean considers that a distinction could be drawn between "promotional" conventions which did not impose on the ratifying States obligations of an immediate application but seek to promote defined objectives and policies and to set out standards to achieved (includes *inter alia* Economic Covenant 1966) "immediately binding" conventions and others "mixed with some obligations taking effect immediately, but with others to be introduced gradually to avoid the difficulties and dislocations with an immediate obligation might cause (includes Racial Discrimination Convention- 1965 and the Civil and Political Rights Covenant-1966) Mckean, 103-104. Commenting upon the ICESCR, Robertson and Merrills have this to say "It is thus quite clear that this is what is known as a promotional convention, that is to say that it does not set out rights which the parties are required to implement immediately, but rather lists standards which they undertake to promote and which they pledge themselves to secure progressively, to the greatest extent possible, having regard to their resources.....this difference in the obligations results from the very nature of the rights recognised in the Covenant." Robertson and Merrills, *Human Rights in the World, An Introduction to the Study of International Protection of Human Rights,* 3rd edn., (Manchester: Manchester University Press), 1989, 230.

rights" such as the right to development,[12] the right to a healthy environment, and human rights to share in the "common heritage of mankind" in the category of rights. Robertson and Merrills properly query the nature of these rights saying "Economic development, the protection of Environment, the common heritage of mankind and peace: are these concepts `rights' in any meaningful sense? They can, and should be objectives of social policy. They may be items in a political programme. However, they are certainly not legally enforceable claims".[13]

Perhaps one of the most fundamental issues that attracts our attention as international lawyers is the complications arising out of the enforcement of legal rights. It remains clear that enforcement mechanisms in international law and in particular those related to enforcement of individual human rights are inadequate and ineffective and at best rudimentary. Indeed, even the astute and calculating human rights enthusiast may find it difficult to quarrel with the view which questions the existence of rights for which it is not possible to seek a remedy or if it were possible, would depend on the consent of the State.[14]

Intractably related to this issue of enforcement is the procedural capacity of bringing an action. International law provides limited procedural capacity to individuals to bring actions before international tribunals, and although some recent instruments have adopted a group oriented approach, [15] minorities generally are devoid

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12 S Chowdhury, E Denters and P de Waart, *The Right to Development in International Law*, (Dordrecht: M. Nijhoff) 1992; P Alston "The Right to Development at the International level" (eds.) S Snyder and S Sathirathe, *Third World attitudes towards International Law*, (Dordrecht:M. Nijhoff) 1987, 811-824; R Rich, "The Right to Development A Right of peoples" (ed.) J Crawford, *The Rights of Peoples*, (Oxford: OUP), 1988, 39-54.

13 Robertson and Merrills *op.cit note 11*, 258.

14 Speaking in the context of a Labour dispute Lord Denning's views seem highly instructive when he states that a right which depended on its enforcement upon the consent of another person, could hardly be regarded as a right *Gouriet V Union of Post Office Workers* (1977) 1 QB 729, 761; also see R Higgins "Conceptual Thinking about the Individual in International Law" 24 *NYLSLR* (1978), 11-29.

15 See e.g. article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, 60 UNTS 195; UKTS 77 (1969); Article 25 European Convention of Human Rights 1950.; also see Protocol 11 to this Convention, signed 11 May, 1994, 33 *ILM* 943. R Bernhardt "Reform of the Control Machinery under the European Convention on Human Rights: Protocol No 11" 89 *AJIL* (1995), 145-154.

of a procedural capacity. Lying "upon the fault line of international personality"[16] the best hope for bringing actions with the ultimate objective of the realisation of whatever rights international law provides them, minorities rely upon the medium of the individual. The "implementation" of rights of minorities ought to be seen in the background of the present discussion.

2.3 THE DEFINITION OF "MINORITY" IN INTERNATIONAL LAW

"Minority" is an ambiguous term, potentially definable through an endless combination of interacting variables, like religion, language, ethnicity, race, culture, physical characteristics and a variety of other traits. Minorities come in all forms and sizes and indeed each and every individual in one form or another belongs to a minority. Bearing in mind the ambiguities inherent in the concept of "minority", international law has historically found it difficult to provide any firm guide-lines in relation to defining the concept. It is not surprising to note that despite the setting up of a regime on minorities treaties after the establishment of the League of Nations, no standard definition of minorities was forthcoming.

While refraining from elaborating on the meaning of minority, the Permanent Court of International Justice in the *Greco-Bulgarian communities case*[17] stated

> "By tradition....'the community' is a group of persons living in a given country or locality having a race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and tradition of their race and rendering mutual assistance to each other".[18]

More recently in the United Nations regime, although considerable efforts principally in the Sub-Commission on the Prevention of Discrimination and Protection

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[16] M Shaw "The Definition of Minorities in international law" (ed.) Y Dinstein and M Tabory, *The Protection of Minorities and Human Rights*, (Dordrecht: M.Nijhoff), 1993, 1-31, 2.
[17] 1930 PCIJ., Ser B., No 17, 17.
[18] *Ibid.* 21.

of Minorities (Sub-Commission) have been made, a consensus definition of minorities has proved elusive. This failure has been due mainly to a feeling that the concept is inherently vague and imprecise, and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist. Indeed, as the memorandum prepared by the United Nations Secretary-General stated

> "It follows ...that `minority' cannot for practical purposes be defined simply by interpreting the word in its literal sense. If this were the case, nearly all communities existing within a state would be styled minorities, including families, social classes, cultural groups, speakers of dialects, etc. Such a definition would be useless. As a matter of fact, the term minority is frequently used at present in a more restricted sense; it has come to refer to mainly a particular kind of community, which differs from the predominant group in the state
> Such a minority may have originated in any of the following ways
> (a) It may formerly have constituted an independent nation with its own state (or more or less independent tribal organisation);
> (b) It may formerly have been part of a nation living under its own state, which was later segregated from this jurisdiction and annexed to another state; or
> (c) It may have been, or may still be, a regional or scattered group which although bound to the pre-dominant group by certain feelings of solidarity, has not reached even a minimum degree of assimilation with the predominant group".[19]

Explaining the difficulties the Special Rapporteur Capotorti has written

> "Despite the many references to minorities to be found in international legal instruments of all kinds (multi-lateral conventions, bi-lateral treaties and resolutions of international organisations) there is no generally accepted definition of the term `minority'. The preparation of a definition capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it to date. The reason for this is the number of different aspects considered. Should the concept of a minority be based on numerical ratio of the `minority' group to the population as a whole or is this quantitative aspect secondary or even unimportant? Is it necessary to limit this concept by introducing the idea of minimum size? Should only objective criteria be taken into account or should it be assumed that `subjective' factors also have a part to play? Does the origin of minorities matter for the purposes of a definition? Should we

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[19] *Definition and Classification of Minorities*, UN Publications Sales No 1950.XIV.3. paras 37-38.

understand by minorities groups of nationals only, excluding groups of foreigners".[20]

2.3.1 Definition Proposed by the Special Rapporteur Francesco Capotorti

Despite the continuous hesitancy in defining the term minority,[21] the issue was provided urgency by the inclusion of an article relating to "persons belonging to minorities" in the 1966 International Covenant on Civil and Political Rights. Subsequently, Special Rapporteur Capotorti who was assigned to the task of preparing a study pursuant to article 27 of the International Covenant on Civil and Political rights formulated a definition specific to this article. According to his definition a "minority" is 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".[22]

2.3.1.1 Complications Arising from Capotorti's Definition

Although it does not seem possible to provide an all-embracing and acceptable definition, critics have raised a number of issues in relation to Capotorti's description. The primary feature of the definition seems to be a combination of both objective and

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[20] Capotorti, 5.

[21] In a number of occasions the Sub-Commissions recommended, albeit unsuccessfully to adopt a preliminary definition of minorities (E/CN.4 Sub 2/119, para 32; E/CN.4/Sub.2/140, annex 1, draft resolution II; E/CN.4/Sub.2/149, para 26). In its 5th session, the Sub-Commission put forward a recommendation for the Human Rights Commission, that the latter adopt a draft resolution on the definition of "minority" bearing a number of factors in mind which were (i) the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from the rest of the population; (ii) such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics (iii) such minorities must be loyal to the state of which they are nationals. Further consideration of the issue was however halted due to a number of disagreements in the concept of minority, see proceedings of the 9th session E/CN.4/405, para 438.

[22] Capotorti, 96.

subjective elements in ascertaining a minority group. Objective criteria would involve a factual analysis of a group as a distinct entity within the State "possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population"[23]. The subjective criteria would be found on the basis that there exists "a common will in the group, a sense of solidarity, directed towards preserving the distinctive characteristics of the group"[24]. It may well be that in view of these rather onerous considerations of evaluating both the objective and subjective criterion, identification of a minority group might prove to be a difficult task.

The second proposition that needs to be dealt with is that of numerical strength of the group in question. Capotorti's insistence on numerical inferiority to the rest of the population would generate difficulties in multi-minority situations where no single group forms an ascertainable majority.[25] Whereas it seems acceptable that the numerical inferiority must at least account for "a sufficient number of persons to preserve their traditional characteristics"[26], further complications are engendered when we consider the situations where the "non-dominant position" is in fact held by a numerical majority, a situation akin to contemporary Rwanda, or formerly that of South Africa, or to that of East Pakistan prior to 1971.[27]

Arguably these latter examples are cases of a "reversed minority",[28] requiring more a consideration of the principles of self-determination, although it may well be

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23 L Sohn "The Rights of Minorities", in Henkin 270-289, 278-279.

24 *Ibid.*

25 *Ibid.*

26 UN Doc. E/CN.4/703 (1953), para 200.

27 "In fact, one has to consider the protection of collective human rights not merely of minorities, but ethnic, religious and linguistic groups in general. For a State may be under the sway of a minority, in which case the collective human rights of the majority may call for protection. South Africa today, and Pakistan before the creation of Bangladesh, may be instance to demonstrate the point. If we continue to use the familiar term 'minorities', it is worthwhile bearing in mind that the test for the existence of a minority entitled to protection under international law is not always numerical. Perhaps we can think of a minority in the sense that such a group plays a minor role in the affairs of the country" Y Dinstein, "Collective rights of minorities and peoples" 25 *ICLQ* (1976), 102-120, 112; cf. however, Tomuschat's view who treats Dinstein as "an isolated voice" in this matter C Tomuschat "Article 27 of the International Covenant on Civil and Political Rights" *Volkerrecht als Rechtsordnung Internationale Gerichtbarkeit Menschernrechte Festschnft Fur Herman Mosler,* (1983), 949-979, 957.

28 P Ermacora, "The Protection of Minorities before the United Nations" 182 *Rec. des Cours* (1983), 251-366, 284.

that a definition similar in nature to that of the one provided by Professor Palley, with its focus on power-politics of a group may be more appropriate in these circumstances. According to her, a minority is "any racial, tribal, linguistic, religious caste or nationality group within a nation state and which is not control of the political machinery of the state".[29] This view has been endorsed by UNESCO when it stated that it is doubtful that "groups numerically smaller than the rest of the population' is an adequate definition. In some cases, the majority population is in fact a sociological minority, and it may be useful to take into account the power distribution and who can dispense what in deciding on `minority rights'".[30]

The third issue that arises out of the Capotorti definition is that of the position of non-nationals within the State.[31] Non-nationals could form a significant proportion of a State's population, and although the main thrust of the development of international law of human rights has devoted itself to a consideration of the plight of nationals within the State, the rights of the non-nationals, as individuals, is also becoming a concern of human rights law. Indeed, as Lillich correctly points out "the question of rights of aliens is inextricably linked to the contemporary international human rights law movement because it poses a clear test of relevance and enforceability of international human rights norms which have developed since World War II".[32]

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29 Palley 3; also see J Fawcett, *International Protection of Minorities,* (London: MRG), 1979, 4; Laponce, 8-9; "the distinction....between nations and minorities is one of power. The elements of power or powerlessness is distinguishing characteristic of national and minority discourses" H Cullen, 3 *Law and Critique*, 1992, 219-240, 219-220.

30 Cited in Capotorti, 9, para 43.

31 There is considerable amount of slipperiness in the concept of nationality in international law and lacks concise definition. In *Nottembhom case* the ICJ stated "According to the practice of states, arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties". *Nottembham case (Liechtenstein v Guatemala)* Second phase ICJ, 1955, 4, 23; On the concept of Nationality see P Weiss, *Nationality and Statelessness in International Law,* (Alhenann de Rijn: Sijthof and Nooordhoff) 2nd edn, 1979 c.f., however the usage of this concept by T Modeen, *International Protection of National Minorities in Europe,* (Abo: Abo Akandmi), 15-20.

32 R Lillich, *The Human Rights of Aliens in Contemporary International Law,* (Manchester: Manchester University Press), 1984, 2; 44-48; "..the whole human rights movement may be seen as an attempt to extend the minimum international standards from aliens to nationals" M Akehurst, *A Modern Introduction to International Law,* (London: George Alen and Unwin), 1986, 91; H Rosting, "Protection of minorities by the League of Nations" 17 *AJIL* (1923), 641-

Non-nationals consist of a number of categories including migrant workers, refugees and stateless persons and the phenomenal increase in their numbers in recent years has brought considerable attention to their position in international human rights law.[33] The *travaux préparatoires* of the International Covenants on Civil and Political Rights are not extremely helpful on the matter, though whatever guidance that could be obtained points more in the direction of exclusion of non-nationals from the category of minorities as envisaged in article 27.[34] On the other hand, it needs to be noted that article 27 of the ICCPR, unlike article 25, refers to persons,[35] and the working group of the Human Rights Committee in its preparation of a general comment on article 27 hinted at the possibility of the inclusion of non-citizens within the ambit of the article.[36]

660; L Sohn and T Burgenthal, *International Protection of Human Rights,* (Indianapolis: The Bob-Merrill Co), 1973.

33 See Wiess *op.cit* note 31, G Goodwin Gill, *The Refugee in International Law,* (Oxford: OUP), 2nd ed. 1991, F'souza *et al, The Refugee Dilemma* (London: MRG), 1984; A Ghosal and T Crowly "Refugees and Immigrants: A Human Rights dilemma" 3 *HRQ* (1983), 327-347, D Grieg, "The Protection of Refugees and Customary International Law" 8 *AYBIL* (1978-80), 108-141; P Hyndman "The 1951 Convention Definition of refugees: An Appraisal with particular reference to the case of Sri Lankan Tamil Applicants" 9 *HRQ* (1987), 49-73; J-P Fonteyne, "Burden Sharing: An Analysis of the Nature and Function of International Solidarity in cases of Mass Influx of Refugees" *ibid.* 162-188; D Kennedy, "International Refugee Protection" 8 *HRQ* (1986), 1-69; J Hathaway, *The Law of Refugee Status,* (Toronto: Butterworths) 1991; T Rogers, "Two Dimensions of a National Crises Population Growth and Refugees in Pakistan" 26 *MAS* (1992), 735-761. On the position of Migrant workers see R Owen, *Migrant Workers in the Gulf,* (London: Minority Rights Group) 1985; I Muyuki, *International Protection of Human Rights of Migrant Workers: With Special Reference to the Role of the ILO,* Unpublished LL.M dissertation, University of Hull, 1992.

34 See the additional draft clause to [Article 27] that was proposed by Yugoslavia limiting the article to "citizens", UN Doc A/C.3/SR.1103 para 54; the Indian delegate Mr Kaslival "wondered whether the committee would not prefer to replace the word 'persons' by 'citizens'". According to Mrs Afnan the Iraqi delegation "understood....the obligation of a state within its own territory could only be towards its own citizens. It was in that sense that she understood the word 'person' used in the article" UN Doc A/C.3/SR.1104, para 7; also note the Pakistani position UN Doc A/C.3/SR. 1104, para 17; cf. the position of the representative from Equador *ibid.* para 45.

35 Attempts to replace in Article 2(1) the term individuals with "nationals" or "citizens" could not succeed. UN Doc A.C.3/SR. 1103, para 38; The exclusive focus of Capotorti has come under considerable academic criticism. According to Tomuschat "One can not fail to observe that the word employed [in Article 27] is 'person', not nationals" *op.cit* note 27, 960; similarly Dinstein is critical of this view of the special Rapporteur "This interpretation can not be endorsed" "Freedom of Religion and the Protection of Religious minorities" (ed.) Dinstein and Tabory *op.cit note* 16, 145-169, 157.

36 "the quality of a community as a minority under article 27 does not necessarily depend on a formed bond of citizenship of its members with the host states" UN Doc. CCPR/C/23/CPR.1 (1984) para 4. Also note the similar views of Bhandare in the UN Sub-Commission, UN Doc.E/CN.4/Sub.2/1985 SR.14, at 2; for a similar position adopted in relation to the definition of minorities see A Eide, *Protection of Minorities, Possible ways and means of facilitating the*

Another area on which Capotorti's definition could be challenged is its restrictiveness by concentrating almost exclusively on its reliance upon what has been termed as "minorities by will" and overlooking the position of "minorities by force". "Minorities by will" and "Minorities by force" are terms engineered by Laponce.[37]. Explaining the distinctions between the two kinds of minorities, he comments:

> "two fundamentally different attitudes are possible for a minority in its relationship with the majority: it may wish to be assimilated or it may refuse to be assimilated. The minority that desires assimilation but is barred is a minority by force. The minority that refuses assimilation is a minority by will".[38]

It would appear that Capotorti's definition while focusing on the position of these "Minorities by will" would tend to ignore "Minorities by force". As we shall see in Part III and IV a number of minorities, which although anxious to integrate with the community have been forcibly segregated by usage of hideous phenomenons as Apartheid, and segregation based on race and religion.

2.3.1.2 Alternative Definition Proposed by Jules Deschênes

A more recent exposition of the concept has been conducted by Mr Jules Deschênes, a Canadian member of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[39] For Deschenês, 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 one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law".

Peaceful and Constructive solution of Problems involving Minorities, Second progress report E/CN.4/Sub.2/1992/37, 13-14, paras 59-65.

37 Laponce, 12-13.

38 *Ibid. 12*

39 UN Doc E/CN.4/Sub.2/1985/31, 30, para 181.

The abundance of similarities between the definitions put forward by Capotorti and Deschenês are so pronounced that the latter could in fact be regarded as merely a refined version of the former: the term "citizen" is used instead of "nationals"; the expression "inferior" is replaced to avoid connotations of cultural-value judgement without altering the meaning.[40] Deschenês, nonetheless treats minorities as numerically fewer, being citizens of the State, bearing distinct ethnic, linguistic and religious characteristics. It probably is the case that most definitions of "minority" which are formulated would not differ radically from Capotorti's definition. Besides that, his definition, despite some weaknesses, has endured the test of time and still carries considerable following, and general reliance will be placed on it in the present work.

2.4 RATIONALE FOR THE FOCUS ON "ETHNIC, LINGUISTIC AND RELIGIOUS MINORITIES" IN THE PRESENT STUDY

As noted earlier the ambiguity in the concept of "minority" results from the possibility of having included in it innumerable sections of the community; it is clearly not possible to discuss all the minorities that may exist and the abundance of varied terminology in the modern jurisprudence of human rights makes the selection of an appropriate category of minorities a rather cumbersome task. The United Nations Charter relies upon the terms race, sex, language or religion in the employment of human rights.[41] The 1948 Universal Declaration of Human Rights uses the terms "race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status."[42] 1948 The Genocide Convention focuses on the protection of national, ethnical, racial or religious groups.[43] The 1966 International Covenant on Civil and Political Rights in its article 27 accords protection on the basis

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40 Thornberry, 7.

41 Article 1(3) *op.cit*

42 Article 2. Adopted December 10, 1948, GA Resolution 217, UN Doc A/810, 71.

43 Article 2 Convention on the prevention and punishment of the crime of Genocide 78 UNTS 277, 1948; Cmnd.2904.

of ethnicity, religion or language. However, in its article relating to non-discrimination, the Covenant uses identical provisions of the Universal Declaration but without any elaboration of the terms.[44] The 1966 International Convention on the Elimination of All forms of Racial Discrimination when defining "racial discrimination" relies on the features of race, colour, descent, national or ethnic origin.[45] The 1992 United Nations General Assembly Declaration focuses upon the Rights of Persons belonging to "national or ethnic, religious and linguistic minorities."[46]

2.4.1 Article 27 of ICCPR

In view of this profusion of wide ranging terminology, the selection of "ethnic, linguistic and religious" minorities calls for an explanation. The rationale for the employment of these terms is rather simplistic; "ethnic, linguistic and religious" minorities are terms borrowed from article 27 of the International Covenant on Civil and Political Rights.[47]

Article 27 provides

> "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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

Since Article 27 carries the burden of being the main treaty provisions in contemporary international law which aims to provide a direct protection to persons

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[44] Article 2(1) International Covenant on Civil and Political Rights Annex to UN Gen Ass Res 2200 (XXI), GAOR, 21st session, supp 16, 49; 6 UKTS 1977.

[45] Article 1. Racial Discrimination is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exclusion or an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". The Convention on the Elimination on all forms of Racial Discrimination 60 UNTS 195; UKTS 77 (1969).

[46] UN Doc.A/Res/47/135 adopted December 1992.

[47] ICCPR, adopted 16 December, 1966, entered in to force 23 March 76, GA Res 2200 (XXI), 21 UN GAOR supp. No. 16 at 52, UN Doc. A/6316 (1966).

belonging to ethnic, religious or linguistic minorities,[48] it would be appropriate, in a study on minority rights, to incorporate and acknowledge the terminology of the primary international provision on minorities. The present study, while not completely ignoring other minorities will concentrate on the position of ethnic, linguistic and religious minorities.

2.4.2 Meaning of "Ethnicity", "Language" and "Religion" in the Context of Minority Rights

In addition to the uncertainty as to the definition of a "minority" international law has also failed to provide appropriate guide-lines as to the meaning of "ethnicity", "language" or "religion". The term "ethnicity" presents particular complications, for in the absence of any precise or adequate definition in international law, reliance has to be placed on secondary sources. According to one scholar "ethnic groups may be defined as peoples who conceive of themselves as one kind by virtue of their common ancestry (real or imagined), who are united by emotional bonds, a common culture and by concern with preservation of their groups".[49] Another author, focusing on ethnic groups within Thailand, has viewed ethnic groups as "...categories of the population... who distinguish themselves or are distinguished by the majority groups as differing from each other and the latter in acquired behavioural characteristics or culture, regardless of whether or not they differ in inherited or racial characteristics".[50]

Despite uncertainty as to the scope of the term as noted above, it has frequently been used in binding legal instruments. Although, until 1950 ethnicity does not feature significantly as ground for discrimination in international instruments, its subsequent

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48 Thornberry "Self-determination" 877.

49 R Burkey, *Discrimination and Racial Relations*, Report on the International Research Conference on Race Relations, (Aspen: Colorado), 1970, 62.

50 F Moore, *Thailand, Its People, Its Society, Its Culture,*, (New Haven: Yale University Press), 1974, 64; According to the Oxford English Dictionary the term is derived from the Greek word "ethnikos" which refers to (a) nations not converted to Christianity; heathens, pagans; (b) race or large group of people having common traits and customs; or (c) groups in an exotic primitive culture *Oxford English Dictionary* 2nd ed. (Prepared by J Simpson and E Weiner) Vol. v, (Oxford: OUP), 1989, 423-424.

use has been justified on the basis of its apparent comprehensiveness.[51] Nonetheless, the differences and the preferences particularly between the usage of ethnicity and race often remains unclear, and it has been suggested that a better "practical approach" would be "to deal with the two [concepts] together to prevent unfortunate gaps appearing".[52]

The problems that arise from a debate in relation to the meaning of "religion" are of a serious nature, for the issue of religion in itself is highly sensitive and capable of being extremely controversial.[53] Comparative lesser international consensus has emerged in relation to the issues involving religion and international instruments fail to provide any definition as to what constitutes a religion.[54]

A survey of the international instruments as well as the constitutional provisions relating to religious freedom and non-discrimination, presents a rather unhelpful exercise if the objective is to ascertain the meaning and scope of religion. Although the *travaux préparatoires* of the Declaration on the Elimination of All forms of Intolerance and Discrimination based on Religion or Belief reflects a broad consensus that religion or belief includes "theistic, non-theistic and atheistic beliefs" and excludes political or aesthetic philosophies from this category, no actual definition of the term "religion" could be incorporated in the text.[55]

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[51] Capotorti, 34; E/CN.4/Sub.2/SR.48; E/CN.4/Sub.2/119, Para 31. "Although in the Universal Declaration of Human Rights and other instruments prior to 1950 the term 'racial minorities' was generally used, this gradually fell out of favour as being unscientific'. 'Ethnic group' was preferred since this was a wider term including groups which saw themselves or were seen by others as possessing different characteristics or culture regardless of whether they differed in inherited, racial or national characteristics" Mckean, 144.

[52] Shaw *op.cit note* 16, 17.

[53] For an interesting analysis of the influence of religion upon international law see M Janis (ed.) *The Influence of Religion on the Development of International Law,* (Dordrecht:M. Nijhoff), 1991; A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices, UN Publication Sales* E60.X.IV2; 1960; T Van Boven, "Advances and Obstacles in building understanding between People of diverse Religions and Beliefs" 13 *HRQ* (1991), 437-452; Benito.

[54] R Clark, "The United Nations and Religious Freedom" 11 *NYUJILP* (1978-9) 197-225; S Neff, "An Evolving International Norms of Religious Freedom: Problem and Prospects" 7 *CalWILJ* 1973, 543-590.

[55] G A Res. 36/55, 36 UN GAOR Supp (No 4) at 171 UN Doc A/36/51 1981; see Article 1(a) of the *Draft Convention on the Elimination of All Forms of Religious Intolerance*, 1967 *YBUN* 1967, 488-90; I Brownlie, *Basic Documents on Human Rights*, (Oxford: OUP), 2 edn. 1981, 111-115; D Sullvian, "Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination" 82 *AJIL* (1988), 487-502, 491. It had

Some elaboration has been conducted by Courts though without any definitive formulations. In a United States Case the Court stated

> "the term `religion' has reference to one's views of his relation to his creator and the obligations they impose of reverence for His Being and Character and of obedience to His Will. It is often confounded with cults of form of worship of a particular sect, but is distinguishable from the latter"[56]

A judgment of the Indian Supreme Court found that

> "Religion is a matter of faith with individuals or communities and not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God. A Religion undoubtedly has its basis in the system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine of belief. A Religion may not only lay down a code of ethical rules for its followers to accept, it may prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might even extend to matters of food and dress".[57]

In her recent study the United Nations special Rapporteur Elizabeth Odio Benito

> "refrained from attempting to define `religion', since the meaning of the word is generally well understood by all...nevertheless, it is perhaps useful to point out that `religion' can be described as an explanation of the meaning of life and how to live accordingly. Every religion has at least a creed, a code of action and a cult".[58]

Another prominent authority sees religion as "in contra-distinction to any other form of belief-relates to faith in God as a Supreme Being, or in multiple deities, or at

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been contended at the drafting stages that the phrase `religion on belief' to include such values as, inter alia, free thought be understood and animistic beliefs, monotheism, polytheism, agnosticism, UN Doc.E/ 3925, Annex at 1, 3-4; 1978 ESCOR Supp (No 4) 62, UN Doc E/1978/34. It was also contended that certain philosophies should be specifically excluded from the definition e.g., racism, Nazism, Apartheid, UN Doc A/C/C.3/L.2033, 1973, alongside theories on subjects in the nature of philosophy, history, politics, art and science.

56 Per Mr Justice Fields *Davies v. Beason 1890,* 133, US SCt.Reports, 333.

57 Per Mukherjea, J., *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thiratha Swamiar of Sri Shirur Mutt AIR 1954 SC. 282*; also see *Ratilad Panchad Gandhi and Others v. State of Bombay and Others AIR 1954 SC. 388; Ramanasramam by its Secretary-general Sambasiva Roa and Others v. The Commissioner of Hindu Religious and Charitable Endowments Madras AIR 1961 Madras 265.*

58 Benito, 4.

least in some supernatural powers or spirits capable of influencing human affairs".[59] In view of the undoubtedly differing opinions on the definition of religion and belief, it may be wiser to leave the matter open, in the hope that a wider constituency could benefit from whatever international legal norms have to offer to religious minorities.

On the other hand, the lack of consensus in issues of definition also reflects the complexity which international law may face in providing recognition to certain groups as a minority; certain States have not hesitated in exploiting this weakness to the fullest advantage in denying recognition.[60] The constitution of the Islamic Republic of Iran, for instance, provides recognition to Jews, Christians and Zoroastrians as minorities, denying the same status to approximately 300,000 Bahá'ís,[61] and in Turkey, only those Kurds who do not speak Turkish are officially recognised as Kurd, producing a much lower figure of Kurdish population.[62] However, it is equally possible to confront a situation where a majority is forcibly imposing upon a particular section of the community the status of a religious minority.[63]

The meaning of "language" in international legal discourse, similarly remains imprecise. According to McDougal, Laswell and Chen "language" "is broadly

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[59] Y Dinstein, "Freedom of Religion and the protection of Religious Minorities" (eds.) Dinstein and Tabory *op.cit note* 16,145-159, 146.

[60] In this regard the view of the so-called "countries of immigration", in particular the Latin American States have been very pronounced, see A/C.3/SR.1103; for the position of Brazil (para 12); Chile (paras 19, 23); Ecuador (paras 43, 44).

[61] According to Article 13 of the Iranian Constitution "Zoroastrian, Jewish and Christian Iranians are the only recognised religious minorities, who within the limits of law, are free to perform their religious rites and ceremonies and to act according to their own canons in matters of personal affair and religious education" *Constitution of the Islamic Republic of Iran of 24th October 1979, as amended to 28 July 1989,* A Blaustein and G Flanz, *Constitutions of the Countries of the World,* (Dobbs Ferry: Oceana Publications) Vol. viii, 1992. The Constitution doesn't mention religion as a ground for non-discrimination see Article 19; A An-Ná-im "Religious Minorities under Islamic Law and the limits of cultural relativism" 9 *HRQ* (1987), 1-18, 1,13; Bahá'í International Community, *The Bahá'ís of Iran, A Report on the Persecution of a Religious Minority,* (June 1981), 1 ; K Bigelow "A campaign to deter genocide: The Bahá'í experience" (ed.) Fien *Genocide Watch* (New Haven and London: Yale University Press), 1992, 189-196; "The Bahá'í faith is not recognised by the Iranian authorities as an official religion, as a result, members of that faith wishing to register themselves as Bahá'ís are refused identification cards, passports and other official documents, are dismissed from jobs are refused admittance to universities" cited in Benito, 10.

[62] See *The Turkish Constitution inter alia* Article 3, 42 A Blaustein and G Flanz, *Constitutions of the Countries of the World,* (Dobbs Ferry: Oceana Publications) vol. xx, 1982; D McDowall, *The Kurds,* (London: MRG), 1991, 9.

[63] See *infra* Part IV, the case of Ahmadis in Pakistan.

understood to include all the means (signs and symbols), phonetic and phonemic, by which people communicate with each other".[64] It is arguable that to a large extent ethnicity subsumes linguistic and cultural identities. However, as the case of a number of tribes in the African continent exemplifies, there remains the possibility of linguistically distinctive groups though having the same ethnic or racial origin. In a number of instances, there is a fine dividing line between a dialect of an existing language or the presence of a different language altogether.

The recently adopted European Charter for Regional or Minority Languages[65] while not providing a clarification on the meaning of "language" as such, defines the term "regional or minority language" as

> (i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the population, and
> (ii) different from the official language(s) of that State;
>
> it does not include dialects of the official language(s) of the State or the Language of migrants.[66]

As far as the identification of linguistic minorities is concerned, it has to be conceded that academic opinion also reflects the characteristic difficulties. Nowak, for instance writes

> "Linguistic minorities refer to those groups of the population that use a language, both among themselves and in public, that clearly differs from that used by the majority as well as from the state language. This need not be a written language. However, mere dialects that deviate slightly (in pronunciation) from the majority language do not establish the status of a minority".[67]

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[64] M McDougal, H Lasswell and L-C Chen, "Freedom of discrimination in choice of Language and International human rights" 1 *SIULJ* (1976), 151-174, 151; also see M Tabory, "Language rights as Human Rights" 10 *IYHR* (1980), 167-223, 187-188.

[65] Adopted by the Committee of Ministers of the Council of Europe, opened for signature 2 October, 1992.

[66] *Ibid.*, Article 1.

[67] M Nowak, *United Nations Covenant on Civil and Political Rights, CCPR Commentary* (Kehl am Rhein: Strasbourg), 1993, 491.

The Characterisation of individuals on the basis of "race", "ethnicity", "language" or "religion" is not infrequently premised on objective criterion and it may well be that in a number of instances there is a strong inter-relationship between these identities.[68]

2.5 CONCLUSIONS

The concept of "rights" and "minorities", presents particular difficulties, especially in the sphere of international law where the quest for consensus can be an enduring exercise. However, an inability to define concepts with precision is not necessarily synonymous to a questionable legal existence, though it may affect their viability; many international legal institutions have survived in the absence of specification and meticulousness.

As we have noted, the definition of "minority" has and continues to provide difficulties; views on the entire subject vary significantly depending on the cultural, sociological, political and legalistic values of the proponent. It must be emphasised however, that not everything is in conflict and contention; there is a solid core in the definition of the conception of minority. The dissensions that do exist are not necessarily of an elementary nature or central to the entire subject, though the present work, as we shall see in due course, does recommend that a full and precise exposition is required to facilitate further progress to protect the rights of minorities.

Although there is room for further improvement, Special Rapporteur Capotorti's definition could be taken to reflect the aforementioned core; a definition which he proposed in his study pursuant to article 27 of the ICCPR. The definition, as well as article 27, singles out "ethnicity", "language" and "religion" as distinctive features of minority identity. Ethnicity, language and religion, as we have seen are

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[68] See the United States Supreme Court Decision in *Saint Francis College v AL-Khazraju* 107 S.Ct 2022 (1987), *Shaare Tefila Congregation v Cobb* 1075 S.Ct. 2019 (1987).

difficult conceptions and, without a uniform basis under international law are quite capable of engendering confusion. However, in practical terms, it must be conceded that the identification of a particular identity may not be so complex as it might first appear. A greater challenge, and from the Statist point of view a more sinister scenario tends to develop, when the rather mundane and manageable subject of minority rights is allied to such conceptions as "Right of all Peoples to self-determination" a subject to which we now turn.

CHAPTER THREE

MINORITIES AND COMPARABLE ENTITIES IN INTERNATIONAL LAW

"PEOPLES" AND "INDIGENOUS PEOPLES"

3.1 INTRODUCTION

To distil "peoples" and "indigenous peoples" from the volumes of minorities can be an onerous and perplexing exercise. The task, can by no means be regarded as a fairly straight forward one; while academic opinion differs radically, international law itself could be regarded as faltering at crucial instances. The difficulties become obvious if we consider the position of such groups as the Kurds of Iraq, Turkey and Iran, the Tamils of Sri Lanka, the indigenous Indians of the Americas, the aborigines of Australia and the Toureque people from Mali, Ogonis from Nigeria, and the Twa Du people from Rwanda.[1] The guidelines that are provided, as we shall consider shortly in greater detail, tend to make matters no less ambiguous.

Regardless of the complexity of the debate, the aforementioned exercise is necessitated by the fact that, the rights of "peoples" and "indigenous peoples" may differ significantly from those that are accorded to members of minority groups. The issue is given added impetus when the debate centres around self-determination, a phrase aptly described as one "simply loaded with dynamite".[2] International legal instruments associate the concept of self-determination to "peoples", minorities are not *per se* beneficiaries,[3] making the issue of identification and distinctions crucial.

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1 See T Estamotopoulou, "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic" 16 *HRQ* (1994), 58-81, 71; J Corntassel and T Primeau "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-determination'" 17 *HRQ* (1995), 343-365, 345-348; W Roxana, *What to celebrate in the United Nations Year of Indigenous Peoples?* (Singapore: Department of Sociology National University of Singapore), 1993.

2 R Lansing, *The Peace Negotiations, A Personal Narrative, 1921, 97*, cited in M Promerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations*, (The Hague: M.Nijhoff), 1982, 74. Also cited by L Brilmayer, "Secession and Self-Determination A Territorial Interpretation" 16 *Yale JIL* (1991), 177-202, 177.

3 "Self-determination is not a right of minorities. They must look instead to human rights: those which are not the rights of 'peoples'" P Thornberry, *Minorities and Human Rights Law*, (London: MRG) Report No 73, 1987, 5; "...minorities as such do not have a right to self-determination" R Higgins "General Course in Public International Law" (1991) *Rec. des cours*, 170.

3.2 "PEOPLES"

3.2.1 THE DEFINITIONAL DEBATE

The identification of an entity as "Peoples" in international law, particularly in the post-colonial period, has proved to be controversial; the primary cause for altercation being differences in rights accorded to "Peoples" and "minorities". There are differing views as to the substance and content of the rights which are enjoyed by "Peoples", although it is well established that the "right to self-determination", belongs to "Peoples", regardless of the complications in their identification. As Professor Shaw succinctly points out "the issue of what in law constitutes a `People' has proved to be one of great controversies of the Post-World War II era. The reason for this has been the development of the concept of self-determination".[4]

The definitional debate as to the precise meaning of "Peoples" has waged ever since the term was used in the United Nations Charter. The Charter attaches the "Right of self-determination to Peoples".[5] The UN Secretariat commenting upon the term "Peoples" in the Charter stated "Peoples refers to a group of human beings, who may or may not comprise States or Nations",[6] leading to the view, albeit a minority one, that the provisions of the Charter allowed secession for minorities.[7] Incidentally it also needs to be borne in mind that the United Nations, although using the term "Nations" is itself an organisation representing the States of the World.

Since the coming into operation of the Charter, the term "Peoples" has become an indelible fixture of many international and national instruments though there has often been an inconclusive debate as to its meaning and scope. It is not the intention of the present study, nor it is submitted, is it possible, to define a concept such as the "Right of All Peoples to self-determination" with any precision. As Hannum comments

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4 M Shaw, "The Definition of Minorities in international law" in Y Dinstein and Mala Tabory, (eds.), *The Protection of Minorities and Human Rights,* (Dordrecht: M. Nijhoff), 1993, 1-31, 2.

5 See *infra.*

6 UNCIO Docs, XVIII, 657-658.

7 UNCIO Docs, XVII, 142.

"..no contemporary norm of international law has been so vigorously promoted or widely accepted....as the rights of all peoples to self-determination. Yet the meaning of that right remains as vague and imprecise as when it was enunciated by President Wilson and others at Versailles".[8]

It is submitted that a simple elaboration of the varied contexts in which the term has been used may not be very helpful. On the other hand, a brief consideration of the "Right of All Peoples to self-determination" seems to be necessary for a study of this nature. Not only is the issue of self-determination, at least that of "internal self-determination" in the form of *inter alia* autonomy, self-government and establishment of representative institutions capable of affecting the position of minorities but a wider interpretation of the right (as is currently taking place in Central and Eastern Europe and in many other parts), could have a phenomenal impact on the future political geography of the world.

3.2.2 THE RIGHT TO SELF-DETERMINATION

Self-determination in its modern form could be related to the experiences of American, French and Bolshevik Revolutions with their emphasis on popular sovereignty.[9] Though used widely by politicians and nationalists, in international law the concept remained in embryonic form until the events of the First World War when President Wilson, the leading exponent of this ideal attempted to assert his wishes in

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[8] H Hannum, "Rethinking Self-Determination" 34 *Va.JIL* (1993), 1-69, 2.

[9] "There had been waves of nationalism in Europe since the Lutheran and Calvinist revolutions, but self-determination was not a revolt of princes and theologians but that of the popular will, its imagination inflamed by the American and French Revolutions and notions of the inherent 'rights of man' as adumbrated by the Scottish Enlightenment and Immanel Kant" T Franck, "Post-modern Tribalism and the Right to secession" (ed.) C Brolmann, R Lefeber, M Zieck, *Peoples and Minorities in International* law, (Dordrecht: M. Nijhoff), 1993, 6-7; I Brownlie, "Rights of Peoples in International law" (ed.) J Crawford, *Rights of Peoples* (Oxford: OUP), 1988, 1-16, 4; see also J Crawford, *The Creation of States in International Law,* (Oxford: OUP) 1979, 85-89; A Sureda, *The Evolution of the Right of Self-Determination,* (Leaden: Sijthoff), 1973, 17.

various forms.[10] However, President Wilson was soon to discover, presenting utopian ideals was one thing, yet their practice quite another. As Claude Jr accurately states

> "Wilson's preachments concerning national self-determination were characterised by more evangelical fire than clarity of definition or analysis. Not only was the concept vague, but its consistent application as the absolute criterion for the settlement of all boundary questions would have involved more drastic consequences for the map of Europe than Wilson realised when he began to function as its prophet or was willing to support when he was confronted with political realities".[11]

Perhaps the fundamental difficulty with an otherwise attractive, and even sensible proposition was the identification of its potential beneficiaries. Jennings comments provide a fruitful analysis of this problem

> "Nearly forty years ago a Professor of Political Science who was also the President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of Self-determination. On the surface it seemed reasonable: Let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people".[12]

Hence, beset by the inherent contradictions of different though competing and equally worthy "selves", the uncertainty in ascertaining the proper mode of "determination" and its content and the conflict of self-determination with the cardinal principles of sovereign equality, duty of non-intervention, maintenance of status quo, preservation of peace and security and the sanctity of international treaties, the

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[10] In a statement before the Congress in 1916 he said "Every people has a right to choose the sovereignty under which they shall live" and in 1918 he was firmly of the belief that "all well defined national aspirations shall be accorded the utmost satisfaction that can be accorded them with out introducing new or perpetuating old demands of discord and antagonism" cited in M Shaw, *Title to Territory in Africa,* (Oxford: OUP), 1986, 60-61; Of his famous 14 points, Wilson's fifth point was as follows "A free, open-minded, and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined" cited in M Nawaz, "The Meaning and Range of the principle of self-determination" 82 *Duke LJ* (1965), 82-101, 82-83.

[11] I Claude Jr, *National Minorities An International Problem,* (Cambridge, Mass: Harvard University Press), 1955, 11.

[12] I Jennings, *The Approach to Self-Government,* (Cambridge: Cambridge University Press) 1956, 56.

Wilsonian ideal failed to flourish.[13] On a universal level, its application could not be taken seriously, it was generally ignored in the Paris Peace Conference 1919, and was not even mentioned in the final draft of the Covenant of the League of Nations. Though the final territorial settlements proved disappointing, self-determination left some of its mark in the form of the mandate system,[14] minority rights treaties[15] and was sometimes reflected in the judgements of the Permanent Court of International Justice.[16]

Despite repeated references to it, both by politicians and lawyers during the inter-war years, self-determination failed to be recognised as part of positive International law.[17] Although the events in Europe in the 1930's and during the course of the Second World War forced the allied powers to focus on the issue of human rights, references to self-determination remained ambivalent, only rarely making its appearance. The Atlantic Charter of August 1941 makes reference to it, but the Dumbarton Oaks proposals do not.[18]

The United Nations Charter makes express reference to self-determination on two occasions. According to Article 1, one of the purposes of the UN is to "develop friendly relations among nations based on respect for equal rights and self-determination of all peoples and to take other appropriate measures to strengthen universal peace".[19] The other reference is made in Article 55, according to which "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the

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13 Promerance *op.cit note 2,* 1-9; see also T Franck, "Legitimacy in international system" 82 *AJIL* (1988), 705-759, 744.

14 See Article 22 of the Covenant of League of Nations; 225 CTS 195; 112 BFSP 13, 316; 13 *AJIL* Supp 128, 361.

15 *Infra chapter 4;* P Thornberry, "Is there a phoenix in the Ashes? International law and Minority Rights" 15 *Tex.ILJ* (1980), 421-458, 453-4.

16 *Minority Schools in Albania* (1935) PCIJ Ser A/B no 64, 17.

17 "The self-determination idea.....did not emerge as a principle of positive international law until the Soviet Union insisted on it at the 1945 San Francisco on the United Nations" F Kirgis Jr "The Degrees of Self-Determination in the United Nations Era" 88 *AJIL* (1994) 304-310, 304. Thornberry "Self-Determination" 871; see also *the Aaland Island Case* LON Official J Special Supp No. 1. Aug. 1920 3, 5.

18 For the text of the Atlantic Charter see 35 *AJIL,* Supp., 191. Adherence by USSR and other states was done through a declaration of 1 January 1942; 36 *AJIL* (1942) Supp, 191.

19 Article 1(2).

principle of equal rights and self-determination of peoples, the United Nations shall promote" followed by a number of objectives. Chapter XI, which was subsequently to form the basis of decolonisation, also implicitly recognises the principle of self-determination, although the term itself is not used.[20]

There seems to be some debate as to whether it was, in fact, the intention of the drafters of the UN Charter to provide for a legally binding right of self-determination,[21] although the view may seem persuasive that Charter provisions in relation to self-determination did create binding legal obligations, albeit in a rather vague and imprecise manner.[22] In any event, as Professor Higgins points out, the self-determination principle-as enunciated in the Charter-was inherently conservative and radically different from how it came to be subsequently understood.[23]

Whatever the legal position as regards self-determination may have been at the time of the coming into operation of the Charter, the rapid changes in the UN have ensured its conspicuous existence as a legal right though its primary focus has been directed towards decolonisation. Although a number of States have adopted a negative stance on the issue it seems certain that the right to self-determination is

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20 According to Professor Bowett "It is [] permissible to regard the entirety of Chapters XI and XII of the U.N. Charter as reflection of the basis idea of self-determination" Problems of Self-Determination and Political Rights in the Developing Countries, *Pros ASIL*, (1966), 129-135, 134.

21 "There is probably a consensus among scholars that, whatever its political significance, the principle of self-determination did not rise to the level of rule international at the time the United Nations Charter was drafted" Hannum, 33; "Self determination, in contrast to sovereignty and all that flows from it, was not originally perceived as an *operative principle* of UN Charter, ...it was one of the *desiderata* of the Charter rather than a legal right that could be invoked" Y Blum, "Reflections on the changing concept of self-determination" 10 *Israel L.R.* (1975), 509-514, 511; see also the views of Gross as discussed by Emerson, "Self-Determination" 65 *AJIL* (1971), 359-377, 361. "Many jurists and governments were prepared to interpret these references as merely hortatory effect, but the practice of United Nations organs has established the principle as part of the United Nations" Brownlie, 596;

22 "Not withstanding initial equivocation, it can now be seen that real obligations were created, if imperfectly expressed in the Charter" Thornberry, 871.

23 "The concept of self-determination did not then, originally, seem to refer to a right of dependant peoples to be independent, or indeed, even to vote". After a discussion of Chapter XI and XII she concludes "It can now be seen that self-determination is not provided for the text of the United Nations Charter-at least in the sense that it is generally used". R Higgins, "General Course on Public International Law" (1991) *Rec. des Cours*, 155, 156; also see R Emerson "Colonialism, Political development and the United Nations" *IO* (1965), 484-503.

applicable even in the post-colonial world.[24] The most forceful assertion of this view is propounded in the common article of the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.

According to the common article

> "All peoples have a right to self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development".

Amongst regional conventions, the right to self-determination is enshrined in the African Charter on Human and Peoples Rights.[25] The recently revised ILO Convention on Indigenous population and Tribal people,[26] while distancing itself from the "ordinary" minorities, also provides for the right to self-determination, though again without defining the concept.[27]

Customary international law affirms the view that self-determination is a binding legal right. General Assembly Resolutions are not *per se* binding,[28] though

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[24] Note Article 1(3) of ICCPR which provides "The state parties to the present covenant, including those having responsibility for ...Non-self-governing and Trust territories, shall promote the realisation of the right of self-determination". On the practice of Human Rights Committee see R Higgins *op.cit*, note 22, 161; According to Crawford "The Charter mentions self-determination only twice, and in both cases it seems to mean something different from the usual understanding of self-determination" J Crawford, *op.cit note* 9, 90. Although the limits of the meaning of what Kimminch terms as "self-determination of races" are not clear his overall view seems pertinent when he says "Nonetheless, there can be no doubt that with the present situation in the evolution of international law self-determination of races is now not merely a principle but a genuine right" O Kimminich, "The Function of the Law of Ethnic Groups in International Systems" 23 Law and State (1981), 37-51-46.

[25] OAU Doc CAB/LEG/67/3 Rev 5; 27 Rev ICJ; 21 ILM 59.

[26] 72 ILO Bulletin 59 (1989).

[27] See *infra* text accompanying notes 34-47; See N Lerner, *Group Rights and Discrimination and International Law*, (Dordrecht: M. Nijhoff) 1991, 29. The Helsinki Final Act of the Conference on the Security of Europe (CSCE) 1975 is not an international treaty and only a set of political commitments. It nonetheless has carried substantial influence in the subsequent development of legal norms. Article VIII of the document provides for the right to self-determination as a continuing right; see M Koskeniemi "National Self-determination Today: Problems of legal theory and practice" 43 *ICLQ* (1994), 241-269, 242; E Eddison, *The Protection of Minorities at the Conference on Security and Co-operation in Europe*, (Essex: Human Rights Centre Papers in the theory and practice of human rights No, 5) 1994; R Brett and E Eddison, *Minorities A Report on the CSCE Human Dimension seminar on case studies on National Minority issues: Positive Results Warsaw 24-28 May 1993* (Essex: Human Rights Centre Papers in the theory and practice of human rights No, 6) 1994 .

[28] Save for those which deal with internal matters of the Organisation e.g. Article 17 of the United Nations Charter; See Higgins 4-5. S Davidson, *Human Rights*, (Buckingham: Open University) 1993.

they can be instrumental in providing evidence of State practice,[29] and can in certain circumstances be regarded as interpreting the provisions of the Charter.[30] In this context it is important to note the highly authoritative UN General Assembly Resolutions which have been treated as authoritative interpretations of the Charter, and generally regarded as reflective of customary law, for example *Declaration on the Granting of Independence to Colonial territories and Peoples G.A.Res 1514 (XV)*[31] and the *Declaration of the Principles of International law concerning Friendly Relations and Co-operation amongst States in Accordance with the Charter of the UN GAR 2625 (XXV), 1970;*[32] there are many others which reaffirm this normative value. Judicial discussion and the views of publicists and international lawyers tend to validate this assertion.[33] A detailed exposition of the matter of *jus cogens* will be conducted

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[29] On the Customary value of General Assembly Resolutions see B Slaon, "General Assembly Resolutions Revisited" 58 *BYIL* (1987), 39-150; Higgins, 1-10, B Cheng, "United Nations Resolutions on Outer space: Instant Customary International Law" 5 *IJIL* (1965), 23-48; Judge Tanaka, *South West Africa Cases (Second Phase)* ICJ Reports 1966, 16, 291-293; for a stricter interpretation see Judge Fitzmaurice, dissenting opinion, *Namibia Case* ICJ Rep 1971, 6, 280-281.

[30] "In some cases a resolution may have a direct legal effect as an authoritative interpretation and application of the Charter" Brownlie 15; he then goes on to mention as an example in the footnote the Declaration on the Principles of International Law concerning Friendly Relations, 1970.

[31] According to Bleicher "The language and the circumstance of the passage of Res 1514 (XV) ....indicate that the resolution was intended to set out a binding interpretation of the Charter, and the continual re-citation and other actions of the General Assembly in support of the resolution display seriousness of the belief" S Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions" 63 *AJIL* (1969), 444-477, 474; The Declaration has been treated "as a document only slightly less sacred then the Charter" see R Rosenstock "The Declaration of Principles of International Law concerning Friendly Relations: A Survey" 65 *AJIL,* 713-735, 730. Note also the evolutionary G.A. Res. 1541 (XV) 1960, which attempts to provide guidelines to United Nations and its members in determining as to whether a territory has achieved a full measure of Self-Government.

[32] According to Professor Brownlie "Most important is the Declaration on the Granting of Independence to Colonial countries and peoples adopted by the General Assembly in 1960 and referred to in a series of Resolutions concerning specific territories since then. The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter. The principle has been incorporated in a number of international instruments. The United States and many other governments support the principle, which appears in the Declaration of Principle of International Law concerning Friendly Relations adopted without vote by the United Nations General Assembly in 1970" Brownlie 596-7.

[33] See the *Namibia case* "the subsequent developments of international law in regard to non-self governing, as enunciated in the Charter of the United Nations, made the principle of self-determination applicable to all of them..." ICJ Reports 1971, 6, 31; *Western Sahara Cases* ICJ Reports, 1975, 12, 31-33 and Judge Dillard's celebrated opinion especially at 122. For a succinct discussion see Shaw, *op.cit note 10;* 1986; Higgins, 90-106.

shortly,[34] though it needs to be noted that in the absence of any precise specification, it has been contended that self-determination forms part of the norms of *jus cogens.*[35]

3.3 INDIGENOUS PEOPLES

3.3.1 THE DEFINITIONAL DEBATE

A consideration of the position of minorities in international law could not afford to ignore the case of the indigenous peoples. Indigenous peoples, in a number of States occupy the position of minorities and being weak and inarticulate many of their demands coincide with those of other minority groups.[36] As their name reflects, being indigenous to the land, many of them were killed-off, while the survivors were conquered or subjugated.[37] Having been relentlessly victimised in the contemporary

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[34] See *infra chapter 5.*

[35] H Gros Espell, Special Rapporteur, *Implementation of United Nations Resolutions relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, Study for the Sub-Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/Sub.2/390, 1977, 17-19, paras 61-71; H Gros Espiell's Report UN Doc E/CN.4/Sub.2/405, 1978, 31-37, paras 67-81; "The writer shares...with full conviction and in dull awareness of all its consequences, the idea today, the rights of peoples to self-determination in one of the case of *Jus Cogens*" G Espiell, "Self-Determination and Jus Cogens" in A Cassesse, (ed.) *UN Law/Fundamental Rights Two Topics in International Law,* (Alpen aan den Rijn: Sijthof and Noordhoff), 1979; ILC, Draft Articles on State Responsibility, Part I, Article 19 3(b); Special Rapporteur T Van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for victims of Gross Violations of Human Rights and Fundamental Freedoms,* E/CN.4/Sub.2/1993/8, 16.

[36] The documentation produced by organisations such as "Survival" include those which could be equally conveniently indexed in the category of minorities; see e.g. the Newsletter of Survival International 38, 1994. Conversely a key focus of Minority Rights Group has been the plight of indigenous groups; see e.g. H O'Shaugnnessy and S Corry, *What future for the Armindians of South America,* (London: MRG) 1987; J Wilson, *Canada's Indians,* 1982; I Creery, *The Inuit (Eskimo) of Canada,* (London: MRG) 1983; J Wilson, *The Original Americans: US Indians,* (London: MRG) 1980; D Stephen and P Wearne, *Central America's Indians,* (London: MRG) 1984.

[37] "Genocide has been committed against indigenous, Indian or tribal peoples in every regime in the World..." Hannum, 74; W Heinz *Indigenous Populations, Ethnic Minorities and Human Rights,* (Berlin: Quorum verlag) 1988; J Clinebell and J Thomson "Sovereignty and self-determination: The rights of native Americans under international law" 27 *Buff L.R.* (1978), 669-714. Many like the Aché(Guayaki) Indians have reached a point of physical extinction; see R Arnes "The Aché of Paraguay" in Potter, 218-237; Kuper, *International Action against Genocide,* (London: MRG) 1984, 5; G Alfredson, "International Law, International Organisations and Indigenous peoples" *JIAffs* (1982), 113-124.

age, they remain in conditions which governments of modern States regard as less developed. Efforts to retain their aboriginal and autochthonous life has cost a number of them dearly, stretching from forced assimilation to genocide. Unfortunately, persecution and discrimination against indigenous peoples, is still existent in many societies, and the continuation of a number of discriminatory laws provide a sad commentary on their state of affairs.[38] A United Nations document eloquently summarises their contemporary position

> "Often uprooted from their traditional lands and way of life and forced into prevailing national societies, indigenous peoples face discrimination, marginalisation and alienation. Despite growing political mobilization in pursuit of their rights, they continue to lose their cultural identity along with their natural resources. Some are in imminent danger of extinction".[39]

As we shall see in due course, in a number of instances the limited jurisprudence that exists on the position of minorities relates itself closely to the position of indigenous peoples.[40] Indeed, having been the primary targets of genocide, persecution and discrimination, indigenous peoples deserve to be the chief beneficiaries of whatever the modern norms relating to minorities has to offer.

On the other hand, while similar concerns are shared as regards both indigenous peoples and other minorities, there remains a pronounced view that the indigenous peoples belong to a distinct category.[41] This, in fact, is the established view of the indigenous peoples themselves-an aspiration which was succinctly reflected by a representative of the Indian Treaty Council when he stated that "the ultimate goal of

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[38] See International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 64th session, 1978.

[39] United Nations, *Indigenous Peoples International Year 1993*, (United Nations), 1992.

[40] See the jurisprudence of the Human Rights Committee *Lovelace v Canada*, HR Committee, Selected Decisions under the Optional Protocol (2nd to 16th session); UN Doc CCPR/C/OP/1, 1985, 10 (admissibility), 37 (interlocutory decisions), 83 (view of Human Rights Committee); *Kitok v. Sweden* Doc A/43/40, 221; *infra chapter 7.*

[41] See the proceedings of the 11th meeting of the United Nations working group on indigenous rights 18 UN Doc E/CN.4/Sub.2/1992/33, 1992, 19; Shaw, *op.cit note 3,* 13-16; Lerner, "The Evolution of Minority Rights in International Law" in (eds.)., C Brolmann, R Lefeber, M Zieck *op.cit note* 9, 77-101, 81.

their colonizers would be achieved by referring to them as minorities".[42] According to the Special Rapporteur Deschênes of Canada "we should not attempt to deal with questions of indigenous populations while discussing the rights of minorities".[43]

Indeed in many ways demands made by indigenous peoples are more forceful with a higher threshold, claiming "to be more than minorities" and asking for an entitlement of "two set of rights, one as indigenous group and the other as minority".[44] Equally, there remains an uneasiness that the claims of indigenous peoples, if applied generally to minorities may threaten the established world order. Hence, it is not surprising to note the identification and definition of the indigenous peoples has proved to be a controversial and politically sensitive issue, even more so than in the case of other minority groups. State practice, like that of the issues relating to the definition of minorities, remains equivocal. However, a number of States-determined not to accept the existence of indigenous peoples within their frontiers-have denied any association of indigenous peoples with any other minority. Barsh mentions Bangladesh, Indonesia, the former USSR, India and China which have maintained that there are no "indigenous" peoples in Asia only minorities epitomising former Soviet Ambassador Sofinsky's view before the Sub-Commission in 1985 that "indigenous situations only arise in the Americas and Australasia where there are imported `populations' of Europeans".[45]

Equally, while several States have proved extremely sensitive, particularly States from the Latin American region on this definitional issue-many of the indigenous groups themselves have asserted a prerogative to define their "nations".[46] In the midst of these conflicts, it is not surprising to perceive tensions as to whatever definition is accorded to the indigenous peoples or communities.[47]

According to the Special Rapporteur José R Martínez Cobo:

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42 Cited in Thornberry, 331.
43 UN Doc E/CN.4/Sub.2/1985/31, paras 32-38.
44 Thornberry *342.*
45 R Barsh, "Indigenous People An Emerging Object of International Law", 80 *AJIL* (1986), 369-385, 375.
46 *Ibid.* 376.
47 Hannum 88-90.

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

The historical continuity may consist of the continuation, for an external period reaching into present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them
(b) common ancestry with the original occupants of the lands;
(c) Culture in general, or in specific manifestation (such as religion, living under a tribal system, membership of international community, dress, means of livelihood, life-style etc.)
(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main preferred, habitual general or normal language).
(e) Residence in certain parts of the country, or in certain regions of the World;
(f) other relevant factors".[48]

According to Article 1(1) of the ILO Convention 109, adopted in 1989, the Convention applies to

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of natural community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country belongs at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1(2) goes on to provide

[48] Special Rapporteur, José R Martínez-Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc.E/CN.4/Sub.2/1986/7/Add.4, 1986, 29, paras 378-80.

> Self-identification as individual or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply.

This discussion reveals the tensions and divisive nature of the probable definition of "indigenous" peoples in international law. It is also the case that indigenous peoples, themselves, like other groups or communities, are capable of differing radically from each other. Certainly, an observation into the myriad existence of some of these "savage and inaccessible people"[49] or "people within contact with civilization" provides fascinating and cherishable distinctions.[50] It may well be that the threat to the institution of the indigenous peoples might not come so much from the absence of a consensus definition, but from the extent of the rights that they have under international law.

3.3.2 THE RIGHTS OF INDIGENOUS PEOPLES

Many of the claims made by the indigenous peoples coincide with those of other minorities. The desire for autonomy and recognition as collective entities forms part of the vocabulary of the indigenous peoples as well as other minority groups, although the thrust and vibrancy of these made may differ significantly. Historical association with land and environment dispenses a distinct flavour to the demands made by the indigenous peoples. Their claims include, *inter alia,* that of collective property rights of land and natural resources, the special nature and form of relationship between individual members and tribes and the right to impose obligations on individual members which may not necessarily be aspired by other minorities.[51]

Indeed international instruments have, of late, attempted to consider in depth the position of indigenous people and a number of specialist instruments have been

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[49] F Van Langenhove, *The Question of Aborigines Before the United Nations, The Belgian Thesis,* (Brussels: Royal Colonial Institute) 1954, 10.

[50] *Ibid.* 16.

[51] G Neithem "'Peoples" and "Populations" Indigenous Peoples and the Rights of Peoples", J Crawford, *Rights of Peoples,* (Oxford: OUP), 1988.

adopted which aim to concentrate solely on the position of indigenous populations.[52] This rather sudden resurgence of interest may be taken as an acknowledgement, at least in part, that the cause of Indigenous peoples raises specific issues of concern which ought to be focused on more specifically.

The organisation which has shown a significant interest in the plight of indigenous peoples and more generally in its efforts to "establish universal and lasting peace" through means of social justice is the International Labour Organisation (ILO).[53] The organisation, ever since its inception in 1919, made evident its interest by establishing a Committee of Experts on Native Labour in 1926.[54] A natural projection of this agenda was reflected in the adaptation of various conventions and recommendations including the Forced Labour Convention 1930 (ILO Convention 29),[55] the Recruiting of Indigenous Workers Convention 1936, (ILO Convention 50),[56] the Contracts of Employment (Indigenous Workers) Convention 1939 (ILO Convention 64),[57] the Penal Sanctions (Indigenous Workers) Convention 1940 (ILO 65)[58] and the Contracts of Employment (Indigenous Workers) Convention (ILO 86).[59]

A significant work in the cause of protecting indigenous peoples was conducted under the auspices of the organisation, *Indigenous Peoples Living and Working Conditions of Aboriginal Population in Independent Countries.*[60] The study published in 1953, bears its mark in the two texts adopted at the fortieth session of the organisation, manifesting in the ILO Convention 107 Concerning the Protection and

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52 See e.g. Barsh *op.cit note* 45., Barsh "Revision of the ILO Convention no. 107", 81 *AJIL* (1987) 756-762; Barsh "United Nations seminar on indigenous peoples and States" 83 *AJIL* (1989), 599-756-762.

53 Preamble to the Constitution of the ILO 62 Stat. 3485; TIAS No 1868; I Brownlie (ed.) *Basic Documents on Human Rights 2nd edition,* (Oxford: OUP), 1981, 171; F Wolf, "Human Rights and the International Labour Organisation" T Meron (ed.) *Human Rights in International Law,* (Oxford: OUP), 1984, 273-305.

54 H Hannum (ed.), *Documents on Autonomy and Minority Rights,* (Dordrecht: M.Nijhoff), 1993, 8.

55 39 UNTS 55; Cmd 3693; 134 BFSP 449.

56 40 UNTS 109; Cmd 5305; 21 ILO Bull III.

57 40 UNTS 281; Cmd 6141; 8 Hudson 359.

58 40 UNTS 311; Cmd 6141; 8 Hudson 377.

59 161 UNTS 113; Cmd 7437; 148 BFSP 664.

60 *Studies and Reports, New Series No, 35* (Geneva: International Labour Office), 1953.

Integration of Indigenous and other tribal and Semi-tribal Populations in Independent Countries[61] and Recommendations No 104.

The adoption of the 1957 Convention was a significant step forward in projecting the views and aspirations of the indigenous peoples. The Convention, however has been a product of its time with a considerable imprint of an assimilationist ideology. By its own admission, it applies, *inter alia,* to those populations "whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community".

The Convention has remained an object of ridicule and objection on the part of indigenous groups themselves. The India Council complained:

> "[The Convention] does not consider in its articles the right to self-determination. It seeks integration and assimilation, with total lack of respect for the dignity of every people and its right to freedom. Its aim is the destruction of our culture, of our traditions, of our language....It seeks to promote the individual, which is contrary to the communal spirit of our peoples".[62]

No doubt a prominent theme of the Convention is the emphasis on integration of indigenous peoples with other sections of the community, even at the cost of abandoning their heritage. This bears the appearance of less "respect for indigenous culture" and more in the nature of a "simple recognition that it exists and is undesirable".[63] The Convention has remained limited and ineffectual both in terms of the meagre participation as well as the inadequacy of its provisions.

This overwhelming feeling of discontentment provided the impetus to the adoption of a revised ILO Convention 169, *Convention concerning Indigenous and Tribal peoples in Independent Countries, 1989.*[64] The 1989 Convention is certainly a reflection of a more liberal attitude and biased against hitherto prevalent integrationist

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61 328 UNTS 247.
62 Cited in Van Dyke, 83.
63 Thornberry, 350
64 72 ILO Bull 59 (1989); 28 ILM 1382.

and assimilation orientations; its moderating effect on what according to its preamble were "the assimilationist orientations of earlier standards" is worthy of appreciation.

On the substantive front, a number of features reflect a degree of promise. Article 2, for instance, while improving upon the 1957 convention, reinforces the issue stating that governments shall have the responsibility to develop the participation of the peoples concerned, and acts to protect their rights. It stresses upon the participation of the peoples concerned, actions to protect their rights with the emphasis upon the need to respect for social and cultural identity, their customs and traditions and their institutions. These acts shall ensure equality of rights and opportunities, full realization of the social, economic and cultural rights of the indigenous peoples, and would eliminate the socio-economic gaps.

While article 3 prohibits discrimination in the enjoyment of human rights and fundamental freedoms, article 4 enjoins special measures for safeguarding the institutions, property, labour, culture and environment of indigenous peoples in a manner which is not inconsistent with their freely expressed wishes. Article 5, reaffirms the fundamental principle of recognising, respecting and promoting the social, cultural and religious values.

The significance of article 6 lies primarily in the fact that it requires governments to consult indigenous peoples in matters affecting them, allowing and establishing means for free participation and establishing means for development of their institutions. Article 7, reflects the cherished ideals of autonomy by stating that peoples concerned shall have their right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The advance of the 1989 Convention is considerable over its predecessor, and deserves our attention in so far as it relates specifically to the position of indigenous

peoples and their rights. It is also important for our overall consideration of minority rights. As we shall see in chapter seven, many of the rights recognised and provided in the 1989 Convention for indigenous peoples, may come to provide an appropriate substance to what has been termed as the "emerging right to autonomy".

Having said this, the 1989 Convention, in many ways, falls short of providing an adequate expression to the claims of indigenous peoples. There are a number of issues where their is very little international consensus. These relate, *inter alia,* to land rights, the right of self-determination and international personality. Although, Chapter II of the Convention deals in considerable detail with the subject of land, in its drafting stages there emerged considerable disagreement with more than 100 amendments being presented, and in the final resort only reflecting a compromise amongst divergent interests.[65]

The right to self-determination has proved to be particularly contentious and it needs to be borne in mind that while the Convention does apply to "peoples" a number of State representatives were unhappy with the usage of the term "peoples" with all its paraphernalia, and wanted it replaced with "populations".[66] The Convention itself has grudgingly granted indigenous peoples a limited recognition to this right, although the adoption of this text was only possible through the addition of an extra paragraph curtailing the effect of whatever the right has to offer. This occurs in the form of article 1(3) which provides:

> The use of the term "peoples" in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law

Efforts on the part of other international organisations have of late begun to match those of the ILO.[67] The issue of indigenous peoples has been elevated in certain

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[65] See views of Latin American and Asian representatives in International Labour Conference, Provisional Records, 76th session, 1989, No 25, 25/1, 25 June; N Lerner, *Group Rights and Discrimination in International Law,* (Dordrecht: M.Nijhoff), 1991, 109.

[66] *Ibid.*.

[67] The United Nations General Assembly declared 1993 as the International Year of the World's indigenous Peoples-GA Res 46/128; UN GAOR 46th session, UN Doc A/Res/46/128, 1992; See generally Estamatopoulou *op.cit* note 1.

quarters-notably the Inter-American Institute, an agency of OAS.[68] In 1981 the United Nations created a pre-sessional working group on Indigenous population of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[69] The fruitful work of the individual experts, along with the impact of the completion of a major study conducted by the United Nations Special Rapporteur in 1983,[70] has projected the issue in the United Nations to significant proportions, and a Declaration on Indigenous peoples is on the agenda of the United Nations General Assembly.[71]

It is submitted that while indigenous peoples cannot be divorced from other minorities, there appears to be an increasing recognition of indigenous peoples as a distinct category of international legal subjects, leading to a number of specialist instruments dealing specifically with their position. The present work, while considering the position of indigenous populations in so far as it comes within the overall bracket of ethnic, linguistic and religious minorities, would not in view of the present limitations focus in any great depth on matters which deal exclusively with indigenous peoples.

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[68] See the Inter-American Commission on Human Rights, *Inter-American Year Book on Human Rights 1969-70* (Washington DC: OAS), 1976, 73-83; also see Inter-American Commission on Human Rights, *Report on the work accomplished by the Inter-American Commission on Human Rights during its 29th session (October 16-27),* 1972 OAS Doc. OAS/Ser L/V/II.29 Doc.40 rev.1 1973, 63-65; *ibid., Ten years Activity 1971-1981* (Washington D.C: OAS), 1982, 328-29.

[69] See Sub-Commission Res 2 (XXIV) Sept. 8, 1981; Commission on Human Rights Res 1982/19, Mar 10; ECOSOC Res 1982/34, May 7.

[70] Special Rapporteur, José R Martínez-Cobo, *Study of the Problem of Discrimination against Indigenous Populations,* UN Doc. E/CN.4/Sub/1986/7 and Add 1-4, 1986.

[71] See the *Draft Declaration on the Rights of the Indigenous Peoples* as adopted by the Working Group on Indigenous Population of the UN Sub-Commission on the Prevention of Discrimination UN Doc E/CN.4/Sub.2, 1992/33, Annex 1, 1992; *Draft Declaration on the Rights of Indigenous Peoples* Revised working paper submitted by the Chairperson-Rapporteur Ms. Erica-Irene Daes, pursuant to Sub-Commission Res 1992/331, E/CN.4/Sub.2/1993/26, 1993; *The Draft United Nations Declaration on the Rights of Indigenous Peoples* adopted by the Sub-Commission in August 1994 UN Doc E/CN.4/1995/2; E/CN.4/Sub.2/1994/56. This draft was submitted before the Human Rights Commission which decided to establish an inter-governmental working group UN Doc E/CN.4/1995/L.11/Add.2 March 1995; reprinted 34 *ILM* 1995, 535.

3.4 PEOPLES, MINORITIES AND SELF-DETERMINATION

Academic opinion clearly points to links between minorities, peoples and self-determination. According to Professor Brownlie:

> "The issue of self-determination, the treatment of minorities and the status of indigenous population *are the same* and the segregation of topics is an impediment of fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same-they must be. It is problem of implementation of principles and standards which vary, simply because the facts will vary. The point can be expressed by saying that the problems of Lapps, the Inuit, Australian Aboriginal, the Welsh, the Québécois, the Armenians, the Palestinians, and so forth, are the same in principle but different in practice. This association of categories is one reason for the hesitant approach to the definition of `peoples' or `minorities' or `indigenous peoples'".[72]

Equally in Dr Thornberry's view "Self-determination and the rights of minorities are two sides of the same coin".[73] In contrast to these views, international legal instruments attempt to draw distinction between "Peoples", "minorities" and "indigenous peoples", and avoid almost religiously associating minorities with notions of self-determination.[74] In practical terms as well, ethnic, linguistic and religious minority groups without a territorial base may have had little in the way of self-determination; the burst of decolonisation did not significantly further the cause of self-determination for many of those groups. A number of them felt that after the

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[72] I Brownlie, "The Rights of Peoples in Modern International Law" (ed.) J Crawford *op.cit note* 9, 1-16, 16; also cited by K Partsh "Recent developments in the field of Peoples Rights" 7 *HRLJ* (1986), 177-182, 182.

[73] Thornberry "Self-determination" 867.

[74] The practice of States and their views on the subject can also be ascertained from their reports to the Human Rights Committee. For the position of Iraq in relation to the Kurds see UN Doc A/42/40 paras 352, 353, 385, 386. The jurisprudence of the Human Rights Committee itself endorses a distinction between persons to belonging to minorities under article 27, and the peoples under 1. Article 27 provides an appropriate basis of redress for individuals belonging to minorities; article 1 has no application in their situation see *A.D. v. Canada* UN Doc A/39/40, 1984, 200; Human Rights Committee: Selected Decisions under the Optional Protocol vol. ii, 23; also see *McIntyre v. Canada* 14 *HRLJ*, 1993, 171 discussed by H Cullen, "A Response to William Lawton" in Kritsiotis, 34-39, 34-45.

colonisers left, they were subjected to another form of colonialism, and have remained under "alien and colonial subjugation".

3.4.1 The Belgian Thesis

The early attempts that were made to espouse the cause of self-determination of these groups did not meet with much success. According to the Belgian representative the primary focus under the provisions of Charter needed to be on "territories whose peoples have not yet attained a full measures of self-government", whatever their political status may be.[75] The substance of the argument, which later came to be known as the Belgian thesis, attempted to open up the possibility of expanding the ambit of self-determination to "indigenous peoples" and "minorities" by expanding the scope of Chapter XI further than colonies and protectorates.[76] Kunz presents the gist of the argument when he says:

> "The interpretation that Chapter XI applies only to colonies and protectorates is strongly attacked as discriminatory and arbitrary. The word `colony' is nowhere used in Chapter XI. It is also not true that Chapter XI applies only to `overseas territories'; there is a colonization by seaward and by Landward expansion. Neither is the existence of such territories excluded by the fact that they are integrated into the metropolitan area. There are many peoples-the Belgian thesis gives detailed explanation as to many concrete examples-of inferior civilzations in Africa, Asia and Latin America which do not merely form minorities, but form quite separate ethnic groups, different in race, language or religion, or have hardly anything in common with the peoples of higher civilizations on whom the government of the country in question is based. *Colonization is no less colonization, if it is made by territorial contiguity, than by overseas expansion.* The primitive Indians of Latin America were in colonial times governed from overseas. The fact that their countries became independent by

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75 Van Langenhove *op.cit note* 49; Thornberry "Self-determination" 873.

76 "The generality of the Belgian concern was expressed in the delegate's remark that `similar problems [to colonialism] existed wherever there were underdeveloped groups' The thesis radicalises self-determination by insisting that it can apply to indigenous groups and minorities" Thornberry *ibid.*, 873. "[the] `Belgian thesis' was unavailingly launched to seek to broaden out the application of Chapter XI to bring under its protection not only the colonial peoples but all others who were substantively not self-governing" R Emerson "Colonialism, Political development and the United Nations" *IO* (1965), 484-503, 489.

> revolutions by Criollos-revolutions in which the native inhabitants had no part-often did not change their status; only now an independent government sitting in the same country controls them. Even in the new Asian states, where independence was won by autochthonous peoples, many primitive peoples of these states are not fully self-governing".[77]

This argument failed to muster any support from the international community because most States were keen not to enlarge the scope of the principle of self-determination. Any other course would not only be too disruptive for international stability but there would also be a conflict with the cherished ideals of State sovereignty and territorial integrity. The world community had recognised the rights of "peoples" to self-determination and, while emphasising on this right to self-determination of "peoples" under colonial domination,[78] expressed serious doubts as to its legitimacy outside the colonial or neo-colonial context. Hence "the United Nations rejected [the Belgian thesis] and adopted in its place a 'salt water' theory of colonialism. Inclusion of unwilling nationalities was illegal only if the state and its colony were geographically separated".[79]

3.4.2 The Colonial Declaration

The restrictive view of the non-applicability of the concept of self-determination to minorities generally can be reiterated by a consideration of the *Declaration on the granting of independence to Colonial Countries and Peoples, the General Assembly Resolution 1514 (XV).*[80] As its title makes clear, the Declaration is primarily concerned with colonialism, and not aimed in any manner or form at affecting the status quo of the post-colonial world. In radically reinterpreting the "self-determination" provisions of the United Nations Charter, the Declaration calls for "immediate steps....[to] be taken, in trust and non-self governing territories or all other

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77 J Kunz, "Chapter XI of the United Nations Charter in Action" 48 *AJIL* 1954, 103-111, 109 (emphasis added); also see Whiteman 13 Digest 697-698; Crawford *op.cit note* 9, 359.

78 W Reisman "The struggle for the Falklands" 93 *Yale LJ* (1983) 28-58, 46.

79 Brilamayer, *op.cit note 2*, 182.

80 UN GA Res 1514 (XV) adopted on 14 December 1960; Thornberry 17.

territories which have not yet attained independence, to transfer all powers to the peoples of those territories...in order to enable them to enjoy complete independence and freedom".

Peoples is a territorial concept; territorial integrity is to be maintained beyond independence.[81] Article 6 of the Declaration in affirming this position states

> Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

While the forces of conservatism have been strong, international law has remained disinclined to look piercingly through the impermeable veil of State sovereignty. A general view seems to have been accepted that self-determination is a right pertaining only to peoples under "alien subjugation, domination and exploitation"[82] or peoples under "colonial and alien domination", [83] or "peoples subject to colonial exploitation".[84]

3.4.3 The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States

The hypothesis of either restricting cases of self-determination to colonial and neo-colonial situations[85] or alternatively treating self-determination as a continuing right in the post-colonial era but only limited to the whole peoples of a State has generally meant that self-determination is not associated in any manner with minority groups. *The Declaration on Principles of International Law concerning Friendly*

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81 P Thornberry, *op.cit note 3*, 5.

82 See paragraph 1 of the Declaration.

83 G.A.Res 2649 (XXV), 30 Nov. 1970; 2708 (XXV) 14 December 1970; 2878 (XXVI) 20 December 1971.

84 G.A.Res 2787 (XXVI), 6 December 1971.

85 Note the position of India which has entered a reservation to Article 1 of the ICCPR; also see India's second periodic report before the Human Rights Committee CCPR/C/Add.13.

Relations and Co-operation among States, G.A.Res. 2625 (XXV) does provide some opportunity to link self-determination to minorities.[86]

Considerable attention has been given to the principle of sovereign equality in of the Declaration with this object in mind.[87] The paragraph on self-determination which is followed by an obligatory territorial clause provides

> Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

According to White

> "....to be immune from claims of self-determination which in certain cases may result in the fragmentation of an existing State, that State must be acting in compliance with the right of self-determination. The test of legitimacy is the possession of a government which is representative of the people and does not practice discrimination. The final paragraph...requires that States do not act in such a way as to imperil the territorial integrity of any other State. There was no express proscription on the ability of peoples to struggle for self-determination either by seeking to replace an unrepresentative government with one that secures self-determination".[88]

The issue of representative government has also attracted Rosenstock's attention.[89] He says

> "a close examination of the its text will reward to the reader with an affirmation of the applicability of the principle to peoples within existing States and the necessity for governments to represent the governed".[90]

Similarly Erica-Irene Deas notes

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86 Thornberry "Self-Determination" 875.
87 *Ibid.*
88 R White, "Self-Determination: Time for a Re-assessment?" 28 *NILR* (1981), 140-170, 159.
89 Rosenstock, *op.cit note* 31.
90 *Ibid.* 732.

> "The meaning....is plain. Once an independent State has been established and recognised, its constituent peoples must try to express their aspirations through national political system, and not through the creation of new states. This requirement continues unless the national political system becomes so exclusive and non-democratic that it cannot be said to be 'representing the whole people'. At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new state for their safety. Indeed, in such a state of affairs, legal arguments cease to have any real significance since peoples will defend themselves by whatever means they can. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right to self-determination and for continued application of the territorial integrity and national unity principles".[91]

Thus, for these authorities the implication from the aforementioned principle of the Declaration, as well as from general principles of international law is that if people within existing States are treated in a discriminatory manner by a government, or that the government is unrepresentative, then the probable claim for self-determination may not be defeated by arguments of territorial integrity.

Having said that, whatever the emerging trend might be in academic opinion, this academic voice would only form a very subsidiary portion of the sources of international law. It can perhaps be surmised with relative certainty that in the contemporary State-centred international law, "Peoples" is still very much a territorial concept; territorial integrity and State sovereignty act as the twin pillars of the post-colonial world order. On this hypothesis, it would be difficult to sustain a view that ethnic, linguistic and religious minorities within modern nation-States are synonymous to "Peoples". Thornberry's contention is more appealing that "if Peoples' applies within States it is majorities; there is little in this definition for minorities".[92]

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[91] E A Daes E/CN.4/Sub.2/1993/26 Add 1, 4, para 21. According to the Vienna Declaration adopted on 25 June 1993, "In accordance with the Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory with out distinction of any kind". *UN World Conference on Human Rights,* (United Nations: New York) *1993*, 29, pt 1, para 2.

[92] Thornberry *op.cit note 3*, 5.

3.5 CONCLUSIONS

While the debate on the substance of the right to self-determination is likely to continue to be volatile and probably inconclusive, the conceptual difficulties inherent in this debate must not be overlooked. Hohfeld's paradigm of rights has been considered earlier along with the difficulty in fitting the so-called "third-generation" rights as "claim-rights". Attempts to treat "the right of all peoples to self-determination" as a "claim-right" would engender particular difficulties. Who would be the holder of the "right" and upon whom lies the "co-relative duty"? Can the "peoples" of a State, in fact be treated as synonymous to the State itself, meaning thereby that the holder of "rights" and bearer of "duties" is the identical identity of the State?[93]

In so far as the relevance of the debate as regards the definition of "peoples" and "indigenous peoples", there remains the possibility of considerable overlap between the concepts of "minority" "peoples" and "indigenous peoples", though they cannot be regarded as being identical; certainly the constraints within which international law operates would not permit it to take such a stance. Minorities, like many of the weaker and poorer elements of any society have an uncanny faculty for survival and resilience; they cannot be simply wished away nor could they easily be coerced into submission. Despite the reluctance of international law to allow minorities the status of "peoples" many of them have nonetheless attempted to appropriate the concept of self-determination to their dictionary,[94] with a number of their claims being synonymous to those of "peoples".

On the other hand, it must however be conceded that the nervousness exhibited by international instruments is not wholly without any rationale. As the present work

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[93] The debate would appear to reach confusing proportions. According to Crawford "If the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own government. In other words, if the only rights of peoples are right against other States, and if there is no change to the established position that the government of the State represents 'the State' (i.e. the people of the State) for all international purposes irrespective of its representativeness, than what is the point of referring to the rights in question as the rights of peoples? why not refer to them as the rights of States in the familiar, well understood though some what elliptical way?" J Crawford *op.cit note 9, 55-67,* 56.

[94] P Thornberry "Self-determination" 868.

would attempt to exemplify through the case of Pakistan, the lacuna between the right to self-determination and what has been termed as the emerging right of autonomy may not be very wide; notions of autonomy could easily extend to those of self-determination and threaten the existence of the State structure.

It is probably the case that if self-determination has any relevance to minorities, it is of an indirect nature. The concept of "internal self-determination" would benefit the whole peoples including minorities. It could also be argued that self-determination is a continuum of collective rights, and there is a linkage between the rights of individual members of any community, minorities, indigenous peoples or the entire peoples of the State; in essence minorities and other collectivities profit from the contemporary norms of human rights or conversely as Sieghart has put it "....all human rights exist for the protection of minorities..".[95]

[95] P Seighart, *The Lawful Rights of Mankind,* (Oxford: OUP), 1986, 168.

PART III

MINORITIES AND INTERNATIONAL LAW FROM PAST TO PRESENT

INTRODUCTION TO PART III

The present part comprises of four chapters and although the primary objective is to analyse the contemporary rights of minorities, a historical survey has been included for a number of reasons. Firstly, as we shall shortly see in the next chapter, protection of minorities is indeed "one of the oldest concerns of international law".[1] A historical analysis, while confirming this latter point would also, it is hoped, provide us with some reasons for the shift away from minority protection to individual human rights after the Second world war.

A second basis for not overlooking the past position derives from the caveat that in international law there remains the possibility of renaissance and revival of previous values and norms. It is important to bear in mind Professor Kunz's remarks relating to "fashions" in international law".[2] In a similar vein Krishnaswami, in his seminal work on *The Study of Discrimination in the Matter of Religious Rights and Practices,* reminds us of trends and the changes of attitudes.[3]

As a logical corollary of what has been said as regards the non-immutable nature of international law, the remaining Chapters of Part III, have themselves been divided into two main sections, section A and B. Section A considers, what are termed as "established rights" of minorities in international law. Under this section, chapter five analyses "the right to physical existence of minorities" and chapter six goes on to consider "the right to equality and non-discrimination". Section B, consists of what has been called "emerging rights". It consists of a single chapter, chapter seven and analyses the view, possibility and difficulties in recognising "autonomy" as a right of minorities under international law.

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1 Thornberry, 1; also cited *supra* chapter 1.

2 J Kunz, "The Present Status of the International Law for the Protection of Minorities" 48 *AJIL* (1954) 282-287, 282.

3 A Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices,* UN Publication Sales E.60.XIV.2. 1960, 55.

CHAPTER FOUR

HISTORICAL EVOLUTION OF THE CONCEPT OF PROTECTION OF MINORITIES IN INTERNATIONAL LAW

4.1 INTRODUCTION

The constitution of modern political geography has seen the rise and fall of great empires; the birth and demise of many glorious civilisations and cultures, and the growth and extinction of multifarious religions and languages. The heterogeneity in the composition of modern nation-States which, although a legacy of the past, evinces more pronounced and varied manners than words could describe. The tapestry of human diversity exhibits itself in a million different ways in infinite variations of taxonomy. Religions splinter into denominations of creeds and sects, languages branch out into dialects and the ethnic equation is imbalanced by peoples of all colours and shades living side by side.[1] While a consciousness of this diversity is reflected in the natural and metaphysical sensitivities of man, history also reveals a general unwillingness to accept differences. Religious intolerance has been, and unfortunately continues to provide, a lacerative and tormenting concern to the possibility of congenial human relationships.[2] Indeed from a historical point of view, while questions of religious minorities are as old as history itself,[3] corresponding efforts to protect them were amongst the first ones to generate tensions at the international level. Subsequent developments with the emergence of nation-States led to wide variety of issues over which the then existing international society showed its concern.

In order to conduct a proper analysis of the rights of minorities in contemporary international law and to assess the limitations that exist in their

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1 Thornberry, 2.

2 A Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices,* UN Publication Sales E.60.X.IV.2 1960; S Neff "An Evolving International Legal norm of Religious Freedom: Problems and Prospects" 7 *Cal.WILJ* (1973) 543-590; Benito; *Report submitted by Angelo Vidal d'Almeida Ribeiro Special Rapporteur appointed in accordance with Resolution 1986/20 of the Commission on Human Rights* E/CN.4/1988/45 6 January, 1988; T Van Boven, "Religious Freedom in International Perspective: Existing and Future Standards" (eds.) J Lekwwitz *et al, Des Menschen Recht Zwischen Freicheit und Verantwortung, Festschrift fu Karl Joesf Partsch zum 75 Geburstag,* (Berlin: Dunker and Humblot) 1989, 103-113; On the topical issue of blasphemy laws see AI, *Pakistan Use and Abuse of blasphemy laws,* 1994 ASA 33/08/94; The Times, "Boy escapes hanging in Pakistan" 24-2-95; Independent, "Boy 14 escapes death sentence"; see *Part IV infra.*

3 H Rosting, "Protection of Minorities by the League of Nations" 17 *AJIL* (1923), 641-660, 642.

protection, it seems necessary to provide a historical overview. The present chapter, therefore, aims to analyse briefly the evolution of minority rights in international law, and to draw out some of the difficulties that have been inherent in the protection of minority groups.

4.2 EVOLUTION OF THE CONCEPT OF PROTECTION OF MINORITIES IN INTERNATIONAL LAW

In the evolution of international law, the treatment that was accorded to religious minorities in a number of States in Europe was the first to attract international attention.[4] There were discernible international efforts in the direction of protecting religious minorities against persecution as early as the thirteenth century.[5] Since the Reformation, however, the surge of intolerance amongst sects of the Christian religion amplified the debate on minorities, elevating the subject so that it was expressly incorporated in international agreements when territories were ceded.

During the seventeenth and eighteenth century, a number of treaties embodying clauses relating to religious minorities were concluded between various European countries. These treaties included the Treaty of Vienna signed in 1607 by the King of Hungary and Prince of Transylvannia, which accorded to the Protestant minority in Transylvannia the free exercise of their religion.[6] For the development of international law the Peace of Westphalia 1648, between France and Holy Roman Empire and their respective allies, is not an event of insignificance.[7] The Peace marked the end of the

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4 "In earlier times it was religious minorities above all which were the focus of attention" T Modeen, *The International Protection of Minorities in Europe*, (Abo: Abo Akandmi), 1969, 35; "The international protection of minorities originated in the attempt to safeguard the position of dissident religious groups" I Claude Jr, *National Minorities An International Problem*, (Cambridge, Mass: Harvard University Press), 1955, 6; H Heinz, *Indigenous Populations, Ethnic Minorities and Human Rights*, (Berlin: Quorum Verlag), 1988, 22; For the struggles within the national orders of a number of European States see Krishnaswami, *op.cit note 2*, 4-8.

5 Claude, *ibid.*, 6.

6 Thornberry, 28; Heinz, *op.cit note 4*, 22.

7 "The origins of the international community in its present structure and configuration is usually traced back to the peace of Westphalia (1648) which concluded the ferocious and sanguinary thirty years war". A Cassese, *International Law in a Divided World*, (Oxford: OUP), 1986, 34;

Thirty Years War, which had seen unprecedented suffering and pain. While having had "its origins, at least partially, in a religious conflict, or one might say, in religious intolerance" [8] the Peace "consecrated the principle of toleration by establishing the equality between Protestants and Catholic states and by providing safeguards for religious minorities".[9]

The Treaty of Osnabruck, in particular, could be regarded as a landmark, since it provided that

> "subjects who in 1627 had been debarred from the free exercise of their ruler, were by the Peace granted the right of conducting private worship and of educating their children, at home or abroad, in conformity with their own faith, they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estate or leaving them to be managed by others".[10]

Subsequently, the 1660 Treaty of Olivia, between Sweden and Poland provided for the free exercise of their religion by the Roman Catholics in the territory of Livonia ceded by Poland to Sweden: Article 2(3) provided that "cities of Royal Prussia, which as a consequence of this war, have become property of .....(Sweden), will maintain all the rights, liberties and privileges which they have enjoyed...in the ecclesiastical or lay domain". Other examples of treaties providing for freedom of religion and worship include the treaties between France and Holland at Nijmegen[11] concluded in 1678 and the Treaty of Ryswick of 1697[12] together with the Treaty of Paris of 1763[13] concluded between France, Spain and Great Britain under which Great Britain accorded freedom of worship to Roman Catholics in the Canadian territory ceded by France.[14]

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also see C Parry, Preface to *The Consolidated Treaty Series,* (Dobbs Ferry, New York: Oceana, 1969-81), 1969, Vol. I, 1648-1649, 1969; for text *see ibid.*, 119, 271.

8 L Gross, "The Peace of Westphalia" 42 *AJIL* (1948), 20-41, 21; see also Neff *op.cit* note 2, 550; Krishnaswami, *op.cit note 2,* 11; M Nowak, *United Nations Covenant on Civil and Political Rights,* (Strasbourg: Kehl am Rhein) 1993, 480; B Dickson, "The United Nations and Freedom of Religion" 44 *ICLQ* (1995), 327-357, 330.

9 Gross *Ibid,* 22.

10 Gross, *ibid,* 22.

11 14 Parrys treaty series, 441.

12 22 Parrys treaty series, 5.

13 42 Parrys treaty series, 320.

14 Neff, *op.cit note 2,* 11.

4.2.1 Protection of Minorities and the Concept of Humanitarian Intervention

The nineteenth century saw a shift in the approach of the developments relating to minority protection; the bi-lateral stance was remodelled and a number of multi-lateral treaties emerged. Similarly, a change was also evidenced in so far as the protection of ethnic and national minorities was concerned with the Final Act of the Congress of Vienna.[15] This was the first international instrument to contain clauses for the protection of national as well as religious minorities. Indeed, while the French Revolution had sent waves of an emancipating ideology of religious freedom across the frontiers of Western Europe,[16] concern had begun to concretise not only as to the position of religious minorities in certain parts of the world but also as to the problems of national and ethnic minorities.

The inchoate structures of international laws, in which the system of protection of minorities operated, also had its hazards and nurtured germs of abuse. The potential for exploitation and intervention in the absence of any regulations regarding the use of force,[17] leading to, for example, acquisition of new territory was a source of suspicion and controversy. The system itself was abused, and while heavy traces of interventions based upon these ulterior motives could be found in some earlier incidents, further degeneration was to take place in territories held by the Ottoman rulers.

A contemporaneous development to the decline of the Ottoman Empire in the eighteenth and nineteenth centuries was the increasing focus of attention of the position of minorities in Central and Eastern Europe. Amongst the many factors leading to the final demise of the Empire, an important one was the increasing

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15 64 Parrys treaty series 453.

16 "It is the history of religious tolerance and of mankind's struggle to obtain liberty of thought which reaches its culminating point in the Declaration of the Rights of Man at the time of the French Revolution" Rosting, *op.cit* note 3, 642-3.

17 For subsequent developments see General Treaty for the Renunciation of War 29 UKTS 1929, 94 LNTS 57; Article 2(4) United Nations Charter; see generally I Brownlie, *International Law and the Use of Force by States*, (Oxford: OUP), 1963.

intolerance and repression of minorities. Historically the minorities, with the Millet system in place under the Ottoman's had enjoyed a considerable measure of autonomy, in social, civil and religious affairs;[18] as Van Dyke comments "it was an application of the right of Self-Determination in advance of Woodrow Wilson".[19]

A generally retrogressive move towards intolerance ultimately resulted in the disintegration of the Millet system. In the wake of this repression, although a considerable Western movement gathered towards the protection of Christian minorities, there remained serious reservations as to the true motives of the Western European powers in the affairs of the rapidly degenerating Ottoman Empire. While it might be possible to discern, during this era, some evidence of the doctrine of "humanitarian intervention", a closer analysis of the concept may also provide a disastrous prognosis for post-Charter world order were a right of such a nature recognised.[20]

There were intermittent threats of interventions in the affairs of the Ottoman Empire, some of which were ultimately carried out, though with justifications which were frequently untenable. In 1827, Great Britain, Russia and France-ostensibly concerned at the plight of the Christian minorities in Greece-used military force. On

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[18] Laponce, 84-5.

[19] Van Dyke, 74.

[20] For a survey of the literature on the subject see I Brownlie, *op.cit note 17,* 338-342; R Lillich, "Intervention to Protect Human Rights" 15 *McGill LR* (1965), 205-219; L Sohn and T Burgenthal, *International Law and Human Rights,* (Indianapolis: The Bob-Merrill Co) 1973, 137-211; T Frank and N Rodley, "After Bangladesh The Law of Humanitarian Intervention by Military Force" 67 *AJIL* (1973), 275-305; R Lillich, (ed.) *Humanitarian Intervention and the United Nations,* (Charlottesville: University Press of Virginia) 1973; J Fawcett, "Intervention to Protect Minorities" in B Whitaker (ed.) *Minorities A Question of Human Rights* (London: Pergomon Press) 1984, 69-77; E Behanuik, "The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey" 79 *Military Law Review* (1978) 157-191; J-P Fonteyne, "The Customary International Law doctrine of Humanitarian Intervention: Its current validity under United Nations Charter" 4 *CalWILJ* (1974) 203-270; M Nawaz, "What Limits on the Use of Force? Can force be used to depose an Oppressive Government" 24 *IJIL* (1984), 406-410; C Greenwood, "Is there a Right of Humanitarian Intervention" World Today February (1993), 34-40; K Pease and D Forsythe "Human Rights, Humanitarian Intervention and World Politics" 15 *HRQ,* (1993), 290-314; P Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force,* Inaugural lecture at the University of Amsterdam 22 January 1993 (Amsterdam: Het Spinhuis) 1993; N White, "Humanitarian Intervention" 1 *International law and Armed Conflict Commentary,* 1994, 13-27; L Kuper, "Theoretical issues relating to Genocide: Use and Abuses" (ed.) G Andreopoulous, (ed.) *Genocide: Conceptual and Historical Dimensions,* (Philadelphia: University of Pennsylvania Press) 1994, 31-46.

the other hand, as Franck and Rodley point out, there were a number of practical considerations and the action cannot unequivocally be described as having been taken for purely humanitarian reasons.[21]

The Greek intervention was undertaken as a collective effort for fear of one power establishing an undue influence in the Balkans. Indeed, the issue of the balance of power was seen to be of such a paramount nature that it led Great Britain and France alongside Turkey, to fight the Russians in 1857, when the latter tried to intervene unilaterally in order to protect the Christians of the Ottoman Empire. A further series of intervention could also be attributed to the Ottoman Empire, taking place between 1840-1861.[22]

In 1842, an intervention also took place to protect the Marinate Christians of Lebanon, although it was conducted with the consent of the government of Turkey. In 1860, foreign troops, primarily 6000 French troops were employed to protect Marinates after widespread news of the massacres of thousands of Marinates. Although Professor Brownlie terms the incident as an exceptional case of genuine humanitarian intervention,[23] there was considerable suspicion at Napoleon III's true intentions. The expedition itself was only authorised after guarantees of the removal of the French troops within a fixed period, initially that of six months. A consideration of the overall circumstances-in particular an analysis of the "fault" element in the civil war and the desire of the European intervenors-has led commentators to regard even this incident as suspicious.[24] Later, interventions both in the Ottoman Empire as well as in Latin America have been cast aside as doubtful. Indeed, with the benefit of hindsight and bearing in mind the often selfish motives of interventions, it might be taxing to

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21 "The episode, may, but need not be seen as part of general pattern of protecting Christian minorities against Mohammedan infidels; it may also be classified as a chapter in the epic of the European love-hate [relationship] towards the Turk, governed by the desire to bring the Ottoman Empire under European surveillance as a necessary concomitant of Europe's civilizing mission, its trade superiority, the imperatives of the balance of power, and the Western powers fear in Russia" (footnotes omitted) Franck and Rodley, *op.cit* note 20, 280.

22 Malanczuk, *op.cit* note 20, 13-14; Modeen, *op.cit* note 4, 33.

23 I Brownlie, *op.cit* note 17, 340.

24 I Pogany "Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined" 35 *ICLQ* (1986), 182-190; Franck and Rodley, *op.cit* note 20, 282. Lillich *op.cit note* 20; Behauniak; Kuper, *Genocide* 1981, 165.

agree with Lillich's view that "the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate".[25]

4.2.2 The Conceptual and Substantive Difficulties with the Concept of Humanitarian Intervention

While, the list could be appended with incidents of interventions both prior to the inception of the United Nations Charter and subsequent to it-as could be the directory of jurists who at some point in history have shown an inclination for some form of humanitarian intervention-the conceptual and substantive problems associated with the doctrine are unlikely to be resolved. Historically, a coercive weapon in the hands of stronger States, its advocacy has been opposed by less powerful States.[26] A chronicled analysis of the circumstances in which these interventions took place, and of those episodes when, despite gross violations of human rights no effective action was undertaken could perhaps lead us to affirm the view held by Franck and Rodley, that States have only acted when it has suited their interests to act and notions of human rights have been only secondary and generally peripheral.

In the contemporary post-Charter era, criticism of the doctrine of humanitarian intervention has emanated from its largely ambiguous and its potentially exploitative nature. It is difficult to arrive at any objective and universally acceptable criterion under which unilateral (or multilateral) intervention could be legitimated-in particular, the nature, circumstances and scale of violations of human rights which could trigger such interventions,[27] and perhaps more significantly the difficulty in practice of

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25 Lillich *ibid.*

26 Franck and Rodley *op.cit note* 20, 290.

27 Franck and Rodley pose the question "Does the scope of humanitarian intervention encompass all 'human rights' or only political and economic rights, or only the right to life? Is the right to intervene to be limited to situations of actual large-scale losses of life or does it also extend to the imminence or apprehension of such losses? what do such terms mean and how are the facts or probabilities to be established? How large scale must the loss of life be? If Self-Determination is a protected right, how large a majority must desire it, how strongly held must their belief be". *ibid.*

protecting human right on a permanent basis through any such use of force.[28] There would also remain the issue of examining and dissociating the possible vested interest of the intervening power(s). Equally significant would be the question as to whether there should be specific limitations imposed on such interventions, along with the necessity of particular safeguards against threats of possible exploitation by the intervening State(s).

It remains clear that without effective protection, individual as well as collective rights would remain a dead letter,[29] and it has been argued vigorously that in the absence of any concerted international effort, humanitarian intervention ought to be recognised. However, it is submitted that although the idea of unilateral or collective interventions, in situations of gross violations might seem attractive, recognition of a right of intervention on humanitarian grounds would open floodgates of military intervention on genuine as well as not-so-genuine grounds of violations of human rights. This would destabilise the delicately poised international order and provide a recipe for the destruction of modern rules relating to the prohibition of use of force. It is wiser to assert that pleading for a general recognition of humanitarian intervention is not a step forward and that

> "any attempt to devise a general justification for humanitarian intervention, even if such a doctrine were to limit intervention to very extreme circumstances, would run into difficulty. A blind humanitarianism, which fails to perceive the basic truth that different States perceive social and international problems very differently can only lead into a blind alley".[30]

Invocation of the powers of the Security Council under Chapter VII, which can authorise military actions in respect of threats to the peace, breaches of the peace, and

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28 See I Brownlie "Humanitarian Intervention" J Moore (ed.), *Law and Civil War in the Modern World,* (Baltimore: John Hopkins University Press), 1974, 217-228, 222-223.

29 ILA Rapporteur "human rights without effective implementation are shadows without substance" cited in R Lillich *op.cit note* 20, 206.

30 A Roberts "Humanitarian War: Military Intervention and Human Rights", 69 *IAffs,* 429-449, (1991), 448.

acts of aggression,[31] would probably seem to be a more rational and practical approach. It is fortunate that with the ending of the Cold War, there is optimism that the Security Council would be able to undertake some positive measures in the direction of protection of human rights. Changes of circumstance in world affairs since 1989 has borne some of this optimism out in practice. On the other hand the recent cases of the former Yugoslavia, Rwanda, and Sudan, Somalia, Afghanistan and Iraq seem to reaffirm the view of sceptics that while nations of the world act in their own interests, international law would remain a difficult medium to promote and protect rights of minorities.[32]

4.3 THE PROTECTION OF MINORITIES AFTER THE FIRST WORLD WAR

As a consequence of the appalling atrocities and abuses of individual and group rights during the Great War, the end of the war generated a number of efforts to project the issue of minorities and self-determination at the international level. More importantly, the territorial readjustments that were brought about, made it imperative that the issue of the position of minorities was to be resolved in order to lay a firm foundation for a lasting peace.

The debate relating to the position of minorities was raised when the Covenant of the League of Nations was being drafted with attempts being made to incorporate minorities provisions in the Covenant of the League.[33] President Wilson spearheaded

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31 Article 39 of the UN Charter provides "The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security".

32 Franck and Rodley *op.cit* note 20, 294; see P Alston "The Security Council and Human Rights Lessons to be learned from the Iraq-Kuwait crises and its aftermath" 13 *AYBIL* (1990-91) 107-176; H Adelman "Humanitarian Intervention: The case of the Kurds" 4 *IJRL* (1992) 4-38; P Malanczuk "The Kurdish crises and Allied intervention in the aftermath of the second Gulf War" 2 *EJIL* (1991), 114-132.

33 D Miller, *The Drafting of the Covenants,* (New York: G B Putman and Sons) 1928, vol. ii, 91.

the attempts to provide ideals of self-determination and minority rights with concrete forms. The second draft covenant prepared by him included a clause in accordance with which the new States would bind themselves to guarantee equality of treatment of their "racial and national minorities".[34] In a third draft submitted, Wilson elaborated on his previous proposals by adding a stipulation under which all States seeking admission to the League would bind themselves to accord equal treatment to their minorities. The draft article stated

> "The League of Nations shall require all States to bind themselves as a condition precedent to their recognition as independent or autonomous States, and the executive council shall exact of all states seeking admission to the League of Nations the promise to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of the people".[35]

Similarly, as far as the position of religious minorities was concerned, President Wilson's third draft contained the following provision

> "Recognising religious persecution and intolerance as fertile sources of war, the powers signatory hereto agree, and the League of Nations shall exact from all new States and all States seeking admission to it the promise, that they will make no law prohibiting or interfering with the free exercise of religion, and that they will in no way discriminate, either in law or in fact, against those who practice any particular creed, religion or belief whose practices are not inconsistent with public order or public morals".[36]

The final version that subsequently emerged, however, failed to contain any provisions relating to the position of minorities, largely as a result of the fears of the impact it might have on the issue of sovereignty. It might also have questioned the post-war order, including the colonial possessions of the Great Powers. It was also surprising to note that when at last there had arrived an opportunity to incorporate a

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[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.* vol. ii, 105.

provision of such a nature in the Covenant, President Wilson himself changed his view-point in favour of "quiet diplomacy" and avoiding "embarrassments".[37]

4.3.1 The Minorities Treaties

Despite the non-inclusion of any clauses pertaining to minorities, the Peace Conference that set about the task of re-establishing the legal order and in the process re-drawing the map, was aware that changes in the political geography of the European continent would inevitably exacerbate the minority question. The conference placed under the guarantee of the League of Nations a system for the protection of minorities.

The minorities regime took four different forms[38]

1) The five minorities treaties concluded between 1919-20

Poland:
The treaty between Principal Allied and Associated Powers and Poland 28 June 1919

Chzecho-Slovakia:
The treaty between Principal Allied and Associated Powers and Chzecho-Slovakia, St-Germain-en-laye, 16 September 1919

The Serbo-Croat-Slovene State:
The treaty between Principal Allied and Associated Powers and The Serbo-Croat-Slovene State, St Germain-en-laye, 10 September 1919

Romania:
Treaty between Principal Allied and Associated Powers and Romania, Paris 9 December 1919

Greece:
Treaty between Principal Allied and Associated Powers and Greece, Sèvers 10 August 1920

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[37] Robinson *et al, Were the Minorities treaties a failure?*, (New York: Institute of Jewish Affairs) 1943, 15.

[38] For a list of instruments See United Nations, *Special Protective Measure of an International Character for Ethnic, Religious or Linguistic Minorities* UN Doc/CN.4/Sub.2/214/rev 1; UN Doc E/CN.4/Sub.2/221/Rev 1; UN Sales No 67.XIV3; for texts until 1927 see *Protection of Linguistic, Racial and Religious Minorities by the League of Nations, Provisions contained in the various international instruments at present in force,* (Geneva) August 1927, League of Nations publications IB Minorite 1927 IB2.

2) Four special chapters of the Peace treaties of 1919-1923 imposed on the vanquished States

Austria:
Treaty between Principal Allied and Associated Powers and Austria, St Germain-en-Laye, 10 September 1919, Arts 62-69.

Bulgaria:
Treaty between Principal Allied and Associated Powers and Bulgaria, Neuilly-sur-seine, 27 November 1919, Arts 49-57.

Hungary:
Treaty between Principal Allied and Associated Powers and Hungary, Trianon, 4 June 1921, Arts 54-60.

Turkey:
Treaty of Peace between Britain, France, Italy, Japan, Greece, Romania, the Serbo-Croat-Slovene State and Turkey Lausanne, 24 July 1923, Arts 37-45.

3) Four subsequent treaties

The Polish Danzig convention of 9 November 1920

Agreement between Sweden and Finland concerning the population of the Aaland Islands placed on record and approved by resolution of the Council of League of Nations on June 27 1921

German-Polish Convention relating to Upper Silesia of 15 May 1922

Convention of 8th May 1924 concerning the territory of Memel, between Allied and Associated powers and Lithuania

4) Five unilateral declarations signed by various States signed between 1921-1932 upon their admission to the League of Nations, of which the Council of the League of the Nations took note in *ad hoc* resolutions.

The States that made such a declaration were

Albania 2 October 1921,

Lithuania 12 May 1922 (extended to Memel district 29 September, 1924)

Latvia 7 July 1923,

Estonia 17 September 1923,

Iraq 30 May 1932.

Although there were some variations in the substance of the treaties, the Polish treaty essentially served as a model. In general, the minorities treaties provided for rules on nationality, a guarantee to all inhabitants for the protection of life and liberty, equality of treatment regardless of religious denomination and equal enjoyment of civil and political rights. Furthermore, the provisions for special protection for members of racial, linguistic and religious minorities were built-in to the treaty system. In addition to providing for equality of treatment in law and in fact, these special provisions included access to public offices and educational, cultural, linguistic and religious autonomy. This autonomy provided for the establishment of institutions and associated facilities under their own control. Minorities were also to be authorised to have an equitable proportion of funds in order to exercise these rights satisfactorily.[39] Guarantees were introduced for the expression of religious beliefs, freedom of receiving education in mother tongue as well as the usage of native language in private life and certain spheres of public life.[40]

Specific rights were also introduced for a number of minorities including the Jewish minority of Greece, Rumania, and Lithuania; the Vlachs of Pindus of Greece; the non-Greek minority communities of Mount Athos; the Moslem minority of Albania, Greece, Serbo-Croat-Slovene state; the non-Muslim minority in Turkey and the non-Muslim minority in Iraq.[41]

The framework upon which the League system was established carried internal as well as international obligations. Internally, the States agreed to irrevocably entrench the provisions relating to minorities in their constitutional set-up. The external obligations manifested themselves in guarantees in so far as they related to

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[39] Robinson, *Op.cit note* 37.

[40] F Ermacora, "The Protection of Minorities before the United Nations" 182 *Rec. des Cours* 1983, 251-366, 259; I Claude Jr *op.cit* note 4, 19.

[41] J Robinson, "International Protection of Minorities A Global View", 1 *IYBHR* (1971) 61-91.

members of racial, religious and linguistic minorities and were designated as "obligations of international concern".[42] This guarantee meant that while no modifications to the relevant treaty provisions were possible without the consent of the majority of the League Council, the Council undertook the responsibility of enforcement.

The main procedure through which the League system operated was as follows. The Secretariat of the League examined the petition to determine whether it was receivable. It is to be noted that although minorities had been given the right to make petitions, these petitions were more in the nature of providing information rather than being a party to any probable proceedings. Once declared to be receivable, the petition was transmitted by the Committee of the Council to the State concerned for comments. If the conditions laid down by the Council were fulfilled it was then passed to the members of the League of Nations.

In the Council, the examination of the petitions was carried out by a committee of the Council comprising of three members, known as the "Minorities Committee". A Committee was set up to deal with each petition. At the conclusion of its examination, the committee could either reject the petition, attempt to find a solution through a negotiation with the government, or request that the question be placed on the agenda of the Council. Any member of the Council had the right to bring the matter before the council, whatever the decision by the Committee. The Council could therefore take such action and give such direction as it may deem proper and effective in the circumstances, including invoking the jurisdiction of the Court.

The instruments for the protection of minorities provided for the intervention of the Court in cases where differences of opinion arose between the Government concerned and any of the allied or associated powers or any other power which was a member of the Council. The States which had assumed obligations with regard to minorities were obliged to refer the dispute to the Court if the other parties requested it. Furthermore the decision of the Court was final. The Court also was empowered

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[42] Polish Treaty, Article 12.

to provide advisory opinions. The authority for delivering advisory opinion as well as the competence "to hear and determine any disputes of an international character" was granted by Article 14 of the Covenant. The Court did use its jurisdiction and on occasions expressed itself with such felicity that despite the overall failure of the system, many of its pronouncements have left a lasting impression.[43]

4.3.2 Evaluation of the League System

The League Minority Treaty System worked well for some years, for some minorities and on some issues, though it failed to achieve an overall success. The absence of any rational lay-out of the system, with its rather arbitrary confinement to smaller States of Eastern and Central Europe, was probably the biggest drawback in the system of the protection of minorities. The States which had assumed obligations often found them embarrassing and unacceptable and felt, with some justification that the Great Powers were unduly interfering in their sovereign rights and domestic jurisdiction.[44]

The reason for the collapse of the system of protection of minorities similarly lay in the discriminatory and inequitable set-up. Taking the then prevailing orthodox

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[43] The Court's Advisory Opinion in Minority Schools in Albania of 6th April 1935 has become a major precedent, guidance and source of inspiration on issues relating to equality of treatment. According to the Court "The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs...In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the state. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of it being a minority"; *Advisory Opinion in Minority Schools in Albania* 1935 PCIJ Ser A/B, 17; also see the *advisory opinion in Settlers of German Origin in territory ceded by Germany to Poland 1923 PCIJ, Ser B, No 6; Acquisition of Polish Nationality 1933 PCIJ Ser B, No, 7; Access to German Minority Schools in Upper Silesia 1931 PCIJ Ser A/B, No 40; Treatment of Polish Nationals and other Persons of Polish Origin or speech in Danzig 1932 PCIJ Ser A/B No 44.*

[44] Heinz, *op.cit note* 4, 30.

view of State sovereignty, these States felt humiliated and indignated at being placed under the scrutiny of an external body. Had the system been impartially applied to all and sundry, this would perhaps have eased some of the pain felt by minority States. Robinson and his collaborators sum up this sentiment in the following manner

> "it was in the interests of preservation of this status that the minorities provision in the special treaties and the in the peace treaties were imposed upon reluctant states *(Coactus tamen Voluit).* [But] these considerations stopped short of applying them to big powers too. Neither the defeated (and territorially amputated) Germany nor the victorious (and territorially aggrandized) Italy were forced to assume responsibilities appropriate for medium-sized states. The rational behind this exceptional treatment was apparently the conviction that the Big powers, by their very essence are responsible and would not indulge in such acts as might offend public opinion. As for others, it was thought that they had to be protected from themselves: left alone, they might indulge in repression of minorities".[45]

A number of minorities initially felt disillusioned at being denied any expression of self-determination, and then being placed under a system which, although *prima facie* was set up for their benefit, neither promised them adequate and satisfying recompense nor did it allow them to play any significant role in their own defence. On the other hand, attempts were made to abuse the system by particular "disloyal" and "privileged" minorities who could act in concert with their allied kin-States. Indeed, some States-particularly Germany-exploited the minority issue to satisfy their own expansionist ambitions.[46]

Whatever the indiscretions on the part of minorities, the kin-States, or the minority States, it would perhaps be naive to rest the entire blame for the ultimate failure on one party. Claude's view seems rational and sober when he suggests

> "...the system was not executed in good faith, it was never given a fair trail, since none of the interested parties-neither minority states, nor minorities nor Kin-states nor neutral powers-entered into the great

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[45] Robinson, *op.cit,* note 37, 65.

[46] J Kelly, "National Minorities in International Law" 3 *JILP* (1973), 253-273, 258.

> experiment with the spirit and attitude which were essential to its success".[47]

Despite all its shortcomings and inherent contradictions, the league system was nonetheless a remarkable attempt at ensuring certain minimal rights to certain minority groups. The ultimate outcome needs to be judged in the context of the prevailing world order with all its inequities and injustices. The legacy of the system in fact, remains in many ways a positive moment in the painful history of group rights. At least an attempt, be it limited in vision and ultimately unsuccessful, was made to elevate the issue of minority protection in the international arena. The merits in the system continue to provide strength to those commentators who believe in a more rational and just society. Hinting at some of these merits, Lerner says

> "minority schools were established in several countries, neglected groups were rehabilitated, forced assimilation was resisted and representatives could play a role in the political affairs of countries such as Czechoslovakia and Latvia. Moreover, the methods of mediation and conciliation produced some results, and the Permanent Court of International Justice contributed to the protection of minorities with important decisions, of great value even today".[48]

4.3.3 Postscript to the League System

The setting up of the wide network of treaties could be compared with the anti-climax of its subsequent demise. The manner and form which the ultimate breakdown of the League system took was only to reconfirm the views of its critics. During the long and painful years of the Second world war the minority issue consistently remained at the forefront. While the role which turbulent minorities had played as part

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[47] Claude Jr, *op.cit* note 4, 48.

[48] N Lerner, *Group Rights and Discrimination in International law,* (Dordrecht: M.Nijhoff) 1991, 11.

of their contribution to the war aroused scepticism, the treatment which certain minorities received-in particular the Jews-at the hands of their host States incensed the world at large.

Unhappy with the League experience, and perhaps more fearful of the instability and insecurity which "disloyal" minorities could generate, the statesmen who were to build the new world order aimed to give priority to peace, order and stability. There was a discernible switch from advocacy of the rights of minorities, to the less threatening rhetoric of individual human rights, leading to a suggestion that problem of minorities would cease in the era of human rights and "hence in a confused world of minority protection bliss was found in the rhetoric of individual human rights as eloquently envisioned by President [Roosevelt]'s four freedoms".[49] The issue of minority rights, on the whole was seen as damaging; its potential for abuse more pre-eminent than its constructive faculties. This emotion is embodied in Brugel's view that

> "[a]fter the Second world war the slogan was no longer `protection of minorities' but `protection from minorities' and it seemed that the cunning exploitation of justified or spurious complaints for the aims of aggressive regimes was quite welcome to some of their protagonists as a motive [so to speak] for `abolishing' a problem, for whose constructive solution their existed neither the readiness nor the necessary ability".[50]

Indeed, a number of minorities were to suffer heavily in the aftermath of the war; the transfer of population treaties between various States of Eastern Europe and more prominently the expulsion of nearly fourteen million Germans from various regions of Europe and its sanctification is a painful example of the *realpolitik.*[51] The manner and form that these expulsions took, with two million German perishing in the process, defies both reason and legal principles, though it nonetheless goes some way in substantiating a view of the difficulty in the operation of international law as an

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[49] Claude, *op.cit* note 4, 73.

[50] W Brugel, "A Neglected field, the Protection of Minorities" 4 *RDH*, (1971), 413-442, 413.

[51] *Ibid.*, A de Zayas "The International Judicial Protection of Peoples and Minorities" in C Brolmann, R Lefeber and M Zieck, *Peoples and Minorities in International Law*, (Dordrecht: M.Nijhoff) 1993, 223-287.

objective and impartial mechanism. Justifications for such transfers based on post-war legal principles would not be able to withstand the charge of application of double standards; at Nuremberg the Nazis expulsion had been condemned as a crime against humanity. [52] According to Professor de Zayas

> "some fourteen million Germans were `transferred' from Poland, Czechoslovakia, and Hungary, partly on the basis of Article XIII of the 1945 Postdam Protocol, mostly under inhuman conditions and complete dispossession of the property. Over two million Germans perished in the process, precisely at the same time when the Allies were prosecuting the Nazis at Nuremberg on the specific charge of forcibly deporting Frenchmen and Poles out of ostensibly annexed territories. The Nuremberg judgment held that Nazi expulsions constituted crimes against humanity....By contrast the Allied policy of expelling peoples and minorities suddenly seemed acceptable, as long as it was carried with the approval of victorious powers".[53]

International law cannot be so easily disassociated, either from its State-centred constitution or from its enduring historical and political impressions. The human injustices which became a contributing factor in provoking the Second world war and the unfathomable atrocities during the course of the war led to a determined attempt to bring to justice those involved in committing these atrocities. In the final analysis, it may be argued, that those who had lost the war, and those who could be associated with the vanquished were the ones to suffer the consequences of their misdeeds.[54] The justice that was dispensed at Nuremberg, Tokyo and in subsequent proceedings, could be considered more in the nature "victor's vengeance". Although not treating this so-called "one-sided justice", as "without merits",[55] Professor Bassiouni laments the fact that

> "one sided justice reveals the unfairness of the legal international system. Germany, during world war I and world war II, had records of

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52 Thornberry, 115.

53 *Op.cit note*, 51, 258-9.

54 See generally A de Zayas, *Nemesis at PostDam: the Anglo-Americans and the expulsions of the Germans: Background, Execution, Consequences* (London: Routledge and Kegan Paul) 1977; A de Zayas "International Law and Mass Population Transfers" 16 *Harvard ILJ* (1975), 207-58; I Claude Jr, *op.cit note 4*, 114-125.

55 C Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht: M.Nijhoff), 1992, 231.

> Allied violations of the very laws and rules which the Allies charged Germany of violating. The German documentation of world war I Allies violations against Germany even escaped public attention and no significant trace of world war II Allied violations against Germany and against Germans and others appears in the recollection of world public opinion. Some exceptions, however, exist, such as the dreadful fire bombing of Dresden during world war II that remains in the world's conscience as a symbol of the terrible sufferance that befell the civilian German population between 1943-1945. It is shocking that the wholesale violations of conventional and customary rules of war against German prisoners of war by the USSR, has escaped international public attention. The same inattention applies to the Allies violations against the Japanese, the worst example of which the world community's approval of the use of two atomic bombs in 1945 against the cities of Hiroshima and Nagasaki, killing and injuring hundreds of thousands of civilians. Had Japan and Germany so bombed an Allied power, there is no doubt that its perpetrators, from the decision-makers to the crews of the planes, would have been tried and convicted of war crimes".[56]

Historically speaking, instances of physical extermination of weaker elements, genocide and persecution, are too many and too painful; political constraints have often prevailed over humanitarian and legalistic concerns in preventing or in punishing those involved. For many, disillusionment has been grave, bordering upon misanthropy. The worst international criminals may have escaped the wrath of international community; even in the case of Hitler and Nazi Germany, Hannum's cynicism bears elements of the unfortunate *realpolitik* when he comments that had

> "Nazi Germany not been so thoroughly defeated, [] reasoning [of political inconvenience] also would have permitted Hitler to remain in power-so long as whatever post-war coalition that emerged in Germany was politically acceptable to the Allied powers".[57]

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[56] *ibid.*, 231-232.

[57] H Hannum "International Law and the Cambodian Genocide Sounds of Silence" 11 *HRQ* (1989), 83-138, 137.

4.3.4 Issue of the Subsequent Legal Validity of Minorities Treatise

The final question in this historical debate and one which is of a practical nature, relates to the contemporary value of the Minority treaty system. There remains some controversy as to the extent to which treaty obligations survived the demise of the League. If they had indeed been extinguished what were the causes? A fairly detailed study was conducted by the UN Secretariat under the title of *The Study of the Legal Validity of the Undertaking concerning Minorities.*[58] The study, however, is not exactly a model of clarity and the matter has not been completely resolved. The study in its conclusion states

> "Reviewing the situation as a whole...one is led to conclude that between 1939 and 1947 circumstances as a whole changed to such an extent that generally speaking, the system should be considered as having ceased to exist"[59]

While drawing strength from *clausula rebus sic stantibus,*[60] it is possible to argue that all minorities treaties have been extinguished. There nonetheless remains a strong view that some obligations-in particular those regarding Turkey and Greece,[61] Finland (in relation to Aaland Island) remain intact,[62] and Austria relating to the provisions of St Germain-are still in force due to constitutional provision of 1920.[63]

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58 UN Doc.E/CN.4/367, 7 April 1950.

59 *Ibid.*, 70-71.

60 N Fienburg "The Legal Validity of the undertakings concerning Minorities and the Clausula *Rebus Sic Stantibus*" in B Azkin (ed.) *Scripta Hiersolyminitana V Studies in Law,* (Jerusalem: Magness Press) 1958, 99-131; For a reflection of this doctrine in modern international law see Article 62 VCLT 1969; Brownlie, 619-621.

61 see UN Doc E/CN.4/367/Add.1 27 March 1951, 2; According to the secretariat "Only in regard to the special regime established bilaterally between Greece and Turkey does the secretariat take the position that Greece (and also Turkey) may still be bound".

62 T Modeen, *op.cit note 4,* 69-73. "The machinery established by the League of Nations to deal with the minorities problem ceased to exist altogether with the League, in 1946. The obligations created by the minorities treaties and clauses, except for Aaland Islands agreement lost their force after World War II, either because of desuetude or by the traditional *clausula rebus sic stantibus,* a substantial change of circumstances which makes a pre-existing obligation inapplicable" Lerner *op.cit* note 48, 14.

63 Ermacora, *op.cit* note 40, 268.

4.5 CONCLUSIONS

A chronicle of man's endeavour of being accorded a right to be different in terms of his ethnic, linguistic and religious identity has passed through changes in attitudes; from inchoate protection of religious minorities of Northern and Central Europe to interventionist attempts to protect minorities-largely those in Eastern Europe-under the rubric of humanitarian intervention, to a system of limited protection under the aegis of the League of Nations, to a more generalised model of human rights focusing upon the individual.

As indicated in the introductory section to the present part changes in trends may be more in the nature of their replacement with different models; their abandonment may only be transitory and cannot generally be treated as synonymous with their permanent exhaustion. Historical surveys are beneficial not merely for their general enlightenment, but also for predicting revivals and renaissance of trends and fashions.

As in other societies, in international society, fashions and trends are not immutable. Krishnaswami points to a positive progression in the direction of a regime of religious non-discrimination though with the caveat that "a prediction of trends is in the nature of prophecy, and it is quite possible that any estimate.....may be reversed, by the course of human affairs".[64] This reflection on the historical debate of the position of minorities, we hope, in addition to providing an appropriate prelude to a discussion of the contemporary phase of minority rights, would also result in more rational and realistic conclusions-both in terms of predictions as post-scripts to the end of the "cold-war" as well as to *de lege Ferenda* of the rights of minorities.

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[64] Krishnaswami, *op.cit note 2*, 55.

SECTION A

ESTABLISHED RIGHTS

CHAPTER FIVE

MINORITIES AND THE RIGHT TO PHYSICAL EXISTENCE

5.1 INTRODUCTION

The development of human rights jurisprudence has been based on the premise that all human beings, regardless of whether they are seen singularly as individuals or in the form of such collectivities as minorities, have a basic right to physical existence. The right to existence is paramount to all other rights, for it is only the living who could lay a claim to other human rights.[1] Existence, however is a term of myriad connotations reflecting differences in the case of individuals and minorities. Whereas for individuals, physical existence is the essence of life, minorities relish on their collective sense of identity.[2] For minorities, any right to existence is not exclusive to their physical existence but would also include *inter alia* a cultural, religious, linguistic existence, without which the group in question would lose its distinctiveness.[3]

> "Existence is a notion which has a special sense for a collectivity. An individual `exists' or he does not; his non-existence is individual death. A collectivity such as a minority group exists in the individual lives of its members; the physical death of some members does not destroy the `existence' of the group, though it may impair its health. There is, however, another existence for a minority through 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: it has been replaced by something other than itself, perhaps a new group, larger or smaller".[4]

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1 Y Dinstein, "The Right to Life, Physical integrity and Liberty" in Henkin, 114-137. P Sieghart, *The Lawful Rights of Mankind,* (Oxford: OUP) 1986, 107. "Amongst all human rights, the primacy of the right to life is unanimously agreed to be pre-eminent and essential: it is the *sine qua non,* for all other human rights depend for their potential existence on the preservation of human life" B Whitaker *The Study of the Question of the Prevention and Punishment of the Crime of Genocide,* (Revised and Updated) UN Doc E/CN.4/Sub.2/1985/6. "There must surely be unanimity among members of the United Nations on the primacy of the right to life. The emphasis on human rights would be quite meaningless without the survival of living subjects to be the carriers of these rights. And the circumstances of the founding of the United Nations, as well as its charter, declarations, and covenants, seem to establish without doubt that in the midst of the sharpest conflict of ideologies, of values, and of national interest there is unanimity among the member states on the primacy of the right to life". Kuper *Prevention of Genocide,* 3; "who can doubt that right to life in a literal sense is the most basic rights of all" I Claude Jr, *National Minorities An international Problem,* (Cambridge, Mass: Harvard University Press) 1955, 156.

2 Thornberry, 57.

3 *Infra,* Chapter 7.

4 Thornberry, 57.

In its fundamental sense, however, the right to existence is seen in terms of physical existence, a right which, in the case of individuals, is adequately acknowledged and protected in contemporary international human rights instruments.[5] The subject of the destruction of the physical existence of minorities, on the other hand, comes within the ambit of international criminal law.[6] The development of international criminal law has matched the progress made in the field of the international standard-setting of human rights. International criminal law has not only come to concern itself with many issues like piracy, terrorism and drug trafficking, but has also more recently engaged itself with crimes which directly offend international human rights norms.[7]

This inter-action is reflected vividly by the Genocide Convention,[8] the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,[9] the draft code of crimes against peace and security of Mankind prepared by the International Law Commission,[10] and the International Convention on the Suppression and Punishment of the crime of Apartheid.[11] Although the right to physical existence remains paramount and pre-eminent, it can stretch the developing norms of international law of human rights to their limits; the right is generally

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5 See the Universal Declaration of Human Rights (1948) Article 3, adopted Dec. 10, 1948, GA Res 217, UN Doc A 1810 at 71. Article 2 ECHR (1950) Article 2, and the Sixth Protocol (1983), The International Covenant on Civil and Political Rights (1966) Article 6, annex to the UN Gen Ass Res 2200 (XXI), GAOR 21st session, supp 49; UKTS 6 (1977). ACHR (1969), 9 ILM; 1969 YBHR 390. Protocol to ACHR to abolish the Death Penalty (1990); The African Charter on Human and Peoples' Rights (1981) 21 ILM 59; 27 Rev ICJ 64.

6 Thornberry, 57; L Green "International Criminal Law and the protection of Human rights" in B Cheng and E Brown, (eds.) *Contemporary Problems of International law: Essays in honour of Schwanzenberger on his Eightieth Birthday,* (London: Stevens and Sons Limited) 1988, 116-137.

7 M Bassiouni and V Nanda (eds.), *A Treaties on International Criminal Law,* (Illinios: Charles C Thomas) 1973.

8 78 UNTS 277; 58 UKTS, 1970; Cmnd 4421.

9 754 UNTS 73; 8 ILM 68; 1968 YBHR 459; 9 IJIL 317; R Miller, "The Convention on the non-applicability of statutory limitation to War Crimes and Crimes Against Humanity" 65 *AJIL* (1971) 476-501.

10 Draft Report of the International Law Commission on the work of its 43rd session UN Doc.A/CN.4/L.464 Add.4, 1991; also appended in L Sunga, *Individual Responsibility in International Law for Serious Human Rights violations,* (Dordrecht: M. Nijhoff) 1992, 169.

11 GAR 3068 (XXVIII) Annex, GAOR, 28th session, Supp 30; I Brownlie (ed.), Basic Documents on Human Rights, (Oxford: OUP) 2nd ed., 1981, 164; see *Multilateral Treaties in respect of which the Secretary-General performs Depository functions,* 1978, 120-121.

violated, or at least its violation is tolerated by sovereign States,[12] who are the main subjects of international law.

The main purpose of the present chapter is to analyse the development of international legal norms in relation to the physical existence of minorities, and to consider the difficulties and complications that confront international law in adequately protecting the right to physical existence.

5.2 MINORITIES AND THE RIGHT TO PHYSICAL EXISTENCE IN INTERNATIONAL INSTRUMENTS

A historical legal analysis depicts a melancholy picture of the antiquity of the acts of the physical extermination of minorities.[13] This phenomenon, unfortunately, is as old as the human history itself; every leaf of the chronicle of human endeavours unfolds sad tales where the weak and the inarticulate became victims, and were sacrificed at the alter of the strong, the powerful and the reckless. Leo Kuper, while analysing the history of physical extermination of minority groups, provides several revealing and tragic instances. These include a mention of the horrifying massacres resulting from the Assyrian warfare during the seventh and eighth centuries B.C; Roman obliteration of the city of Carthage and all its inhabitants;[14] religious wars of medieval and indeed modern history as a source of extermination.[15]

More recently, the rise of nationalism, totalitarian ideologies like that of Nazism, Stalinism and the upsurge of racial, religious and linguistic consciousness, have generated wholesale extermination of groups. Equally, there remains substantial

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12 "...it is almost impossible for this [genocide] to be committed other than at the connivance or toleration of state authorities" Green *op.cit* note 6, 35.

13 Kuper *Genocide*, 11-18; Potter; Kuper *Prevention of Genocide* ; L Kuper, *International Action against Genocide*, (London: MRG) 1982; H Fien, *Genocide Watch*, (New Haven and London: Yale University Press) 1992.

14 Kuper, *Genocide*, 11-12.

15 Kuper, *ibid.*, 12-14; B Whitaker, *op.cit* note 1, 6-7; also see I Brownlie, *International Law and the Use of Force*, (Oxford: OUP) 1963.

evidence to support the conviction that large scale massacres-extending even to the wiping out of entire indigenous communities-has been conducted in several parts of the world.[16] If the phenomenon of colonisation of indigenous peoples and minorities reflects a sad and shameful comment on the annals of history, the progression towards decolonisation and the destruction wrecked upon many groups in the newly independent States is more painful to digest.[17]

Ironically, however, it was the continent of Europe-the root and foundation of principles which were to give birth to human rights ideology-where the worst crimes of physical extermination of minorities took place. It was to be the atrocities committed by the Nazis and their accomplices towards weaker groups like the Jews that led to the wholesale acceptance of the crime of the physical extermination of groups into the realm of international criminal law.[18]

5.2.1 Emergence of the Term "Genocide"

In contemporary terms, this activity of physical extermination of groups is labelled as genocide.[19] Ralph Lemkin, a Polish jurist of Jewish origin is accredited with developing the modern principles relating to the crime of genocide and indeed for coining the term itself.[20] In 1933, he presented his ideas based on the protection of groups in a special report to the Fifth International Conference for the Unification of Penal Law.[21] He later elaborated these perceptions in his work, *Axis Rule in Occupied*

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16 Potter, 16; Kuper, *International Action against Genocide*, *op.cit* note 13, 15.

17 For the position of Algeria see L Kuper, *Pity of it All Polarisation of Racial and Ethnic Relations*, (London: Duckworth) 1977, 245-275; As to the case of India see Part IV *infra*.

18 "It was the devastation of peoples by the Nazis which provided the impetus for the formal recognition of genocide as a crime in international law, thus laying the basis of intervention by judicial process" Kuper *Genocide*, 20.

19 Whitaker aptly describes this activity as "the ultimate crime and gravest violation of human rights it is possible to commit" supra *op.cit* note 1, 5.

20 R Lemkin, *Axis Rule in Occupied Europe*, (Washington: Carneige Endowment for International Peace) 1944, 79; J Potter, "What is Genocide? Notes towards a definition" in Potter, 5.

21 R Lemkin, 'Genocide as a crime in international law' 43 *AJIL* (1949) 145-151. R Lemkin 'Terrorisme' Actes de la Ve Conference Internationale pour l'Unification du Droit Penal, Paris, 1935, 48-56. His formulation at that time were that certain elements whose aim was to destroy racial or ethnic groups should be declared *declita juris gentum*. These acts of destruction of groups were to be divided in to two principal crimes 'barbarity' and 'vandalism'. Whereas the

Europe, to develop the term genocide which was derived partly from the Greek word "*genos*" meaning race, tribe or nation, and partly from the Latin verb "*caedere*" which denotes the act of killing.[22] In his view

> "By 'genocide' we mean destruction of a nation or of an ethnic group...Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, or except when accompanied by mass killings of all members of a nation. It is intended rather to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of life of national groups...The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of national groups, and the destruction of personal security, liberty, health, dignity, and even lives of the individual belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group".[23]

Crimes in the nature of genocide, which strain and exhaust contemporary archives, could interest international lawyers in their capacity as individuals and as fragments and elements of the human race; the spirit of John Donne may transcend all of us when he comments "...every man is a piece of continent, a part of the main...Any man's death diminishes me because I am involved in mankind...".[24] For international lawyers and jurists the appeal for a challenge against genocide lies on a higher plane; the term has passed into international legal vocabulary; its prohibition has become an indelible part of the minority directory; it stands out as the first principle in international law.

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former was denoted to oppressive and destructive actions against individuals as members of national, racial or religious groups, the latter included acts of malicious destruction of artistic and cultural heritage. Kuper *Genocide*, 22. Thornberry, 60-61.

22 "New conceptions require new terms. By "'genocide' we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word genos (race, tribe) and the Latin, cide (Killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide etc." Lemkin *op.cit*, note 20, 79.

23 Lemkin *ibid.*, 79.

24 Cited in M Bassiouni, *Crimes against Humanity in International Criminal law*, (Netherlands: Sijthoff) 1992, *Preface.*

5.2.2 International Legal Vocabulary and the Term "Genocide"

In international legal discourse the usage of the term "genocide" is a relatively new one, and appeared for the first time during the Nuremberg trials in a separate category. Its recognition as a crime in international law was a direct consequence of the atrocities committed during the Second World War. The term "genocide" itself was used for the first time in the indictment of 8th October which charged major German war criminals of having committed "deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national racial and religious groups".[25] The concept re-emerges in various trials of the Nazi war criminal conducted in the National courts by the Allies.[26]

Although genocide has now emerged as an independent concept, it bears a relationship to war crimes and crimes against humanity. The Charter of the International Military Tribunal does not specifically mention the term genocide, nonetheless, Article 6(c) of the Charter provided the necessary lineage between war crimes and crimes against humanity on which the concept could be developed as a separate category.[27]

Article 6 of the Charter of International Military Tribunal annexed to an agreement signed by the Four-Powers in 1945 provided for the establishment of a tribunal to prosecute and punish war criminals, who were involved in the commission of any of the following offences:

> (a) crimes against peace;
> namely planning preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) war crimes;

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[25] *Trial of the Major War Criminals before the International Military Tribunal, 1947*, vol. i, 43-44.

[26] *Law Reports of Trials of War Criminals, 1947-49*, vol. vi, 48; vol. vii 7, 24; vol. xiii, 2, 3, 6, 112, 114 and vol. xv, 123.

[27] Text of the agreement for the establishment of IMT and Annexed Charter, UNTS, 5, 251; AJIL, 39 (1945), Supplement 257.

> namely, violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupation of or in occupied territory, murder or ill treatment of prisoners of War or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) crimes against humanity;
> murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime with in the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated

The last of these categories-crimes against humanity-was at that time only establishing itself as a rather controversial principle as it divided academic opinion into two schools of thought. One school regarded it as revolutionary with great potential, whereas the other considered it as being inconsistent with international legal norms.[28] Indeed, international legal history reveals that crimes against humanity have occupied a subsidiary position to war crimes, and did not emerge as a separate concept in international law until at least 1923,[29] meaning thereby that offences committed by governments against their own nationals was not within any of the recognised categories of international crime.[30]

However, the position was considerably different at the end of the Second world war. The atrocities committed by the Nazis had produced a united front regarding the punishment of those who had been involved in crimes against humanity during the currency of the war and more specifically at condemning and criminalizing

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[28] E Schwelb, "Crimes Against Humanity" 23 *BYIL* (1946), 178-226, 178; J Brand, "Crimes against Humanity and Nuremberg trials" 28 *OLR* (1949), 93-119; Bassiouni *op.cit note 24*, Bassiouni, "Crimes against Humanity" 31 *Col.JTL* (1992), 457-494; Kuper *Genocide*, 21; On War Crimes see H Lauterpacht, "The Law of Nations and the punishment of War Crimes" 21 *BYIL* (1948) 58-59.

[29] C Bassiouni, "International law and the Holocaust" 9 *Cal.WILJ*, (1978), 202-305, 211. In the peace treaties of Versailles (Art 228-230) Saint-Germain-en-laye (Art 173-76), Trianon (Art 157-159), Neuilly-sur-seine (Art 118-120), the term Crimes against humanity does not appear. Although in the Treaty of Sèvres (1920) the substance of the concept does make an appearance, the treaty itself remained unratified and was replaced by another treaty, the treaty of Lausanne which allowed for a general amnesty. Schwelb *op.cit* note 28, 182.

[30] Thornberry, 88.

genocide in times of war and peace alike. Hence, it was not surprising that in its very first session, the United Nations General Assembly included in its agenda a resolution entitled "Resolution on the crime of Genocide" and adopted it as Resolution 96(I) on 11 December 1946.[31] Although, a General Assembly Resolution and *prima facie* deprived of the status of binding legal obligation,[32] the unanimity of the Assembly in declaring "Genocide as a Crime under international law which the civilised world condemns" and the substance and form of the Resolution leads to a conviction that it was, in fact, declaratory of customary international law.[33]

The Resolution played a major role in the recognition of genocide as a crime in international law, for not only did it form the basis of the Genocide Convention of 1948, but several of its themes were taken up in various other international instruments. There was essentially a recognition of the emergence of this concept of genocide, quite independent to that of "crimes against humanity".[34] To concretise and provide a legal recognition to this independent concept, the establishment of a convention on genocide was deemed necessary and a convention was in fact adopted within the space of two years.

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31 YBUN, 1946-7, 255.

32 H Kunz, "The United Nations Convention on Genocide" 43 *AJIL* (1949), 738-746, 738.

33 "such Resolutions...are authority for the content of customary law only if they claim to be declaration of existing law. A clear example is Resolution 96(I) of 11 December 1946". M Akehurst, "Custom as a source of international law" 47 *BYIL* (1974-5), 1-53, 6; see *infra* chapter 9.

34 Note the views of the various delegates during the preparatory stages of the Genocide Convention. According to the Brazilian representative Mr Amado "...while it was true that article 6 (c) of the Nuremberg Charter enunciated acts which, by their nature, constituted genocide, such acts were covered by the article only in so far as they had been committed either during or in connection with the preparation for war. Genocide, however, was an international crime which could also be committed in time of peace, and the Assembly had been careful to make that important distinction". GAOR, 3rd session, Part 1, Sixth committee, 63 meeting, 30 September 1948, 6, para 7.

5.3 THE ESTABLISHMENT OF THE RIGHT OF PHYSICAL EXISTENCE FOR MINORITIES IN INTERNATIONAL LAW

5.3.1 International Conventions

5.3.1.1 The Convention on the Prevention and Punishment of the Crime of Genocide 1948

The main thrust of the crystallisation of a right to physical protection of minorities has been provided by *the Convention on the Prevention and Punishment of the Crime of Genocide, 1948*[35] (here-in-after the Convention). Indeed, after the coming into operation of the United Nations Charter it was the first convention to have dealt directly with the issue of the physical protection of groups, and it still remains as the primary conventional obligation in this respect.[36] There is no mention of minorities in the text of the treaty itself; an unfortunate reflection of the lack of the then existing enthusiasm for minorities. It is directed more at the offenders, an ordinance against offenders rather than a proclamation of the rights of groups.[37] On the other hand, it remains clear that the dynamics of the State structure makes minorities its natural beneficiaries and hence it is meaningful to consider the Convention as an indelible part of their Charter of Rights.[38]

The origins of the Convention adequately reflect the abhorrence with which the world community regarded genocide. The unanimity with which the Convention was

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35 78 UNTS 277; 58 UKTS 1970.

36 Thornberry, 59.

37 J Crawford "Peoples or Governments" in J Crawford (ed.), *Rights of Peoples*, (Oxford: OUP) 1988, 55-67, 59.

38 "The Convention on Genocide may be characterised as a means of protecting minorities since in reality it is most nearly concerned with affording protection for population groups in minority positions" T Modeen, *The International Protection of Minorities in Europe*, (Abo: Abo Akandmi) 1969, 111.

adopted has several important consequences. Firstly, the terminology of the Convention makes it clear that the substantive principles enunciated therein are recognised and binding on all States, regardless of their treaty obligations. Secondly, it manifests the view that there is a legal obligation on all States to take action not only to prevent its occurrence, but also to punish those involved in committing genocide.

The preamble of the Convention, while noting the General Assembly Resolution 96(1) of 11 December 1946 which condemns genocide as a crime under international law, calls for international co-operation to rid mankind of what it terms as an "odious scourge". According to article 1, "the contracting parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". Although, article 1, seemingly merely confirms the prohibition of genocide, nonetheless it remains of considerable significance. Not only is it an attempt to provide a universal recognition of the crime of genocide, but also its application both in times of peace and war is a considerable expansion of the scope of the Charter of the International Military Tribunal.[39] The issues relating to prevention and punishment have raised considerable controversy and will be dealt with separately.

(i) Acts Constituting Genocide

According to Article II of the Convention genocide consists of

"any of the following acts committed with intent to destroy in whole or part a national, ethical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;

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[39] This sentiment was echoed by the Egyptian Representative, Mr Raffat, when he said that article 1 "expressed three fundamental concepts, namely, that genocide was a crime under international law, and it was a crime in time of Peace as well as in time of war. That was no doubt a repetition of the terms of the General Assembly Resolution, but the latter was only a recommendation whereas the Convention would be binding on the parties" GAOR, 3rd Session, Part 1, Sixth Committee, 67th mtg., 5 October 1948, 39. For debates on the value and need of the retention of Article 1 see the 67th and 68th mtg., 6 October 1948 *ibid.* 29-36, 36-47.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births with in the group;
(e) Forcibly transferring children of the group to another group."

It would appear that the definition of the acts which constitute genocide is exhaustive in nature, which contrasts vividly with the wider expression of the General Assembly Resolution 96(1). Though the provision of an exhaustive definition results in the disadvantage of inflexibility, the main benefit of such a provision is to provide set guide-lines for States and to adopt consistency in their approach to follow and not to provide a loophole for them to set their own standards in relation to its meaning.[40] It is important to note that genocide, according to Article II, is not only aimed at the total destruction of a group, but also covers the partial destruction. On the other hand, it is also to be noted that none of the characteristics, as we have already considered, i.e. national, ethical, racial or religious, are defined.

(ii) Exclusion of "Cultural" Genocide

From the definition as preserved in the Convention, it would appear that whereas categories (a) to (c) can be described as classic cases of "physical genocide", and category (d) as "biological genocide", category (e) is more controversially aimed at reflecting elements of "cultural genocide",[41] the legal validity of which is subject to debate.

Indeed as the *travaux préparatoires* suggest, the issue of inclusion of "cultural genocide" had proved highly controversial, with several member States arguing vigorously over the risk of political interference in the domestic affairs of States.[42] The *Ad hoc* Committee, following the view adopted in the General Assembly Resolution,

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[40] See T Franck, "Legitimacy in international system" 82 *AJIL* (1988) 705-759, 714.
[41] See the Secretariat Draft Convention, the Secretary-generals preliminary draft as supplemented by the comments of the three experts consulted, UN Doc E/447. The draft, and comments on it by states, is reproduced as UN Doc A/362, GOAR, 2nd Session, 6th Committee, Summary Records, 16 September-26 November 1947, Annex 3, and Annex 3a (comments); Thornberry 71.
[42] The Secretariat Draft Convention, the Secretary General's preliminary draft as supplemented by the comments of the three experts consulted, UN Doc. E/447.

not only decided to keep it within the Convention, but also devoted a full article elaborating its meaning.

Article III of the draft convention provided:

> In this convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:
> (1) prohibiting the use of the language of the group in daily intercourse or in schools or the printing or circulation of publications in the language of the group,
> (2) Destroying or preventing the use of libraries, museums, schools, historical introductions and objects of the group.

The extensive debates on the subject that were conducted reflect that those in favour of retaining "cultural genocide" within the definition pointed out to the imperative nature of preserving the group identity without which it would seem meaningless to talk about the existence of groups. It was argued that there was an obvious and natural relationship between physical and cultural extermination making it vital to protect both the physical and cultural existence of groups. "Cultural genocide", however, was ultimately excluded from the definition. There were fears on the part of the majority of States of converting the legally binding instrument into a mere formula of political rhetoric; of providing a pretext for unnecessary intervention and establishing a grave hurdle in the State-building process on the part of the newly emerging States.[43]

The practicality of incorporating such an offence was also brought into question: international and national tribunals would be unable to gauge the accuracy and extent of the allegations brought forth and the governments would not be in a position to adequately safeguard themselves from such charges. The prevailing opinion was that there was a difference between mass murder and closing libraries and that the later issue of "cultural genocide" should be left to human rights treaties and

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[43] GAOR, 3rd session, Part 1, Sixth Committee (83 mtg.) at 193-207, 25th October 1948; GAOR Plenary (178 meeting) 9th December 1948; Note the views of Mr Amado (Brazil) *ibid.* 83rd mtg., at 197-8; Mr Federspiel (Denmark); Mr Lapointe (Canada) 199-200; Mr Goyhsolo (Peru) 202; Mr Gross (USA) 203; Mr Keckenbeeck (Belgium) 204; Also see chapter 9 *infra.*

minority rights treaties.[44] Despite its exclusion from the text of the treaty, "cultural genocide" has left its mark. A special reference is made to the forcible transfer of children from one group to another, and the word "ethical" was added to the groups covered there by creating the impression of extending protection to groups with distinctive culture and language.[45]

As part IV will illustrate, through the case of Pakistan, wanton destruction of groups may also take the form of deportation, mass displacement and plantation of an alien population. There have been innumerable contemporary instances where States have employed some or all of the aforesaid means to destroy the existence of the groups.[46] Concern over the omissions of these activities has attracted the attention of many commentators. According to Drost, "The five acts of genocide enumerated in article II do not cover all possible ways and means of intentionally destroying a human group as such. Deliberate destruction of a human group may well take the form of deportation or mass displacement of internment and enslavement with forced labour, of denationalisation by systematic terrorism, inhumane treatment and physical intimidation measures".[47]

A further reflection of a serious gap, and closely related to the issue of "cultural genocide", is the absence of a prohibition on demographic changes which could transform the proportion of a population. Indeed, Professor Ermacora's point is a valid one when he observes that "...another form of genocide can be the demographic change in a given area. This demographic change does not fall under the acts enumerated...in the Convention.".[48] There has also been growing concern that modern day developments have created newer threats to the survival of certain groups.

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44 GAOR, 3rd session, Part 1, Sixth Committee (83 mtg.) at 193-207, 25th October 1948; the views of the Brazilian, Canadian, US and Belgium representative. N Robinson, *The Genocide Convention A Commentary*, (New York: Institute of Jewish Affairs) 1960, 65.

45 Kuper, *Genocide*, 31.

46 See A DeZayas, "International law and Mass population transfers" 16 *Harvard ILJ* (1975) 207-258; J Claydon, "Internationally uprooted people and the transnational protection of minority culture" 24 *NYLSLR* (1978), 125-151; V Iyer, "Mass expulsion as violations of human rights" 13 *IJIL* (1973), 169-175.

47 P Drost, *Crimes of State Book II*, (Leiden: Sijthoff) 1959, 124.

48 F Ermacora, "The Protection of Minorities before the United Nations" 182 *Rec. des cours*, (1983) 251-366, 314.

Activities such as the use of nuclear and chemical explosions, toxic environmental pollution, acid rain or the destruction of rain forests threaten the existence of peoples in several parts of the world.[49]

A particular concern of the General Assembly Resolution of 11 December 1946 was the "cultural contributions lost as a result of genocide". The omission of this sentiment was unfortunate; minorities shorn of their cultural identity would be little more than a collection of individuals going through the motions of a physical existence. In the words of one commentator, the deletion of an article relating to cultural genocide "destroyed the very letter and spirit of the Resolution of December 1946 because it effectively deprived the world of cultural contributions of small groups of people".[50]

(iii) Issue of Intent

The commission of the crime of genocide requires two necessary ingredients: *actus reus,* which is the physical action of destruction, in whole or in part, of a national, ethnical, racial or religious group and *mens rea,* which is the mental element or the intent to commit such a crime. The crime of genocide would not be committed, regardless of the ruthlessness of the act and the barbarity of its consequences, without a specific intent of committing genocide being involved.[51] On the other hand acts, which do not succeed in achieving the intended result of extermination of groups notwithstanding the presence of intent are punishable.[52]

Attempts were made to have an objective criterion to assess the commission of the crime.[53] It was argued that the requirement could provide a pretext in suggesting

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49 Whitaker *op.cit* note 1, 17.
50 S Ikramullah, *Pakistan Horizon* December 1948, 234.
51 Also see Robinson *op.cit* note 44, 58-59.
52 See Article III.
53 GAOR, 3rd Session, Part 1, Sixth Committee (73 mtg.) 12 October, 1948, 81-98; See the views of USSR representative Mr Morozov, *ibid.* 96 and the views of Mr Chaumont (France) *ibid.* 96-97.

denial of the crime for absence of any intent involved.[54] According to an amendment proposed by the Soviet Union the phrase "committed with the intent to destroy" in the draft Convention should be replaced by the phrase "aimed at the physical destruction".[55]

Attempts to discard the requirement of intent failed to attract the required consensus; the Soviet proposed amendment was rejected by 36 votes to 11, with 4 abstentions. Whereas the Secretariat draft Convention provides a wider view, subsequent drafts reflect a continually narrowing view on this issue of intent. An equally significant deficiency in the present definition, it is contended relates to the relationship between the requirement of *mens rea* and *actus reas.* From a simple construction of the article, it appears that intent alongside positive *actus reas* is necessary to constitute the crime. It is equally conceivable that *actus reas* might be committed through omissions which may be intentional or negligent.

Since the coming into operation of the Genocide Convention, charges have been levelled against a number of States, and the defence-not surprisingly has been an absence of intent. Indeed, the French delegate was to make the prophetic statement when he pleaded that substitution of the term was necessary as it would "guard against the possibility that the presence in the definition of the word `intent' might be used as a pretext in the future for pleading not guilty on the ground of absence of intent".[56]

(iv) Protected Groups

The protected groups in the Convention are "national, ethnical, racial or religious...".[57] Some of the features and the inherent problems in the list are immediately prominent. In a given situation, it may well be possible to earmark a group as fitting within a certain category. However, since none of these terms are

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54 *Ibid.*
55 A/C.6/223.
56 GAOR, 3rd Session, Part 1, Sixth Committee (73 mtg.) 12 October, 1948, 97.
57 Article II.

defined in the Convention or indeed in any other international legal instrument, there remains considerable ambiguity as to the possible meaning of "national" or "ethnical" "racial" or "religious" group.[58]

Though unlike Resolution 96(I) national and ethnic groups are mentioned, there is no reference to the political and "other" groups as stated in the Resolution, or "linguistic" groups as mentioned in the Secretariat draft. The draft prepared by the Secretariat had mentioned racial, national, linguistic, religious and political groups but not ethnic groups, which were first mentioned in the text prepared by the Ad hoc Committee.

(v) Exclusion of Political Groups

The most contentious debate as to the potential scope of protection related to political groups. The debates of the Sixth Committee probably reveal the dawning of the Cold-war politics; the US delegates were keen to include political groups while their Soviet counter-parts wanted the exclusion of such groups from the realm of protection under the Convention.[59] The advocates of such a provision cited the case of Nazis who had found it easier to identify political opponents for example, the communists for persecution.[60] The whole point of the discussion being that it was relatively straightforward to recognise groups associated to opposition, and to be made subsequent objects of genocide. The exclusion of "political groups" proved a disappointment for those who pleaded that political dissidents were as much a target of genocide as national, ethnical, racial or religious groups.[61] Opponents of the motion countenanced their argument on grounds of rationality and practicality; they projected a view that the constitution of political groups was too vague and would provide an

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[58] See the discussion *Supra* chapter 2.

[59] GAOR, 3rd Session, Part 1, Sixth Committee, 74th mtg., 14th October, 1948; 75th mtg. 15 October 1948; and 128th mtg., 7 December 1948. See in particular views of Mr Gross (USA) 101-103; and Mr Morzov (USSR) 103-106.

[60] *Ibid* Gross 101; Mr De Beus (Netherlands) 100; Mr Medeiros (Bolivia) 98; Mr Correa (Ecuador) 100-1.

[61] *Ibid.*

opportunity for external interference. In addition to these objections was the genuine fear of losing the unanimity amongst States and consequent lack of enthusiasm in drafting and ratification of the treaty. Concern was expressed at the prospects of instability and the provision of a vague terminology in a legally binding instrument.[62]

The international society works on the basis of State sovereignty; a majority of States considered that the inclusion of such a provision might provide a pretext for other States to interfere or intervention on the part of United Nation's contrary to Article 2(7) of the Charter.[63] Added to that there was also the fear of the loss of sovereignty of a State in quelling unrest and civil war for fear of external scrutiny.

The Venezuelan representative summed up the argument succinctly in the Sixth Committee when he said:

> "The inclusion of political groups might endanger the future of the convention because many States would be unwilling to ratify it, fearing the possibility of being called before an international tribunal to answer charges made against them, even if those charges were without foundation. Subversive elements might make use of the convention to weaken the attempts of their governments to suppress them.....[while] certain countries where civic spirit was highly developed and the political struggle fought through electoral laws would favour the inclusion of political groups,....there were countries where the population was still developing and where political struggles were violent. These countries would obviously not favour the inclusion of political groups in the convention".[64]

Considerable faith was placed in the emerging trends of human rights. The issues relating to the position of political groups alongside other individuals could merge into the wider and more encapsulating human rights values rather than being

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[62] *Ibid.* See views of Mr Morzov (USSR); Mr Abdoh (Iran) 99; and Mr Messina (Dominican Republic) 99.

[63] Article 2(7) of the United Nations Charter provides "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially with in the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present chapter; but this principle shall not prejudice the application of enforcement measures under chapter VII".

[64] GAOR, 3rd Session, Part 1, Sixth Committee, 69 mtg., 7 October 1948, 58.

based on narrow and difficult conceptions of genocide.[65] It is contended that the exclusion of political groups has, however, proved to be a great oversight; incidents that have taken place since the coming into operation of the Convention, in several parts of the world, particularly in the newly emerged States of Asia and Africa, remain witness to the phenomenon of "political genocide". As the French representative stated in the General Assembly "Whereas in the past crimes of genocide had been committed on racial or religious grounds it was clear that in the future they would be committed mainly on political grounds".[66]

Subsequent history and contemporary events prove that political groups continue to remain a major target of genocide. States have felt comfortable to conduct genocide in the pretext of public order or suppressing political opposition. The issue relating to the exclusion of political groups also has wider repercussions, for not only has made it possible for such groups like the communists to be victimised but it has also been possible for States to conduct genocide of certain racial, national, ethnical or religious groups, for these group are likely to form part of the political opposition.[67]

Political groups are not the only ones whose omission can be subjected to criticism. Linguistic groups claim to have the same sanctuary as ethnical, national, racial or religious groups; the slipperiness in the terms ethnicity and race arguably subsumes linguistic elements, though the heterogeneity and incongruity in the peculiar

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[65] *Ibid.*, 54-62; cf. views of Drost "The argument that inclusion of political groups or of economic, social and cultural groups under the scope of the convention would involve problems of the protection of minorities and the promotion of a respect for human rights any more than the four groups actually protected under the present article II, serves merely as a pretext against the principle of international penal safeguards in general"... "By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loophole for any government to escape the human duties under the convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state. If perhaps political reasons cannot be adduced as proper excuse for the genocidal measures against a group protected under Article II, then very likely such genocidal policy will be defended on economic, social or cultural grounds" P Drost, *Crimes of State* volume i, 1956, 122-123.

[66] See ECOSOCOR, 7th Session, 26th August 1948, 723; M Shaw, "Genocide and International Law" in Y Dinstein and M Tabory (eds.), *International Law at a time of Perplexity, Essays in honour of Shabtai Rosenne*, (Dordrecht: M.Nijhoff) 1989, 797-820, 808.

[67] This point had been made by the representative of Ecuador, when he stated that the governments might "use the pretext of political opinions of a racial or religious group to persecute or destroy it, without becoming liable to international sanctions" GAOR, 3rd session, Part 1, Sixth Committee, 74th mtg., 14th October 1948, 102.

taxonomies of State may demand an independent identification.[68] If ethnicity and race could embody linguistic identities, there remain other sections of a community which require a similar form of protection. These includes the old, the disabled or retarded, women, children, sexual minorities such as homosexuals, and many others; certainly the record of the Nazis and their predecessors who had perpetrated crimes of genocide had targeted many groups which were most vulnerable and need the greatest amount of protection.

On the other hand, it is important to appreciate that in the context of our present debate, certain omission were inevitable for reasons of practicality as well as for the purposes of concluding a convention of this nature. The primary objective was to provide a basic guarantee to certain groups, and the overall selection of the categories it would appear, did succeed in matching the overall objectives.

(vi) Issue of Individual Criminal Responsibility

Article IV of the Convention lays down the principle of individual criminal Responsibility. According to the Article

> "Persons committing genocide or any of the acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

Attempts were made at the Sixth Committee stage to incorporate liability of States in order to cover firstly the preventive aspects of the Convention, and secondly to ensure that liability was accepted by the States.[69] The General Assembly, however, following the International Military Tribunal and the generally held view, declined to accept the principle of State Responsibility for genocide. This was partly because of fear of individuals evading responsibility and partly due to the fear of implicating States where the question of punishment did not exist.

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[68] See M Tabory "Language Rights as Human Rights" 10 *IYHR* (1980), 167-223, 174-175.
[69] UN Doc A/C/6th Committee, Annexes, 24. 93 and 92 and 96 meeting.

The Genocide Convention follows the established view since the Second World War, a view eloquently presented by the International Military Tribunal of Nuremberg:

> "Crimes against International law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[70]

According to article 8 of the Nuremberg Charter

> "The fact that the defendant had acted pursuant to orders of his government or of a superior shall not free him from the responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[71]

The preparatory work following this intention reinforces the view that the prime objective had been to exclude pleas of "acts of State" or "supreme orders". There remain however, a number of intriguing issues such as the probable meaning of public officials, and the position of those members of the government who have opposed, through their actions, any commission of acts which constitute genocide.

The Convention fails to provide for any rules relating to superior orders, although attempts were made by the Soviet Union in the Sixth committee-albeit unsuccessfully-to explicitly deny "superior orders" any justification for committing genocide.[72] It is worth noting that the *Ad hoc* Committee had excluded from its draft, references to non-admissibility of the plea of superior orders, primarily because it might, in certain circumstances be unfair, for a person not to rely on such a plea. While appreciating this inherent concern, it is submitted that a plea of non-admissibility of such a defence ought to have been retained, for invariably this defence would be relied upon whether justified or not.[73]

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[70] *Trail of major War Criminals before the IMT,* proceedings., Nuremberg, 1947, 234.

[71] 39 AJIL 3 (Supp. 1945, Official Documents); also see H McCoubrey, *International Humanitarian Law The Regulation of Armed Conflicts* (Aldershot: Dartmouth) 1990, 220.

[72] The proposed amendment read "Command of law or Superior order shall not justify genocide" UN Doc A/C.6/215/Rev.1.

[73] L Green "Superior Orders and Command Responsibility" 27 *CYIL*, (1989) 167-202.

5.3.2 INTERNATIONAL CUSTOMARY LAW

5.3.2.1 Customary Law and the Scope of the Prohibition

(i) Groups Protected

There exists a unanimity as to the criminalization of genocide in municipal and international law, though the precise scope of the concepts beg a number of questions. In international law, as we have already noted, a number of international instruments testify to the validity of this prohibition. A primary focus of our attention has been the conventional rules on the matter; an analysis of the scope and substance of the provisions of the Convention has been conducted. However, conventional rules, can and certainly in the present case, do work in conjunction with customary rules though the scope and substance may vary. A treaty provision could possess the customary force if it fulfils the basic criterion of the establishment of custom; it could reflect customary law if its text declares or its *travaux préparatoires* state, with the requisite *opinio juris*, that its substance is declaratory of existing law.[74]

In the present context, it is contended that despite the absolute prohibition of the crime of genocide in both customary and conventional law, customary law varies in its scope. The declaratory nature of General Assembly Resolution 96(I) has already been referred to. The Resolution, it would appear, is more expansive, based on a more ambitious agenda. It has a wider constituency and appeals to humanity in general. Genocide is considered in general terms as "a denial of the right of existence of entire human groups". The Genocide Convention, by contrast, reflects a cautious approach:

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[74] M Akehurst, *A Modern Introduction to International Law*, (London: George Allen and Unwin) 6th edn. 1987, 26-27; C Baxter, "Multilateral treaties as evidence of customary law" 41 *BYIL* (1967-66), 275-300; M Akehurst, "Custom as a source of international law" 47 *BYIL* (1974-5), 1-53, 42-52; for a detailed discussion see *infra* chapter 7.

after providing an affirmation of the crime of genocide in Article I, Article II goes on to provide a definition explicit to the Convention.

This wider perspective, as present in the General Assembly Resolution is a reflection of the abhorrence with which international community viewed the crime. The Nazi atrocities, fresh in the minds of international politicians and the public alike, had demonstrated the various forms in which genocide could be committed; the Resolution reflecting a general revulsion, aimed to provide a general prohibition. The constraints which we have seen characterise the Convention are not present in this idealistic expression; political or other groups are placed in the same bracket as racial or religious groups; culture is deemed as an integral part of the existence of human groups. Reinforcement of the wider vision of genocide could also be sought from a number of proceedings by national tribunals of the Allies.[75]

In *Ulrich Greifelt et al,*[76] for instance, the prosecution case rested on the broader scope of genocide as envisioned in the General Assembly Resolution. The second count in the indictment made reference to a "systematic programme of genocide, aimed at the destruction of foreign nationals and ethnic groups, in part by murderous extermination, and in part by the elimination and suppression of national characteristics" and that "the object of this programme was to strengthen the German nation and the so-called `Aryan' race at the expense of....other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom (such imposition being hereinafter called `Germanization') and by the extermination of `undesirable' racial elements". The indictment went on to provide specific instances of this programme of genocide.

(a) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of `racial value';

(b) Encouraging and compelling abortions on Eastern workers for the purpose of preserving their working capacity as slave labour and weakening Eastern nations;

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[75] Law Reports of Trials of war criminals (London: HMSO, 1947-9), vol. vi, 48; vol vii, 7-9; and 24-26; vol xiii, 2,3, 6, 112 and 114; vol xiv, 122-123.

[76] *Ibid.*, vol xiii, 1.

(c) Taking away, for the purpose of exterminating or Germanization, infants born to Eastern Workers;

(d) Executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning those involved;

(e) preventing marriages and hampering reproduction of enemy nationals;

(f) Evacuating enemy populations from their native lands by force and resettling so-called `ethnic-Germans' (Volksdeutsche) on such lands;

(g) compelling nationals of other countries to perform work in Germany, to become members of the German community, to accept German citizenship and to join the German armed forces...;

(h) Plundering public and private property in Germany and in the incorporated and occupied territories, e.g., taking church property in Germany, real estate..etc.;

(I) Participating in the persecution and extermination of Jews.[77]

Similarly, in awarding its judgment in the trial of *Gauleiter Artur Greiser*,[78] the Supreme National Tribunal of Poland included, *inter alia*, in the list of crimes committed against the Polish population:

.....

(b) Repression, genocidal in character, of the religion of the local population; by restriction of religious practices to the minimum; and by destruction of churches, cemeteries and the property of the church

(c) Equally genocidal attacks on Polish culture.[79]

It is necessary, however, to note that the nature of binding customary norms require a higher form of allegiance; the declaratory nature of the prohibition of genocide as enunciated in Resolution 96(I) does not mean that all and everything that is expressed in it carries an equal value.[80] As we have noted briefly through the proceedings of the war crimes trials, genocide could and probably did mean a number of things to a number of people, a point which can also be confirmed through an analysis of the *travaux préparatoires* of the Genocide Convention. Thus, for instance,

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[77] *Ibid.*, 2-3.

[78] Law Reports of Trials of war criminals, XIII, 70.

[79] *Ibid.*, 112.

[80] See the position of the Polish Representative; GAOR, 3rd session Part I, Sixth Committee 64th mtg., 1st October 1948, 19.

on the issue of "political genocide", political groups, as we have noted earlier, featured in the text of the Resolution, although during the preparatory stages of the Convention a number of disagreements resurfaced in relation to the possible normative value of the subject. According to the representative of Poland, the operative part of the Resolution did not deal with political groups, but related only to the grounds on which genocide could be committed.[81] Similarly, according to the representative of Venezuela,[82] and Belgium[83] the terms of reference in the Resolution were only to be measured as guidelines and not interpreted literally for the purpose of deciding its customary value. The *travaux préparatoires* also reflect disagreements on the issue of "cultural" genocide. Several representatives presented the view that although cultural genocide was an evil in its own right, it was more appropriately dealt within the ambit of international law of human rights rather than a convention of this nature.[84]

(ii) The issues of Criminal Responsibility of States and the Subject of Jurisdiction

If the disagreements on such issues as the subject of "cultural" genocide and its subsequent exclusion leads to a view that such a prohibition does not exist in customary law, there are a number of other issues whose inchoate recognition may pose questions as to their contemporary validity. Individual responsibility for crimes against international law, including genocide is firmly established; State responsibility is not. The debate on the subject of criminal responsibility of States has been lively though probably not conclusive.[85] The 1980 International Law Commission Draft Articles on State responsibility in article 19, include acts of genocide carrying State

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81 *Ibid.*, 175 mtg. 110-111.
82 *Ibid.*, 112-113.
83 *Ibid.*, 74th mtg.
84 See e.g. the views of the Indian delegate *ibid.*, 64th mtg. 15-16.
85 According to Professor Shaw "The question as to whether States may indeed be criminally responsible is highly controversial" *op.cit note* 66, 814; also see Professor Weil views in "Towards Relative Normativity in International Law" 77 *AJIL* (1983), 413-442.

responsibility.[86] According to probably the leading authority on international law, Ian Brownlie

> "the concept [of criminal responsibility of States] cannot be justified in principle, and is contradicted by the majority of developments which have appeared in international law. Its only sphere is that of morals and propaganda. Some supporters of the theory of the criminal responsibility of the state in fact only prescribe punishment for the individuals comprising the government, in which case the only difference between their position and that of those who say that there can only be criminal responsibility of individuals is terminological. The `sanctions' which are referred to as providing the penal responsibility of states have an artificial look".[87]

Professor Brownlie continues to remain "unconvinced of the practical utility of the concept of criminal responsibility of States".[88] Similarly as regards the aforementioned article 19 Sinclair's view is that it does not establish the criminal responsibility of States; it simply posits an aggravated degree of responsibility for internationally wrongful acts designated for want of a better term, as `international crimes'.[89]

Brief consideration also needs to be provided to another rather controversial principle. The principle enunciated in article VI of the Genocide Convention as regards jurisdiction seem to be established in customary law, though the expansion of jurisdiction on universal grounds, is an issue which, it is submitted is not resolved completely. The matter was a subject of considerable debate and disagreement in the preparatory stages of the Convention. The view of a number of States was summarised by the Soviet representative when in the Sixth Committee he said "the principle of universal punishment was even more incompatible with the sovereignty of

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[86] 18 ILM, 1979, 1568, Article 19(3)(c); also see Special Rapporteur Theo Van Boven, Study concerning the rights to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms E/CN.4/Sub.2/1993/8, 16.

[87] Brownlie, *op.cit note 15*, 152-3.

[88] I Brownlie, *System of the Law of Nations: State Responsibility*, (Oxford: OUP), 1983, 33.

[89] I Sinclair, "Lex Ferenda and Crimes of State" in J Weiler, A Cassese and M Spinedi, (eds.) *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, (Berlin: Walter de Gryter) 1989, 242.

States than international punishment".[90] Others, however, have viewed the provision of universal jurisdiction established in customary international law.[91] This certainly was the approach taken by the District Court in *Attorney-General of the Government of Israel v Adolf Eichmann*[92] envisaging article VI of the convention as "a compulsory minimum".[93] The Court's pronouncement on the crime of genocide, its recognition as of the crime as one of "utmost gravity under international law" tends to draw parallels with other crimes for which universal jurisdiction exists. Taking strength from the *Eichmann's* case, a number of jurists have claimed the existence of universal jurisdiction. According to Shaw "Article VI is a treaty rule and it may be strongly argued that State practice has defined genocide as a crime of universal jurisdiction, apart from the narrow provision of that article".[94]

5.3.3 *JUS COGENS*

The repeated references to the prohibition of genocide has led to a general consensus that it now forms part of *jus cogens.*[95] The elaboration of the doctrine is provided by the 1969 Vienna Convention on the Law of treaties.[96] According to article 53 of the Convention

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of present convention, a peremptory norm of general international law is a norm accepted and recognised by international community of States as a whole as a norm from which no derogation is permitted and which

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90 GAOR, 3rd session, Part 1, Sixth committee, 100 mtg., 403.

91 Bassiouni, *op.cit note* 24, 520. In a recent case, US Circuit Court of Appeal allowed the extradition of an alleged Nazi concentration camp guard to Israel on grounds of universal jurisdiction, *Demjanuk v Petrovsky 776 F 2d 571 (6th Cir. 1985).*

92 Judgement of the District Court 36 ILR 18; Supreme Court of Israel 277.

93 *Ibid.*, para 25.

94 Shaw *op.cit note* 66, 816.

95 For a consideration of the meaning of Jus Cogens see Article 53 & 64 of the Vienna Convention on the Law of Treaties, 1969. YBILC 1966, vol., 247-8. See E Schewelb "Some Aspect of International Jus Cogens as Formulated by International Law Commission" 61 *AJIL* (1967) 946-975. M Whiteman, "Jus Cogens in International Law with a Projected List" 7 *GA.JIL* (1977), 607-626.

96 See J Crawford, *The Creation of States in International Law,* (Oxford: OUP) 1979, 80.

> can be modified only by a subsequent norm of general international law having the same character.

Although there is no specification as to what constitutes such a norm, the commentary of International Law Commission puts forward the example of a treaty attempting to implement genocide as violating the principles of *jus cogens.*[97] While customary as well as conventional law affirms the permanent position of prohibition of genocide, the International Court, has reiterated this point on a number of occasions. Unanimous support is also forthcoming from jurists and publicists. For Professor Brownlie "The least controversial examples of the class [of *Jus Cogens*] are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trades in slaves and piracy".[98] Similarly, in discussing the Genocide Convention, Schwelb says "the case for attributing to its provisions (Whether it restates pre-existing law or creates new law) the character of Peremptory norms is particularly strong".[99]

Genocide has come to be regarded as a crime under international and municipal laws. The confident and authoritative terminology of the General Assembly Resolution 96(I) followed by the confirmation in the Genocide Convention provides clear evidence of this. The view that genocide is unconditionally prohibited in international law has been affirmed on various occasions both by national and by international courts[100]. According to the ICJ

> "The origins of the convention show that it was the intention of the United Nations to condemn and punish genocide as `a crime under international law' involving a denial which shocks the conscience of

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97 According to the Commission's analysis of 'obvious and best settled' rules of *Jus Cogens* include
(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter
(b) a treaty contemplating the performance of any other act criminal under international law, and
(c) a treaty contemplating or conniving at the commission of acts, such as trade in Slaves, piracy or genocide in the suppression of which every state is called upon to co-operate. YBILC, 1966, II, 248.

98 Brownlie, 513.

99 Schwelb, *op.cit note 95,* 954; "Genocide and slavery are favourite examples of practices which are generally accepted to be contrary to *jus cogens*" Mckean 281.

100 For the international perspective see the judgement the *International Court of Justice in Reservations to the Convention on the Prevention and Punishment of the crime of Genocide, Advisory Opinion, ICJ Reports 1951, 15.*

> mankind, etc. (Resolution 96(I) of the General Assembly, December 11 1946). The first consequence arising from this conception is that the principles which are recognised by civilized nations as binding on States, even with out any conventional obligation. A second consequence is the universal character both of condemnation of genocide and of the co-operation required `in order to liberate mankind from such odious scourge'...The Genocide Convention was therefore intended by the Contracting Parties to be definitely universal in scope".[101]

In the later case of *Barcelona Traction, Light and Power Co*[102] the Court, while providing a distinction between the obligations *erga omnes* and obligations of States towards each other in diplomatic protection, described the former in the following manner

> "in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide); others are conferred by international instruments of a universal or quasi-universal character".[103]

As far as the municipal laws are concerned, practically every State has declared that it regards genocide as a criminal offence and the judgment in *Eichmann's* case provide the best precedent.[104] According to the District Court of Jerusalem (considering the repeated pronouncements by General Assembly in Resolution 96(I), the Genocide Convention and the Reservations Case)

> "There is no doubt that genocide has been recognised as a crime under international law in the full meaning of this term *ex tunc*, that is to say the crime of genocide committed against the Jewish people and other peoples during the period of Hitler regime were crimes under international law".[105]

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101 *Ibid.*, 23.

102 *Barcelona Traction, Light and Power Co. Case (Belgium v Spain)*, ICJ Reports 1970, 3.

103 See *Ibid.*, 3 paras 33-34.

104 *Attorney-General of the Government of Israel v Eichmann* (1961) ILR 36, 5; J Fawcett, "The Eichmann Case", 38 *BYIL* (1962) 181-215.

105 36 ILR (1961) 34.

5.4 WEAKNESSES IN THE IMPLEMENTATION OF THE RIGHT TO PHYSICAL EXISTENCE

As noted in the earlier sections, the right to physical existence of members belonging to groups has been transformed into a peremptory norm of international law and no derogation is permissible from it. Despite this, unfortunate though it sounds, genocide of minorities has taken place in a number of States. These States include both those which are parties to the Convention and those which have not ratified the Convention.

A number of genocidal conflicts have taken place in the States which have emerged from the rubble of colonialism. Indeed, in several States of Africa, Asia and Latin America minorities have frequently become victims of genocidal conflict. It would perhaps not be inaccurate to suggest that the minorities in the post-colonial States of Africa have suffered the most adverse consequences. The historical and contemporary position of many groups, including the Tutsis and Hutus in Rwanda and Burundi, Ibos in Nigeria and the indigenous Africans of Southern Sudan provide an unfortunate commentary.

In December 1963, soon after Rwanda won her independence, there was large scale genocide of the Tutsi minority resulting in the massacre of approximately 20,000 Tutsi men, women and children.[106] In the neighbouring Burundi, the genocidal conflict between Tutsis and Hutus went on for several years resulting in the massacre of hundreds of thousands. Immediately after 1962, when Burundi gained her political independence, relations began to turn sour between the minority Tutsis and majority Hutus. In 1965, with the failure of a Hutu backed coup attempt, several thousand Hutus were massacred. This triggered a bloody genocidal conflict resulting in the massacre of thousands of Tutsis, but more significantly of at least 100,000 Hutus.[107]

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[106] Kuper *Genocide*, 62.
[107] *Ibid.*, 63.

This conflict between the Hutus and Tutsis in both Rwanda and Burundi has gone on, and seems almost unending. In Rwanda, since last year the orgy of "ethnic cleansing" has resurfaced with an unprecedented vigour and threatens to engulf Burundi as well.[108]

Ever since the creation of independent Sudan in 1956, the peoples of southern regions have suffered from a form of "colonial or alien domination" and the resulting conflict between the relatively prosperous and dominant north and the poor and underdeveloped south has caused the virtual extermination and liquidation of thousands of Southerners.[109] The rigour and upsurge of religious fundamentalism[110] which has been characterised in many parts of the Islamic world, is typically reflected in the mood of the Khartoum government; religious, racial minorities and political opponents becoming unfortunate victims of a policy of discrimination, persecution, physical extermination and genocide. The case of Southern Sudan epitomises a tragic tale of attempts at forced cultural, linguistic and religious assimilation, of Arabization and of "starvation deployed as a weapon against civilians".[111] The agreements that have been made-most notably, the Southern Provinces self-government Act 1972, and the Koka Dam agreement of 1986-unfortunately became a causality of intolerance of successive Khartoum governments and the political immaturity of rebels factions of the south.[112]

A potentially clearer example of genocide seems to be reflected in the case of Ibos of Nigeria at the hands of the Northern Nigerians. Typically, the political structures left over by the colonial powers sew the seeds of distinctions and divisions

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[108] Médecins sans Frontiéres, *Genocide in Rwanda,* July 1994.

[109] Hannum, 308-327. Kuper says that during 1955-1972 nearly 500,000 southern Sudanese were killed, victims of civil war, famine and disease. Nearly 100,0000 became refugees Kuper Genocide, 69.

[110] See M P Moya, Rapporteur, *The Rise of Islamic Radicalism and the future of Democracy in North Africa, Sub-committee on the Mediterranean Basin, Draft Interim Report,* May, 1994.

[111] L Kuper "Theoretical issues relating to Genocide" (ed.) Andreopoulos *op.cit,* 31-46, 42.

[112] See generally D Kritsiotis "Uti Possidetis in the Sudan: An African crises in perspective" (ed.), D Kritsiotis, 71-83; C Eprile "Sudan: The Long War" (ed.), B Cruziers, *Conflict Studies* 1972; G Morrison, *The Southern Sudan and Eriteria: Aspects of wider African Problem* (London: MRG); for extracts of the 1972 and 1986 agreements see H Hannum, *Documents on Autonomy and Minority Rights,* (Dordrecht: M. Nijhoff) 1993, 688-701.

between the various indigenous communities. Nigeria could be divided into three main structures. In the north, the Hausa-Fulani were dominant with the east inhabited by Ibos and the west Yoruba. There were many linguistic, cultural and religious differences between the north and east. The January 1966 coups (the first of a series of military coups) was taken by a majority of northerners as an attempt on the part of the Ibos to dominate Nigeria. Using this as a reasonable scapegoat, the northerners started to wreak their vengeance on those Ibos who had migrated upwards. Thousands of Ibos were killed hundreds of thousands were forced to flee. The intensity of the massacres resulted in producing a reaction on the part of the minority group in the form of a secessionist movement and civil war, resulting in the massacre of nearly 1 millions Ibos.[113]

Large scale genocide of minority groups has taken place in the Middle East and Asia.[114] It is not possible to provide a detailed analysis of the position in every State, although a reference to prime instance of genocide seems necessary. The Kurds, as a MRG Report comments "are the fourth most numerous people in the Middle East. They constitute one of the largest races, indeed nations, in the world today to have been denied an independent State. Whatever the yardstick for national identity the Kurds measure up to it".[115] However, the atrocities that have been committed to the now fragmented Kurdish people, and the inadequate international response towards the plight of the Kurds in Iran, Iraq, Turkey and Syria remains one of the most unfortunate stories of human history. There is evidence to suggest that the Kurds have been made victims of genocide, have been and continue to be persecuted and discriminated in each of the States they inhabit.[116]

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[113] See the views of various commentators, "Biafra, Bengal and Beyond: International Responsibility and genocidal conflicts" *Proc.ASIL* (1972), 89-108; R Lillich, (ed.) *Humanitarian Intervention and the United Nations,*(Charlottesville: University Press of Virginia) 1973.

[114] There are many painful instances, which though grave in magnitude would require volumes-for the case of Cambodia see H Hannum, "International Law and Cambodian Genocide: The Sounds of Silence" 11 *HRQ* (1989), 82-138; D Hawk and R Coomaraswamy, "Minorities in Cambodia" (London: MRG), 1995: Keesings Contemporary Archives "Cambodia" November 1992, 39195.

[115] D McDowall, *The Kurds* (London: MRG). 1985, 5.

[116] For the discriminatory position of Kurds in Turkey see article 3, 42 of the Constitution of Turkish Republic reprinted in A Blaustein and G Flanz,, *Constitution of the Countries of the world* (Dobbs Ferry: Oceana Publications, 1973*)* 1984, vol. xxi; AI, *Escalation in human rights abuses*

In the case of Iraq, memories of recent repression, persecution and genocide have attracted more international attention. These atrocities have resulted in the extermination and displacement of hundreds of thousands of innocent men, women and children. During the "reign of terror" as perpetuated by President Saddam Hussain, the Kurds, alongside other minorities such as the Shiites and the Marsh Arabs have become victims of a genocidal campaign.

During the presidency of Saddam Hussain, there have been constant attacks made on Kurdish villages. The Kurds received the treatment of belonging to the fifth column during the Iran-Iraq war. In 1987, the Kurds became the victims of chemical attacks by the Iraqi forces. During the month of April, a number of villages in the Sulamani province and in the Balisan valley were attacked by mustard gas, leaving hundreds of innocent people dead or permanently disabled.[117] Unfortunately, as the MRG report goes on to state "[a]lthough news of these chemical attacks disseminated internationally, no steps were taken to restrain Iraq. Furthermore, although a United Nations Commission investigated and confirmed the alleged use of chemical weapons by Iraq against Iran, it did not investigate allegations of this use against Iraqi Kurds, since it was not authorised to do so".[118]

On 17th of March 1988, the Iraqis used poisonous gas in Halabja killing at least 5000 people with several thousand blinded, wounded and injured[119] and there are reports that similar attacks continued thereafter particularly in the immediate aftermath of the cease-fire with Iran. Some international attention in recent years has been focused on the position of the Kurds in Iraq, which may in itself be due to political reasons.

The limited protection that had been provided to the Kurds in the immediate aftermath of the Gulf crisis, through the creation of "safe-havens", fell far short of

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against Kurdish villages July 1993 AI Index EUR 44/64/93; AI, *A Time for action* AI Index EUR 44/13/94 February 1994; AI, *Turkey, More people "disappear" following detention* AI Index: EUR 44/15/94; AI *Turkey, Selahattin Sinsek: 12 years in prison after unfair trial* AI Index: EUR 44/EUR 44/09/93; AI *Turkey, Student Soner Onder still held* July 1993 AI Index EUR 44/66/93.

117 D McDowall, *The Kurds*, (London: MRG) 1985, 38.

118 *Ibid.*

119 *Ibid.* 38.

adequate and permanent protection to the Kurdish people. The legal basis under which the limited enforcement action was undertaken is open to question; certainly it was difficult to accept the view that the Security Council Resolution 688, as such, was sufficient to provide the firm legal basis.[120] It has to be accepted that the threat to Kurds remains so long as President Saddam's regime stays intact. Besides that Kurds are being victimised in Iran and Turkey.[121] The recent initiative on the part of the Turkish government to wipe out the PKK rebels, and the allegations of brutality and violations of human rights of the Kurdish population endorses this point.[122]

There is also substantial evidence to support the view that genocide of religious groups (regardless of whether their minority status is recognised or not) in several countries-primarily those of Middle East and Asia-has taken place. The plight of Bahá'ís in Iran is a chilling reminder as to what fundamentalist States can do to dissident religious and ideological groups. Politicians and statesmen are generally extremely careful as not to accept responsibility for genocide, though the example of Iran has shown that when fundamentalism takes over other faculties, this may not necessarily be the case. In this context the statement of Hujjab'l-Islam Qazi, President of the Revolutionary Court in Shiraz is revealing

> "The Iranian nation has determined to establish the government of God on earth. Therefore it cannot tolerate the perverted Bahá'ís who were instruments of Satan and the followers of devil and of the super powers and their agents....It is absolutely certain that in the Islamic Republic of Iran there is no place for the Bahá'ís and Bahá'ísm ...Before it is too late the Bahá'ís should recant Bahá'ísm, which is condemned by reason and logic. Otherwise the day will soon come

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120 See P Alston "The Security Council and Human Rights: Lessons from the Iraq-Kuwait crises and its aftermath" 13 *AYBIL* (1990-91) 107-176; F Hampson, "Liability for war crimes" in P Rowe, (ed.), *The Gulf War 1990-91 in International and English Law*, (London: Routledge) 1991, 241-260; T Farer, "Human Rights and foreign policy: what the Kurds learnt (A Drama in one Act)" 14 *HRQ* (1992), 62-77; L Freedman and E Karsh, *The Gulf Conflict 1990-91*, (Princeton, NJ: Princeton University Press) 1993; H Adelman "Humanitarian Intervention: The case of Kurds" 4 *IJRL* (1992), 4-38.

121 For a general consideration of human rights in Turkey with some analysis of the position of Kurds see C Rumpf "The Protection of Human Rights in Turkey and the significance of International Human Rights instruments" 14 *HRLJ* (1993), 394-407, 401.

122 Times, "Fear of civilians grows as Turks advance in to Iraq", 23 March 1995; Independent, "Turks ignore EU and harry Kurds" 24 March 1995.

> when the Islamic nation will deal with them in accordance with its religious obligations, as it has dealt with other hypocrites....The Muslim nation will, God willing, fulfil the prayer of Noah [from the Koran]: `And Noah said, Lord, leave not a single family of Infidels on the Earth: For if thou leave them, they will beguile thy servants and will beget only sinners, infidels'" [123]

Genocidal conflicts have also arisen in most other parts of the world. Although religious cleavages, as in the case of India, Lebanon, Northern Ireland, Cyprus and the former Yugoslavia, have some times been the key element in starting such conflicts, as the situation in Pakistan illustrates, ethnic and linguistic dissonance[124] could be equally destructive. Indeed, as the cases of Tibet, Sri Lanka and more recently that of the former Yugoslavia and the former USSR reflect it is quite possible that a combination of several factors lead to such genocidal conflicts.[125]

Although atrocities have occurred in virtually every republic of the former Yugoslavia, it would appear that the Muslims in Bosnia-Herzegovina have been the prime targets of genocide, victims of the Serbian aggression. Exact figures are hard to obtain and probably are not of extreme significance; the fact of the matter is that while several millions have become displaced or have become refugees, uncountable numbers have perished, been tortured, gang raped or become victims of the "systematic policies of ethnic cleansing".[126] The rather insignificant role which the United Nations has played in as far as the actual physical protection of the minorities of the former

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[123] Cited in B Frelick "Refugees: Witnesses to Genocide" in H Fien (ed.) *op.cit note 13*, 47-48; also see various newsletters produced by Bha'ia International Community. see also *the Report submitted by Special Rapporteur, Angelo Vidal d'Almeida Riberio complied in accordance with Resolution 1986/20 of the Commission on Human Rights* E/CN.4/1988/45, 5. An'-Na'im's paper also contains a catalogue of alleged measures taken against the Bahais in Iran, see A An'-Na'im "Religious Minorities under Islamic laws and the limits of cultural relativism" 9 *HRQ* (1987), 1-18, 1, 13.

[124] See *supra* chapter 4.

[125] J Rehman "Accomplices or Globo-Cop? Genocide Alive in Bosnia" paper presented at the Conference on *The Law and Politics of Yugoslavia* 7 May, 1993.

[126] Guardian Education "Nation States Recipe for International disasters" The Guardian, 23 February, 1993. See symposium, "The Yugoslav crisis New International law issues"; C Chinkin, "Rape and sexual abuse of women in international law" 5 *EJIL* (1994), 326-341; D Petrovic "Ethnic Cleansing-An attempt at methodology" *ibid.*, 342-359.

Yugoslavia is concerned creates disillusionment of any hope that a "New World Order" has generated.[127]

In the case of States who are parties to the Convention, the binding legal obligations of the treaty have not proved sufficient to prevent genocide.[128] The Convention has not been able to overcome the hurdle of State sovereignty and provide for a satisfactory mechanism for the trial and punishment of those involved in committing genocide.

The real test of the efficacy of any human rights instrument is its effective implementation. Human Rights instruments generally suffer from the absence of an adequate implementation machinery which in the face of principles of State sovereignty remains seriously ineffective. The Genocide Convention provides no exceptions as the mechanisms provided within the Convention have not come into operation or have proved fundamentally flawed.[129] According to Article V

> "all contracting parties undertake to enact in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any other acts enumerated in article III"

The provision implies that each State party would introduce legislation which would meet the requirements of Article V. States are given considerable latitude as to the application of this provision within their constitutional framework. This has also meant a difference in interpretation of the various provisions nationally, both by legislatures and judiciary. A number of States have not adopted any specific measures implying that they regarded the treaty as self-executing. Finland and Poland are two

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[127] M Ignatreff, "Ugly face of a new world order" Sunday Times, 7 Nov. 1993; Z Pajic, *Violations of Fundamental Human Rights in the Former Yugoslavia, The Conflict of Bosnia-Herzegovina*, (London: Institute of International Studies) Occasional Paper No 2, February 1993.

[128] The former Yugoslavia provides a prime example of this situation.

[129] See for International Instruments H Hannum, *Guide to International Human Rights Practice*, (London: Macmillan) 1984; Sohn, "Human Rights: Their Implementation and Supervision by the United Nations" in Meron (ed.), *Human Rights in International law*, (Oxford: OUP) 1984, 369-401.

key examples of States which have treated the Convention as directly applicable in their domestic laws.[130]

Most States have claimed that their existing legislation satisfies the requirements of the Convention. The Special Rapporteur M. Ruhashyankiko in his report provides a number of examples where States have responded in this manner.[131] Egypt, for instance, stated:

> "In application of these constitutional principles, Egyptian penal law contains provisions guaranteeing the individual's right to the physical and psychological safety of his person and the protection of his freedom. The penal code devotes a special chapter to the crimes of homicide and assault (articles 230 to 251) and prescribes the death penalty for any person who leads such a band or holds a position of command therein. Any person who has joined such a band without taking part in its organisation or with holding a position of command therein is liable to a penalty of a term of hard labour or hard labour for life (article 89)."[132]

Similarly the former Union of Soviet Socialist Republic replied stating that its constitutional arrangements satisfied the requirements of the Convention. Her government stated, *inter alia*:

> "That action [of ratification of Genocide Convention] did not require any changes in or addition to Soviet Legislation, since a system of guarantees designed to ensure the free development of national, ethnic, and religious groups existed in law long before the adoption by United Nations of the Genocide Convention. Article 123 of the Constitution of the USSR states: Equality of Rights of the Citizens of the USSR, irrespective of their nationality or race, in all spheres of economic, government, cultural, political and other public activity, is an indefeasible law...."
>
> The Soviet report concluded that:
>
> "Thus the Soviet Legislation provides all the necessary guarantees for fully implementing the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide".

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[130] M Ruhashyankiko, *The Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc/CN.4/Sub.2/416, 141.

[131] *Ibid.*

[132] *Ibid.* 142.

Ruhashyankiko's report similarly reveals that the domestic legislation introduced by a number of States is based on the provisions of the Convention. Indeed, in a some cases the legislation uses terminology of Article II verbatim.[133] The legislation, though incorporated by a few States, however, raises questions as to whether it complies with the provisions of Article II of the Convention. The case of Israel, is the classic example, as its legislation, although similar to the Convention, is deemed only to apply to crimes committed "against the Jewish people" with the implication that other groups are not covered by the Law.

In his report, the Special Rapporteur provides a detailed analysis of efforts made by a number of States to incorporate legislative measures to adopt the Convention in their domestic laws; this includes those States who have had a satisfactory record of protection of minority rights. However there are also a number of those States which, although claiming to have incorporated the Genocide Convention have failed to respect its provisions.[134] Although a number of East European States could be mentioned in this respect, the main focus lies on the States of Africa. One prime example is Rwanda. Despite its pitiful record on physical protection of minorities, Rwanda has maintained that its domestic legislation contains adequate protection against acts of genocide.[135]

As far as the implementation of the Convention is concerned, according to Article VI of the convention

> "Persons Charged with genocide...shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have its jurisdiction"

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[133] See the Legislation introduced by UK *(Genocide Act 1969, Ch 12, 40* Halsbury's Statutes of England 387-90, 3rd edn; also see the War Crimes Act 1991; A Richardson "War Crimes Act 1991" 55 *MLR* (1992), 73-87; G Ganz "The War Crimes Act 1991 Why no constitutional crisis" *ibid.*, 87-95; for Canada see *Can.Rev. STAT. Supp 1, 171-181,1970.*

[134] Pakistan would be the main focus of attention in Part IV *infra.*

[135] Ruhashyankiko *op.cit note* 130, 150-151.

The Convention in its final draft presents two alternatives; firstly that of a trial on the basis of *Lex Loci delicti commissi*, and secondly on providing jurisdiction to an international penal tribunal. In relation to the first alternative i.e., of providing jurisdiction at the place of commission of the wrongful act in question, it follows the rules of general international law, although there are practical problems attached to the trial of individuals in the territory where the alleged acts were committed.

The primary problem confronting this area is the fact that genocide in most instances is committed by the governments in power, and as long as those government remain in power, it is almost impossible to rely on this territorial principle. The case of Germany after the Second World War, as the defeated power, was an exceptional one in providing the allied powers a forum-probably a manifestation of a prerogative of the victors against the losers.

However, in most cases of genocide, it is the governments within the States that are involved, and unless and until they are removed, the difficulty remains of trying those who have been involved in committing genocide. It is quite possible for a genocidal regime to stay in power for a long time and defy international law and municipal laws. It is equally possible that the stance of successive governments might be based on the policy of genocide and forced assimilation of certain minority groups. The cases of *Eichmann* and many others show, that the apprehension of the accused could cause serious problems. Although, by Article VII, States parties to the Convention pledge to grant extradition wherever appropriate, political interests and subjective opinion seriously hamper a smooth operation of the provision.

It is quite possible for the accused to flee a State which is not a contracting party to the Convention. Since international law does not impose any specific obligations on States to comply with each other to extradite individuals, the last and perhaps the only course of action would be to resort to illegality to assume jurisdiction.[136] Even if the accused is captured and tried in the State in which the

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[136] J Bridge, "The Case of an International Court of Criminal Justice and the formulation of International Criminal Law" 13 *ICLQ*, (1964), 1255-1281, 1258.

offences were committed, the sensitivity of the issue of genocide might make the possibility of fair trail very remote.

If the option of *lex loci delicti commissi* seems impractical, the second alternative to date is not available, due largely to lack of consensus on the part of sovereign States. The recent atrocities, including genocide and crimes of international humanitarian law in the former Yugoslavia and Rwanda, have however, once again given impetus to the efforts for the creation of international criminal court. Indeed, the Security Council acting under Chapter VII of the United Nations Charter, in its Resolution 827 and 955 determined that the breaches to humanitarian law constituted "a threat to international peace and security" and that prosecuting the alleged offenders would constitute towards restoring international peace. Notwithstanding, the setting up of these tribunals, there appear to be "mighty tasks" confronted by the Prosecutors.[137] There are serious difficulties involving procedural, substantive and more importantly the funding and availability of resources.[138]

Having regard to these complexities, commentators have expressed surprise that some proceedings have at all been commenced.[139] Sceptics would argue that there may well be some "show-case" trials, but in so far as the punishment of real perpetrators of the international crimes are concerned political constraints would prevent them being brought to justice.

There has also been a renewed interest in the effort to establish an International Criminal Court. A draft statute has been submitted to the General Assembly, and consideration was given to its provisions by the Sixth Committee during 1993.[140] The International Law Commission provided a revised draft statute to the General Assembly in December 1994. However, the work of the ILC is still in draft form; the geographical and temporal limitations which contributed in generating a consensus in

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137 D McGoldrick and C Warbrick "International Criminal Law" 44 *ICLQ* (1995), 466-479, 478.

138 *Ibid.*

139 *Ibid. 471.*

140 Ibid. 473; J Crawford, "The ILC's Draft Statute for an International Criminal Court" 88 *AJIL* (1994), 130-152, 140; J Crawford, "The ILC adopts a Statute for an International Criminal Court" 89 *AJIL* (1995) 404-416.

the Security Council to establish *ad hoc* tribunals for the former Yugoslavia and Rwanda may not be present in the case of establishing an International Court.

In so far as the Genocide Convention itself is concerned the provisions of article IX seem to have been of primary importance, not simply because they attempt to provide ICJ with the jurisdiction to try cases, but, perhaps more significantly because it challenges the vital issue of State sovereignty. Article IX provides

> Disputes between the contracting parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The revolutionary nature of the article is reflected through its provisions of compulsory jurisdiction of the International Court of Justice in contrast to article 36 of the Statute of International Court. The article has a considerably wide scope, including not only the interpretation of the provisions of the convention but also its application and fulfilment of obligations undertaken by the States parties. The article is not self-explanatory in a number of ways and there remain several unanswered questions for instance whether responsibility incurred is to be civil or criminal and whether a State could be held liable in international law to its own citizens for the genocide perpetuated.[141]

Unfortunately, although genocidal activity has taken place on a number of occasions, the article has been nearly redundant as far as its practical utility is concerned and the jurisdiction of the court has rarely been invoked with nearly a quarter of the ratifying States entering reservations to the article.[142] The provisional court order in relation to the Case of *Bosnia-Herzegovina v. Serbia and Montenegro*[143]

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[141] GAOR 3rd session, Part I, 6 Committee, 103rd meeting, 428-440 and 109th meeting, 442.

[142] UN Doc. ST/LEG/SER.E/8, 98 et seq.; Harris, *Cases and Materials on International Law*, 4th edn. (London: Sweet and Maxwell) 1991; on Reservations see J Gamble Jr "Reservations to Multi-Lateral treaties: A Macroscopic view of State Practice" 74 *AJIL* (1980), 372-394.

[143] *Case concerning Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina) v Yugoslavia (Serbia and Montenegro) Request for the*

would not appear to be helpful, either for the resolution of the dispute or for the development of norms relating to the prohibition of genocide.[144]

The effect of a reservation made by a State party to a Convention is to exclude or to modify the effects of a treaty provision in its application to that State.[145] The States presenting reservations to the article in the Convention have attempted to exclude the jurisdiction of the Court. Indeed, the question of reservations to the Convention, while reflecting the reluctance of States to submit to the jurisdiction of the International Court provided a starting point in the area of reservations to treaties in international law.

The issue of reservations to the Convention became a subject of intense debate, even prior to the Convention coming into force. Certain States, in particular-Australia and Ecuador-objected to the reservations entered into by members of the Soviet bloc and this dispute led the General Assembly to seek an advisory opinion of the International Court.[146] According to the traditional practice, reservations to multi-lateral treaties were only accepted as valid if the treaty allowed such a reservation and all the parties consented to it.[147] While the League secretariat and subsequently the Secretary-General of the United Nations followed this principle of "absolute integrity",[148] simultaneously a more flexible approach had been developing amongst members of Pan-American Union (subsequently the Organisation of American States).[149]

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indication of Provisional Measures, ICJ 8 April, 1993, *and Further Request for the Indication of Provisional Measures, Order of 12 September 1993*, ICJ Rep 1993, 325.

144 See C Gray, "Application of the Convention on the prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) orders of provisional Measures of 8 April 1993 and 13 September 1993" 43 *ICLQ* (1994) 704-714.

145 According to Article 2(1)(d) of VCLT (1969), Reservation means "a unilateral statement, however phrased or named by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that state".

146 the ICJ *op.cit* note 100, 15.

147 See C Redgwell, "Universality or integrity: Some reflections on reservations to General Multilateral Treaties" 64 *BYIL* (1993) 245-383, 346.

148 Brownlie, 609.

149 Redgwell *op.cit note* 147, 247-8.

This evolving approach reflected a desire to allow States to become parties to a treaty as against those States which did not object to the reservation. The inquiry before the Court essentially related as to the extent, if at all, to which a State ratifying the Convention with a reservation became party if reservations were objected to by one or more parties. If such a State could be regarded as party, what would be the effect of a reservation both as against States accepting the reservation and those objecting to it?

When the issue of reservations was confronted by the International Court, the Court pointed to the importance of bearing in mind the special characteristics of the Convention, with its universal Character and humanitarian purpose. According to the Court, in essence "the principles underlying the Convention are principles which are recognised by civlized nations as binding on States even without any conventional obligation",[150] and it was determined not to risk providing loopholes in the absolute condemnation of genocide through a limited participation in the Convention.[151] The Court, relying upon the "Object and Purposes" test, stated that it was "the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion"[152] for States that present a reservation as well as for States objecting to it. This indication of the element of subjective judgement means disagreement as to the compatibility of a reservation, and consequently the status of a State as a party to the Convention.

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[150] ICJ *op.cit* note 100, 24.

[151] N Rodley, "Human Rights and Humanitarian Intervention The Case Law of the World Court" 38 *ICLQ* 321-333, 322.

[152] ICJ *Op.cit note* 100, 124.

5.5 CONCLUSIONS

Since the Second World War, a number of developments have featured prominently in relation to the right to existence. Although the focus of attention has been on the individual and not minorities as such, international and municipal laws have progressed sufficiently to provide minority groups the fundamental right of physical existence. In this respect the role of the General Assembly Resolution 96(I) and the Genocide Convention is of primary importance; the Genocide Convention is the first post world-war II treaty with any bearing on minorities which has provided the inspiration for most States to provide-at least in theoretical terms-to criminalize genocide and accord the guarantee of right to existence to minority groups.

Hypothesising on the crucial *ifs and buts* of history may be a dangerous exercise for building legal arguments, though it may be contended that even on a practical plane, minorities in general have benefited from this prohibition of physical extermination. The world may not be a safe place for the weaker and vulnerable elements but it does provide a fundamental legal right to physical existence for all individuals. State practice, in a number of cases and the role of the United Nations itself has, however, left much to be desired for the physical protection of minorities. This problem has featured more prominently in a number of post-colonial States of Asia, Africa and Latin America, who, in the process of building up, States have relied too heavily on an assimilationist policy. The nexus between minorities and their collective identity does beg the issue of impact of these assimilationist policies, and potential repercussions on the existence of minorities.

There also remains a considerable body of academics which has remained pessimistic about the practical impact of the rules emerging out of the Convention. According to Schwarzenberger

> "..the whole convention is based on the assumption of virtuous governments and criminal individuals, a reversion of the truth in

> proportion to the degree of totalitarianism and nationalism practised in any country. Thus the convention is unnecessary where it can be applied and inapplicable where it may be necessary. It is an insult to the intelligence and dangerous, because it may be argued *a contrario* by brazen upholders of an unlimited *rasion d'Etat* that acts enumerated in the Convention, but not committed with the intent of destroying groups of a people `as such' are legal" [153]

It may not be wise to unconditionally condemn the provisions of the Convention. There are certain inherent virtues embedded in its text, the value of it which must be appreciated and preserved. As Gabriela Mistral said

> "[the] success of the Genocide Convention today and its greater success tomorrow can be traced to the fact that it responds to necessities and desires of a universal nature: The word genocide carries in itself a moral judgement over an evil in which every feeling man and woman concurs".[154]

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[153] Schwarzenberger, "The Problem of International Criminal Court" 3 *CLP*, (1950), 263-296, 292-293.

[154] G Mistral "An Appeal to World Conscience-The Genocide Convention" *UN Review*, June 1956, 14-15

CHAPTER SIX

MINORITIES AND THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

6.1 INTRODUCTION

The principles of equality and non-discrimination can be regarded as the twin pillars on which the whole edifice of modern international law of human rights is established. A refined and eloquent expression of the same sentiment is provided by Sir Hersch Lauterpacht when he writes that the claim to equality "is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all liberties".[1] While the ultimate objective of all versions of equality and non-discrimination is perceived to create a just and equitable order, "justice", "equality" and "non-discrimination" are in themselves controversial terms with immense uncertainty as to their precise scope and ingredients.[2]

Subjective principles of equality have been practised by every society, civilisation and religion[3] and have been the inspiring force behind the great revolutions in England, France, America and Russia. The historical phenomenon of unfathomably discriminatory treatment of individuals on the basis of their religion, sex, language and race is well documented. Discrimination, unfortunately, is not only a historical phenomenon but is rampant in many contemporary societies. Minority groups as the weaker sections of the community are most vulnerable to discrimination; in societies where the majority will dictates the expression and route of behaviour, minorities may

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1 H Lauterpacht, *An International Bill of the Rights of Man*, (New York: Columbia University Press) 1945, 115.

2 "Equality is a notion exposed to different philosophical interpretations; its meaning in the various legal systems is not always the same" N Lerner, *Group Rights and Discrimination in International law*, (Dordrecht: M. Nijhoff) 1991, 25; also see Judge Tanaka's dissenting opinion in *South West Africa Cases* (Second Phase) 1966 ICJ Report 6; also J Verzijl, *International Law in Historical Perspective*, (Leydon: Sijthoff) 1968 vol. ii, 6.

3 According to Judaism and Christianity, "the common human ancestor in God's image described in Genesis and the fatherhood of God to all men imply the essential quality of all men, supporting the idea of rights which all enjoy by virtue of their common humanity" (Malachi), "thou shalt love thy neighbour". According to Islamic ideology "he who believes in God, let him act kindly towards his neighbour". Hadih of Prophet Mohammed (PBUH). quoted in Ramcharan "Equality and non-discrimination" in Henkin 246-269, 248..

have little, if any opportunity to manifest let alone adopt an independent stance. Minorities frequently suffer at the hands of majorities as the will of the latter predominates, and indeed the prime reason of the initial development of minority perceptions has often been a result of deprivation, persecution and maltreatment by the callous and unkind majority group.[4]

As the present chapter will attempt to illustrate, international law has gone a long way to ensure the practice of principles of equality and non-discrimination. It has increasingly become a convincing argument that prohibition of discrimination, at least of racial non-discrimination now bears the value of customary international law which partakes of the norm of *jus cogens*. The matter of religious intolerance remains conspicuous for a relatively attenuated consensus as regards the formulation of specific binding international instruments.

Members of minority groups clearly would be beneficiaries of a regime based upon equality of treatment and non-discrimination. Claims made by members of these groups may however prove to be more complex and taxing for States to digest. As Lerner comments "equality does not mean only formal equality before the Law. Equality for all may well be proclaimed in the texts, the law may grant equal protection to all, and still de facto, there may be a real, material inequality, and as a consequence of social, economic or cultural conditions, sometimes even when there is no intention to discriminate";[5] *de jure* equality may not be adequate, legal values and social behaviour may need to be stretched to limits in attempts to ensure genuine equality and non-discrimination.

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[4] See N Lerner, *op.cit note 2*, 1991, 27.
[5] *Ibid.*

6.2 THE RIGHT TO EQUAL TREATMENT AND NON-DISCRIMINATION IN INTERNATIONAL INSTRUMENTS

As we have already noted, the perception of the quest for equality and non-discrimination, in its modern form, was manifested in the move initiated by President Wilson of the United States at the end of the first world war. He attempted, albeit unsuccessfully, to incorporate in the Covenant of the League of Nations provisions relating to self-determination and equality of treatment for racial and religious minorities.[6] Subsequently, when efforts were made to incorporate a clause relating to racial equality at the Peace Conference, it proved unacceptable to the major Western Powers, "in the end [leading] only to ruined hopes, fierce hostility and accentuated prejudices".[7]

The final arrangements after the First World War did not provide much cause for optimism for a global regime based upon the notions of equality and non-discrimination save for the occasional and inchoate reflection in the form of the mandate system,[8] minority treaties and were sometimes referred to in the judgement of the PCIJ.[9] These measures were not adequate to make the principles of equality and

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6 According to Article VI of his draft Covenant "The League of Nations shall require all new States to bind themselves as a condition precedent to their recognition as independent or autonomous States, to accord to all racial or national minorities within their jurisdiction exactly the same treatment and security, both in law and in fact that is accorded to the racial and national majority of their people".

7 P Lauren "First Principles of Racial Equality" 3 *HRQ* (1983) 1-26, 2.

8 Article 22 of the Covenant stated that the well-being and development of the peoples in the mandated territories should form a "sacred trust of civilisation" and that the mandatory powers should administer the territories under conditions which "will guarantee freedom of conscience and religion....and the prohibition of abuses such as the slave trade".

9 [to secure equality for minorities] "two things were regarded as particularly necessary...the first is to ensure that nationals belonging to racial, religions or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State. The second is to ensure for the minority..suitable means for the preservation of their traditions and their national characteristics" *Minority Schools in Albania* (1935) PCIJ Ser A/B no 64, 17.

non-discrimination part of positive international law, though there was a nascent recognition of such a possibility.[10]

The inter-war years and perhaps more prominently the period during the Second World War perceived that the new international organisation that was to replace the League of Nations could not limit itself to a few minorities. The principle of Universal human rights had to replace the limited rights which were formerly accorded to a number of groups.[11]

The United Nations Charter, like the Covenant of the League of Nations contains no explicit provisions for the protection of minorities. However, unlike the Covenant there are a number of references to the principle of Universal respect of human rights and fundamental freedoms, equality and non-discrimination. Since the adoption of the United Nations Charter, the principles of equality and non-discrimination have proved to be the linchpins of the human rights regimes. These principles are enshrined in the Universal Declaration of Human Rights,[12] the Charter of the Organisation of American States,[13] the American Declaration on Rights and Duties of Man,[14] the European Convention on Human Rights and Fundamental Freedoms,[15] the European Economic Community Treaty,[16] the ILO Convention and Recommendation concerning Discrimination in Respect of Employment of Occupation,[17] the UNESCO Convention against Discrimination in Education,[18] the ILO Convention 169,[19] the International Convention on the Elimination of All forms of

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10 Even so, prior to the United Nations Charter the notion of non-discrimination as a general principle of international law remained a remote prospect see W Mckean "The meaning of discrimination in international and municipal law" 44 *BYIL* (1970) 177-192, 177.

11 See *supra* chapter 4; Mckean, 52.

12 Adopted December 10, 1948, GA Resolution 217, UN Doc A/810, 71.

13 4 UNTS 119; 152 BFSP 51; 2 UST 2394.

14 Text in Brownlie, *Basic Documents on Human Rights* 2nd edn. (Oxford: OUP), 1981, 381.

15 Adopted November 4, 1950. UNTS 232, see in particular Article 14.

16 261 UNTS 140; Cmnd 7461; See the "Social Policy" articles, article 117-122; also see F Von Prondzynski, "The Development of EEC Social and Employment law", in L Heffernam and J Kingston (eds.) *Human Rights A European Perspective*, (Blackrock Co Dublin: Round Hall Press) 1994, 249-257.

17 Adopted June 25, 1958 UNTS 34 (ILO General Conference) entered into force June 5, 1960.

18 429 UNTS 93; 44 UKTS 1962.

19 *Supra*, Chapter 4.

Racial Discrimination,[20] the International Covenants on Human Rights,[21] and the UNESCO Declaration on Race and Racial Prejudice.[22]

The foundations of the modern international legal jurisprudence relating to the issue of equality and non-discrimination can be traced from the provisions of the United Nations Charter. There are several references to the principle of equality and non-discrimination. The preamble points to the determination of the peoples of the United Nations to "re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...".[23] Article 1 (3) states that one of the purposes of the UN is the promotion and encouragement of respect for human rights and fundamental freedoms for all "without distinction as to race, sex, language or religion". According to Article 8, the UN shall place no restrictions on eligibility of men and women to participate in any capacity in its principal and subsidiary organs.

The Charter also devolves authority to the General Assembly to initiate studies and making recommendations "for the purpose of .....assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[24] The United Nations is obliged to "promote ...Universal respect for and observance of, human rights and fundamental freedoms for all with out distinction as to race, sex, language or religion".[25] According to Article 62 (2) the Economic and Social Council (ECOSOC) may "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all". The trusteeship system that was incorporated in the UN also carried with it the notion of equality for all.[26]

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20 60 UNTS 195; UKTS 77 (1969).

21 The International Covenant on Civil and Political Rights UN Gen Ass Res 2200 (XXI), GAOR, 21st session, supp 16, 49; UKTS (1977). The International Covenant on Social, Economic and Cultural Rights (1966) 993 UNTS 3.

22 Text in United Nations, *A Compilation of International Instruments*, (New York: United Nations) 1988, 135-142.

23 United Nations Charter UNTS XVI; UKTS 67 (1946); Cmnd 7015.

24 *Ibid.* Article 13 (1) (b) *ibid.*

25 *Ibid.* Article 55 (c)*ibid.*

26 Article 76 (d). It is noteworthy that there was a radical change in the provisions relating to non-discrimination and human rights from the Dumbarton Oaks to San Francisco. At Dumbarton

The Universal Declaration on Human Rights is based on the principles of equality and non-discrimination, with a number of its articles relating themselves to this concept.[27] The Declaration, although a General Assembly Resolution and as such not binding on States, nonetheless stands out as probably the most authoritative instrument in the armoury of international human rights law. Indeed, as has been eloquently summed up

> "Since 1945, the Universal Declaration has acquired a greatly re-inforced status, not only as a `common standard of achievement for all peoples and all nations' but also as a statement of principles which all states should observe. It has been reaffirmed by the General Assembly on a number of occasions, of which the most striking were perhaps the adoption of the Declaration on colonialism in 1960, which provided `All states shall observe faithfully and strictly the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights and the present Declaration....' and the unanimous adoption in 1963 of the Declaration on the Elimination of Racial Discrimination, which contained similar provision.
>
> In the World outside the United Nations the influence of the Universal Declaration has been no less profound. It has inspired more than forty state constitutions, together with regional human rights treaties of Europe, Africa and the Americas, and examples of legislation quoting or reproducing provisions of the Declaration can be found in all continents. Thus the impact of the Universal Declaration has probably exceeded it's authors most sanguine expectations while its constant and widespread recognition means that many of its principles can now be regarded as part of customary law."[28]

The adoption of the Universal Declaration also set the stage for a number of multilateral treaties.[29] The Genocide Convention, as we have already noted, was the first of a series of international conventions which related themselves to the non-

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Oaks there were few proposals relating to the protection of human rights and the international organisation that was to be ultimately formed had its main functions in establishing international peace and security. A number of factors brought the human rights issues to the front see generally A Robertson and J Merrills, *Human Rights in the World An Introduction to the Study of International Protection of Human Rights*, (Manchester: Manchester University Press) 1989.

27 Article 2 of the Declaration provides "Everyone is entitled to the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or status. Furthermore no distinctions shall be made on the basis of the political, jurisdictional or other international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

28 Robertson and Merrills, *op.cit note* 26, 27.

29 Mckean, 104.

discriminatory jurisprudence of human rights. The Convention, as noted above attempts to prevent the worst form of discriminatory behaviour- physical extermination on grounds that a group has a particular national, ethnic or religious origin.[30] There have also been other notable developments for instance in respect of the attempts to abolish Apartheid,[31] Slavery[32] and forced labour.[33] Discrimination based on race, religion or country of origin is rendered impermissible in both the Convention relating to the Status of Refugees (1951)[34] and to the Status of Stateless Persons (1954).[35] A number of instruments have been adopted in such areas as employment and education where discrimination at least in subtle manifestations is fairly rampant; Convention on Discrimination in Education 1960 provides a key examples. Similarly, the work of the ILO, and its particular focus in eliminating discrimination against indigenous peoples is worthy of appreciation and has been dealt with already.[36]

Equality and non-discrimination are prominent features of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, a subject to which we shall return to in the next section. As has been noted, a considerable overlap exists between the principle of protection of minorities and the provision of non-discrimination so much so that a regime of non-discrimination is sometimes regarded as sufficient. Not only has this been the traditional approach, in the current political environment States find the issue of non-discrimination more appealing, a premises which has often reflected in the activities of the Commission on Human Rights. Although an over-emphasis on non-

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30 According to Mckean the Genocide convention "seeks to prevent the most severe form of discrimination-the physical destruction of persons on the grounds that they belong to certain national, ethnic, racial or religious groups" *ibid.*, 105; "..genocide is not only the ultimate denial of human rights, it is, in the deepest sense, the sociological outcome of discrimination" W M Reisman "Responses to crimes of Discrimination and Genocide An Appraisal of the Convention on the Elimination of All forms of Racial Discrimination" 1 *Den JILP* (1971) 29-64, 41.

31 Convention on the Abolition of Apartheid UN Gen Ass Res 3068 (XXVIII), Annex, GAOR, 28th session, supp 30; 13 ILM 50.

32 The Slavery Convention 1926, as amended by the Protocol of 1953. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery 1956.

33 The Forced Labour Convention, 1930 and the abolition of forced labour convention 1957.

34 189 UNTS 150; UKTS 39 (1954); Cmnd 9171; 158 BFSP 499.

35 360 UNTS 117; UKTS 41 (1960); Cmnd 1098; 161 BFSP 372.

36 *Supra* Chapter 3.

discrimination at the expense of positive duties in relation to protection and promotion of the interests of minorities, can be a dangerous exercise, the existence of non-discriminatory regime is nonetheless fundamental to both individual and collective rights and in this respect the role of the various United Nations organs is commendable.

6.2.1 Religious Non-Discrimination in International Instruments

One of the key issues of concern has been the relatively weak nature of the prohibition of the norm of religious non-discrimination when compared to the condemnation of racial discrimination. The drafting history of instruments based on religious intolerance and discrimination provide a living testimony to this. Whereas the idea of the prohibition of racial discrimination was readily concretised and given legal recognition in the form of a Convention, it was not until 1981 that a rather attenuated General Assembly Resolution was adopted in the matter of religious intolerance and discrimination.[37] The prospects of adoption of a Convention on the prohibition of discrimination based on Religion and its subsequent large-scale ratification seem, at best remote. Lerner's comments reflect the dichotomy of the situation

> "After World War II, discrimination on the religious grounds received the same treatment as other forms of discrimination in general human rights instruments. When it was decided to prepare specific instruments in that area, progress was very slow, particularly compared with the field of racial discrimination and incitement. The consequence was that until now there is no obligatory treaty encompassing religious intolerance and discrimination in particular. Moreover, there is no general agreement as to the advisability of launching a struggle in favor of such a document under the present circumstances, and its observers foresee great difficulties if a new attempt is made to adopt a convention".[38]

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[37] Lerner, *op.cit note 2*, 89.
[38] *Ibid.* 75.

As far as the stance of the United Nations is concerned in its attempts to combat discrimination, there seems a certain amount of fallacy. In contrast to the considerable success in adopting international instruments relating to the elimination of racial discrimination, a similar consensus has been absent in issues relating to religious discrimination. In its Resolution 1510(XV) of 12 December 1960, the General Assembly condemned all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society as violations of the Charter of the United Nations and the provisions of the Universal Declaration of Human Rights.[39]

However, when it came to the undertaking of practical steps, it was not found possible to have a consensus on all issues relating to the prohibition of discrimination. At the end as a compromise it was decided to create separate instruments each dealing with race[40] and religion.[41] In 1962, the General Assembly requested the Economic and Social Council for the preparation of a draft declaration and Convention on the Elimination of All forms of Racial Discrimination and the General Assembly in its Resolution 1904 (XVIII) adopted on 20 November 1963, proclaimed the Declaration on the Elimination of All forms of racial discrimination.

On the other hand the frequent impasse in the drafting of specific instruments on prohibition of discrimination based on religion can be treated as "shameful"[42] and comparable to "a tale punctuated by hypocrisy, procedural jockeying and false starts".[43] Mckean considers the issue as being one of "neglected"[44] discrimination pointing out that "no other subject has been so shunned and neglected" in the United Nations as one of religious rights and beliefs. Similarly, when providing a commentary

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39 A number of similar resolutions were adopted by the Sub-Commission in January 1960 (E/CN.4/800, para 163), the Commission on Human Rights in March 1960 (Res 6 (XVI) and ECOSOC in July 1961 (Resolution 826B (XXXII).

40 See GAR 1780 (XVII), 7 December 1962 17 UN GAOR (No 17) 33.

41 See GAR 1781 (XVII), 7 Dec. 1962 17 UN GAOR (No 17) 33.

42 B Dickson "The United Nations and Freedom of Religion" 44 *ICLQ* (1995) 327-357, 342; P Alston "The Commission on Human Rights" in P Alston, (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Oxford: OUP), 1992, 134.

43 R Clark "The United Nations and Religious freedom" *NYUJILP* (1978), 197-220; also cited in Mckean, 121.

44 Mckean *ibid.* 121.

on the Declaration on religious intolerance, Sullvian says "There is no consensus on whether the prohibition of discrimination on grounds of religion or belief already constitutes a norm of customary law".[45] Mckean's analysis is correct when he writes

> "It is regrettable that, at the end of the twentieth century, religious intolerance and bigotry should remain, as they have over centuries, a prime cause of division between States and communities inhabiting those States; no topic, it may be contended, had divided mankind more and it is unlikely that the United Nations will find acceptable solutions quickly".[46]

It probably is the case that the constitutional provisions and legislation overwhelmingly satisfies the broad and generalised requirements of non-discriminatory stance on the basis of religion. However, freedom of religion or belief itself is a conglomeration of various rights and values. It can be a regarded as a complete code of life, determining every pattern of social behaviour. Its pronouncements affect every aspect of life, including matrimonial and family affairs, public order, freedom of expression, association, freedom to preach and manifest one's religion as matter of conscience and faith.[47] Domestic and international tribunals have often been confronted with faithfuls belonging to different religious and sects and raising questions of a serious nature.[48]

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45 Sullvian "Advancing the Freedom of Religion or Belief through the United Nations Declaration on the Elimination of All forms of Religious intolerance and Discrimination" 82 *AJIL* (1988) 487- 502, 488-489. Her footnote comments includes this view "Although generalised reference to the freedom of religion or belief appear in the Universal Declaration of Human Rights article 18, the ICCPR article 18, regional instruments, the Declaration is the only instrument that deals with the subject in specific terms". *ibid.*

46 *Mckean*, 123.

47 On the subject of ritual sacrifices of animals see the US Supreme Court in *Church of Lukimi Babali Aye Inc. v. City of Hialeah* (1993) 12 4 LE.d 472; and Indian Supreme Court *in Mohammed Hanif Qureshi v. Bihar* 1959 SCR 629; on the subject of proselytism see *Kokkinnass v. Greece* ECHR, 17 EHRR (1993), 397.

48 An analysis of Pakistani and Indian case law provides an interesting view of the difficulties involved. See *Navendra v. State of Gujrat* AIR 1974 SC 2098; *Jagdishwar Anand v. P.C.*, Calcutta (1984) S.C 51; *Ratilal Panchad Ghandhi and Others v. State of Bombay and Others AIR (SC.) (1954),* 388; *Ramji lal Modi v. State of UP*, 1957 AIR; Rev. Stainsislans AIR 1975 MP 163; *Saifuddin Saheb* AIR 1962 SC 853; *Commissioner of Hindu Religious endowments Madras v. Sri Lakshmandra* AIR (1954) SC 388; *Sarwar Hussain* AIR (1983) All 252; *State of Bombay v. Narasu Appa Mali* AIR 1952 Bombay 1984; *Mohammed Ahed Khan v. Shah Bano Begum* 1985 AIR SC 945. For the position of Pakistan see infra Part *IV*

Therefore although the plethora of international treaties since 1945 clearly reflects the view that the fundamental principle of international law of human rights is that all individuals are to be treated equally-and ought not to be discriminated against merely on the basis of their belonging to a certain ethnic, religious or linguistic group-it is argued that the strength of the prohibition in each case differs. This argument is endorsed by Professor Van Boven in his scholarly article, where he states "It is clear that the degree of consensus and sense of urgency are more prevalent when it comes to the elimination of racial discrimination than when elimination of religious intolerance is envisaged".[49] Hence while the legal norms in relation to the prohibition of racial discrimination are regarded as fairly uncontroversial example of *jus cogens,*[50] the same cannot be said with an equal conviction in relation to the prohibition of discrimination based on religion.

6.3 THE CRYSTALLISATION OF THE RIGHT TO RACIAL EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL LAW

6.3.1 International Conventions

6.3.1.1 The International Covenants

Inherent in the nature of the International Bill of Rights is the concept of equality and non-discrimination, and the International Covenants of 1966, provide an accurate reflection of this. There is considerable strength in Ramcharan's view that "equality and non-discrimination constitutes the most dominant single theme of the [ICCPR] Covenant".[51]

According to Article 2(1) of ICCPR States Parties undertake to

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[49] T Van Boven, "Religious Freedom in International Perspective Existing and Future Standards", in J Jeweitz *et al.*, (eds.) *Des Menschen Recht Zwischen Freicht und Verantwortung,* (Berlin: Dunker and Humblot), 1989, 103-113, 105.

[50] Brownlie, 513.

[51] Ramcharan in Henkin, 246-269, 246.

"respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the covenant without distinction of any kind, such as race, colour, sex, language and religion, political or other opinion, national or social origin, property, birth or other status..."

Article 3, while providing for equality for men and women states

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present covenant"

Article 25 provides

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Perhaps the primary article[52] on equality and non-discrimination in the Covenant is contained in article 26 according to which

"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against any one on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 2(1) of the ICESCR provides

"The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status".[53]

From a closer reading of the provisions of article 2(1) and 26 of ICCPR, the key articles in the present context-use the terms "distinction" and "discrimination" respectively. Article 2(2) of the ICESCR relies upon the term "discrimination". The ambiguity generated by the differential use of the terms "distinction" and "discrimination" is exacerbated by the fact that there is no definite attempt to define

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[52] Also see Article 27 of the International Covenant discussed at length in chapter 7 *infra*.
[53] GA Res 2200 A, 21 UN GAOR, (Supp.No 16) 49-50.

either of these terms,[54] though it probably is the case that the terms have been used interchangeably with each other. A stronger challenge against the International Covenants, in particular, ICCPR is its focus on the individual. It is the individual, whose equal treatment and non-discrimination is the primary concern; the group dimension is not so well appreciated. The focus of article 27, as we shall see in the next chapter, is individualistic in nature, though minorities as groups are intended to be the ultimate beneficiaries. The absence of any explicit provisions relating to policies of affirmative action tends to reinforce the anti-collective stance; the Race Convention in these respects is an improvement for certainly there is a stronger recognition of group rights, in terms of affirmative action as well as *locus standi.*

6.3.1.2 International Convention on the Elimination of All Forms of Racial Discrimination

The adoption and entry into force of the Covenant on the Elimination of All forms of Racial Discrimination provides a significant step towards the attempts to combat racial discrimination at the global level.[55] It has accurately been regarded as "the international community's only tool for combating racial discrimination which is

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[54] "This review of the covenants demonstrates that although they are largely concerned with the principle of equality and non-discrimination, much confusion and uncertainty still existed at the time of drafting as to their nature and content. It is unfortunate that a greater attempt was not made to compare the work of other UN organs in the field and to investigate the experience of domestic courts in interpreting equality clauses under municipal constitutions. One major reason for the lack of proper analysis was the speed with which the drafting committees changed their composition. There was often little continuity between sessions and it was regrettable that an effort was not made to ensure that representatives who had begun the drafting of a particular instrument were not permitted to make use of their experience and complete the tasks assigned to them". Mckean, 152.

[55] The Convention is "more than a statement of lofty ideals. It provides machinery for implementation which goes well beyond any previous human rights instruments negotiated in the UN" per the American representative at the time of the adoption of the Convention. A/Pv. 1406, 53-55, cited in T Meron, "The Meaning and Reach of the International Convention on the Elimination of Racial Discrimination" 79 *AJIL* (1985) 283-318, 283.

one and at the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation".[56]

The International Convention on the Elimination of All forms of Racial discrimination was adopted on 21 December 1965[57] and entered into force on 4 January 1969. The strength of the international consensus is reflected by a number of features. Firstly, the Convention was adopted by 106 votes to none. Although, Mexico abstained initially, it later declared an affirmative vote in support of the provisions of the Convention.[58] Secondly, the speed and number of State ratification speaks much for itself as to the general consensus on the issues relating to prohibition of Racial Discrimination. The importance of the Convention lies in the fact that it has been ratified by a vast majority of States to the extent where it is only second in number after the Geneva Conventions of 1949.[59]

While the Declaration on the Elimination of Racial Discrimination provided the driving force for the incorporation of both substantive and normative articles of the Convention, it would be fair to suggest that the adoption of the Convention within two years after the Declaration has its roots in the political support of the newly emerging States of Africa and Asia who have been particularly strong in condemning racial discrimination and Apartheid. The Provisions of the Convention, although undeniably a major advance in the cause of eliminating racial discrimination, nonetheless raise a number of complex questions reflecting in some ways the weaknesses that still exist in international law relating to the prohibition of discrimination.

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56 Statement by Committee on the Elimination of Racial Discrimination at World Conference to Combat Racism and Racial Discrimination 33 GAOR, Supp (No 18) at 108-9 UN Doc. A/33/18 (1978).

57 UN GA Res. 2106A (XX). The Convention was adopted by 106 votes to none.

58 Thornberry, 259.

59 T Meron, *Human Rights Law Making in the UN, Legal and Policy Issues*, (Oxford: OUP) 1986, 8.

(i) Complications in the Definition of "Discrimination" and the Scope of the Convention

The preamble of the Convention while introducing the matters of consideration, emphasises on equality and upon the imperative nature of removing racial barriers. Unlike the Declaration, the Convention however does contain a definition of "discrimination" which means

> "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life"[60]

The importance of the contents of the definition necessitates a close scrutiny. "Racial discrimination" is given a broad meaning which according to the terms of the Convention could be based on a variety of factors like race, colour, descent,[61] national[62] or ethnic origin. According to the definition, four kinds of acts could be regarded as discriminatory: any distinction, exclusion, restriction or preference. For any of these acts to constitute discrimination they must be based on (a) race; (b) colour; (c) descent; (d) national origin or (e) ethnic origin and should have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal

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60 *Op.cit* Article 1(1).

61 This term is unique only to be used in the present convention. It was adopted on the suggestion of India in the third Committee UN Doc A/C.3/L1216, & L.1238; UN Doc A/6181 paras 33, 37, 41(a), although the first impression that one gets is that it is no different from national or ethnic origin. However as Mckean remarks descent may add something else as "it is not easily subsumed under the concept of national or ethnic origin" Mckean, 156.

62 The meaning of national origin provoked considerable controversy, as according to Lerner the *travaux préparatoires* of the Convention reveal that "the confusion regarding the terms national origin and nationality, widely used as relating not only to persons who were citizens of, or held passports issued by a given State, but also ethnic groups or nations having a distinct culture, language and traditional way of life but living together with other similar groups in the same state" Lerner *op.cit* note 2, 49.

footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[63]

In comparison to the ICCPR, it appears that the Race Convention seems to have a broader perspective for, unlike the ICCPR, which is limited to rights addressed in that particular instrument, article 1(1) applies to racial discrimination "which has the purpose or effect of nullifying or impairing, recognition, enforcement or exercise...of [all] human rights and fundamental freedoms".[64] However, in another respect the scope of the Race Convention is far limited as it only deals with racial discrimination and any discrimination based on grounds of religion, sex or political opinion are *prima facie* out side its scope.[65] The definition of racial discrimination raises a number of intriguing though controversial issues.[66] There is a constant debate over the nature of equality that is aspired for; how far is the separation of different groups on the basis of ensuring equality compatible to the provisions of the Covenant? How far the Convention imposes obligations or extends itself in prohibiting discrimination in private life as opposed to public life?[67] Indeed the meaning as to what constitutes public life is itself subject of controversy.

It is equally important to note the situations where the Convention is not applicable as provided in other paragraphs of Article 1. The Convention is not applicable in cases of "distinctions, exclusions, restrictions or preferences" made by a

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63 *Ibid.* 28.

64 T Meron "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" 79 *AJIL* (1985) 283-308, 286.

65 Note however the provisions of Article 5.

66 W Vierdag, *Concept of Discrimination in International Law-With Special Reference to Human Rights*, (The Hague: M. Nijhoff) 1973.

67 At first sight the usage of the terminology may restrict the activities contained therein to Public Life (see Article 1(1)). However a number of other provisions indicate a broader approach e.g. see article 2(1)(d). Similarly article 5 provides for a number of rights not necessarily coming within the ambit of public life. To reconcile these apparently conflicting approaches it has been suggested that the term public life is used in the wider sense encompassing all sectors of organised life of community, an interpretation presented in support of the rejection of draft proposal of the limiting of the scope of Article 1(1) of the Convention M Mcdougal S Lasswell and L Chen, *Human Rights and World Public Order*, (New Haven and London: Yale University Press) 1980, 593; also see M Ford "Non-Governmental Interference with Human Rights" *BYIL* (1986) 253-280, 261-262; D Harris, *Cases and Material in International Law*, 4th edn. (London: Sweet and Maxwell), 1991, 654 cf. *Brooks v. Netherlands* 2 Selected Decisions HRC 196, 1987, and the comments by Harris.

State party between citizens and non-citizens and cannot be interpreted as affecting the laws regulating nationality, citizenship[68] or naturalisation, "provided that such provisions do not discriminate against any particular nationality".[69] Hence, while distinctions made solely on the basis of race, colour, descent, national or ethnic origin are impermissible,[70] a number of international lawyers severely criticised these provisions as permitting *de facto* discrimination. According to Reisman, for example

> "The language of Article 1(2) opens the way for discrimination against non-citizens, which in some context may constitute *de facto* racial discrimination. If the non citizens are stateless and without hope of diplomatic protection, they are the most helpless creatures in international law. Much of East African racial discrimination against Indians is probably not covered by Article 1(3), which excludes from the Convention domestic provisions of nationality, citizenship or naturalization as long as they do not discriminate against a particular nationality, may be formulated too broadly. A significant number of ethnic states practice preferential immigration and naturalization as a means of maintaining their existence and it is not clear whether the intention of para 3 was to challenge the lawfulness of this practice".[71]

Article 2 sets out States obligations in detail with the aim to "pursue by all appropriate means and without delay, a policy of eliminating racial discrimination in all its forms and promoting understanding among all races". A close analysis of the article reveals the objectives of its incorporation. The parties not only undertake to refrain from permitting discriminatory acts, but promise to take positive steps through legislative and administrative policies to prohibit and condemn racial discrimination.

Article 2(1) reads as follows:

> States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to this end:

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68 *Op.cit* Article 1 para 2.
69 *Ibid.* para 3.
70 Article 1(3).
71 Reisman *op.cit note* 30, 47; M Iyoda, *International Protection of Human Rights of Migrant workers with Special Reference to the Role of ILO*, unpub LL.M Dissertation, Hull University, 1992.

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any person or organisations;
(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any person, group or organisation;
(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organisations and movements and other means of eliminating barriers between races, and to discourage any thing which tends to strengthen racial division.

Article 2(1), it would appear, imposes a twofold obligation on Parties, one positive and the other negative. The negative obligations prevent Parties or their agents from undertaking acts or practices of racial discrimination against persons or institutions. The second, positive obligation is conducted thorough effective, concrete measures to bring to an end any form of racial discrimination. Hence, while article 2(1) (a) prevents a State party from sponsoring, defending or supporting racial discrimination by any persons or organisations, article 2(1)(c) and (d) impose on State parties positive obligations to take effective measures to eradicate the possibility of racial discrimination by any person, group of persons or organisation. Article 2(1)(e) perhaps reveals the essence of the whole section stating that the aim of each State party is to encourage integration of racial groups in the nation-State.

(ii) Issues of Affirmative Action

One of the most significant features of the Convention is the exception to the general rule of equality for all individuals; the provisions relating to affirmative action finds expression in article 1(4) and 2(2).[72] According to article 1(4)

[72] For similar provisions see Article 2(3) of the Declaration, Article 5 of the ILO Convention 328 UNTS 247; Cmnd 328. According to UNESCO Convention provision of separate schools by States parties will not be deemed discriminatory. Also see the 1978 UNESCO Declaration on Race and Racial Prejudice Article 9(2).

> "special measures taken for the sole purpose of securing adequate advancement of certain ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved"

This is complemented by Article 2(2) which represents a detail of the obligations undertaken by the States parties who:

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

The two provisions are not without their complications and may offer States too much of a discretion in decisions relating to the constitution of "racial", "ethnic" groups and the form and content of the relief that is to be provided. Having noted this, it is also clear that the provisions are of potentially considerable significance for minorities and lesser advantaged groups. The unique feature of these provisions is that unlike article 27 of ICCPR Covenant (which on a literal reading of the text does not provide for affirmative action), article 2(2) attempts to provide protection to groups of persons or individuals *qua* members of a group.[73] The essence of both these articles of the Race Convention is that, although permitting for special measures they are, designed to be of a temporary nature. Their essential purpose is to generate equality in real terms. Mckean's view is that Art 1(4) and 2(2) provide a synthesis

> "which incorporates the notion of special temporary measures, not as an exception to the principle but as a corollary to it, demonstrates the fruition of the work of the sub-commission and the method by which the twin concepts of discrimination and minority protection can be fused in to the principle of equality"[74]

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[73] Meron *op.cit* note 55, 306.

[74] Mckean, 159.

This view, it is submitted, should be received with caution for it might lead to a suggestion that minorities could be adequately protected merely with the institution of non-discriminatory laws. The induction of the concept of temporary measures to produce equality and non-discrimination may not be the ultimate cherished ideal for minorities to preserve their identity. As the position in the Commission has clearly reflected, a number of States are keen on the issue of non-discrimination, which necessarily implies the flattening of differences between linguistic, cultural and religious groups and promoting assimilation, invariably going to the credit of the dominant majorities.[75]

(iii) The Broad Scope of the Convention and Attempts to Prohibit Racial Discrimination

A number of provisions of the Convention have a very broad scope, and in practice may seem rather over-ambitious. Article 4, for instance and primarily for this reason has been regarded as one of the most controversial of articles within the Convention.[76] According to it, State parties:

> condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and to this end with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this convention, inter alia;
> (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement or racial discrimination, as well as acts of violence or incitement of such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

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[75] "Depending upon the legal regime in a State 'prevention of discrimination' alone may be seen as flattening out differences between cultural and religious groups and promoting assimilation, no doubt in the interest of the dominant culture". Thornberry, 128.

[76] Mckean,160; also see M Korengold "Lessons in Confronting Racist Speech: Good Intentions, Bad Results and Article 4 (a) of the Convention on the Elimination of All forms of Racial Discrimination" 77 *Minn LR* (1993), 719-737.

(b) shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
(c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The provisions of article 4 carry far-reaching implications. State parties not only take upon themselves to prohibit discriminatory acts, but also undertake to declare illegal and prohibit organisations and activities which attempt to disseminate opinions of racial superiority inciting racial discrimination.[77] The scope of the obligations imposed are also far wider than other international instruments, e.g. ICCPR 20(2). Article 4 uses a very wide and strong terminology, and the question arises as to the resolution of any conflict of rights which is inherent in the provisions of the article.[78]

According to article 5, States undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour or national or ethnic origin to equality before the law. The article then goes on to enumerate a number of rights, including both civil and political rights as well as economic, social and cultural rights. Article 6 provides remedies against those who have been involved in racial discrimination, be it in their official or unofficial capacity. It provides:

State parties shall assure to everyone with in their jurisdiction effective protection and remedies through the competent national tribunals and other states institutions against any acts of racial discrimination which violates his human rights and fundamental freedoms contrary to this convention as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination

It has been suggested that a liberal interpretation of the provisions of the article, particularly bearing in mind the phrase "just and adequate reparation or satisfaction" for any damage suffered as a consequence of racial discrimination would be a considerable advance over previous instruments over such instruments as Article 8

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[77] Meron *op.cit* note 59, 24.
[78] which right is to be given priority freedom of expression as against non-discrimination UN Docs E/CN.4/837, paras 73-83; E/3873, paras.144-188; A/6181, paras 60-74.

of the Universal Declaration, Article 2 of ICCPR, and Article 7(2) of the Declaration on the Elimination of All forms of Racial discrimination which have dealt with the subject previously.[79] In accordance with Article 7, States parties undertake to adopt immediate and effective measures particularly in the field of teaching, education, culture and information with a view to combat prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups.

6.3.2 INTERNATIONAL CUSTOMARY LAW

6.3.2.1 Development of Customary Norms Relating to Racial Equality and Non-Discrimination

There seems to be a general consensus that the international legal principles relating, at least to racial equality and non-discrimination, now form part of international customary law. States are thus bound by these principles regardless of their treaty obligations. There is considerable evidence in that direction through State practice accompanied by the relevant *opinio juris*. Substantiation of this principle, as we shall consider shortly, is also forthcoming through an analysis of a number of subsidiary sources such as pronouncements of the International Court of Justice[80] and the view of the publicists.

The emergence of the principles of equality and non-discrimination since 1945 may in contemporary terms seem relatively non-controversial, with a common consensus on the part of the international community. However the evolution of these fundamental precepts has incurred considerable hesitancy. Indeed, despite the atrocities committed during the second world war, the essence of which had been discrimination based on race, sex, language, religion and political affiliations, there is

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[79] Lerner, *op.cit note 2*, 57-58.

[80] *South West Africa Cases ICJ Reports* 1962, 318 (1st Phase) and ICJ Reports, 6 (2nd Phase). see *infra*.

evidence to suggest that, at least initially, the great colonial powers, in particular the UK were not keen on discussing the matter if it were in any way to affect their policies in relation to colonies.[81]

The proposals relating to equality and non-discrimination at Dumbarton Oaks were not forthcoming with only one reference to human rights and fundamental freedoms[82] primarily because of the fear that this might lead to intervention into the domestic affairs of sovereign States. A proposal by China that "the principle of equality of all states and races shall be upheld"[83] proved unacceptable to the United States, Britain and Soviet delegates at Dumbarton Oaks and hence was eliminated.

At San Francisco, the climate was however different with increasing recognition being given to human rights as a major purpose of the United Nations. The pressure of smaller States, the role and influence of Non-Governmental Organisation's, and the sentiment of the States with experience of racial discrimination during colonialism merged with those which had suffered discrimination at the hands of Nazis.

Thus, unlike the Covenant of the League of Nations and the Dumbarton Oaks proposals, human rights and non-discrimination do feature in the United Nations Charter. Despite the incorporation of a number of references to human rights in the Charter, it must not be overlooked that the issue of effective implementation of human rights and non-discriminatory norms provoked great anxiety and drew reservations from a majority of States which relied on the notion of State sovereignty and domestic jurisdiction. Hence in the end

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[81] "The general coalescence of opinion at San Francisco in favour of the principle was not without elements of political compromise. The Atlantic Charter agreed by the United Kingdom and the United States of America, and the subsequent Declaration of the United Nations made only general statements and were not explicit on the Racial Discrimination issue. Following the promulgation of these documents, Britain made it clear that it had made no commitments in relation to racial policies in the colonies. There is evidence that the 'racial question' caused nervous responses in other states, including the United States of America-though wartime drafts of the charter of the new international organisation prepared in the United States emphasised the importance of the principle" (footnotes omitted) Thornberry, 310.

[82] According to chapter IX, Section A the organisation was to promote respect for human rights and fundamental freedoms, UNCIO Doc, iv.13. Mckean, 53.

[83] cited in Lauren *op.cit note, 7*, 10-11.

> "all the proposals that the United Nations be actively required to `safeguard' `protect', `guarantee' `implement' `ensure' `assure' or `enforce' these provisions died a sudden death. Instead, the only verbs that could gain majority acceptance were relatively innocuous ones such as `should facilitate' `assist', `encourage' and `promote'. Even here delegates carefully explained that they did not want these words to assume any greater meaning than they already possessed".[84]

From these humble beginnings, and in an environment when "human rights and racial discrimination founded on the rock of national sovereignty" the rapid progress that was made on the issue of developing international norms on prohibition of racial discrimination is truly remarkable. Indeed, the crusade to adopt international measure for denouncing and prohibiting racial discrimination became a potent force. By the time it was decided by the Human Rights Commission that the proposed Bill of rights was to contain a Declaration, a Covenant and measures of implementation, the UN General Assembly, had already through a number of its resolutions manifested its interest in the issue of non-discrimination.

As early as 1946 General Assembly Resolution 103 (I),[85] declared that it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination ....[calling]....on the governments and responsible authorities to conform both to letter and spirit of the UN Charter. There are innumerable other General Assembly Resolutions testifying to this determination of the United Nations including for example, Resolution 44(I) concerning the treatment of persons of Indian Origin in South Africa,[86] GA Resolution 56 (I) concerning the Political rights of Women[87] and GA Res. 96 (I) relating to genocide.[88]

A number of incidents, although taking place at the different parts of the World, further increased the momentum for generating norms on the prohibition of discrimination. The series of anti-Semitism movement "swastika epidemics" that

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[84] Lauren, *ibid.*, 18.
[85] GA Res 103 (I), adopted forty-eighth plenary meeting, 19 November, 1946.
[86] GA Res 44 (I), fifty-second plenary meeting, adopted 8 December, 1946.
[87] GA Res 56 (I) Political rights of women, fifth plenary meeting adopted 11 December, 1946
[88] GA Res, 96 (I) fifty-fifth plenary meeting adopted 11 December 1946.

spread around Western Europe during the late fifty's-early sixty's revived the bitter memories of Nazi philosophy of anti-Semites and its consequences. Perhaps more important for the cause of non-discrimination was the rapid increase of the new members of the United Nations and their philosophy of ending racial discrimination and colonisation.

Notions of equality can be wide-ranging and can be reflected in myriad forms and as far as collectivities are concerned, may encompass ideals such as self-government, autonomy, and self-determination. The impetus of the United Nations on self-government with its focus on independence for peoples under "colonial and alien domination" drew its inspiration from a movement against racial discrimination and domination, blending itself logically in the ideal of "equal rights and self-determination of all peoples, and of the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Although, as we have seen earlier, self-determination as an ideal has eluded a number of minority groups, the United Nations has been able to use it as its most potent weapon in its arsenal to destroy colonialism, and more generally racial oppression and domination. The 1960 Colonial Declaration in this respect has attained a landmark status. The pronouncement of the General Assembly was so revolutionary so as to earn a comment that it is "almost an amendment of the Charter".[89] It demanded that

> "immediate steps shall be taken, in trust and Non-Self Governing territories or all other territories which have not yet attained independence, to transfer all powers to peoples of those territories...without any distinction as to race, creed or colour....."[90]

When considering the issue of non-discrimination, it is surprising to note the voluminous nature of instruments that the UN has adopted. The Genocide Convention has, in essence, its primary motive, the prohibition and prevention of the worst form of

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[89] R Emerson, "Colonialism, Political Development and the United Nations" 19 *IO* (1965), 484-503, 493.

[90] Article 5.

discrimination, i.e. physical destruction of groups due to reason of their belonging to a particular national, ethnic, racial or religious group.[91] The United Nations has also shown great interest in the issues of Apartheid and Slavery which directly relate to the subject of discrimination. This perspective is reflected in the adoption of the convention on Discrimination in Education 1960. The two International Covenants, as we have noted, provide several references to the issue of equality and non-discrimination. More significant in this regard is the Race Convention. Schwelb's view is appealing when he writes that the Race Convention "is to a large extent declaratory of the law of the Charter, or in other words, the basic principles of the Convention lay down the law which binds also States which are not parties to the Convention, but as members of the United Nations, are parties to the Charter".[92]

The formulation and establishment of a right to racial equality owes a great deal to a range of sources, a number of them subsidiary in character. The Universal Declaration on Human Rights aspired to be the *magna carta* of all mankind, remains as one of the most frequently cited Resolution of the General Assembly and in a number of instances it has been treated as an equivalent level as the United Nations Charter itself.[93] It is however debatable whether all the rights enumerated in the Declaration now form part of international custom, it would nonetheless be difficult to disagree with the view that those which relate themselves to equality and non-discrimination have attained the maximum status of whatever the Declaration has to provide to the universal human rights jurisprudence.[94]

As far as judicial pronouncements on the matter are concerned, there are several occasions where the ICJ and its predecessor, the PCIJ, has considered the issue

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91 See *supra* chapter 5.

92 E Schwelb "International Court of Justice and the Human Rights Clauses of the United Nations Charter" 66 *AJIL* (1972), 337-353, 351.

93 Mckean , 274.

94 "...it must not be assumed without more that any and every right in the Universal Declaration is part of customary international law. However the prohibition of discrimination occupies a special place in the sense that it determines the field of application of the rights in the Declaration: it is a structural, architectural aspect of the Universal Declaration, and for other general international instruments of human rights, rather than merely another right. It is plausible to assert that the non-discrimination partakes of whatever maximum status of the Universal Declaration." P Thornberry, 322.

of equality and non-discrimination. Perhaps the most celebrated consideration and pronouncement on the concept of equality is the advisory opinion of Permanent Court in the *Minority Schools in Albania Case.*[95] In that case the Court elaborated on the meaning of equality when it stated

> "same treatment and security in law and fact implies a notion of equality which is ...peculiar to the relations between the majority and the minorities...Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations...The equality between members of the majority and of the minority must be an effective genuine equality; that is the meaning of this provision"[96].

The Court went on to say

> "far from creating a privilege in favour of the minority...it ensues from this stipulation that the minority shall not be given a privileged situation as compared with the majority...It seems difficult to maintain that the adjective `equal', which qualifies the word `right', has the effect of empowering the state to abolish the right, and thus to render the clause in question illusory; for if so, the stipulation, which confers so important a right on the members of the minority...but it would become a weapon by which the state could deprive the minority regime of a great value".[97]

The dissenting opinion of Judge Tanaka in the *South West Africa Case (2nd Phase)*[98] has been described as "probably the best exposition of the concept of equality in existing literature"[99] and it has played a phenomenal role in elevating the status of racial non-discrimination. In the *South West Africa Cases*, the applicants, Liberia and Ethiopia charged South Africa with the breach of international legal obligations in relation to the territory of South West Africa as imposed under Article 2 of the Mandate and Article 22 of the League Covenant. In the second phase of the case,

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95 A/B 64, 1935, 17.
96 A/B 64, 19.
97 *Ibid.*
98 ICJ Rep 1966, 6.
99 I Brownlie (ed.), *Basic Documents on Human Rights,* 1981, 2nd edn.(Oxford: OUP) 439.

though the Court declined to examine the merits of the claim on the grounds that "the applicants can not be considered to have established any legal right appertaining to them in the subject matter of the present claim", the judgment of the dissenting Judge, Judge Tanaka contains an excellent comment on the issue of prohibition of racial discrimination in general international law. After a detailed analysis drawing upon the various sources he concludes "the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law".[100] During his analysis of this concept of equality, Judge Tanaka says

> "the most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves, that they the aim itself and not means for others, and that, therefore slavery is denied. The idea of equality of man as persons and equal treatment as such is of metaphysical nature. It underlies all modern law systems as a principle of natural law"[101]

However, he goes on to elaborate that the principle of equality does not exclude the differentiation of treatment on the basis of such considerations as sex, language, age, religion, economic conditions and education. In his view,

> "to treat different matters equally in a mechanical ways would be as unjust as to treat equal matters differently" and that "the principle of equality before the law does not mean the absolutely equality, namely equal treatment of men without regard to individual concrete circumstances but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal".[102]

The respondents, in defending their policies, provided a number of cases of differential treatment such as the minorities treaties and different treatment based on gender drawing parallels with their policy of apartheid. Judge Tanaka intelligently and meticulously attempted to draw a distinction between permissible and impermissible forms of differentiation.

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[100] 293.
[101] 305.
[102] *Ibid.* 305-6.

> "Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with Justice, as in the treatment of minorities, different treatment of sexes regarding public conveniences, etc. In these cases, the differentiation is aimed at the protection of those concerned, and is not detrimental and therefore not against their will".[103]

The eloquence of Judge Tanaka's enunciation of the principle of non-discrimination nonetheless, reflects complexities if it was considered from a standpoint of undertaking special measures to protect minorities. If, as the respondents claimed, Apartheid was simply an expression of separate and autonomous development for the ultimate well-being of racially, linguistically, culturally and economically different communities, then, in view of preserving group identities it could not be *per se* be deemed illegal. Eloquent, though the opinion is, a close reading nonetheless reflects certain difficulties which general international law presents for the protection of minorities. According to Dr Thornberry

> "while stating the fundamental norm in terms of the fundamental norm in term of non-discrimination and non-separation there is an implicit recognition that the justice of the minorities' case may require permanent measures of protection. The justification of the minorities case is not achieved without difficulty, and the opinion demonstrates the tension between a concept of equality, which is not coherent enough to recognise and embrace their case. The judge goes too far in his denial of the realities of group identity which is subject to increasing recognition in later international instruments".[104]

In any event, recognition of the basic principles expressed by Judge Tanaka came in the ICJ's advisory opinion in the *Namibia case.*[105] The advisory opinion was as a consequence of the unacceptable stance of South Africa in the face of opposition by the international community as reflected through numerous General Assembly and Security Council Resolutions. In its Resolution 284 the Security Council requested the Court to advise upon the following matter "What are the legal consequences for the

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[103] *Ibid.* 313.

[104] Thornberry, 317.

[105] *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* ICJ Rep. 1971, 16.

states of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)?" The judgement of the Court is absolutely clear on the position of International law in relation to non-discrimination.[106] The Court is adamant and assertive in its view that the

> "official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the territory...These measures established limitations, exclusions or restrictions for the members of indigenous population [and that] to establish instead and to enforce, distinction, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter".[107]

As far as extrapolating wider norms relating to racial discrimination is concerned some caution may be called for; the opinion is directed towards the pariah State of South Africa and the focus is upon a "territory having an international status",[108] On the other hand such an interpretation, it is submitted, is too narrow; it is so constrictive and limited that it betrays reality. Schwelb's view is more convincing "what is a flagrant violation for the purposes of and principles of the Charter when committed in Namibia, is also such a violation when committed in South Africa proper, or for that matter, in any other sovereign Member State, or a Non-Self-Governing or Trust territory".[109] There are a number of other cases where the court has shared the same sentiment. In the *Barcelona Traction Case,* for example, in its description of the basic human rights in "contemporary international law" the Court referred to "protection from racial discrimination".

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[106] Schwelb *op.cit note* 92.

[107] paras 130 and 131; The views of Sir Gerald Fitzmaurics were much in the minority. His contention was that there was more in the South African argument that practices of Apartheid per se are not detrimental to the welfare of the population; *ibid.* para 208; Schwelb *op.cit note 92,* 349.

[108] Para 131.

[109] Schwelb, *op.cit note* 92, 349.

6.3.3 *JUS COGENS*

If the stance of the United Nations is considered through the role it has played in adopting international instruments relating to the prohibition of discrimination based on race, and the consensus which has emerged from state practice and the various judgements of ICJ, it is highly persuasive to argue that the prohibition of racial discrimination now forms part of the norm of *jus cogens.*

As we have noticed earlier, a divergence of opinion exists as to the contents of *jus cogens.*[110] Taking a more liberal approach, as Judge Tanaka did in the *South West Africa cases* it would be possible to view the whole of human rights regime having in it a character of *jus cogens.* He says

> "If we can introduce in the international field a category of law, namely *jus cogens,* recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus depositivum,* capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to *jus cogens".*[111]

On the other hand, an overtly generous view on *jus cogens* might stretch the concept to unacceptable limits so as to risk its indelibility. It is important to bear in mind Professor Brownlie's cautionary remarks when he says "that the major distinguishing feature of [the rules of *jus cogens*] is their relative indelibility".[112] Nonetheless, quite regardless of the extent to which one is prepared to agree with Judge Tanaka, out of the general category of human rights, prohibition of racial discrimination stands out as a safe candidate for inclusion in the list of *Jus Cogens.* According to Schwelb "if there is a subject matter in the matter in the present-day

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[110] See *infra* chapter 5, notes 94-98 and accompanying text.
[111] *South West Africa cases,* ICJ reports 1966, 298.
[112] 513.

international law which appears to be a successful candidate for regulation by peremptory norms, it is certainly the prohibition of racial discrimination".[113]

Mckean's point is persuasive when he suggests that even on a narrow view "the principle of equality and non-discrimination are prime candidates for inclusion in the list of *jus cogens*". He reiterates this view in a more assertive manner saying that there are good reasons "for accepting that the principles of equality and non-discrimination, in view of their nature as fundamental constituents of international law of human rights, are part of *jus cogens*".[114] Dicta in both the *Barcelona Traction Case*[115] and the *Namibia case*[116] reinforces this assertion. In a similar fashion Professor Brownlie includes prohibition of racial discrimination in his category of the list of non-controversial cases of *jus cogens.*[117]

While there seems very little doubt as to the recognition of prohibition of racial discrimination and apartheid as categories of *jus cogens*, it is submitted that it would be unwise to include in the same bracket any and every form of discrimination regardless of its form and content. Religious discrimination, may be alluded to as an example of the latter instance and some uncertainty exists as to its place in the norm of non-discrimination.[118]

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[113] E Schwelb "Some Aspects of International *Jus Cogens* as formulated by the International Law Commission" 61 *AJIL* (1967) 946-975, 956.

[114] 283.

[115] ICJ Rep, 1970, 3.

[116] ICJ Rep, 16.

[117] I Brownlie, 513; c.f. the "projected list" of Whiteman which does not contain an explicit mention of discrimination.; M Whitman "Jus Cogens in International Law with a Projected List" 7 *Ga.JCL* (1977), 609-626.

[118] It is worth noting that while the main thrust of Brownlie's argument in placing the "principle of racial non-discrimination" as a primary example of the norm of *Jus Cogens*, the supporting statement as far as religious and sexual discrimination is concerned, finds only a place as a footnote where he rather tentatively says "The principle of religious non-discrimination must have the same status as also the principle of non-discrimination as to sex" Brownlie, 513; also see Sullvian *op.cit note* 45.

6.4 WEAKNESSES IN IMPLEMENTATION OF THE RIGHT TO RACIAL EQUALITY AND NON-DISCRIMINATION

In the preceding sections we have already noted that there exists a broad consensus on the issue of prohibition of racial discrimination. This consensus is evidenced through an analysis of international treaty law as well as customary law. As far as the Race Convention is concerned, its unique position is reflected by the degree of its ratification's and by the readiness of States to endorse its provisions by the necessary amendments to their domestic legislation. A closer analysis, even that of the issue of racial equality however, discloses a number of weaknesses in implementation.

Discrimination based on race, colour, ethnicity, language, religion and culture are historical as well as contemporary phenomenon. The consequences of traditional practices of discrimination have produced complex problems in contemporary terms; it is largely recognised that legal prohibitions *per se* would not be completely effective in societies with ancient history of rivalries between communities or where there are vast economic, educational and cultural differences amongst various groups.

The differences may well not be based on the sophistication or otherwise of a particular community but because of prejudice and past acts of discrimination. As Meron rightly points out

> "past acts of discrimination have created systematic patterns of discrimination in many societies. The present effects of past discrimination may be continued or even exacerbated by facially neutral policies or practices that, though not purposely discriminatory, perpetuate the consequences of prior often intentional discrimination. For example when unnecessarily rigorous educational qualifications are prescribed of racial groups who were denied access to education in the past may be denied employment".[119]

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[119] Meron, *op.cit note* 55, 289; for a succinct analysis of a number of moral justifications in favour of Affirmative Action see B Parekh "A case for Positive Discrimination" in B Hepple and E Szyazczak (eds.), *Discrimination: The Limits of Law* (London: Mansell Publishing Limited), 1992.

In order to overcome past disabilities, a strong case can be made for affirmative action. However, if there is logic in the argument for overcoming past acts of discriminatory behaviour, there is also a strong lobby which would not be in favour of a *prima facie* discriminatory treatment in order to compensate for previous acts. In order to overcome past acts of discrimination going back to earlier generations, would it be fair and just to give priority to the contemporary less meritorious claims?

The intensity and vigour of the debate has resurfaced in constitutional, legal, administrative and judicial pronouncements, creating bitter divisions. North American and Indo-Pakistan lawyers need not be reminded of the divisive nature of the issues involved.[120] The Race Convention, as has been seen, provides for affirmative action policies. On the other hand, a closer analysis of the *travaux préparatoires* and the reservations that are entered against the articles relating to the provisions of affirmative action provide complexity to the issues. It hence remains unclear whether the broad consensus which is reflected in the general principles of the Convention is reflected in case of the provisions relating to affirmative action.

It may well be that at present, in view of the lack of clarity as to State practice it may be difficult to accept the view unequivocally that the principles relating to affirmative action exist in customary international law. Another recurrent problem to which considerable attention needs to be paid is the nature of the political and administrative structures in various States. There are a number of patently undemocratic regimes, which perpetuate on the basis of the exploitation of conflicts within the society. One only has to consider the problems confronted by such States as Iraq, Iran, Burundi, Rwanda and a number of other African and Asian States to appreciate the problems confronted.

The problems of racial, ethnic and religious tensions are confronted by most States, regardless of the fact of the official admission. Whereas these tensions are

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[120] *Brown v Board of Education, 347 US 483 1954; Regents of the University of California v Bakke, 438 US 265, 1978*; A Freeman "Anti Discrimination law A Critical Review" Politics of Law, 96-116; J Armour "Compensatory Discrimination: The Indian Constitution and Judicial Review" 16 *Melbourne ULR* (1987) 126-138.

evident in advanced industrialised States of North America as well as Western Europe, extreme forms of racial and ethnic divisions have taken place in States which have recently gained their independence. Tribal, ethnic and racial antagonism has been witnessed in many of the States of Africa. Similarly, acute divisions have been evident in Asia with the prime examples of Malaysia, Sri Lanka, India and Pakistan. In Malaysia for instance, as Van Dyke explains in some detail the issue of religion, race and linguistic identities is intertwined and discrimination by the Malays "the Bumiputras" persists against the Chinese, Indians and others.[121] Sri Lanka provides a stark example where, through a culmination of discriminatory legislation and governmental policies there has been a sustained effort to discriminate against the Tamils. The early restrictive and discriminatory laws relating to citizenship, and the linguistic and religious policies while all working against the Tamils reflect an unfortunate picture.[122] In view of the socio-economic, political and historical difficulties it is not surprising to see that a complete end to all forms of racial discrimination is an enduring and painstaking task. The implementation mechanisms that exist in pursuance of States conventional obligations certainly provide a reflection of the difficulties inherent in combating racial discrimination.

The key international implementation mechanism that has been devised as far as the elimination of racial discrimination is concerned is the procedure adopted under the Race Convention. The main vehicle for the performance of the Convention and for measures of implementation is the Committee on the Elimination of All Forms of Racial Discrimination (CERD) having 18 independent experts. They are elected from a list of persons nominated by the State parties from among their own nationals. The experts are of high moral standing, elected by State parties from their nationals but acting in their personal capacity.[123] The committee is involved in all the procedures concerned with the implementation. These systems consist of (a) a reporting

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[121] Van Dyke, 111-130.

[122] P Hyndman, "The 1951 Convention Definition of Refugee: An appraisal with particular reference to the case of Sri Lankan Tamil Applicants" 9 *HRQ* (1987), 49-73.

[123] Article 8 (1).

procedure (b) inter-State complaints procedure (c) an *ad hoc* conciliation commission to deal with the inter-State complaints (d) petitions by individuals or groups on an optional basis (e) petitions by inhabitants of colonial territories. The key mechanisms to date remains of State reporting to which we shall focus our attention. Article 9(1) provides

> State parties undertake to submit to the Secretary-General of the United Nations, for consideration by the committee, a report on the legislative, judicial, or other measures which they adopted and which they adopted and which give effect to the provisions of this convention;
> (a) within 1 year after the entry into force of the Convention for the state concerned; and
> (b) thereafter every two years and whenever the committee requests. The committee may request further information from the State parties.

According to Article 9(2)

> The committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from State parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from the state parties.

Despite the often considerable delay in receiving State reports, with frequent and significant omissions or lack of information, the flexibility and ingenuity with which the committee has performed its task has made the reporting procedure a success. Its flexibility in receiving delayed reports, usage of a variety of sources of information alongside the content of the report, guidance as to the content of the state reports, and accommodating a system of examination of reports have all contributed towards a positive element. Despite that, a survey of the reports reveals the considerable problems with the activities, some genuine due to the enormity of the issues faced, some due to the obligations undertaken.

The inter-State procedure under article 11-13 is supervised by CERD, with provisions for sub-ordinate ad hoc conciliation commission in the case of more intractable disputes.[124] The provisions of the aforesaid article are similar in nature to that of the ICCPR,[125] although in the case of the ICCPR it applies only to States that

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[124] Article 12 & 13.
[125] See Articles 41 and 42 of ICCPR.

have specifically recognised the competence of the committee to receive reports.[126] It is rather surprising to note that this procedure has not been used frequently, although some States have made allegations against other States (non-parties) of having generated difficulties in their implementation obligations.

Article 14(1) provides for a provision whereby a State party

> "may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that state party of any of the rights set forth in the convention. No communication shall be received by the committee if it concerns a state party which not made such a declaration"[127]

The provisions contained in the article are provisional. The drafting history reveals that this article reflects a compromise "between the desire to grant victims of racial discrimination an adequate remedy, on the one hand, and the reluctance of many States jealous of their sovereignty to recognise such a right, on the other".[128] By Article 14 (2) a State party agreeing to this procedure "may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions or group of individuals within its jurisdiction who claim to be victims". Hence, there exists the probability "of a double safeguard against the embarrassments which may be caused to a State party by individual or group petitions".[129] The attenuated nature of the provisions of the article are reflected through a careful reading, and the usage of the term "petition" rather than "communication" has led cynics to point out that the provisions are meant only "to deliver the message",[130]

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126 Article 41.

127 See the Optional Protocol to ICCPR 1966, Article 25 ECHR, Article 44 of IACHR.

128 Comment by the Ghanaian representative UN Doc A/C/.3/SR.1355, 10, Lerner *op.cit note 24*, 61; Since 1984 Article 14 mechanism has been in operation although its significance has not matched that of the first Optional Protocol under ICCPR. For cases before CERD see *Yilmaz-Dogan v. Netherlands* CERD Report, GAOR, 43rd Session, Supp 18, 59, 1988; *D.T.D. v. France* CERD, GAOR., 44th session, Supp 18, 84, 1989.

129 Thornberry, 270.

130 V Bitker "The International treaty against Racial Discrimination" 53 *Marquette Law Review* 1 (1970), 60-93, 79; "According to the Canadian representative Article 14 could not be more optional than it was" UN Doc A/C.3/SR.1357.

While the wording of the article indicates the provisional nature of the presence of such a body with the obvious hurdle of State sovereignty, the provisions relating to petitioning provides a considerable advance since at least the procedure allows racial or ethnic groups the right to petition before an international tribunal. Although, unlike the Optional Protocol, group petitions are acceptable, the scope is narrow both in comparison to article 25 of ECHR and article 44 of ACHR, which allow any person, non-governmental organisation or group of individuals to address petitions.

Although the Convention deals with racial groups and not specifically with minorities, minorities remain the natural victims of racial discrimination in most States and their cases have inevitably come under primary consideration.[131] The reporting procedures designed to obtain information regarding legislative and administrative practices also helps in the identification of the overall policies which affect the position of the States.

The role of CERD is in some ways analogous to that of the Human Rights Committee working under the auspices of the ICCPR and the responses which the States make to both these committees are also similar. However, unlike the individual petitions before the Human Rights Committee, the individual and group petitions before CERD have not rigorously been invoked and hence it is only speculative as to what role these petitions might play in the enforcement procedures.

The Convention operates in a broad framework affecting a considerable number of institutions within the State. State parties are required to ensure that not only public authorities are prohibited from acting in a discriminatory manner but also to ensure that private individuals and groups conform to the provisions of the Convention. The achievement of this task would necessarily entail the implementation machinery within both civil and criminal jurisdiction.

Secondly governments are often constrained in their actions due to a number of conflicting interests within the society. There has to be a balance between the

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[131] Thornberry, 272.

introduction of laws prohibiting racial discrimination and other rights including the freedom of opinion, conscience, expression and assembly. Thirdly, amongst the ordinances of the Convention lie a number of provisions which, despite being progressive in nature are onerous and financially demanding. Hence in order to be implemented thoroughly a number of provisions not only require time but can also put considerable strain on the position of economies of developing States.

Quite apart from these issues, there are a number of difficulties and misconceptions which need to be overcome. The experience of CERD has revealed that a number of States regularly misconceive their obligations under the Convention. While some States have regarded that there is no obligation to report if they claim that racial discrimination does not exist within their States,[132] others have felt under no obligation to report periodically if they have not instituted any further measures to combat discrimination.[133] Confusion has also been reported where a State declares that the ratification of treaty provisions are self-executory and the State party itself does not have to take any action to make changes in the constitutional or legal framework.[134] Another frequent occurrence noted by CERD has been the delay or the presentation of incomplete reports relating to legislative, judicial and administrative matters.

A survey of the State reports on the whole, however, reveals an encouraging picture. Australia, for instance upon ratification of the Convention adopted the Racial Discrimination Act 1975.[135] A number of discriminatory acts were declared unlawful, and the Act's overall impact promised to be phenomenal. Similarly the amendment introduced by Belgium in its constitutional framework has been done with the object of ensuring complete compliance with the provisions of the Convention.

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[132] See generally N Lerner, *The United Convention on the Elimination of all forms of Racial Discrimination* (Alphen aan den Rijn: Sijthoff and Noordhoff) 1980.

[133] *Ibid.* 116.

[134] *Ibid.*

[135] For Australia's initial report see (CERD/C/R.85/Add.3) see A/32/18 par 161-176; see Gerhardy v Brown (1985) 57 ALR 472.

The political changes that have taken place in the States of Central and Eastern Europe may have significant impact in the *de facto* observance of the rights provided in the Convention. However, even prior to this political and ideological transformation, State reports from some eastern European parties showed that a considerable number of positive steps had been undertaken. Bulgaria, which was the first country to ratify the Convention produced such encouraging evidence that in the proceeding of CERD itself it was said that the report of Bulgaria has "demonstrated the influence of the Convention on the development of domestic legislation on a State party".[136]

The comprehensive reports submitted by Poland,[137] the former German Democratic Republic,[138] the former Ukrainian Soviet Socialist Republic[139] and the former Soviet Union[140] similarly showed at least the *de jure* application of the provisions of the Convention. A similar encouraging response has been evinced from the State reports of developing countries. Niger in its fifth periodical report stated that it regards the norm of the prohibition of discrimination as one of *jus cogens.*[141] Philippines in her periodic reports has stated, through the adoption of the 1973 constitution and subsequent legislative changes it has prohibited all actions relating to discrimination.[142]

Senegal[143] and Swaziland[144] have similarly showed the adjustment made to their laws to comply with the provisions of the Convention. Despite the fact that some uneasiness has been evidenced on the part of a number of Muslim States, in particular

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[136] for a survey of the periodic reports submitted by Bulgaria see CERD/C/R.70, CERD/C/R.30/Add.12, Add.19. For their discussions see A/9018, para 249. A/31/18 and CERD/C/SR.413 & 414.

[137] CERD/C/20/Add.19 par 2; CERD/C/R.3/Add.4 & Add 23; CERD/R.30/Add.17; CERD/R.70/Add.28; CERD/R.90/Add.13; C/20/Add.10.

[138] CERD/C/R.63/Add 3; CERD/C/R.87/Add 1; CERD/C17/Add 1; for a discussion of their reports see A/9618, par 216-219; A/31/18 par 198-204; CERD/C/SR. 415-416.

[139] for reports presented by Ukraine CERD/C/R.3 Add 26 and Add 26 and Add 37; CERD/C/R.30/Add.20; CERD/R.70/Add 17; CERD/C/R.90/Add.15; For their discussion see A/9018, par 206-210; A/31/18, par 192-196; CERD/C/SR.418; CERD/C/20/Add 23.

[140] CERD/C/R.3/Add 12; CERD/C/R.30/Add.19; CERD/C/R.70/Add.14; CERD/C/120./Add.19;

[141] CERD/C/R.90/Add.20; CERD/C/20 Add.9 & Add.30

[142] See CERD/C/R.3/Add.13; CERD/C/R.30/Add 11 & Add 37 and CERD/C/R.7 and Add 11.

[143] For Senegal's reports see CERD/C/R.50/Add.14 and CERD/C/R.77/Add.10; CERD/C/R.50/40 p 15.

[144] CERD/C/R.3/Add.33 and 45; CERD/C/R.30/Add.40.

those from the Middle East,[145] the overall impression in relation to the implementation is impressive.

There remains however the fact that the incorporation of legislative provisions are not in themselves sufficient to create a non-discriminatory society. It takes time to overcome the age long prejudices of racial, ethnic and linguistic superiority. The sacred values of equity, justice and non-discrimination could only be achieved gradually and progressively.

6.5 CONCLUSIONS

Discrimination exists in myriad forms and its potentially evil manifestations are capable of affecting every member of society. As far as racial discrimination is concerned it is highly persuasive to argue that there is now an absolute prohibition of it in customary international law. Members of racial and ethnic minorities would therefore be entitled to protection from discrimination under general international law. Discrimination based on race or ethnic origin is however, only one facet of a wider phenomenon. Religious or Linguistic discrimination, although associated to discrimination in general and categorised in the same bracket alongside racial discrimination, are evils in their own right with far reaching implications.

It may well be possible to argue that the general prohibition existing in international law against discrimination on grounds of *inter alia* sex, race, ethnicity, religion and language belongs to the category of peremptory norms of *jus cogens*. On the other hand, the consensus formed on the issue of prohibition of discrimination based on grounds of race and ethnicity cannot be said to match the relative lack of concern shown on grounds of religion. The issue of religion, in particular as Thornberry elaborates:

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[145] See for instance Iran's 5th periodic report CERD/C/20/Add.1. For a consideration of the committee's discussion in relation to Iraq's reports see A/9618, par 105.

> "takes international law to the limits of human rights, at least in so far as the law functions in a community of States. It is quite meaningless, for example, to the adherents of a religion to have their beliefs or practices declared to be contrary to 'Public morality'. To the believer, religion is morality itself and its transcendental foundation grounds it more firmly in terms of obligations than any secular rival, or the tenets of other religions. All religions are to a greater or lesser extent 'fundamentalist' in character in that they recognise that their is the just rule, the correct avenue to truth. When the States and the dominant religion are in harmony with each other, friction is minimized, but in States determined to carry the secular, and anti-religious approach to a position of dominance, or in the case of minority religions struggling to survive in a State dominated by adherents of a majority group, conflict is always possible and frequently occurs. No such considerations militate against the international proscriptions of racial discrimination".[146]

Even in the case of racial discrimination, the apparent international consensus may have many elements of superficiality. We have already noted that while unanimity lies in the ideal of equality and a non-discriminatory society, considerable differences exist on the view of achieving genuine equality and overcoming previous discrimination. As in the Genocide Convention, it may well be argued that not every provision in the Convention bears the mark of customary law.[147] Despite the large number of ratifications of the Race Convention, the issue of affirmative action has remained divisive. State practice is equivocal without, it is submitted, giving any firm guidelines on the position as regards customary law.[148] The Race Convention makes explicit provisions as to affirmative action and the issue is highly significant if progress is to be made in the direction of attaining genuine equality.

A number of tensions precipitate when the matter of taking measures to prohibit racial discrimination is considered, more particularly that of obligations on the part of States to outlaw organisations that incite racial hatred. Article 4 of the Race Convention has already generated debate, controversies and reservations. There can often be a fine dividing line as to what would be racist expressions, or views of a

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[146] Thornberry, 324.

[147] See *Supra* Chapter 5; R Baxter "Multi-lateral treaties as evidence of Customary International Law" 41 *BYIL* (1965-66), 275-300.

[148] *Ibid.*, 326.

particular organisation which may be taken to work against a particular race, ethnic, religious or national groups as against merely sarcastic demeanours or a rightful expression of freedom of speech. The liberties which a tolerant society bestows would surely include as much a right to free expression of views and values as it would to prevent racial abuse and violence.

SECTION B

EMERGING RIGHTS

CHAPTER SEVEN

MINORITIES AND THE RIGHT TO AUTONOMY

7.1 INTRODUCTION

The previous chapters relating to the rights of minorities have attempted to analyse the vacillating approach of international law towards minorities.[1] As has been noted, since 1945 while international law has attempted to provide minorities with a basic right to physical existence, the scope of this right is not clear.[2] The existence of minorities as distinct groups remains under jeopardy as the threat of their physical extermination seems to have provided an unfortunate backdrop to the possibility of their extinction as autonomous ethnic, linguistic and religious entities.

International law, in its modern development, has placed greater emphasis on the issue of non-discrimination with the view that all individuals are to be treated equally. It has been argued that attempts at equality for all individuals and the protection of minorities overlap. This view has been re-affirmed by various authorities which have perceived minority rights and prevention of discrimination as two sides of the same coin.[3] However the formulation of human rights jurisprudence on the ideals of physical existence and non-discrimination for all individuals, it is submitted, is not in itself adequate for preserving distinct identities of minorities. Although the rights to physical existence and of non-discrimination are essential pre-requisites for a minority to survive as a separate and distinct entity, positive measures are called for.

The key question that needs to be analysed is the extent to which contemporary international law has advanced towards furnishing minorities with what has been termed "a

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1 See *Supra* Chapters 3-6.

2 *Supra* chapter 5.

3 According to the Special Rapporteur Capotorti the prevention of discrimination and implementation of special measures to protect minorities "are merely two aspects of the same problem; that of fully ensuring equal rights to all persons". Capotorti, 26.

right of autonomy". A survey of the international legal norms for the protection of minorities reveals the inadequacies in the system; the difficulties in conceiving international law as a medium to protect minorities are substantial. On the other hand, international law is not static, and as the present chapter attempts to examine, there are signs of more liberal tendencies in so far as the norms relating to minorities are concerned.

The present discussion illustrates a progression in a more positive direction, although it is suggested that in view of the inherent difficulties of international law, these liberal tendencies have, as yet, to concretise into the fully established right of autonomy. The meaning of the term "autonomy" is of considerable importance which we shall consider in some detail. The third section of the present chapter considers the possible elements of the concept of autonomy in existing international instruments, whereas the penultimate section deals with the problem in recognition and implementation of the concept.

7.2 ELABORATION OF THE CONCEPT OF "AUTONOMY" IN INTERNATIONAL LAW

Autonomy is not a term of art and has no precise definition or meaning in international law.[4] To the contrary, John Chipman Gray notes that "on no subject of international law has there been so much loose writing and nebulous speculation as on autonomy".[5] There are differences of opinion amongst international lawyers and publicists as to the precise content of autonomy; though there is a relative agreement that autonomy can be interpreted both in a broad and a narrow sense. Hannum and Lillich, while

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4 "There are various models of 'self-government' or 'autonomy' but neither of these is a term of art". I Brownlie "Rights of Peoples in International law" (ed.) J Crawford, *Rights of Peoples,* (Oxford: OUP), 1988, 1-16, 6. H Hannum and R Lillich "Autonomy in international law" Y Dinstein *Models of Autonomy,* (New Brunswick and London: Transaction Books), 1981, 215-254; also see R Lindley, Autonomy, 1986.

5 Cited Hannum and Lillich *(ed.) ibid., 215.*

focusing primarily on what they regard as "general, political or governmental autonomy" and treating it to be consistent with "full autonomy" or the principle of "self-government" distinguish it from the more "restrictive types of autonomy e.g. cultural or religious autonomy".[6] In their view:

> "Autonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by autonomous entity in its political decision-making process. Generally, it is understood to refer to independence of action on the internal or domestic level, as foreign affairs and defence normally are in the hands of the central or national government, but occasionally power to conclude international agreements concerning cultural or economic matters also may reside with autonomous entity".[7]

With their primary attention focused on cases of "full autonomy", they proceed to consider its various ingredients and make a survey of governmental structures and a number of particular issues and power. They observe the governmental structures of autonomous entities with the distribution of the power, authority and responsibility of the executive, judiciary and legislature divided between the autonomous entity and the Central government. They then consider particular issues, such as international personality, policing arrangements and security, financial and economic arrangements.

A consideration of cultural, religious and minority group autonomy only occupies a peripheral place in their study, though they do acknowledge and provide examples of such cases

> "There are, however, several entities which have been granted 'autonomy' not as a response to desires for political self-government, but rather as a means of particular concern to these groups e.g. cultural autonomy or religious freedom. Examples of such limited autonomy include the Belgian linguistic communities, the Aaland Islands, the millets

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[6] *Ibid.* 218.
[7] *Ibid.*

under the Ottoman Empire, ethnic minorities in Eritrea, and de facto cultural autonomy enjoyed by traditional societies in Tokelau atolls".[8]

Professor Bernhardt endorses the aforementioned distinction made by Hannum and Lillich when he comments

> "The notion of `autonomy' has broader as well as narrow meaning. In the broader sense, autonomy means autonomous self-determination of an individual or an entity, the competence or power to handle one's own affairs without interference. In national public law one speaks of autonomy of universities, of cities, this is always done in relation to the state. In the broader sense autonomy describes the limits of state interference, on the one hand and the autonomous determination and regulation of certain affairs by specific institutions on the other...
>
> *In a more narrow sense, autonomy has to do with the protection and self-determination of minorities. And it is in this sense that the notion of autonomy is used in modern international law.*
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> *The essential element of autonomy is the granting of certain rights to a specific part of the state population, in view of its characteristics which differ from the majority of the population...Linguistic, cultural and ethnic minorities are the proto-types of entities which need protection. In order to preserve their culture, the language or their religion. They are interested in having their own schools, other cultural institutions etc. in excluding state and majority interference as far as their specific background. Because a certain group is, and feels different from majority of the population, it longs for different rights. This seems to me to be the central element underlying autonomy.... ".*[9]

Professor Bernhardt then goes on to distinguish between what he terms "territorial autonomy" from "personal autonomy". "Territorial autonomy" is applied to a situation where autonomy is provided on a territorial basis. "Personal autonomy" denotes to situations where members of a minority are scattered in various parts of the country and autonomy is granted on the basis of their personality. The concept of "personal autonomy" seems significant in order to satisfy the myriad possibilities in which minorities can exist. Returning to our analysis of the concept of autonomy, Hannum in his more recent work has proposed that

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[8] *Ibid.* 246.

[9] *Italics added.* R Bernhardt, "Federalism and Autonomy" *ibid.* 23-28, 26.

> "...a new principle of international law can be discerned in the interstices of contemporary definition of sovereignty, self-determination and the human rights of individuals and groups, which will support creative attempts to deal with conflicts over minority and majority rights before they escalate into civil war and demands of secession. This right to autonomy recognises the right of minority and indigenous communities to exercise meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with the ultimate sovereignty-as that term is properly understood-of the State".[10]

The present study, with its focus on the position on ethnic, linguistic and religious minorities concentrates on this issue of autonomy "in the narrow sense" as described by Professor Bernhardt. Attempts at defining concepts have often come up without success; an inability to define conceptions is particularly glaring in international law.[11] In the light of observations made earlier, it is difficult to conceive a possible consensus definition of autonomy. However for the purposes of the present study, Hannum's views as cited above are followed. Autonomy is therefore taken to mean as

> "...recognising the right of minorities and indigenous communities to exercise meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with...[State] sovereignty."[12]

Autonomy as a concept, highly attractive though it may appear, provides a number of complexities. Not least amongst these is its natural affinity and overlap with that of self-determination and all that that may entail. Bearing in mind the probable incendiary tendencies of self-determination, States may feel hesitant to recognise autonomy as a right of minorities under international law. In recent years, however there appears to be a move in the direction of recognition of some form of autonomy for the minority groups and a review of recent international and national would provide strength to this argument. On

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[10] Hannum, 473-4.
[11] *Supra* Chapters 2 and 3.
[12] *Ibid.*

the other hand, it probably is the case that most States are unwilling to be bound under international law to concepts which may ultimately be linked in one form or another to the right of self-determination to minorities.

7.3 MINORITIES AND THE ISSUE OF AUTONOMY IN INTERNATIONAL LAW

Cultural, linguistic and religious autonomy is not an alien concept in the vocabulary of minorities. Its history stretches to the time when minorities as distinct groups came to be recognised. Nascent reflections of autonomy are evident in the Millet system as practised in the Ottoman currency;[13] concern that was expressed at the end of the First World War for the position of minorities;[14] President Wilson's fourteen points programme, point twelve of which declared that non-Turkish minorities of the Empire should be "assured of an absolute unmolested opportunity of autonomous development";[15] the mandate system with the application of the principle "that peoples form a sacred trust of civilisation";[16] minorities treaties[17] and the outcome of the Aaland Islands.[18]

The subsequent developments that took place after the Second World War more or less resulted in the erosion of any independent concern that previously existed for ethnic, linguistic and religious minorities and for their aspiration of autonomy and existence as distinct entities. The interest in the position of minorities that could be ascertained was largely of an indirect nature, namely the United Nations preoccupation with upholding individual human rights and concern with non-self-governing territories;

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13 *Supra chapter 4*; V Van Dyke, 1985, 74.
14 *Supra chapter 4.*
15 D McDowall, *The Kurds,* (London: MRG), 1991, 15-16.
16 Article 22 of the Covenant of the League of Nations.
17 *Supra chapter 4.*
18 *Ibid.*

the territorial aspects of Chapter XI is of considerable significance. It concerns non-self-governing territories and Article 73 applies to territories "whose peoples have not yet attained a measure of self-government". A focus of this nature upon territorial elements meant a lack of consideration for ethnic, linguistic and religious groups who were without a territorial base.

While the issue of self-government, as we have noted, has increasingly been dominated by the surge for independence of the former colonies,[19] the progression in the Untied Nations with the emphasis on individual human rights and non-discrimination meant a neglect of the issue of collective identity and autonomy for minorities.

The United Nations Charter makes no references to minorities and it would appear that the Charter had been framed with the view that while focus should be on the rights of individuals, minority rights could be adequately protected in a regime of non-discrimination.[20] As Mckean says, "There was a sharp reaction against the protection since the interests of minority groups were generally believed to be adequately safeguarded by the faithful observance of the principle of non-discrimination".[21] The Commission on Human Rights that was set-up in 1946 as a subordinate body of the Economic and Social Council (ECOSOC) worked with this ideology in mind and the history of the formation of the Sub-Commission presents an interesting analysis for ascertaining the then existing interest in the protection of minorities.[22]

Although the ECOSOC permitted the inclusion in the terms of reference of the Commission, the mandate to protect minorities, the interests of the Commission and its Sub-Commission in the area of minorities have only occasionally been impressive. This

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19 "From the very beginning of the United Nations, emphasis has been put on the development of non-self-governing territories towards independence" L Sohn, "Models of autonomy within the United Nations framework" in Dinstein (ed.) *op.cit note 4*, 5-22, 9.

20 I Claude Jr, *National Minorities An International Problem* (Cambridge, Mass: Harvard University Press), 1955, 211.

21 Mckean, 59.

22 P Alston "The Commission on Human Rights" (ed.) P Alston *The UN and Human Rights A Critical Appraisal*, (Oxford: OUP), 1992, 126-210.

could partly be explained by the Constitution of the said bodies. The Commission consists of representatives of States[23] and although the Sub-Commission is a body of independent experts, the individuals therein are nominated by States themselves and sometimes act as official spokesmen.[24]

The Commission was authorised to establish separate Sub-commissions on protection of minorities and prevention of discrimination.[25] However in the end it decided to have just one Sub-commission.[26] The Sub-commission has only engaged itself actively in the issue of the protection of minorities during 1947-54 and then 1971 onwards.[27] However, between 1955-1971 the Sub-commission concentrated on the issues relating to non-discrimination.

Kunz's sarcasm bears a considerable measure of truth, at least in the early years of the United Nations- "At the end of the first World War international Protection of minorities was the great fashion: treaties in abundance, conferences, League of Nations activities, an enormous literature. Recently this fashion has become nearly obsolete. Today the well dressed international lawyer wears human rights".[28] The change in trends and fashions was made evident through a decline in the international agreements focusing upon the position of minorities, with greater emphasis on individual human rights. The eclipse in concern for minorities was steady, though not complete, as Minorities did feature in the international agenda in certain agreements. These included the agreement signed between Austrian and Italian Governments in Paris guaranteeing the "German speaking inhabitants" of the Bolzano Province and other neighbouring territories and

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23 *Ibid.*

24 A Eide "The Sub-Commission on Prevention of Discrimination and Protection of Minorities" (ed.) Alston *ibid., 211-264.*

25 J Kelly, "National Minorities in International Law" 3 *JILP* (1973), 253-273, 264-5.

26 *Ibid.*.

27 See Mckean 75-77..

28 J Kunz "The Present Status of International Law for the Protection of Minorities" 48 *AJIL* (1954) 282-287, 282.

providing for a number of rights in particular linguistic and cultural rights.[29] Similarly, the Peace treaties of the Allied Powers with Bulgaria,[30] Hungary,[31]Finland,[32] Italy[33] and Rumania[34] (signed on 10 February 1947) and Japan[35] (signed 8 September 1951) contain provisions requiring those States to protect the basic human rights without any distinction as to race, sex, language, religion. A special statute contained in the Memorandum of Understanding was signed between Italy, the UK, USA and Yugoslavia in relation to the Free territory of Trietise. Similar developments have taken place for the protection minorities in continents other than Europe. In 1950 the newly independent States of India and Pakistan entered into an agreement regarding the protection of their minorities,[36] which shall be a subject of our consideration in Part IV.

7.3.1 The Universal Declaration of Human Rights

As noted above, the Sub-Commission was not heavily involved in drafting the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*,[37] which although not mentioning the term "minority" effectively applies to minority groups.[38] The protection from genocide in the Genocide Convention is accorded to "national, ethnical, racial or religious" groups, though the absence of the term "minority" possibly reflects

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29 Signed 5 September 1946. Capotorti, 30. Austrian State treaty 1947; Bilateral treaty containing minority protection provisions include treaty of Friendship and Mutual aid between Poland and Checkoslovakia 1947; Mckean, 50.

30 UNTS 41, 21 Art 2.

31 UNTS 41, 213 Art 6.

32 UNTS 49, 3 Art 15.

33 UNTS 42, 3 Art 3(1).

34 UNTS 42, 3 Art 3(1). The same provisions appeared in article 6 (1) of the State treaty with Austria 1955 UNTS 217, 223. The treaty provides special measures of providing positive measure for minority protection. E Schwelb "The Austrian State treaty and Human Rights" 5 *ICLQ* (1956), 265-272.

35 See in particular the preamble which emphasises on the basic principles of human rights UNTS, 217, 45.

36 Agreement on Protection of Minorities April 8, 1950, Pakistan-India 131, UNTS, 3.

37 UNTS 78, 277.

38 *Supra* chapter 5.

anti-minority sentiments of that time. More significantly for the present debate the omission of any provisions relating to cultural genocide represents an unfortunate aspect of the Convention.[39] Despite a number of efforts on the part of various organisations, States and members of the Sub-Commission to provide limited rights of autonomy to minority groups[40] no specific references to the protection of minorities were included in the *Universal Declaration of Human Rights.*[41] According to a draft presented by the Division of Human Rights:

> In all countries inhabited by a substantial number of persons of a race, language or religion other than persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of equitable proportion of public funds available for the purpose, their schools and cultural institutions, and to use their language before the courts and other authorities and organs of the state and in the press and public assembly.[42]

A refined and revised draft of the aforesaid article as presented by the Sub-Commission stated

> In States inhabited by well defined ethnic, linguistic or religious groups which are clearly distinguished for the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as is compatible with public order and security to establish and maintain their schools and cultural or religious institutions and to use their own language and script in the press, in public assembly, and before the courts and other authorities of the state, if they so choose[43]

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39 *Ibid.*

40 See article 31 of the drafting committee's article relating to minorities. The Commission however deleted these provisions and also Soviet proposals relating to (1) the provision that cultural groups should not be denied the right to free self-development and (2) to grant national minorities the right to have schools in their mother tongue. The successful argument against these proposals both in the commission and the third committee were that the new human rights regime would be adequate to protect minorities and in any event a single article would be inadequate to protect such a complex issue, UN Doc E/CN.4/SR. 73, 5-6, 10 and E/CN.4/SR.74, 4-6; Thornberry 133.; Mckean 70-71.

41 UN G.A Res. 217A (III) UN Doc. A 1810 (1948), 71.

42 UN Doc E/CN.4/AC.1/3 Add.1, 409.

43 UN Doc E/CN.4/SR.52, 9

Notwithstanding the absence of any specific articles in the Declaration, there is nonetheless a mention of a number of rights, which can parenthetically be associated to the rights of minorities. The *Declaration* specifically provides in article 1[44] and 2,[45] the right of equality and non-discrimination.[46] The right to freedom of thought, conscience and religion is stated in Article 18,[47] the right to freedom of opinion and expression is provided in article 19,[48] the right to peaceful assembly and association in article 20,[49] the right to education in article 26[50] and the right to freely participate in the cultural life of the community to provide the necessary foundation for providing individual members a natural claim for autonomy as a group right.[51]

7.3.2 The International Covenants

Despite the adoption of the individualistic and universalistic Declaration with the emphasis on the principle of non-discrimination, the General Assembly did show some interest in minorities by adopting Resolution 217 (III) which declared that the UN cannot remain insensitive to the fate of minorities. It was also assumed that since the Universal

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44 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

45 Every one is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status....

46 *Infra* Chapter 6.

47 "Every one has the right to freedom of thought; conscience and religion, this right includes freedom to change his religion or belief, *either alone or in community with others* and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

48 "Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions with out interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

49 (1) "Every one has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."

50 Article 26 provides *inter alia* Education "shall be [directed] to promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activates of the Nations for the maintenance of peace. According to sub-section 3 Parents have a prior right to choose the kind of education that shall be given to their children".

51 Article 27 (1) provides "Every one has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefit".

Declaration was to form the first part of International Bill of Human Rights a comprehensive set of rights would be introduced in subsequent documents. The Declaration, after a considerable period of gestation, was followed by the International Covenant on Civil and Political Rights (ICCPR)[52] and the International Covenant of Economic Social and Cultural Rights (ICESCR).[53] The original plan had been to contain substantive rights in just one Covenant. However, there was considerable disagreement as to the inclusion of Civil and Political rights alongside the Economic, Social and Cultural rights and it was eventually decided to have to two Covenants, which now form the basis of international legal obligations in human rights.

The ICCPR and ICESCR are of particular importance for the present discussion for a number of reasons.[54] Unlike General Assembly Resolutions which are not *per se* binding, the Covenants are binding on States which are parties to it. The identical Part 1 of both the Covenants refers to the *Rights of All Peoples of self-determination*, which although not necessarily relevant to the minorities, may have a bearing on their position. Article 27 of the ICCPR is of special importance for minorities as it remains the main Provision in current international law which attempts to provide direct protection to ethnic, linguistic and religious minorities.

The implementation of the ICCPR, like other human rights instruments, is required at national level in the first instance. By article 2(1) of ICCPR each State party

> "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status".

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52 Annex to UN Gen. Ass Res. 2200 (XXI), GAOR, 21st Sess, Sup 16, 49; UKTS 6 (1977); Cmnd 6702.

53 Annex to UN Gen. Ass Res. 2200 (XXX), GAOR, 21st Sess, Sup 16, 49; UKTS 6 (1977); Cmnd 6702.

54 Robertson and Merrills, *Human Rights in the World An Introduction to the Study of International Protection of Human Rights*, (Manchester: Manchester University Press), 1989.

The supervisory body in charge of the implementation of the Covenant is the Human Rights Committee[55] whose functions include the supervision and over seeing of State reports,[56] to deal with the complaints made by State parties that one of the other State party is failing to perform its obligations in a proper manner.[57] Finally under the Optional Protocol, individuals who claim to become victims of violations of human right abuses could bring a communication before the Human Rights Committee.[58]

7.3 ARTICLE 27 AND THE ISSUE OF AUTONOMY FOR MINORITIES

As far as the protection of persons belonging to minorities is concerned, article 27 of the ICCPR stands out as the main article in international treaties, and hence the status which it has, necessitates a detailed analysis.[59] In an environment unfavourable for the preservation of special provisions for minorities, an analysis of the *travaux préparatoires* of article 27 reveal the tensions inherent in drafting such a provision. The final draft of article 27 provides

> "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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

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55 For measures of implementation see Article 28-45 of the ICCPR.

56 *Ibid.* Article 40

57 *Ibid.* Article 41.

58 D McGoldrick, *The Human Rights Committee,* (Oxford: OUP), 1991; J Rehman "The Role of the Human Rights Committee in dealing with Individual Petitions under the Optional Protocol" 11 *JLS* (1992), 13-22; A De Zayas, J Th. Moller, T Opsahal "Applicability of the International Covenant on Civil and Political Rights under the Optional Protocol of the Human Rights Committee" 28 *GYIL* (1985), 9-64; S Ghandhi "The Human Rights Committee and the Right of Individual Communications" 57 *BYIL* (1986), 201-251.

59 H Hannum, *Documents on Autonomy and Minority Rights,* (Dordrecht: M.Nijhoff), *1993*, 27; M Nowak, *United Nations Covenants on Civil and Political Rights, CCPR Commentary* (Kehl am Rhein: Strasbourg) 1993, 482-3.

The article refers to terms provoking a number of questions and although an attempt has already been made to deal with some of those complicated issues,[60] the particular context of article 27 requires certain explanations. The article is drafted in a rather awkward manner; it seems to be framed with a basic presumption that a majority of States comprise of homogenous groups, and the issue of minorities is confined to only a few of these. Indeed this was the precise stance adopted by the so-called "countries of immigration" and in particular a number of American States. The phrase *"In those States in which ethnic, religious or linguistic minorities exist"* was introduced by Chile at the ninth session of the Commission on Human Rights.[61] The aim behind such wording appears to be to provide protection only to the long established minorities and to prevent or discourage the formation of new minority groups.[62] Hence, it appears that if the benefits are to be accorded to members of minority groups, official recognition of their existence is a necessary prerequisite. This phraseology invites States to deny the existence of minorities within their boundaries, and many have not hesitated to do so.[63]

The *travaux préparatoires* reveal that according to the approach adopted by most of the Latin American States issues relating to minority rights were not a problem for their continent but were confined to some European and Asian countries. The Chilean representative, for instance

> "agreed that this problem of minorities which arose in some European Countries did not arise in the American States, particularly those

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60 See *infra* chapter 2.

61 9 U.N ESCOR, Commission on Human Rights, UN.Doc E/CN.4/SR. 368-71 (1951).

62 According to Mr Diaz Casanueva "the term `minority' as used in the article meant `separate or distinct groups, well defined and long established on the territory of a State; hence the term must be understood in a sociological and historical sense'...`he would not like to think that the article would be used to foster the formation of minorities anywhere' GAOR, 16th Session, 3rd Committee, 1103rd meeting, paras 23, 25; Mr Munguia Nova of Nicaragua "wished to make it clear that in its judgement the article would not foster the growth of minority groups in Latin America by referring explicitly to `existing minority groups'", *ibid.* para 36.

63 Mr Kaliswali of India had warned that such phraseology "might encourage dictatorial States to refuse to recognise the rights of minorities living in their territory, simply by denying their existence" *ibid.* para 37.

> of Latin America. They would not like the adoption of article [27] to encourage the formation of minorities, which was already bound to be promoted by the nationalist movements appearing everywhere in the world".[64]

A number of them went so far as to declare that they had no minorities existing in their States. In this regard the position of the delegates from Brazil,[65] Chile[66] and Ecuador[67] needs to be noted. In addition to the stance adopted by the so-called "countries of immigration"[68] representatives from a number of Asian and African States presented a similar view.[69] Although the Eastern European States adopted a more favourable approach towards the existence of minorities, they were reluctant to make concession if it threatened their socio-political ideologies.[70] The recognition of the existence of religious minorities was, for instance, a difficult issue. The attitude of the former German Democratic Republic is typical in the sense that it asserted that since there was no State religion there were no religious minorities either.[71] However vacillation has not merely been an attribute of the formerly communist States, but can also be evidenced in assertions of western democracies. France, for example made a formal declaration in which it stated that "Article 27 is not applicable so far as the Republic is concerned".[72]

The obligations in the article require States "not to deny the right [to persons belonging to minorities] to enjoy their own culture, to profess and practice their own religion, or to use their own language". The wording of the provision, contrary to other

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64 GAOR, 16th Session, 3rd Committee, 1103rd meeting, para 19; also note the view of Mr Cox (Peru) in 1104th mtg., para 4.

65 *Ibid.* 1103 mtg. para 12

66 *Ibid.* para 23

67 *Ibid.*, para 44.

68 Australian delegate *ibid.* para 25

69 See the position adopted by the delegate from Guinea *ibid.* para 53.

70 See e.g. the comments of the Soviet delegate Mr Sapozhnivikov 1104th meeting. paras 10-12.

71 GAOR, 33rd Session, Special Suppl. No 40, UN Doc A/33/40 para 177.

72 Human Rights, International Instruments, signatures, Ratification and Accessions etc. ST/HR/4/REV.4

articles, is definitely negative in tone,[73] and there is a clear difference in approach from other provisions where an express prohibition is involved.[74] The distinction of individual or collective rights also does not provide a clear answer as the only provision containing collective rights in the Covenant has been put considerably forcefully; article 1, as we have already indicated, provides *All Peoples with a Right to self-determination.*

The obligations that are to be imposed upon State parties have been a matter of considerable debate. As the discussions of the Commission indicate, it was the generally held view that the text that had been presented by the Sub-commission was not strong enough to place States and governments under the obligation of providing special facilities to members of minorities. The sole obligation that was placed on the States was not to deprive or deny members of the minority groups of the status they were already enjoying.[75] The culmination of these factors have led a number of academics to suggest that State parties are only required to adopt a benevolent attitude towards their minorities, not to hinder in exercising the rights as stated in the article and to do nothing positive to protect their minorities from being assimilated by the dominant majority. Indeed, there is a considerable academic body which considers that article 27 does not provide collective rights at all. According to Modeen

> "The clause speaks of the rights of a (national) minority member in community with other members of his group to use his own language and enjoy his own culture. Such formulation cannot be interpreted as affording any collective rights. The clause in fact merely states the obvious, that a member of a national minority speaks his own language within his group and cultivate his own qualities. *Thus article 27 reveals an individualistic*

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[73] In contrast see e.g. Article 18(1) "Every one shall have the right to freedom of thought, conscience and religion", Article 24(3) "Every child has the right to require a nationality".

[74] see e.g. Article 7 "No one shall be subjected to torture, cruel, in human or degrading treatment"

[75] According to Capotorti during the discussions at the Commission "It was generally agreed that the text submitted by the Sub-Commission would not for example place States and governments under obligation of providing special schools for persons belonging to ethnic, religious and linguistic minorities. Persons who comprised of ethnic, religious or linguistic minorities could as such request that they should not be deprived of the rights recognised in the draft article. The sole obligation imposed upon them was not to deny that right". Capotorti, 36.

> *approach to the minority problem. According to its wording the clause does not concern minorities as such, but only single members of it.*
>
> The minority States are not required to enter into any commitments to protect their minorities, beyond avoiding hindrances on the minority group employing their own language and developing their own culture. With this unclear formulation it is difficult to discover any express right for a national minority to establish its own schools, even at its own expense and even less are they entitled to receive instructions in their own tongue in schools mandated or supported by the State. Nor is there any sign that minority possesses the right to use its own language in relationships with public authorities".[76]

He then advances on the premise that

> "the international Bill of Human Rights is thus no real advance on the Universal Declaration of Human Rights, so far as the treatment of national minorities is concerned".[77]

In Tomuschat's view, article 27 protects only individual persons and not minority groups as such, a formulation that "can not be viewed just as an accident of drafting".[78] Similarly, Sohn sees the structure of article 27 as "a deliberate decision to avoid giving to the group an international personality".[79] Dinstein, however, is not in favour of adopting a restrictive view. His approach is that if article 27 is not to be rendered meaningless, it must go beyond the ambit of article 18 because "the intention of the drafters of article 27 is to grant collective human rights to members of a minority *qua* a group".[80] In an earlier work, which has carried substantial influence, he is firmly of the view that "international

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[76] *Italics added*; T Modeen, *The Protection of National Minorities in Europe,* (Abo: Abo Akandmi) 1969, 108.

[77] *Ibid.*

[78] C Tomuschat "Protection of Minorities under article 27 of the International Covenant on Civil and Political Rights" Volkerrecht als Rechtsordnung Internationale Gerichtbarkeit Menscherrechte Festschrift Fur Herman Mosler (1983), 949-979, 954.

[79] Sohn "Protection of Minorities" Henkin, 270-289, 274.

[80] Y Dinstein "Freedom of Religion and Protection of Religious Minorities" in Y Dinstein and M Tabory (eds.) *The Protection of Minorities and Human Rights,* (Dordrecht: M.Nijhoff), 1992, 145-170.

law accords rights-on a collective basis-to ethnic, religious and linguistic minorities"[81] and in fact goes on to treat the provisions of the article as declaratory in nature and reflecting minimum rights recognised by customary law,[82] a matter which is of considerable debate and shall be addressed separately.

Equally, it makes sense to argue that, in order for the article to have any meaning over and above the other provisions of the Covenant, it must carry some positive obligations.[83] A necessary corollary of the preservation of cultural, religious, and linguistic autonomy is the imposition of positive obligations. The usage of the term *"in Community with others"* could also be used in favour of a more positive interpretation of the article as it is the community which is the source of the individual's religion, race and language.[84] This interpretation would be in line with the principles laid down in Article 31 of the Vienna Convention on the Law of the treaties 1969.[85] Thornberry suggests that in order to add anything at all to the existing provisions relating to, for instance, the protection of religion and freedom of expression article 27 must be given a more forceful interpretation.[86] To provide for the rights contained in article 27, it would appear that provisions similar in nature to article 18 and 19 must be read in conjunction with the rights provided in article 27.

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81 Y Dinstein "Collective Human Rights of Peoples and Minorities" 25 *ICLQ* (1976) 102-120, 111.

82 *Ibid.*, 118.

83 F Capotorti "The Protection of Minorities under Multi-Lateral agreements on Human Rights" 2 *IYIL* (1976) 3, 22.

84 F Ermacora, "The Protection of Minorities before the United Nations" 182 *Rcc. des cours* (1983), 215, 366, 322.

85 UNTS No 58 (1980); Cmnd 7964. Article 31(1) provides "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

86 Thornberry, 80.

Article 27 can be criticised in another important respect. It is not only emasculated in placing positive obligations on state parties, it is also limited in scope as far as the issue of *locus standi* is concerned. The provisions of the article are limited to persons and not to minorities hence, depriving the latter of any *locus standi* to bring action before the Human Rights Committee. In this regard the Committee has held that an organisation is ineligible to submit a communication.[87] Disappointing though it may seem, the constraints of international law prevented the adoption of a more revolutionary approach.[88]

In the context of human rights, individuals as opposed to minority groups are generally given a *locus standi* before international tribunals. Though there has recently been some bias towards granting groups a certain limited standing,[89] the overall framework discourages minorities as collectivities to challenge their States before international courts. Even in historical terms, when minorities were more a focus of international concern, the issue of international standing posed delicate questions. As Capotorti says:

> "In the system of protection of minorities established in 1919-1920, rights were accorded to individuals only. The theory of an international personality of minorities developed later, mainly owing to the fact that the right of petition was granted not only to members of minority groups but also to other groups themselves. But treaties and other international instruments relating to minorities concerned expressly with individual rights-the rights of persons belonging to minorities". [90]

The International Covenants, in line with other major international instruments discussed above generally accord the rights contained therein to individuals and it has been suggested that the position was followed for reasons of consistency.[91] The political

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87 *A Group of Associations for the Defence of the Rights of the Disabled and Handicapped persons in Italy etc., v Italy,* GAOR, 39th session Supp No 40; *JRT and the WG Party of Canada v Canada,* GAOR, 38th session, supp No 40, 263.

88 Capotorti, 35.

89 See e.g. article 14 of the Race Convention, article 25 of the ECHR and Art 44 of ACHR.

90 Capotorti, 35.

91 *Ibid.*

implications of providing minorities with an international *locus standi* would create greater friction between minorities on the one hand and States on the other. In any event, if minorities were provided with *locus standi*, there would be a number of procedural problems, again involving the issue of what constitutes a minority and whether a certain section could in fact represent the group in question. However this lack of international standing need not be an unmitigating disaster. International law, despite efforts, has at best only partially succeeded in snatching away the limelight from minorities for even by the narrowest of interpretations which one is prepared to provide the "communal" element remains a key ingredient of the article.

The Human Rights Committee is the body in charge of implementing the Covenant. The jurisprudence of the committee under the Optional Protocol which permits individuals-from States who have become parties to both the Covenant and the Optional protocol-to submit communications to the committee, provides a helpful guide. Although a number of communications have involved a discussion of the provisions of article 27,[92] the case that has attracted most attention is that of *Lovelace v Canada.*[93] Mrs Lovelace had lost her status as a Maliseet Indian after her marriage to a non-Indian according to the Indian Act of Canada.[94] She claimed that an Indian man who married a non-Indian woman would not have lost his status and that the law was discriminatory. The essence of the original communication filed by her had been that this loss of status and deprivation of the right to return to her original reserve lands had been in breach of articles 2(1), 3, 23(1), 23(4), 26 and 27 of the Covenant.

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92 See e.g. *Ivan Kitok v Sweden* HRC, 33rd Session, UN Doc CCPR/C/33/D/1985 10 August 1988; *Chief Ominayak and the Lubicon Lake B and v Canada*, Report of the Human Rights Committee, vol ii, GAOR 45 Session, Supp No 40, UN Doc A/45/40, 1. No 167/1984) HRC Selected Decisions. Note also the jurisprudence of Committee on the Elimination of Racial Discrimination (CERD) *supra chapter 5* in particular *A Yilmaz-Dogan v The Netherlands (No 1/1984) & Bemba Talibe Diop v France (No 2/1989)*

93 1981 1 HRC Selected Decisions, 83.

94 S.12(1)(b); Can. Rev. Stat., C.1-6.

In relation to admissibility she had argued that she was not obliged to exhaust the domestic remedies that are provided in article 5(2)(a) of the Optional Protocol since the Canadian Supreme Court had already declared that regardless of any inconsistency with the Canadian Bill of rights and legislation prohibiting discrimination, the relevant provisions[95] remained operative.[96] The communication was declared admissible in August 1979 and the Committee provided its interim decision in July 1980. In giving its decision the Committee took the view that the denial of opportunity to Sandra Lovelace to return to her reserves was essentially a breach of Article 27.[97] The decision of the Committee is revealing for a number of reasons. Firstly, the Committee did not find it necessary to enter the maze of complications arising out of a probable definition of minority and assumed without much ado that Mrs Lovelace belonged to a minority. Secondly, the Committee while delivering its decision took into account the hybrid nature of the rights that arise from the provisions of the article.[98] It is hoped that this approach is continued when the Committee is faced with communications from States like those from Latin America which have persistently insisted on the non-existence of minorities within their jurisdictions.[99]

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95 *Ibid.*

96 *A-G of Canada v. Jeanette Lavelle, Richard Isaac et al v Yvonne Bedard (1974), SCR 1349.*

97 "The rights under article 27 of the Covenant have to be secured to 'persons belonging' to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian Legislation...Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority with in the meaning of the Covenant...The right to live on a reserve is not as such guaranteed by article 27 of the Covenant...However, in the opinion of the Committee the rights of Sandra Lovelace to access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights with in the meaning of article 27..The Committee recognises the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the government...Article 27 must be construed and applied in the light of other provisions mentioned above...Whatever be the merits of the Indian Act in other respects it does not seem to the committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe".

98 See para 15 *Ibid.*

99 See *infra* text accompanying note 64-71.

In *Kitok v Sweden*,[100] the petitioner alleged that he had inherited rights in reindeer breeding, land and water in Sorkaitum Sam village, but through the operation of a Swedish law, he was denied the power to exercise those rights resulting from the loss of his membership from the Sam village. The communication alleged violations of article 1 and 27 of the ICCPR. The Committee declared his claim inadmissible under article 1 viewing that the "author, as an individual, could not claim to be the victim of a violation of the right to self-determination. Whereas the Optional Protocol provides recourse to individuals claiming that their rights have been violated, Article 1 deals with rights conferred upon people as such".[101] As far as the provisions of article 27 were concerned, the Committee decided to consider the communication on its merits. However, it observed that the overall provision of Swedish law was consistent with the spirit of article 27.

7.4 SUPPORT FOR AUTONOMY OUTSIDE THE PROVISIONS OF ARTICLE 27

The ICCPR is a multilateral treaty and hence in pursuance of the rule of *pacta tertiis nec nocent nec prosunt, prima facie* binds only parties to the treaty. The rule is now expressed in article 34 of the Vienna Convention on the Law of Treaties (1969)[102] according to which "A treaty does not create either obligations or rights for a third State with out its consent". Although there was a general consensus among the delegates that the Covenants presented an aspirational standard for all States of the world, it was equally clear that the document as a whole was not to be considered as forming customary

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[100] CCPR/C/33D/197/1985, 10 August 1988; Human Rights Committee, 33rd session ; Prior decisions CCPR/C/WG/27/D/197 1985; CCPR/C/29D/197 1985 (admissibility 25 March 1987).

[101] para 6.3.

[102] UNTS No 58 (1980); Cmnd 7964.

international law;[103] they were more in the nature of "standards of achievement",[104] "a guide"[105] or as elaboration and extenuation of the principle enunciated in the United Nations Charter and the Universal Declaration.[106]

Hence, despite the fact that the ICCPR was adopted overwhelmingly,[107] it still remains doubtful that the States which actually voted in favour of its provisions collectively in the form of a document would have endorsed each of its provisions separately. This opinion was clearly echoed by the representative of Japan who said that while her country had voted for the Covenant as a whole, had she been asked to provide an affirmative response to every provision that was in the Covenant the answer would have been different.[108] Similarly the representative of the USA stated in clear terms "Our affirmative votes do not of course express our agreement with or approval of every part of the Covenant".[109]

A provision of a treaty may attract binding force in customary international law provided it fulfils the basic criterion of the establishment of custom.[110] A treaty would generate rules of customary law if its text or its *travaux preparatoires* is declaratory of pre-existing law or if the rule stated in the treaty has crystallised customary law in the process of formation.[111] There also exists the possibility of the generation of new customary laws, emanating from the treaty rule subsequent to its adoption.[112]

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103 According to the representative of Philippines the Covenant provided a "standard of achievement". The Representative of Czechoslovakia said that it provided an anchoring of an international standard, and according to the representative of Columbia it was guide for world leaders.

104 The representative of Philippines GAOR, 21 session, Plenary meeting, 1496.

105 Representative of Columbia, *ibid.*

106 See the views of the Chinese Representative GAOR 9th session, UN Doc A/C.3.SR 570.

107 105-0-0.

108 GAOR, 1495th meeting.

109 *Ibid.*

110 Article 38 of VCLT 1969 provides that "Nothing in article 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognised as such".

111 "[Discussing the] situation where rules contained in a treaty (or treaties) commend themselves to the international community in general, so that the rules originally formulated in the treaty may come to have the character of customary law and as such be binding on those States which are not parties to the treaty" Sir Robert Jennings and Sir Auther Watts state "Quite apart form the final treaty provision itself, the preparatory work leading up to the negotiations for the treaty, and in some cases the course

However, in order to affirm the existence of customary rule through any of the aforementioned conditions, the basic criterion needs to be satisfied-the criterion requiring adequate proof of State practice alongside the requisite *opinio juris.* It needs to be recalled that Article 38 1(b) mentions "international Custom as evidence of general practice accepted as law".[113] According to Brierly

> "Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor. Evidence that custom...exists... can be found only by examining the practice of States; that is to say, we must look at what States do in their relations with one another and attempt to understand why they do it, and in particular whether they recognise an obligation to adopt a certain course."[114]

There obviously remains an inextricable link between the requirement of State practice and *opinio juris*-exemplification of which could be gauged from dicta of the Court in *North Sea Continental Shelf Cases* when it stated that "State Practice....should...have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[115]

As we have noted, the disagreements and uncertainties that are apparent from the *travaux préparatoires*, make it difficult to sustain the view that article 27 at least initially possessed, customary force, and the argument that article 27 was intended to become part of general international law may also be open to debate. Although there are provisions in

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of the negotiations themselves, will also have made its own contribution to the development of customary law, particularly in the case of those treaties which have been carefully prepared in the manner of those flowing from the work of the International Law Commission". R Jennings and A Watts, (ed.) *Oppenheim's International Law,* vol. i, Peace, 9th edn., (Longman: Harlow) 1992, 33.

112 See the *North Sea Continental Shelf cases* 1969 ICJ Rep 3; O Schacter "Entangled Treaty and Custom" in Y Dinstein, *International law at a time of perplexity, Essays in honour of Shabtai Rosenne,* (Dordrecht: M.Nijhoff), 1989, 717-738, 718.

113 Article 38 1(b) of the Statute of the ICJ see *supra* chapter 1.

114 J Brierly, *The Law of Nations* (ed.) H Waldock 6th edn. (Oxford: OUP), 1963, 59-60.

115 ICJ Reports 1969, 3 at 43.

the Covenant the customary nature of which is beyond question, the controversial position of article 27 makes it unlikely to be included in that list. As observed earlier, a number of governments were sceptical as to the nature and effect of the article. The approach adopted by France typifies the stance of a number of governments. France, as we have already noted made a specific reservation to Article 27 stating that:

> "in the light of Article 2 of the Constitution of the French Republic the French Government declares that Article 27 is not applicable so far as the Republic is Concerned".

On the other hand, there is a body of international lawyers which is firmly of the view that the substance of article 27 carries significant value in general international law. We have already observed Professor Dinstein's view as regards what he believes as its positive value and provisions of a collective nature as provided in article 27. He is also of the view that article 27 is "declaratory in nature and reflects a minimum of rights recognised by customary international law"[116] though he concedes that "what we have here is minimum rather that maximum of rights. There is need of further concertisation of general and somewhat abstract principles".[117]

The assertion that the substance of article 27 is reflective of customary law has been made by a number of noted authorities, although the claim is substantiated only indirectly. Professor Dinstein himself, relies upon the UNESCO Convention against discrimination 1960 the advisory opinion of PCIJ in the *Minority Schools in Albania case.*[118] Professor Brownlie's assertion that the substantive elements of article 27 constitute general international law[119] and his primary bases for such an argument is the irreversible nature of damage to cultural and linguistic identity hence putting the matter at

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[116] *Op.cit* note 81, 118.

[117] *Ibid.*

[118] I*bid.*; also see Thornberry, 220.

[119] *Re the Mackenzie Valley Pipeline enquiry: Consideration of Public International Law concerning the rights of the Dene and Inuit as the indigenous peoples of the North West territories of Canada, Opinion, 1976, ibid.*, 220-21; Personal Communication; Professor Brownlie's response to the initial enquiry is thankfully acknowledged.

a level of fundamental human rights. While principles of fundamental human rights carry the value of obligations *erga omnes*, a possibility of irreversible degradation of minority characteristics merits the consideration at the same level. He reinforces his argument with the inclusion of a whole host of international instruments.

Reliance has also been placed upon other possible sources of international law- Capotorti for instance hypothesis that

> "While this article is not a source of legal obligations for States which have not yet ratified the covenant, the approval of the Covenant by the General Assembly of the United Nations has conferred upon the articles the value of general principles no less significant than those set forth in solemn United Nations Declaration. From this point of view, the right granted by Article 27 to persons belonging to....minorities can be considered as forming an integral part of the system of protection of human rights and fundamental freedoms instituted after the Second World War".[120]

Apart from an explicit admission of the absence of legal obligations for States which have not ratified the Covenant, Special Rapporteur seems to be referring to "general principles" as enunciated in Article 38(1)(c) of the Statute of the ICJ.[121] Equally, he may well be indicating at the possibilities of recognition of the substance of the article through its approval by the General Assembly which would be more opportune as its comes within the ambit of "soft law".[122]

The value of the arguments of the aforementioned jurists is no doubt substantial and carries weight. The increasing number of ratification's to the Covenant may take some heat out of the present discussion. It also seems to be the case that in so far as the article provides a *limited* right of *persons* belonging to minorities, the substance of this right is contemporaneously reflected in customary law. The debate surrounding the position of article 27 has been intensive, though not without reason. For a considerable period of time it has remained the sole beacon house for aspirations of autonomy on the part of

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[120] UN Doc E/CN.4/Sub.2/384/Add.4, para 1.
[121] Thornberry, 219.
[122] *Ibid.*

minorities. The substance of the right to autonomy which the article may be taken to provide is extremely limited, and in practice the value of its provisions may not be as imposing as have been made out by the commentators discussed above. International legal norms and values however are not static; progression is being made in the direction of recognising, albeit in a limited form, of autonomous development of minorities.

If article 27 was to be formerly regarded as a sole phoenix of hope and inspiration to all minorities globally, it has been reinforced by a number of recent initiatives. The United Nations General Assembly in its Resolution 47/135 of 18 December 1992 adopted the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.*[123] The Declaration was finally adopted after a considerable period of gestation. The former Yugoslavia had submitted to the Human Rights Commission a draft declaration in 1978[124] and it had been decided to create a working group to consider the provisions of the declaration. For more than a decade the working group struggled in the labyrinth of definitional and substantive complexities before presenting its final version at the Commission's 1992 session.[125] The Commission adopted the Declaration and recommended the same to the ECOSOC and the General Assembly.

The Declaration cannot by any stretch of the imagination be deemed as a giant step in the direction of autonomy for minorities. Its limitations are manifest from its stature as a General Assembly Resolution; its conservatism obvious from its focus upon individuals or persons belonging to minorities, rather than minorities themselves. Thornberry highlights the points when he writes

> "The rights are those of `persons belonging to' minorities, not minorities as such. The `persons' reference occurs at 24 points in the text.

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[123] UN Doc A/Res/47/135 (Appendix 1)

[124] UN Doc.E/CN.4/L.1367/Rev.1 1978.

[125] See the Commission on Human Rights, Report of the forty-eighth session, ECOSOC Official Records, 1992, Supp No 2, 54; UN Doc.E/1992 22; E/CN.4/1992/84.

> This is in line with article 27 of the [ICCPR] which describes the rights of individuals rather than groups".[126]

There are other possible drawbacks. The title adds the term "National" to "Ethnic", "Religious" and "Linguistic" minorities. While the usage of "National or Ethnic" has contributed to some confusion, the addition of "National" in itself has provided certain States with an opportunity to claim a limitation on the sphere of protection to nationals of the State alone.[127] The Declaration also fails to provide a definition of a "minority" which is unfortunate. As we have noted in an earlier chapter, a number of States have been reluctant to recognise the existence of minorities; international legal mechanisms like other legal principles can not be expected to work effectively in a vacuum.

The Declaration, nonetheless, is a wider and more expansive expression of minority aspirations and may be taken as a concerted effort on the part of the international community to overcome some of the limitations surrounding international law relating to the minorities.[128] Article 1(1), of the Declaration, in itself seems to be an advance over the previous position in so far as there is an explicit and positive ordinance that States

> "shall protect the existence and the national or ethnic, cultural, religious or linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity".

Article 2(1) confirms and elaborates upon the position of article 27 of ICCPR. This provisions of the article present a more positive stance compared with the previous tentativeness associated with article 27; from mere non-denials to positive rights. It provides

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[126] P Thornberry "The UN Declaration on Minority Rights of Persons belonging to National or Ethnic Religious and Linguistic Minorities" (eds.) A Phillips and A Rosas, *The UN Minority Rights Declaration*, (Turku/Abo: London), 1993, 27.

[127] See, for example the German Position as adopted in its statement to the Human Rights Commission, working group. UN Doc E/CN..4/1991/53, para 17.

[128] B Dickson "The United Nations and Freedom of Religion" 44 *ICLQ* (1995)327-357, 354.

> "Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."

Article 2(2) provides for wide-ranging participatory rights to persons belonging to minorities in "cultural, religious, social, economic and public life". The provision is extremely significant for our present debate as the recognition and authorisation of such rights form an essential element of the concept of autonomy. Similarly, article 2(3) provides for effective participation at national and regional levels and on matters which necessarily affect the position of minorities. Article 2(4) authorises persons belonging to minorities to establish and maintain their own institutions, a matter indispensable to the autonomous existence of minorities.

Hence, article 2 as a whole, could be taken to bear significant value for our present debate; there is the explicit recognition of a measure of autonomy, even though the right to autonomy itself failed to be incorporated in the Declaration. Article 3 of the Declaration also carries a similar message. It reinforces the collective dimension with encouragement of the communal enjoyment of rights without discrimination of any sort.

Article 4, is of considerable significance and deserve to be stated in full

> (1) States shall take measure to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedom without any discrimination and in full equality before the law.
>
> (2) States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs except where specific practices are in violation of national law and contrary to international standards.

(3) States should take appropriate measures so that, wherever possible persons belonging to minorities have adequate opportunities to learn their mother tongue.

(4) States should, where appropriate, take measures in the field of education, in order to encourage the knowledge of the history, traditions, language and culture of the minorities existing with in their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

(5) States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Articles 5, 6, and 7 also carry considerable value. According to article 5, "legitimate interests" of the persons belonging to minorities would be taken in account when formulating national policies or programmes of co-operation and assistance among States. The emphasis of articles 6 and 7 is upon international co-operation in understanding the minority question in a more tolerant and rational manner. The Declaration as a whole has many positive elements; there are manifestations of the matter of autonomy as we have been discussing, though as we have noted earlier, suggestions to include a specific right to autonomy for minorities failed to be accepted. The communal aspects of existence of minorities is more pronounced, the references relating to State sovereignty and territorial integrity although integral to the Declaration are framed in a more accommodating manner, less confrontational to aspirations of autonomy and distinct identity.

Having said that, the impulse of realisation of an element of international standard-setting for minorities should not in any way be allowed to overwhelm or exaggerate reality. As noted earlier, the Declaration remains a General Assembly Resolution and its impact on the development of international law as yet unclear. Many of the substantive provisions of the Declaration are themselves framed in a rather general manner providing a number of States with the undesirable discretion.[129] Even as a political and moral

[129] Hence the position adopted by the Poland in the Human Rights Commission may be unduly optimistic according to which "Even though the text, was not perfect, it did appear to fulfil two

expression there have been controversies as to the rights of minorities and concern for State sovereignty and territorial integrity resurfaced frequently. Right to autonomy was not acceptable and even the "lower level" right to "self-management" failed to be incorporated. Connotations of autonomous development and the term "self" reminisces ominously to the explosive subject of self-determination.[130] Again the manner and circumstances of the adoption of the Declaration may, as its critics would argue was probably more in response to the inability of the United Nations to take appropriate action to protect the rights of minorities, even after the East-West détente and the ending of the Cold War.

A number of other international, regional and national instrument may provide some strength to the view of an emerging right to autonomy as has been discussed in the present chapter. The adoption of the revised ILO Convention, as we have seen promises to be a considerable advance on the position of Indigenous peoples and possibilities exist for the passage of the General Assembly Resolution on indigenous peoples.[131] It is worth noting the recent initiative taken at a more regional level. The steps undertaken principally by the Council of Europe and OSCE are to be commended. The setting-up of the institution of High Commissioner for National Minorities promises to be a fruitful exercise.[132] Similarly the adoption and coming into operation of the European Charter

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essential requirements: firstly, it constituted a comprehensive international instrument in the field of protection of minorities, all of whose rights were clearly specified, and secondly, it clearly set out the commitments by which States could universally agree to be bound in so sensitive a sphere. It was thus a sound document, in line with the general approach to the question of international standards for the protection of the rights of minorities, and which, while ensuring a satisfactory balance between the rights of the nation as a whole." UN Doc. E/CN.4/1992/SR.18, para. 20.

130 P Thornberry "International and European Standards on Minority Rights" Miall 14-21.

131 *Supra chapter 3.*

132 CSCE Helsinki Decisions, 35 ILM 1992, 1385; A de Zayas, "The International Judicial Protection of Peoples and Minorities" in C Brolmann, R Lefeber and M Zieck, *Peoples and Minorities in International Law* (Dordrecht: M. Nijhoff), 1993, 253-287, 282; A Bloed, "The OSCE and the issue of National Minorities" in A Phillips and A Rosas (eds), *Universal Minority Rights,* (Abo Akademi/ MRG: Turku/Abo and London), 1995, 113-122, 116-119.

for Regional or Minority languages 1992,[133] and the Framework European Convention for the protection of National Minorities 1994,[134] would provide valuable contributions.

The European Charter for Regional or Minority Languages-the culmination of a project under consideration ever since 1988, in actual fact, leaves much to be desired. The Charter is essentially more an "undertaking" on the part of States to recognise minority languages rather than according specific linguistic rights to minority groups.[135] However, the drawbacks of the Charter ought not to be allowed to negate its overall positive value. The issue of linguistic rights, has been a sensitive one, and minorities both in historical as well as contemporary terms have suffered greatly on the basis of discrimination on grounds of language.

The recognition in the preamble of the Charter that "the right to use a regional or minority language in private and in public life is an inalienable right" is in itself commendable and worthy of appreciation. According to article 2, State parties undertake to base their policies, legislation and practice on the objectives and principles contained in Part II of the Charter-the main aim of the exercise is to ensure the usage of regional and minority languages in such key areas as education, media, in judicial and legal relations, in administration, media, cultural activities, and economic and social life.

Notwithstanding its potentially greater significance, the present study does not analyse in any great depth the recently adopted Framework European Convention for the Protection of Minorities. The Convention was opened for signature on 1st February, 1995. According to article 28 of the Convention

> "shall enter into force on the first day of the month following the expiration of a period of three months after the date on which twelve member States of the Council of Europe have expressed their consent to be bound...."

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133 Adopted by the Committee of Ministers, opened for signature 2 October 1992.

134 Council of Europe, H (94) 10, Strasbourg, 1994. Text also available in A Phillips and A Rosas (eds), *op.cit* note 132.

135 P Thornberry "The United Nations 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), *op.cit* note 132, 13-36, 61.

The very recent coming into operation of the convention, and a regional focus makes it difficult, at least for the time being to analyse adequately the convention's overall impact on general international law. Nonetheless, there is no doubt that the convention is definitely a positive and significant step forward in the direction of protecting the rights of minorities, as well as granting autonomy in the form which we have considered earlier.

In the Convention there is a firm recognition and undertaking on the part of States to

> "promote conditions necessary for persons belonging to national minorities and develop their culture, and to preserve the essential elements of their identity, their religion, language, traditions and cultural heritage."[136]

The convention goes on to elaborate the manner and form in which the aforementioned commitments would be satisfied. Perhaps more significantly the convention provides for effective participatory rights-an essential ingredient in the concept of autonomy.

7.6 PROBLEMS ASSOCIATED WITH THE RECOGNITION AND IMPLEMENTATION OF AUTONOMY IN STATE PRACTICE

The recognition and any implementation of the emerging *right* to autonomy presents significant differences in State practice, depending upon, *inter alia*, the comparative historical, political, social and economic background. The relatively gradual evolution of the advanced States of the industrialised world contrasts radically to the abrupt and often bloody conception of many of the States of Africa and Asia. These new

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[136] Article 5(1).

States that have emerged from the rubble of de-colonisation have often indicated that building up of the nation-State is indispensable even at the cost of assimilative measures.

Independence for a number of States bore a heavy price, both in terms of human lives as well as resources. The aftermath of "liberation" however has been in many ways disillusioning: the Colonisers left behind them an inchoate, political and constitutional structure, the administrative and bureaucratic set-up being tailored to the needs of a colonising elite proved ineffective. There were huge social, political, economic, cultural and educational gaps amongst nationals of these States. The cases of, for example Sri Lanka, Malaysia, Pakistan, India, Sudan, Kenya and Uganda, amongst many others can be read out in support of this argument.

The urge to build nation-States, in the absence of a developed and a balanced political set-up, often resulted in forced assimilation of populations, sometimes bordering upon active persecution and genocide. Minorities, in this struggle have been a prime victim; their often artificial union to the State, their ability to attract trans-national sympathisers, and their irredentist stance in failing to give into the majority demands have raised suspicions on the part of modern governments. Their is no shortage of examples; the case of the "Jaffna" as well as Indian Tamils of Sri Lanka,[137] the Indian and Chinese communities of Malaysia,[138] the Pathans, Baluchis and Sindhis of Pakistan,[139] the various ethnic, linguistic and religious minorities of India,[140] the Biharis and the indigenous peoples

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137 W Schwarz, *The Tamils of Sri Lanka*, (London: Minority Rights Group); also see AI, *Sri Lanka, The North East: Human Rights violations in a context of Armed Conflict, 1991* AI Index ASA 37/14/91; AI, *Sri Lanka An Assessment of Human Rights Situation* ASA 37/1193; P Hyndman "The 1951 Convention Definition of a Refugee: An Appraisal with particular reference to the case of Sri Lankan Tamil Applicants" 9 *HRQ* (1987), 49-73; R Oberst "Tamil Militancy and Youth insurgency in Sri Lanka" in Vajpeyi and Malik; "Teenage Tigresses" Independent on Sunday, 26 February 1995.

138 Van Dyke

139 *see infra Part IV.*

140 A Engineer, (ed.) *Ethnic Conflict in South Asia*, (Dehli: Ajanta Press), 1987; D Vajpeyi and Y Malik (eds.)

in Chittagong Hill tracts of Bangladesh,[141] the Tibetans of China,[142] the Asian population of Kenya and Uganda[143] and many others instantly come to mind.

It is perhaps not an exaggeration to suggest that the issue of minority rights has become ever more significant since the start of the decolonization process. Sadly the burst of decolonization has had little if anything to further the cause of self-determination for a considerable number of groups now arbitrarily placed in the new sovereign States. These groups, newly liberated from centuries of colonial domination, have only found it replaced by a local and more ugly from of oppression.[144] Indeed, it is not surprising that a number of states from Asia and Africa have in the immediate aftermath of attaining their independence become victims of bitter inter-ethnic conflict and have not recovered since.

The principle of *uti possidetis* had generally been followed which resulted in the creation of multi-ethnic, multi-religious and multi-lingual States with artificially drawn boundaries. The origins of principle of *uti possidetis* could be traced in the early nineteenth century whereby the newly independent successor States of the former Spanish Empire in South and Central America were considered to have inherited the administrative divisions of the colonial empire as their new territorial boundaries.[145].

The elaboration of the principle, as well as its rationale, was provided by the arbitrator in Columbia-Venezuela Award of 1922

"The *[Uti Possidetis]* principle laid down the rule that the boundaries of the newly established republics would be the frontiers of the Spanish provinces which they were

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141 Father R Timm *et al, Adivasis of Bangladesh*, (London: MRG), Keesings Contemporary Archives "Bangladesh: Documents in Chittagong hill tracts" July 1986.

142 S Subedi, "The Right of self-determination and Tibetan People" in Kritsiotis, 1-16; ICoJ, *The Question of Tibet and the Rule of Law*, (Geneva) 1959; C Mullin and P Wangyal, *The Tibetans Two Perspectives on Tibet-Chinese Relations*, (London: MRG), 1983; AI, *Peoples Republic of China Repression of Tibet, 1987-1992, 1992;* "Tibetan tells of Chinese torture" *Independent on Sunday, 26-2-95.*

143 A Ghosal and T Crowly "Refugees and Immigrants: A Human Rights Dilemma" 3 *HRQ* (1983) 327-347, 331; M Akehurst "The Uganda Asians" 8 Nov. *NLJ* (1973), 1021.

144 Thornberry "Self-Determination" 867; J Rehman, *Minority Rights: Assimilation or segregation*, Unpublished LL.M Dissertation, University of Hull, 1991.

145 M Shaw, *International Law*, (Cambridge: Grotius Publication), 3rd edn, 1991, 302.

succeeding. This general principle offered the advantage of establishing the absolute rule that in law no territory of old Spanish America was without an owner".[146]

The doctrine has come to be accepted as having universal significance and global application; in essence the application of the principle meant that the demarcations of boundaries under the Colonial regimes corresponded to the boundaries of the new States that emerged.[147] This phenomenon, however, in many instances has resulted in minorities in these new States often finding themselves trapped in an intolerant and repressive environment and many of the leaders from the minority groups feel that they have been denied the very right of self-determination, upon which their nationalistic movements were based. The picture has been eloquently summed up by Professor Claire Palley when she says:

> "Recent social engineering activities, which have contributed to current world minority problems, have been the attempts by the newly independent nation states in Asia and Africa to build a nation. In this task many of the political elites took to heart the theories of sociologists and consciously tried to engage in social control activities. They tried to induce and regulate social change by reconstructing their political and economic institutions and to embody and to promote innovation and to enhance their efficiency by centralisation. They engaged in conflict management. They tried to induce national integration by attempting to control individuals' subjective loyalties and to redirect these to a new nation state so as to

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[146] 1 UNRIAA 1922, 223, 228; cited in D Kritsiotis "Uti Possidetis in the Sudan: An African Crises in Perspective" Kritsiotis, 73-91, 79.

[147] see Article 3(3) of the OAU Charter; Principle III of the Helsinki Final Act 1975, 1975 ILM 1292; Article 62 2(2)(a) VCLT 1969, 58 UKTS, 1980, Cmnd 7964; Article 2 of the Vienna Convention of State succession in respect of treaties 1978 17 ILM 1488, 72 AJIL 971. For judicial acknowledgement of the principles see *Frontier Dispute case (Burkina Faso v Mali)* 1986 ICJ Reports 554; G Naldi "The Case concerning the Frontier Dispute (Burkina Faso v Mali) Uti Possidetis in an African Perspective" 1987 ICLQ 893; *Temple of Peach Vihar case (Merits) (Cambodia v Thailand)* 1962 ICJ Rep 6, 16, 29; *Rann of Kutch Arbitration* 1968, 50 ILR 2, 408; *Guinea-Guinea Bissau Maritime Delimitation case* 77 ILR 1985, 635, 637; *Arbitration tribunal in Guinea-Bissau v Senegal,* 1990 83 ILR 1, 35; *Land, Islands and Maritime Frontier case: El Salvador v Honduras (Nicaragua intervening)* 1992 ICJ Rep 351, 380; also see *Sovereignty over Certain Frontiers (Belgium v the Netherlands)* ICJ Rep 1959, 209, in particular Judge Moeno Quitana's dissenting opinion, 252; *Avis Nos. 2 and 3 of the Arbitration Commission of the Yugoslavia Conference,* 31 ILM 1497, 1499; *Taba Award (Egypt v Israel)* 80 ILR 1989, 224 in particular arbitrator Lapidoth's dissenting opinion; also see J Klabbers and R Lefeber "Africa: Lost between Self-Determination and Uti-Possidetis" in (eds.) C Brolmann, R Lefeber and M Zieck, *Peoples and Minorities in International Law,* (Dordrecht: M. Nijhoff), 1993, 33-76.

> downgrade local loyalties. They have tried to create a common consensus. They sought to create a new ideology. They sought to give the new nation state and their own rule legitimacy. They featured selected national symbols (flag, national dress, national traditions). They tried to use language to draw the nation together. They tried to direct the economy and national wealth for national objects. The approach was usually authoritarian: in many cases one-party systems were set up by their constitutions. The history of such attempts is relatively short, but even so it can confidently be said that as yet such activities have seldom had the intended effects on racial, tribal, linguistic, religious and regional group loyalties".[148]

While many of the minority groups within these countries have continued to feel aggrieved and often discriminated and persecuted, the reasons for such a state of affairs are contemporary as well as historical. Professor Palley comments relating to the urge of Nation-building and national integration of desperate ethnic, linguistic and religious groups synthesise reality. However, the political elite that took over from the colonial masters in a number of instances felt that there options were limited.

In many ways, the considerable demographic changes over centuries, the impact of colonisation and the after effects of decolonisation were to have a profound impact on the new successor states. Many of the contemporary problems relating to Asians in East Africa, in Tanzania, Kenya, and in Uganda and in Fiji Islands; the Blacks in the Americas reminisce a colonial legacy. During the seventeenth and eighteenth centuries, substantial European migration took place primarily to America and Australia, while the indigenous population was wiped out by disease or killing. Similarly the white Colonisers transported various racial and ethnic groups with the intended purpose of propping up their own empires.

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[148] Palley, 4.

The issue of autonomy, for minorities, has been perceived as a probable threat to the territorial integrity and the sovereignty of the State. Though the intensity of the conflict between minorities and the State may vary depending on a number of factors, its existence transcends all political and regional frontiers. Indeed, the former Communist regimes have been notorious for their stance on issues such as religious, cultural and linguistic tolerance. The imposition of a politically repressive and intolerant system was aimed at stripping the individual of his cultural, linguistic and religious identity.

The issue of ethnic, linguistic and religious autonomy has not confined itself to the formerly Communist or developing States of Africa and Asia. Governments in Latin and North America and Australia have faced severe confrontation from their minorities and more significantly their indigenous populations. Equally in Western Europe, a number of minorities exist, and their position within their constitutional framework, as we shall observe shortly, has also engendered difficulties.

Bearing in mind the present limitations of this study, it would not be possible to discuss in any detail the issues that have arisen in relation to the position of minorities within the constitutional framework of every state. The discussion that follows aims, however, at highlighting the myriad complexities and difficulties which the subject of minority rights could and does generate. Ethnic, linguistic and religious minorities have often found themselves being affected by State policies.[149] The aforementioned characteristics are interlinked and cannot be looked at in isolation. The case of the Jews, and to some extent the Muslims, provides a good example of this scenario. Ethnic, cultural, racial and religious values particularly in Africa and Asia have a strong influence on the development of a group. The Muslim minorities which regard themselves as culturally (and perhaps ethnically) different, in various States have shown extreme

[149] Kuper *Genocide*; Potter; H Fien, Geno*cide Watch*, (New Haven and London: Yale University Press), 1992 provide useful historical expositions of cases where religious minorities have been persecuted by States.

displeasure in attempts on the part of the State to be assimilated, fearing that they might lose their religious and cultural identity.[150] Racial, religious and linguistic dissonance involving Muslims has led to a number of genocidal conflicts in several territories including Palestine,[151] Lebanon[152] and, more recently, Bosnia-Herzegovina.[153] A similar problem is faced by the disciples of certain other religions. These religious minorities have often suffered in Asia,[154] Africa[155] and Eastern Europe.[156] The religious conflict, with its political and economic connotations however is not confined solely to the developing world as is signified in the cases of Spain and Northern Ireland.[157]

Language is the vehicle for cultural and moral development of a group, and the strategic position which language enjoys has often been a source of friction between the State on the one hand and minorities on the other. There are a variety of ways in which linguistic persecution could be engineered. These modes include

> "denial of opportunity to acquire and employ the mother tongue, the language of the elite or world languages; deprivation imposed upon individuals through group identifications effected by language for access to different value process (as for employment); the conduct of community process and enterprises, especially of enlightenment and power, in languages alien to members of the community and finally the coerced learning of specified languages other than the home language". [158]

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[150] See for instance the position of Muslims in the United Kingdom, in Thailand and India; T Wright Jr, "North Indian Muslims: The Mobilisation and Demobilisation of a Former Elite" in J Ross and A Cottrell (eds.), *The Mobilisation of Collective Identity: Comparative Perspectives,* (University Press of America), 1980, 279-296.

[151] On the issue of Palestinian Refugees see F D'Souza and J Crisp *et al, The Refugee Dilemma,* (London: MRG) 1985.

[152] D McDowall, *Lebanon: A Conflict of Minorities* (London: MRG) Rev ed., 1986.

[153] J Rehman, "International Community Accomplice to massacre or Globo-cop of human rights The Case of the Bosnian Muslims" (eds.) H Cullen, D Kritsiotis, N Wheeler (eds.) *Politics and the Law of former Yugoslavia,* (Hull: University Press), 1993.

[154] For the position of Chinese in India and Malaysia see Van Dyke, 64-66; R Cooper, *Baha'is of Iran* (London: MRG), 1991.

[155] See a variety of reports produced by MRG.

[156] *Ibid.*

[157] Palley, 14;

[158] M Mcdougal, H Lasswell and L Chen, *Human Rights and World Public Order The Basic Policies of an International Law of Human Rights* (New Haven and London: Yale University Press) 1980, 174 footnotes omitted; Van Dyke, 17-51.

States have adopted a wide range of measures from legal equality of all regional languages to the designation of one language as the sole official language.[159] The cases of Malaysia, Thailand, Iran, Sri Lanka and Burma typify situations where minority linguistic groups have felt being dominated by the policy of a single official language. The attempts to re-assert the hegemony of a single language has raised considerable political strife in countries like India, Canada and Belgium.[160]

A survey of a number of States shows that the issue of language has generated a series of conflicts. In some countries, the imposition of the language of one ethnic group as the official language has led other groups to feel that they are being discriminated and exploited. In many newly independent States of Asia and Africa, the adoption of national language has remained a thorny issue and ironically in the aftermath of independence the retention of the language of the former coloniser has proved less divisive than its replacement by a single indigenous language.[161] The case of Kurds in Iraq, Iran and Turkey, the Tamils in Sri Lanka, Muslims in India, and the various ethnic groups of Pakistan raise delicate questions as to the policy which, a developing state needs to adopt- while accommodating the linguistic interests of the minority groups, also balances with the limited resources that are available for a developing country.

Cultural values, though often an amalgamation of various distinct features, emerge from religious beliefs and linguistic orientations. A discussion of culture has frequently emerged where a State contains an indigenous population. While in the Americas[162] and Australia the indigenous population has been persecuted, the issues of the treatment of such groups as the migrant workers, and immigrants from the former colonies has attracted major criticism of certain European States. The Asian and Black communities in the United Kingdom, the Blacks and Spanish-speaking groups in the United States of

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159 J Paradis "Language Rights in Multicultural States: A Comparative Study" 48 *CBR*, (1970) 651.

160 *Infra.*

161 For the case of Pakistan see Part IV *infra.*

162 J Clinebell and J Thomsom "Sovereignty and Self-Determination: The Rights of Native Americans under International Law" 27 *Buff.LR* (1978) 669-714.

America, the Gypsies, the Laps in Finland and Sweden have all had to confront particular difficulties.

The feeling of mistrust and apprehension between minority groups on the one hand and the State on the other has led to a number of conflicts. The Civil War in Sudan from 1956-1972,[163] the Kurdish rebellion in the early 1970's,[164] the civil war in Nigeria and the civil strife in Northern Ireland are all a manifestation of this fact. It seems that a primary source of conflict arises because the minority groups feel that they could not participate in the political, economic and social life of their country. They feel discriminated and consider that the State is deliberately employing tactics to deprive them of their cultural, religious or linguistic identity. A number of socio-economic, political and historical factors may add to the divisions within the State.

A vast array of constitutional devices provide considerable options and include pluralism, integration, assimilation, and segregation. Whereas examples of all these approaches could be discerned from the State practice of a number of States, it is also quite possible that the State may at any one time be employing two or more methods for different groups at the same time. Assimilation as a constitutional device with its emphasis on individual equality and non-discrimination has been widely practised. Almost all constitutions reflect assimilationist tendencies of this nature, though it may manifest in, for example, in the incorporation of a Bill of Rights, Non-justifiable Directory principles of State Policy (India and Pakistan) and other non-discriminatory statutes and provisions. In a plural system, distinctly separate institutions for minorities are recognised and provided for, with the objective of realising their autonomous development.

Federalism is sometimes seen as a proper mode of granting autonomy to regions on a territorial basis. Federal constitutions in general terms could be regarded as ones where the powers of government are divided between the Central and provincial

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[163] See the discussion *supra* chapter 6

[164] D McDowell *The Kurds*, (London: MRG), 1991.

government. However, as Professor Palley reminds us, and as we have seen from the case of former Yugoslavia and USSR, Federalism does not provide an absolute guarantee for minority autonomy.

> "The prognosis for successful Federalism depends upon the circumstances under which the Federal state has been created. If it is merely a legacy of imperialism and it is a vast territory with agglomerations of ethnic groups, then the state will face almost insuperable difficulties, which would have arisen irrespective of its principle of constitutional organisation. Federation will have been adopted as a last resort and as giving the best chance to the new state of surviving intact. Many new Federations failed, it is surprising that many more have not collapsed...Only if a Federation has arisen out of Organic growth, support by a need for common defence and a desire to exploit economic opportunities, has it in the long run been successful e.g. Switzerland, United States and Australia. Mere artificial creations are unlikely to be held together by constitutional glue and in the long run to survive basic disunity".[165]

Professor Palley then goes on to provide the example of Canada with considerable demand on the part of French Quebecois of complete autonomy bordering on secession; there are many other examples. Lebanon and Cyprus, for instance, present two leading cases where attempts to accommodate minority aspirations and recognition as distinct collectivities through constitutional devices have failed. Lebanon's population, though divided equally between Muslims and Christians, branches out into various sects. The primordial recognition of the existence of various groups resulted in the adoption of a constitution which assigned seats on the basis of religious denominations. The Constitution, however, was abrogated in 1947 which was also against the spirit of the so called National pact which had provided sanctity to the recognition of communal existence. Despite the constitutional rearrangements and expansion of parliamentary representation in 1966, political stability was not forthcoming. While the presence of

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[165] Palley, 8.

Palestinian resistance groups provided Israel the pretext to intervene intermittently, Syria's military intervention only helped to complicate the dynamics of the conflict.[166]

The 1960 Constitution of Cyprus, a most comprehensive (though complicated) attempt at satisfying both Greek and Turkish communities failed in a very short space of time. Although the constitutional provisions, in a determined fashion, tried to provide for proportional representation in political and administrative sections, the mutual mistrust between Greeks and Turks often lead to deadlocks, constitutional crises and ultimately provided a pretext for the Turkish invasion in 1974.[167]

Certain other constitutional practices provide more cause for optimism. Switzerland for instance is an excellent example of a country where political decentralisation has kept different linguistic groups from confronting each other. The Italian practice of regionalism has defused pre-existing tensions and prejudices amongst the various ethno-nationalist groups.[168] From a positive perspective of accommodating minorities the arrangement as regards Trentino-Alro Adiege Region and its provinces of Bolonzo are worthy of appreciation. Similarly, the constitutional and administrative changes that took place in Belgium over a period of time, in particular during 1970-1974 set up the example of a case of the application of group rights on the basis of their linguistic-cultural distinctiveness by constitutional amendments, legislation and compromise.[169] According to Dr Thornberry

> "The whole intention of the division of Belgium into Flemish, French and German language communities in the Belgian scheme is to maintain cultural distinctiveness even at the expense of individual choice. In Belgium the territorial principle is dominant-the principle that an individual's rights depend not altogether on preferences but upon their geographical location. The equilibrium between linguistic groups is maintained from the level of the Belgium cabinet down to local and

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166 J Sigler, *Minority Rights A Comparative Analysis* (London: Greenwood Press), 1983, 111-112; Van Dyke, 57-58.
167 *Ibid.* 112-113; Van Dyke, 57-58.
168 Palley, 14
169 *Ibid.*

> communal level, and effects commerce as much as education. The effect of this complicated bifurcation of rights and responsibilities is that each linguistic community is treated as corporate entity with its own or collective rights. The interests of individuals are mediated through the community to which they belong, and group rights exist to complement individual rights or to compete with them".[170]

It seems to be the case that in States where the existence of minority groups is recognised officially, the right of members of these groups to maintain and develop their own culture is generally recognised. However, in those States where the existence of minorities is denied a policy of assimilation would appear to be pursued. Capotorti provides the examples of a number of Latin American States where expression of minority aspiration is not encouraged.[171] Use of Languages other than Spanish have not been not permitted in Argentina. Similarly Chile, and Brazil are reported to have been actively pursuing a policy of cultural and linguistic assimilation.[172]

7.6 CONCLUSIONS

A debate on the emerging right of autonomy is complex; the probable change in trends which we have already considered points, it can be contended, to a progression in the direction of recognition of some form of autonomy for minorities. Its advance is slow; its limit and scope uncertain. State practice in this politically tumultuous period can be very unpredictable. The issue of minority rights could, as it has in States of Eastern and Central Europe, so cataclysmically, engulf the international community. If

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[170] P Thornberry, *Minorities and Human Rights Law*, (London: MRG), 1987, 11; also see *the Case Relating to certain Aspects of the Laws on the use of Languages in Belgium*, Judgement, 23 July, 1968 European Court of Human Rights Ser A No 6; M McDougal, H Lasswell, L-C Chen, "Freedom from discrimination in choice of Language and International Human Rights" *ISIULJ* (1976), 151-174, 167-170.

[171] Capotorti, 52-3.

[172] *Ibid.* 53.

this indeed were to happen, the existing State structure would be the first causality; governments chastened by recent experiences may not find it easy to reconcile notions of nation-building, as against autonomy and self-determination. The problems, though not exclusive to the developing world, are probably more acute there. The urgency to build nation-states from otherwise artificially united peoples, with repressive and totalitarian regimes has produced a backlash of considerable force sometimes threatening the very fabric of the State.

The debate on the limits of minority rights may well be unending. International law, operates through the medium of States and minorities are confronted with the principles of State sovereignty and territorial integrity. Minorities, like those of the Kurds of Iraq, Iran and Turkey, non-Arab population of Southern Sudan, Tamils of Sri Lanka, the Tibetans of China would find bliss in securing genuine autonomy. Autonomous development can not be taken as an absolute panacea to the global pathologies, though its healing ability may be invoked in such wide and varied cases as the West Bank and Gaza strip, Northern Ireland, and even the Falklands (Malvinas) Islands.[173] The link between minority rights and self-determination is not necessarily secession. Meaningful autonomy may provide satisfactory answers and yet the international community of States remains reluctant to endorse such a course of action.[174]

Some States even though practising liberal policies of autonomy in their domestic laws find it difficult to recognise and to be bound by principles of autonomy, self-government or self-determination. Thornberry's comments may provide a useful point to conclude the discussion.

> "Although it is sometimes resorted to as a means of reconciling the minority and state, the right to autonomy is not a specific right of

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[173] See W Reisman "The Struggle for the Falklands" 93 *Yale LJ* (1983) 28-58, where he draws an analogy of Falklands to Aaland Islands in suggesting the establishment of a similar form of autonomy, 57-58.

[174] See P Alston, "The Security Council and Human Rights: Lessons to be learned from the Iraq-Kuwait Crises and its aftermath" 14 *AYBIL* (1990-1) 107-175.

minorities in contemporary international law. An evolution may be underway in this respect towards greater recognition of autonomy by international law. For the time being we are faced with the paradoxical situation that states practising generous policies of autonomy in their internal law may be very reluctant to translate this into binding or even hortatory international norms".[175]

[175] P Thornberry "International and European Standards on Minority Rights", Miall, 14-21, 20.

PART IV

INTERNATIONAL LAW, MINORITY RIGHTS AND THE CASE OF PAKISTAN

INTRODUCTION TO PART IV

Part III of the present work (chapters 5-7) while examining the existing legal norms relating to the rights of ethnic, linguistic and religious minorities has highlighted both weaknesses in the substance of these rights and the problems associated with their effective implementation. As noted in Part III, State practice has varied considerably in relation to the recognition, promotion and protection of the rights of minorities. Some States have treated their minorities generously while others have dealt with them contemptuously and disdainfully, often exploiting the weaknesses in international legal norms to their greatest advantage.

The differences in State practice, are matched by, and are consequent upon the social, political, cultural, religious and regional peculiarities of minorities.[1] Indeed a wide variety of historical, economic, cultural, sociological and political factors have an important bearing not only on the form and nature of claims that are made by the minority groups, but also on the reaction to these demands on the part of the State concerned.[2] In view of these factors, it is submitted that a global overview of minority rights may be inadequate and merely vacuous. Hence, the present part while focusing on the case of Pakistan, with its own historical, political and constitutional complexities, highlights the problems and difficulties of international law in providing adequate rights to minorities and for effectively safeguarding those rights.

As a matter of fact the case of Pakistan provides an intriguing example of multifarious issues that are confronted by international law in relation to the protection of the rights of minorities. The arbitrary incision of India along religious lines in August

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1 J Robinson "International Protection of minorities A Global view" 1 *IYBHR* (1971), 61-91, 61.

2 R Wrising, (ed.) *Protection of Ethnic Minorities Comparative Perspectives,* (New York: Pergamon Press) 1981; F Heinz *Indigenous populations, Ethnic Minorities and Human Rights,* (Berlin: Quorum Verlag) 1988; J Sigler, *Minority Rights: A Comparative Analysis,* (London: Greenwood Press) 1983; Hannum.

1947,[3] resulted in the physical extermination of hundreds of thousands of men, women and children.[4] The partition also created millions of refugees, conceiving the "largest inter-country transfer of population in the twentieth century".[5] Accurate figures for those who were killed or forced to become refugees are not available. According to Ben Whitaker and his collaborators "in all nearly one million people were killed during the period of partition. A total of some eight million Muslim refugees moved from India into Pakistan, and a similar exodus of Hindus and Sikhs took place in the reverse direction".[6] Despite the presence of evidence of imputability on the part of groups of individuals and to lesser extent the governments of India and Pakistan, in the persecution and genocide of their religious minorities, no legal action was undertaken either at the domestic or international level.[7]

After 1947, Pakistan's association with discrimination, persecution and physical extermination of its minorities continued, though ethnic and linguistic communities became more a focus of attention. Emergence as an independent State was to signal the start of bitter inter-ethnic rivalries resulting in the rupture of the show of solidarity which was evident immediately preceding independence. Ethnic identifications which had, at least temporarily, lost their strength emerged with greater vigour, with until 1971 the country

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3 The Partition of India also resulted in the geographically anomalous State of Pakistan see infra; J Crawford, *The Creation of States in International law,* (Oxford: OUP) 1979 115-117.

4 For useful discussions in English see L Collins and D Lapierre, *Freedom at Midnight,* (London: Collins) 1975; P Moon, *Divide and Quit,* (London: Chatto and Windus) 1961: L Kuper *Genocide, infra* chapter 9.

5 E Haque, *The Dilemma of Nationhood and Religion: A "State of Art" Review of Research on Population Displacement Resulting from the Partition of the sub-continent,* Paper presented at the fourth Research and Advisory Panel conference on Forced Migration (IRAP) *University of Oxford, Oxford, England, 5-9 Jan, 1994,* 3; According to Wilcox "The creation of Pakistan implied not only the drawing of administrative lines but also the largest population transfer in modern history" W Wilcox, *Pakistan The Consolidation of a Nation,* (New York and London: Columbia University Press) 1963, 53.

6 B Whitaker *et al, The Biharis in Bangladesh,* (London: MRG), 1978, 7; Haque considers the number of voluntary and involuntary migrants to be exceeding 13 million, Haque *op.cit note* 5, 3.

7 See *infra* chapter 9.

serving as a battlefield for the anti-antithetical visions of Bengali and West Pakistani nationalism.[8]

Forced assimilation of its ethnic and linguistic communities, in particular the Bengalis and patent discrimination against them resulted in the civil war of 1971.[9] While the international community remained apathetic to the reasons that led to the civil war, generally treating this issue as a matter of domestic jurisdiction under article 2(7) of the United Nations Charter,[10] the peremptory norms of international law relating to the prohibition of genocide conspicuously failed to provide any form of protection to the Bengalis. It is estimated that between 1-3 million Bengalis were massacred,[11] many of them becoming victims of genocide[12] with the civil war creating nearly 10 million refugees.

In the wake of the United Nations failure to act, the Indian military intervention and the *modus operandi* of the process of the birth of Bangladesh promised to lend support to the otherwise suspect doctrine of humanitarian intervention. Military intervention provided encouragement to those who advocated such actions as an exception to the general rule prohibiting the use of force.[13] According to Professor Lillich the military action by India

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8 C Kennedy, "Policies of ethnic preferences in Pakistan" 24 *AS* (1984), 688-703, 688.

9 *Ibid.*; R Jahan, *Pakistan The Failure of National integration,* (New York: Columbia University Press) 1972; G Chaudhury, "Bangladesh: Why it happened" *IAffs* (1972) 242-249; O Noman, *Pakistan A Political and Economic History Since 1947,* (London: Kegan Paul International) 1990.

10 Article 2(7) provides "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

11 "In East Bengal between 1 million and 3 million civilians were massacred in 1971 by Pakistan army in a vain attempt to halt Bangladesh's secession" T Gurr, 92; Kuper, *Genocide*, 79; L Kuper, *Prevention of Genocide,* 1985, 47-48.

12 A Mascarenhas, *The Rape of Bangladesh,* (Dehli: Vikas Publications) 1971; N Macdermot, "Crimes Against Humanity in Bangladesh" *IL* (1973), 476-488, 481.

13 Even critics of the doctrine of humanitarian intervention like Franck and Rodley were forced to concede that "International law is not static. The Bangladesh experience is an instance, by far the most important in our times, of the unilateral use of military force justified *inter alia,* on human rights grounds and India succeeded. International law as a branch of behavioural science, as well as normative philosophy, may treat this event as the harbinger of a new law that will hence forth, increasingly govern inter-State relations. Perhaps India's example, by its success, has already entered in to nation's conscious expectations". T Franck and N Rodley "After Bangladesh The Law of Humanitarian Intervention" 67 *AJIL* (1973), 275-305, 303.

> "following months of inactivity by the United Nations and the world community generally in the face of obvious gross human rights deprivations in the area, manifestly calls for a fundamental re-evaluation of the protection of human rights by general international law. The doctrine of humanitarian intervention, whether unilateral or collective, surely deserves the most searching reassessment given the failure of the United Nations to take effective step to curb the genocidal conduct and alleviate the mass suffering which took place in.....Bangladesh".[14]

Throughout the conflict, while the United Nations Security Council remained bitterly divided, unwilling and unable to take any form of action, the deliberations of the General Assembly and other United Nations organs reflected more a concern for the preservation of territorial integrity and State sovereignty than the persecution and genocide of Bengalis, with most States anxious to prevent their own recalcitrant minority groups from contemplating any similar action.[15] While the international community failed to take any effective action in East Pakistan, India's unilateral action, arguably motivated more due to political concerns helped in the conception of the first and until recently perceived to be the only successful secessionist movement of the post-colonial era. As Gurr points out

> "Until the dissolution of the USSR in 1990, the only ethnonationalists since 1945 who had won independence from existing states were the Bangladeshes, whose independence was bought at the price of political mass murder and India's intervention".[16]

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[14] R Lillich "The International Protection of Human Rights by General International Law, Second Interim Report of the Sub-committee" (R Lillich Rapporteur) in *Report of the International Committee on Human Rights on the International Law Association*, 1972, 38.

[15] ICoJ, *The Events of East Pakistan*, 1971 (Geneva, 1972) 85; Kuper *Genocide*, 58; V Nanda "A Critique of the United Nation's inaction in the Bangladesh Crises" 49 *DenLJ* (1972), 53-67; J Salzburg "United Nations Prevention of Human Rights Violations The Case of Bangladesh" 27 *IO* (1973), 115-127; also see T Franck and Rodley "The Law, the United Nations, and Bangladesh" 2 *IYHR* (1972), 142-175; *infra* chapter 9.

[16] T Gurr, 319; "The only successful case of post-colonial secession is that of Bangladesh. The instrument of the right in that case was not international law, but the Indian army" P Thornberry "Is there a phoenix in the Ashes? International law and Minority Rights" 15 *Tex.ILJ* (1980), 421-458; 453; also see Kuper, *Prevention of Genocide*, 44; R White, "Self-determination: Time for a Re-assessment" 28 *NILR* (1981) 160; V Nanda, "Self-determination in International Law A Tragic tale of two Cities Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *AJIL* (1972), 321-336, 322.

More unfortunate was the fact that no trials could be held for those involved in committing war crimes and crimes against humanity including acts of genocide.[17] There were no significant problems relating to jurisdiction or custody of those accused of committing such crimes. However political considerations proved far too strong and overpowered any legal or humanitarian concerns with China and the US, both permanent members of Security Council putting pressure on the unconditional release of the Pakistani prisoners of War. Equally Bangladesh required the much needed economic and financial aid to develop its damaged infra-structure, and in the end all prisoners of war were unconditionally repatriated without any trials being conducted.[18]

In the truncated Pakistan, despite the promulgation of the 1973 constitution guaranteeing provincial autonomy and religious freedom, there is considerable evidence of discrimination and attempts at forced assimilation of minorities.[19] As the present part would exemplify, while international laws have remained inadequate to protect the minorities of Pakistan with a number of serious gaps in the substantive norms themselves, the limited and attenuated laws that are designed to safeguard any of these rights have proved ineffective.

Since the partition of India along communal lines came to play a crucial part in the subsequent development of minority issues, the next chapter aims to provide a historical overview of the factors leading to such a partition. Chapter nine considers the issues arising out of the right to physical existence of minorities. The international legal

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[17] Keesings Contemporary Archives 13-19 May, 1974, 26509; J Paust and A Blaustein, "War Crimes Jurisdiction and Due Process The Bangladesh Experience" 11 *Vanderbilt JTL*, (1978), 1-37; J Paust and A Blaustein, *Human Rights and the Bangladesh Trials A Legal Memorandum to the People's Republic of Bangladesh on International Crime and Due Process (with supporting Documents)*, Unpublished, 1974.

[18] Paust and Blaustein *ibid.*, L LeBlanc *The United States and the Genocide Convention*, (Durham, N.C: Duke University) 1991; "..Bangladesh,...considered setting up a war crimes tribunal to prosecute Pakistan's military personnel, but then dropped the initiative for a variety of political and diplomatic considerations" C Bassiouni, *Crimes against Humanity in International Criminal law*, (Dordrecht: M. Nijhoff) 1992, 232.

[19] See *infra* Chapter 9, 10 & 11.

obligations of Pakistan are analysed, and the applicability of these norms is then considered within the constitutional framework of Pakistan[20].

Chapter ten of the study discusses the application of the right to equality and non-discrimination within the State practice of Pakistan. The international legal obligations that are placed on Pakistan are analysed through the various sources of international law. In considering the applicability of these norms the main focus relates to highlighting the gaps and the weaknesses in the substance of these rights and the particular problems that have been associated to their application in the cases of Bengalis, Baluchis and the Sindhis.

In section two of the present part, following the pattern of Part III, consideration is given to the problems confronting Pakistan when faced with the emerging right of autonomy of minorities. A natural focus of analysis lies in the artificial nature of the creation of the State, and the historical distinctiveness of the communities that came to form the new State. A conflict of interest between the concepts of state-building as against allowing autonomy, and self-government has been particularly pronounced in the case of Pakistan and attracts our attention in that chapter.

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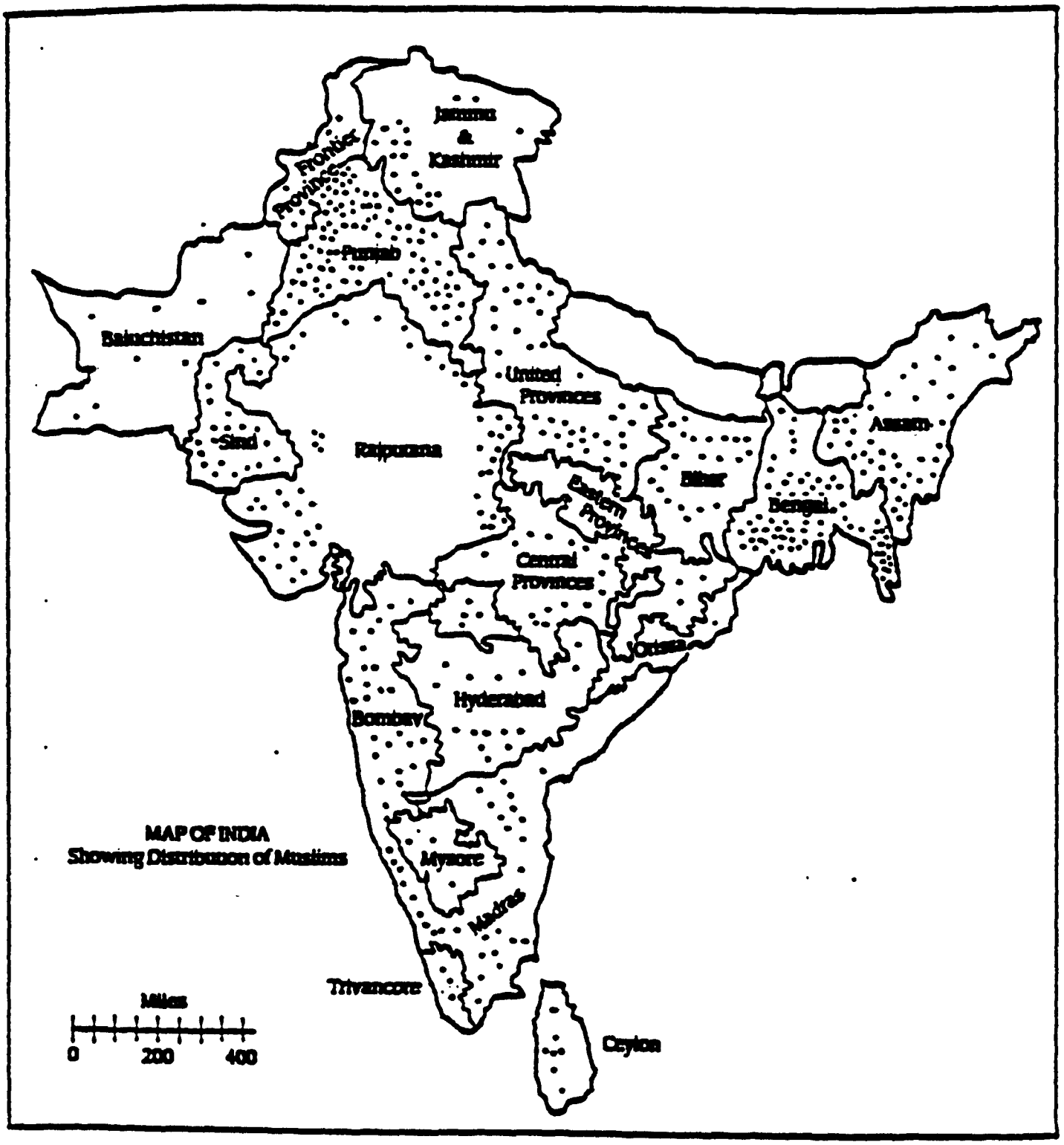
[20] See *infra* Chapter 9.

CHAPTER EIGHT

HISTORICAL CONSIDERATIONS IN THE EVOLUTION OF MINORITY RIGHTS

MAP 1: India (Showing Distribution of Muslims)



8.1 INTRODUCTION

India's contribution to international law, significant though it is,[1] has raised a number of complex and intriguing issues.[2] Not least amongst those has been the question of protection of minorities. The dilemma of minority rights in India had been confronted by the British ever since they gained effective control and incorporated India as a Colony[3] and the successive constitutional arrangements that were made came to recognise that serious minority problems existed.[4] The Muslims of the Sub-Continent, although in a minority believed that they had a special rationale in having their rights recognised and protected in any constitutional arrangement.[5] Although they formed a majority in the western provinces of British India, Muslims were an overall minority being spread out in various states and provinces. The demands made by Muslims League and other Muslim leaders like Sir Mohammed Iqbal reflect the difficulties in satisfying any demands for the protection of minority rights or vindication of aspirations of "self-determination".

Indeed, even the famous Lahore Resolution of 23 March 1940 failed to address adequately whether India was to be partitioned along communal lines in order to create independent States and if so how many new States were to emerge. Hence there remained

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1 See N Singh "India and International Law" in Anand (ed.) *Asian States and the Development of International law* (New Delhi: Vikas) 1972, 25-43; for a historical analysis of the entry and relationships of Asian and African States in the International Communities see C Alexandrowicz "The Afro-Asian World and the Law of Nations" 123 *Rec. des cours* (1968-I), 125-210; also see Abi-Saab, "The Newly Independent States and Roles of International Law, An Outline" 8 *HowLJ* (1962), 95-121.

2 On the anomalous nature of international personality see T Poulouse "India as an Anomalous International Person" 44 *BYIL* (1970) 201-212; W Wilcox, *Pakistan The Consolidation of a Nation,* (New York and London: Columbia University Press), 1963; J Crawford, *The Creation of States in International Law,* (Oxford: OUP) 1979, 131-132.

3 For a historical analysis see K Aziz, *The making of Pakistan* (Lahore: Islamic Book Services) 1966; L Ziring, *Pakistan The Enigma of Political development* (Dawson: Westview) 1980; L William, *The State of Pakistan,* (London: Faber)1962.

4 See *The Government of India Act 1909, The Government of India Act 1919, The Government of India Act 1935.*

5 J Rehman "Self-Determination, State-building and the Mohajirs; The Role of Indian Muslim Refugees in the Constitutional development of Pakistan" 3(2) *CSA* 1994, 111-129.

a profound ambiguity and hesitancy amongst Muslim politicians as to any plans of partition. Ultimately efforts by the British to provide independence to a United India proved unsuccessful in the wake of the inability or unwillingness on the part of Muslim and Hindu leaders to resolve their differences. Hence, after the failure of the *Cabinet Mission Plan* of 1946, it was decided that there was no other option save to partition India and to establish two independent States.[6]

8.2 PARTITION OF INDIA AND THE DILEMMA OF MINORITY RIGHTS

In practical terms, however, the prospect of partitioning India into religious denominations provided immense complications, the precise implications of which were never fully appreciated.[7] Right until the eve of independence, there remained considerable uncertainty as to which territories would be included in Pakistan or India. There were a number of autonomous principalities, whose exact status in international law remains unclear and whose rulers showed a considerable lack of determination in deciding the future of their states.[8]

The problems for the imperial power were compounded because British India comprised of 875,000 square miles and a heterogeneous population of nearly 388,997,995[9] having different cultures, myriad ethnic backgrounds and racial characteristics, practising different religions and speaking more languages than those

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6 ICoJ, *The Events of East Pakistan, 1971*, (Geneva) 1972, 15, Ziring, *op.cit note* 3, 67; A Gledhill, *Pakistan, The Development of its Laws,* (London: Stevens and Sons) 1957, 60.

7 *Infra* Chapter 9-11.

8 "While a degree of autonomy or self-government enjoyed by a territory often has been utilised by international legal scholars to determine in which category of special sovereignty or dependency- protectorates, vassal state, dependent state, colony, associated state, or other category- a territory should be placed, these categories are often overlapping and are frequently subject to scholarly disagreement" H Hannum and R Lillich, "The Concept of Autonomy in International Law" in Y Dinstein (ed.), *Models of Autonomy* (New Brunswick and London: Transaction Books), 215-254, 248-9; For a consideration of the position of Indian States see Wilcox *op.cit* note 2.

9 Census of 1941; According to the Census Muslim Population was 94, 389,428.

spoken in the whole of European Continent. In addition, independence *per se* had come to be unacceptable to a significant minority of the population of British India. Hence the problem that confronted Britain related to the redrawing of the new national boundaries and affording a "right" to self-determination. Ultimately Bengal and Punjab had to be partitioned. The lines drawn in each instance were clearly a recipe for future disasters. While the incision of Bengal meant condemnation of both sides to economic ruin, the decision to award Gurdaspur to India necessarily provided the incentive to the Hindu Raja to join Kashmir with the State of India, a decision which to this day has been a source of antagonism and three wars between India and Pakistan.[10]

As far as the issue of the realisation of a "right" to self-determination was concerned Franck's comments, in a recent paper, are both instructive and illuminating when he says

> "By far the majority of the intended colonial beneficiaries of the new self-determination were in Africa, but the first major test was in India. Here the British permitted a form of self-determination to be used to partition the sub-continent between predominantly Hindu and Muslim regions, a process during which hundreds of thousands were killed and millions left homeless. The Indian experience of undoing the boundaries created by the colonial empires-however benevolent the intent and arbitrary the colonial frontiers-caused most nationalists in the newly emerging African states to try for a better solution".[11]

After all the chaos, and consequent misery of the incision of India, the Pakistan that emerged was nonetheless not immunised form the virus of ethnic, linguistic and religious communalism. In fact, the creation of the new State was only to provide the beginning of concerns relating to the protection of minority rights. In the surge for independence from British rule, and amidst the euphoria generated by the prospect of the

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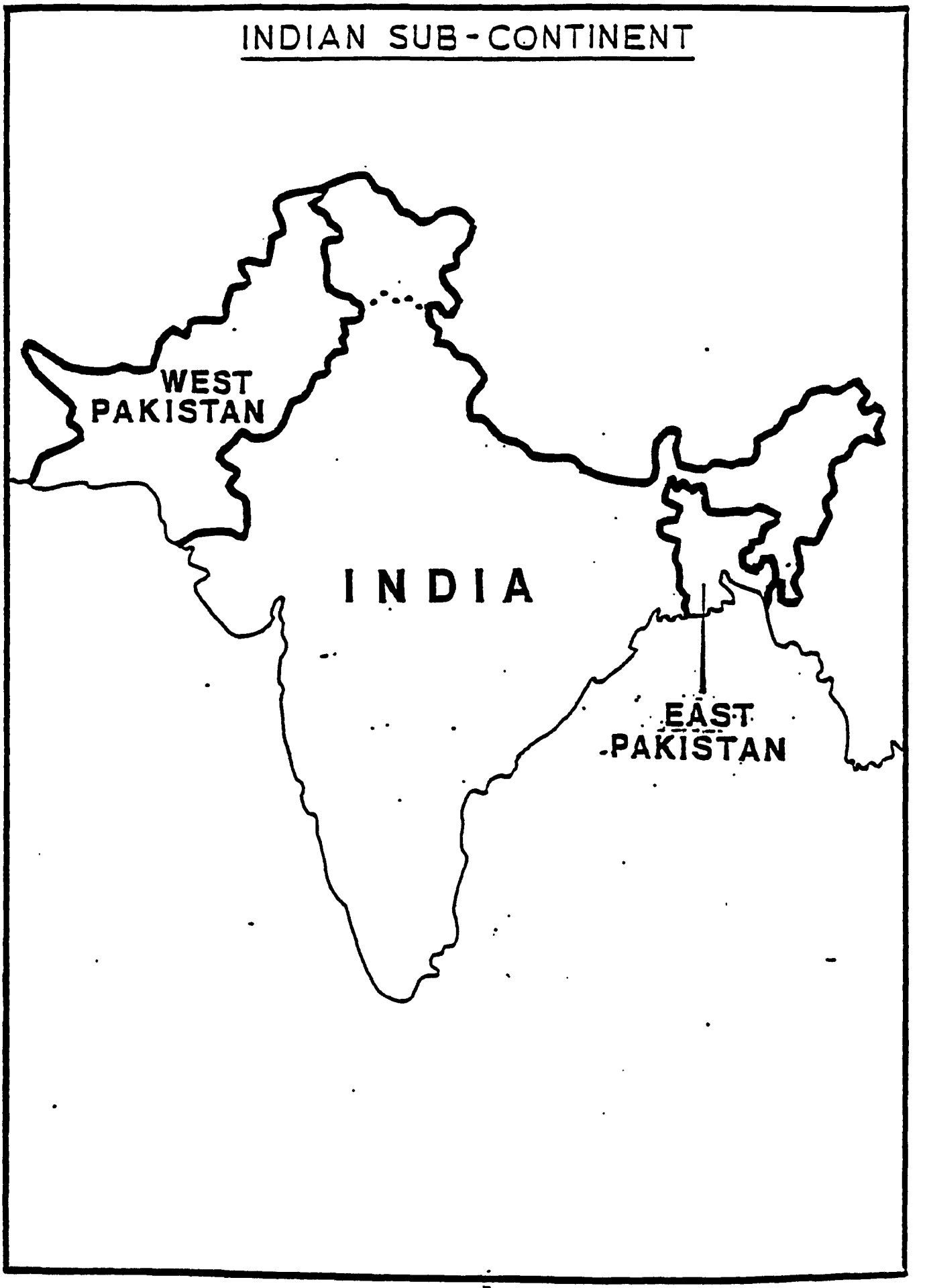
[10] See A Lamb, Kashmir: A Disputed Legacy 1846-1990, (Hertfordshire: Roxford Books), 1991; A Azmi, *Kashmir An Unparalleled Curfew*, (Karachi: Panfwain Printing Press) 1990; A Varsheny, "India, Pakistan and Kashmir: Anatomies of Nationalism" 31 *AS* (1991), 997-1019,1000.

[11] T Franck "Post-modern Tribalism and the Right to Secession" (ed.) C Brolmann, R Lefeber, M Zieck, *Peoples and Minorities in International law*, (Dordrecht: M. Nijhoff)1993, 3-27, 7-8.

MAP 2: Indian Subcontinent (After 1947)



creation of an Islamic State, it had become difficult to appreciate the force of ethnic, linguistic and religious heterogeneity amongst the indigenous population. The new State contained a number of ethnic, linguistic and religious minorities and their position has continued to provide new concerns for international law.

8.3 GEOGRAPHIC AND DEMOGRAPHIC ANOMALIES OF PAKISTAN

At the time of its creation, Pakistan was divided into two "wings" of unequal sizes. East Bengal (Subsequently renamed East Pakistan) comprised of a mere 55,126 square miles whereas West Pakistan consisted of 310,403 square miles. Despite these sizes, it was in fact in the Eastern "wing" that nearly 54% of the total population resided, a figure which could be used to gauge the population density of East Bengal (See Table 1). The diversity in geographical locations and a segregation by 1,200 miles of hostile territory of India made any form of integration extremely difficult between the two wings.

Although there were significant differences between various groups of the Western "wing", these differences seemed less prominent when matched with the historical, socio-political and the linguistic features of the Eastern "wing". The Western "wing" was similar in nature to the Middle East in its history, geography, culture, and language, whereas the Eastern Wing was similar to South-East Asia. On the other hand whereas East Bengal was relatively homogenous linguistically, each of the provinces of West Pakistan had its own language, culture, history and traditions. Ironically, Urdu which was initially designated as the sole national language, was spoken by an extremely small minority. Bengali, the traditional language of Bengal was virtually unknown in West Pakistan. Similarly the majority of Bengalis had no understanding of any of the provincial languages spoken in the Western "wing". (Tables 2 & 3)

MAP 3: Pakistan (Since 1971)

Despite the fact that Islam, as the religion of the majority of the people of Pakistan had influenced their cultures and traditions, it could not be stated categorically that it was the over-riding factor, concealing all other cultural and traditional traits. The indigenous traditions were deeply ingrained in all ethnic and linguistic groups, thereby making the task of integration into the nation-state of Pakistan cumbersome and difficult.

8.4 MINORITIES OF PAKISTAN: FACTS AND FIGURES

Although the official position in relation to the existence and numbers of religious, linguistic and ethnic minorities has often been shrouded in controversy,[12] Pakistan's minorities could generally be divided into two categories. There remains a considerable overlap between ethnic and linguistic minorities who could be bracketed under the same heading. At the time of independence, Pakistan comprised of 6 main ethnic and linguistic communities. The Baluchis (Baluchistan), The Sindhis (Sindh), the Muhajirs (North Indian Muslim refugees who settled in Sindh), the Pakthuns (North West Frontier Province), and the Punjabis (Punjab) formed the communities of Western Pakistan. The Eastern "wing" of Pakistan comprised mainly of the Bengalis, with a small proportion of Urdu-speaking migrants who have come to be known as Biharis.

In the light of the discussion in chapter two relating to the definition of minorities, the Baluchis, the Sindhis and the Pakhtuns could be regarded as coming within the category of minorities. The case of Bengalis was however, more complicated since they constituted a numerical majority and hence would not fit automatically in the definition of a "minority" as provided by Professor Capotorti.[13]

It is submitted that while a basic weakness in international law relating to the protection of the rights of minorities is reflected in the absence of a definition of the term

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[12] See *infra* chapter 9.
[13] Capotorti, 96.

"minority" in an international legal instrument, the adoption of such definition must take in to account the position of ethnic groups like the Bengalis. East Bengal constituted of nearly 54% of the total population and in this sense the provincial population formed a numerical majority.[14] On the other hand, as we shall see in due course, the Bengalis had very little share in the political and constitutional affairs of the State. They were heavily discriminated against, and suffered from the characteristic minority syndromes.[15] It would seem more realistic to define "minorities" in terms of their control of the political, administrative and economic machinery of the State. Although it is true that in most circumstances a numerically superior group is also in a domineering position, this is not always the case; the debate conducted in an earlier chapter, along with the views of certain authorities, such as Professors Palley and Dinstein need to be recalled.[16] Bearing in mind the fact that Bengalis remained a minority in practical terms, the present work analyses their case alongside the Sindhis, Baluchis and the Pakhtuns.

The case of Bengalis is also interesting from the viewpoint of analysing different though conflicting identities present in a single community. If the issue is perceived as one

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[14] The discussion is open to debate, although the argument may seem persuasive that the Bengalis were "Peoples" in International Law, entitled to the "Right of self-determination". ICoJ list their criterion of what constitutes a "People" under international Law; see ICoJ, *op.cit* note 6, 60; also see Professor Nanda's special features which "legitimised" the Bengali struggle for self-determination V Nanda, "Self-Determination in International law: the tragic tale of two cities Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *AJIL* (1972), 321-336; Indeed, the anomalous and rather artificial nature of Pakistan was to lead to not so unconvincing claim that, in 1971, East Pakistan was a non-self-governing territory under Chapter XI of the Charter. According to Crawford [Pakistan's] status [as a metropolitan State and outside the ambit of Chapter XI] at least in 1971, was not quite so clear, for several reasons. In the first place, East Bengal probably qualified as Chapter XI territory in 1971, if one applies the principle accepted by the General Assembly in 1960 as relevant in determining the matter. According to Principle IV of Resolution 1541 (XV) a territory is prima facie non-self-governing if it is both geographically separate and ethnically distinct for the "country administering it". East Pakistan was both geographically separate and ethnically distinct from West Pakistan; moreover the relation between West Pakistan and East Pakistan, both economically and administratively, could fairly be described as one which "arbitrarily place[d] the latter in a position of subordination. It is scarcely surprising then that the Indian representative described East Bengal as, in reality, a non-self-governing territory. In any case, and this point is perhaps as cognet, it is hard to conceive of any non-colonial situation more apt for the description "carence de souverainete" than East Bengal after 15 March 1971; Crawford, *op.cit note 2*, 116 (footnotes omitted).

[15] Y Dinstein "The rights of minorities and peoples" 25 *ICLQ* (1976), 102-120, 112;

[16] *Ibid.*; Palley, 3; UNESCO cited in Capotorti, 9, para 43; J Fawcett, *International Protection of Minorities*, (London: MRG), 1979, 4; *supra* chapter 2.

of religious identity, East Bengal had a significant proportion of ten million, mainly Hindu minority. As an ethnic and linguistic group Bengalis showed greater homogeneity, though the influx of a significant proportion of Urdu-speaking "Biharis" may have affected this homogeneity.

Since the secession of East Pakistan, and the elimination of Bengalis from the equation, the Sindhis, Baluchis and the Pakthuns can be regarded as the primary ethnic and linguistic minorities. Similarly, with the partial dismemberment of Pakistan, and the exclusion of Bengali Hindus, the proportion of religious minorities has correspondingly declined (Tables 4-6). The Post 1971 Pakistan comprises of four provinces, namely Baluchistan, NWFP, Sindh and Punjab. The State is surrounded in the North and North-West by Afghanistan, in the West by Iran, in the south by the Arabian sea and in the East and South-East by India.

Primarily due to the sensitivity of the minority issue, the official census since 1961 has not contained any specific question about the mother tongue of the respondents. Indeed, while the language data from the 1972 census was not published at all[17], (see Table 7) the last census held in 1981 provides information relating to what is termed as a family question on "language commonly spoken in the household".[18] (Table 8). The official census which according to the constitutional provisions was due to take place in 1991 was postponed for a variety of reasons. According to the Human Rights Commission of Pakistan (HRCP)

> the immigrant population settled in Sindh...strongly contested the figures that emerged from preliminary enumeration's. Others disputed the 1981 count too. Representative bodies of Christians, for instance, put the present size of their community in excess of 5 million; Ahmadis claimed their number to be in the region of 4 million. Their grievances tended to be

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[17] See R Wrising "The Baluch Frontier Tribes of Pakistan" in (ed.) R Wrising, *Comparative Perspectives Protection of Ethnic Minorities*, (New York: Pergamon Press) 1981, 271-312, 309.

[18] According to a United Nations Report this question was presented to random sample of 10% of the respondents. United Nations *Pakistan: Report of a Mission on Needs Assessment for Population Assistance*, November 1979, Report No 23, 26.

> frequently voiced because the number of seats for minorities in the national and provincial legislatures is fixed in proportion to their population, and there is a feeling among the minorities of their being grossly underrepresented.[19]

Some reliance, could however be placed on the unofficial figures (Table 8) which have been presented by HRCP.

[19] HRCP, *State of Human Rights in Pakistan 1991*, (Lahore: Maktabi Jadeed) 1992, 119.

SECTION A

ESTABLISHED RIGHTS

CHAPTER NINE

MINORITIES OF PAKISTAN AND THE RIGHT TO PHYSICAL EXISTENCE

9.1 INTRODUCTION

The right to physical existence of all individuals, whether seen singularly or collectively as groups, is of a fundamental and peremptory character.[1] Although it is clear that States remain bound by the international legal prohibition of genocide,[2] it must also be borne in mind that the physical extermination of minorities is generally conducted by States themselves.[3]

The case of Pakistan is exemplary in this regard as there remains substantial evidence to support the view that over its forty seven years of independent history, a number of ethnic, linguistic and religious groups have been persecuted, discriminated and have even been subjected to physical extermination. While the international community has remained apathetic largely due to political considerations and constraints, the current international legal norms, as we shall shortly consider, are in themselves inadequate in a number of ways to provide protection of this right to physical existence.

9.2 INTERNATIONAL LEGAL OBLIGATIONS

Pakistan showed a keen interest in the rapid adoption of the Convention on the Prevention and Punishment of the crime of Genocide[4] (hereafter the Genocide Convention), voting for it both in the Sixth Committee and in the plenary session of the General Assembly. It is a party to the Genocide Convention and the Convention on the non applicability of statutory limitation to War Crimes and Crimes against humanity[5], thus

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1 See *supra*, Part III, chapter 5.
2 For a comparative survey see A Blaustein and G Flanz, *Constitutions of the Countries of the World*, (Dobbs Ferry: Oceana Publications) 1973-.
3 See *supra*, chapter 5.
4 77 UNTS 277; HMSO, Misc. No (1966), Cmnd. 2904; 10 Jan 1958.
5 See *supra* chapter 5; ratified by Pakistan 10 January 1958.

explicitly recognising the provisions contained in these instruments.[6] Although Pakistan has not enacted any specific legislation to give effect to the provisions of either of these conventions, it is clear that it still remains bound by their provisions under international law.[7]

The rules relating to the prohibition of the physical extermination of minorities in contemporary international law, are reflected in the Genocide Convention.[8] According to Thornberry, the treaty provisions of the Convention provide the minimum that international legal norms afford to minorities.[9] In view of our earlier discussion, it would be difficult to lay assertive claims as regards the criminalization of cultural genocide in conventional as well as customary law.[10] The *travaux préparatoires* of the Genocide Convention however reveal that Pakistan considered "cultural" genocide as a crime under international law. The force of authority for this assertion derives from the position adopted by the delegation of Pakistan in the UN General Assembly where the issue was being debated.[11] During the debates the representative of Pakistan in the Sixth Committee, spearheaded an emotional charge of "cultural" genocide conducted by India at the time of

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6 See *The Reply of Pakistan in Question of the Punishment of War Criminals and of Persons who have committed Crimes against humanity, Report to the Secretary General* 25 UN GAOR Annex I (Agenda Item 30), at 24, UN Doc. A/8038/Add 1, 1970

7 J Paust and A Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience" 11 *Vanderbilt JTL,* (1978), 1-37, 20 n71; Referring to the events of 1971 the ICoJ state "At the time of hostilities in 1971 Pakistan had not yet complied with this obligation and genocide did not therefore constitute a crime under the domestic law of Pakistan. However, as Article I declared genocide to "a crime under international law, as soon as Pakistan ratified the Convention, genocide became an international crime applicable to all persons within the territory of Pakistan" ICoJ, *The Events of East Pakistan, 1971,* (Geneva) 1972, 55.

8 See *supra* chapter 5.

9 Thornberry 105; *supra* Chapter 5.

10 *Ibid.*

11 GAOR, 3rd Session, Sixth Committee, Part 1, (63 mtg.) 30 September 1948, 10-11; (83 mtg.) 25 October 1948, 193-205; 3 GAOR Plenary 178 meeting st 818-48. Indeed, it was the fear that Pakistan might take action against India before the International Court of Justice under article IX of the Convention that led to the reservation being put in place by India see LeBlance, *The United States and the Genocide Convention* (Durham, N.C: Duke University) 1991, 205-206; see also I Claude Jr, *National Minorities, An International Problem* (Cambridge: Mass Harvard University Press) 1955, 155; H Hannum, "International Law and the Cambodian Genocide Sounds of Silence" 11 *HRQ* (1989) 83-138, 105.

partition.[12] Pakistan made strenuous efforts to have cultural genocide specifically incorporated in the Convention, and its failure was taken as a serious blow to the cultural contribution of smaller groups.[13] In the plenary meeting Pakistan's representative Begum Ikramullah said

> "...it must be realised that very often a people did not differ from its neighbours by its racial characteristics but by its spiritual heritage. To deprive a human group of its separate culture could thus destroy its individuality as completely as physical annihilation. Moreover, those guilty of the crime of mass extermination committed that crime because the existence of a community endowed with a separate cultural life was intolerable to them. In other words physical genocide was only the means, the end was the destruction of a peoples' spiritual individuality".[14]

Pakistan's subsequent actions particularly in East Pakistan prior to December 1971, and subsequently in Baluchistan and Sindh must be judged in the light of these considerations.

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[12] According to LeBlanc "Through out the negotiations on the convention in the Sixth Committee, the Pakistani delegation lobbied aggressively in favour of an article on cultural genocide. A draft article on the subject covered such acts as 'forced and systematic exile of individuals representing the culture of a group'. Provisions such as this could arguably have made the convention applicable to the kinds of atrocities that occurred during the break-up of India and the creation of Pakistan" LeBlanc *ibid.* 206; "Despite strong opposition by the United States and France, the *Ad hoc* Committee voted overwhelmingly to retain the concept of cultural genocide in the draft convention...The debate continued and the decision reversed, when the General Assembly held its Third session in the fall of 1948. The agenda item relating to the Genocide Convention was referred to the Sixth (Legal) Committee, where the battle to retain cultural genocide provision was waged by a group of states which included prominently the Soviet bloc and a number of Asian-Arab states against a determined opposition which was conspicuously representative of European and European-derived peoples. *One interesting deviation from the pattern suggested above was the position of India, whose objection to the inclusion of cultural genocide was clearly related to the fact that Pakistan, an ardent supporter of the provision, proclaimed that it could hardly wait to haul its neighbor before a tribunal as a violator of the cultural rights of its Moslem minority".* Claude, *op.cit,* note 11, 155.

[13] According to S Ikramullah, Pakistan's representative at the UN the deletion of the provisions relating to cultural genocide "destroyed the very letter and spirit of Resolution of December 1946 because it effectively deprived the contributions of small groups of people" S Ikramullah, *Pakistan Horizon,* December 1948, 234.

[14] GAOR 3rd Session, Part 1, 178 meeting., 9 Dec. 1948, 817.

9.3 APPLICABILITY OF THE INTERNATIONAL NORMS RELATING TO PHYSICAL EXTERMINATION OF MINORITIES

9.3.1 Physical extermination of religious minorities committed after the partition of India

The case of Pakistan provides a classic example of the usage of the defence of absence of intent in committing genocide. A distinct, albeit, closely inter-related argument has been to deny any allegations of genocide in situations where persecution and massacres of political opponents belonging to distinct ethnic, linguistic and religious groups has taken place.[15] The following discussion attempts to highlight these issues in the context of the incidents which have occurred in the territorial jurisdiction of Pakistan.

The ancient history of India bears considerable scars of the traditional rivalry between Hindus and Muslims.[16] The failure of these communities to reach a constitutional settlement[17] and the prospect of partition flared up these traditional hostilities to the extent of an open conflict. As the independence of India approached, with the knowledge that a partition was to take place, communal violence broke out with an unprecedented ferocity in various parts of the country. The frenzy and madness that this partition brought about, took its toll on the religious minorities on either side of the frontier. Innocent Muslims, Hindus and Sikh civilians got involved in the bloody "holy" wars. While the Muslim minorities left behind in India became an easy prey for the Hindus, equally brutal massacres took place inside the frontier of Pakistan of Hindus and Sikhs.

In a majority of instances angry and violent mobs, infuriated at the (often widely exaggerated) stories of the killings and torture of their co-religionists, and the rape,

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[15] See *supra* chapter 5.
[16] See *supra* Chapter 8.
[17] *Ibid.*

assaults and other forms of degradation of their women produced such venom and fury that they lost all senses and in a determined mood of vengeance went ahead to kill in the most tortuous manner possible anyone, belonging to the opposing religion. Everywhere in India and Pakistan, religious minorities became victims of a campaign of physical extermination and their harrowing stories have filled volumes.[18]

The province of Punjab vivisected in an artificial manner, had left nearly 5 million Hindus and Sikhs in Pakistan and over 5 million Muslims in India.[19] Not surprisingly it became one of the worst affected areas, where nearly half a million people perished becoming victims of the genocidal conflict· Describing the incidents that took place in Punjab during August-September 1947, Collins and Lapierre state

> "It would be unique, a cataclysm without precedent, unforeseen in magnitude, unordered in pattern, unreasoned in savagery. For 6 terrible weeks, like the ravages of the medieval plague, a mania for murder would sweep across the face of northern India. There would be no sanctuary from its scourge, no corner free from the contagion of its virus. Half as many Indians would lose their lives in that swift splurge as Americans in four years of combat in World War II".[20]

Similarly Bengal witnessed particularly distressing incidents of mass torture and killings. Collins and Lapierre say

> "mobs howling in quasi-religious fervour came bursting from the slums, wavering clubs, iron bars, shovels, any instrument capable of smashing in a human quasi religious savagely beat to a pulp any Hindu in their path and left the bodies in cities gutters...Later, the Hindu mobs came storming out of the neighbours, looking for differentials Muslims to slaughter. Never in all its violent history, had Calcutta known 24 hours as savage as packed with human viciousness like water-soaked logs, scores of bloated cadavers bobbed down the hooghley river towards the sea. Other

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[18] For objective analysis in English see Collins and Lapierre, *Freedom at Midnight,* (London: Collins) 1975; Kuper *Genocide*; Moon *Divide and Quit*, (London: Chatto and Windus) 1961; G Khosla *Stern Reckoning A Survey of the Events leading up to and the following Partition of India* , (Dehli: OUP) 1989.

[19] Collins and Lapierre *ibid.*, 284; Kuper *Genocide*, 65.

[20] *Ibid.* 284.

> corpses, savagely mutilated, littered the city's streets. Everywhere, the weak and helpless suffering most...".[21]

Admittedly, the forces of confusion that were unleashed by the unplanned and disorganised partition of India and the hostile environment of charges and counter-charges make it extremely difficult to gauge those who were responsible for such large scale genocide.[22] Nonetheless, as we have discussed earlier, acts of genocide, regardless as to whether by public officials or private individuals, are punishable.[23]

It is also submitted that there is sufficient evidence to suggest that the new governments of India and Pakistan were, to an extent, responsible for allowing the physical extermination of the minorities to take place. The views of a British officer stationed in West Pakistan are instructive when he says that "despite noble professions there was no real desire to punish those who robbed, raped and murdered the minority communities, rather there was a disposition to punish those who tried to protect them".[24] It may well be that in such frenzied conditions it is difficult to maintain law and order, but there remains substantial evidence that members of the police and army were themselves suffering from communal hatred.[25] In a number of cases the government officials through their actions encouraged unruly mobs to carry out and perpetuate massacres. According to Kuper "part of the difficulty was that the forces of law and order proved unreliable, having become infected by communal fears and hatreds. The police, the military, railway clerks and other officials, were often themselves involved in massacres or did not intervene".[26] In Lahore, whole street of Hindu homes were ablaze, while Muslim police and troops stood by watching.[27] Another example is that of Sheikhupra where

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21 Collins and Lapierre, *ibid.*

22 Kuper *Genocide*, 66; R Emerson "The Fate of Human Rights in the World" 27 *WP* (1975), 201-226, 223.

23 See *supra* Chapter 5; M Ford "Non-Governmental interference with Human Rights" 56 *BYIL* (1985), 253-280, 260, 279.

24 Moon, *op.cit note* 18, 237.

25 Kuper *Genocide*, 67.

26 *Ibid.*, 67.

27 Collins and Lappierre, *op.cit note* 18, 285.

> "the entire Hindu and Sikh community was herded into an enormous 'go-down', a huge warehouse used by the town bank to store the sacks of grain held as collateral for its loans. Once inside, the helpless Hindus were machine gunned by Moslem police and army deserters. There were no survivors".[28]

A number of sources corroborate the view of complicity on the part of law enforcing agencies during massacres which were carried out by unruly mobs. It is argued that the armed forces that were assigned the task to prevent any such occurrences, often failed to take action while some joined in the plundering and looting themselves. While millions of Hindus and Sikhs were forced to flee from their homes, in Punjab and Sindh, the urge to drive them out was due to a considerable extent to the greed of taking over land and property left by their fleeing victims.[29] The Governments of India and Pakistan had promised to protect the lives and properties of their religious minorities, a view subsequently reaffirmed by the 1950 treaty between the two States.[30] In actual practice, however the properties of these persecuted minorities was taken away permanently, never to be returned.[31] In Pakistan, in a number of instances, the properties taken away from Hindus and Sikhs were arbitrarily distributed amongst political supporters. Besides that large settlements of refugees were established despite resentment on the part of the local population.[32]

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28 *Ibid.* 287.

29 "A motive that had nothing to do with religious fervour was more often behind the Moslem attacks on Hindus and Sikhs in Pakistan. It was the greed, a simple often carefully orchestrated effort to grab the lands, shops and wealth of their neighbours" *ibid.* 288 and "Inevitably a dingly thought swept the Moslem masses: if Pakistan is ours, so too are the shops, farms, houses and factories of Hindus and Sikhs" *ibid. 284.*

30 UNTS 131, 3 (8th April) 1950.

31 Personal interview with Air Marshall (Retd) Zafar A Chaudhry-former chief of Pakistan Air force; Callard, *Pakistan A Political Study,* (London: Allen and Unwin) 17; also see A Ahmed, "Refugee voices, Memories of Partition 1947", 3(3) *JRS,* (1990), 262-264, 263.

32 "The Muhajir (refugees) were allowed to occupy the properties and businesses left by the emigrating Hindus. Tens of thousands of Muhajirs benefited from real or bogus property claims. Several townships were constructed to provide housing to shelters Muhajirs. New housing development projects were approved to Muhajir middle and upper classes residential plots at prices below the developmental cost together with loans on easy terms". F Ahmad "The rise of Muhajir separatism" 1 *JAAS* (1989), 97-129, 108; "..as the administration of evacuee property was in the hands of a non-Sindhi, Raja Ghazanfar Ali Khan, in the government of L A Khan, the lion's share of both urban and

The incision of India in such a manner had momentous consequences as far as the issue of physical protection of minorities was concerned. It resulted in the extermination of more than One million civilians and the creation of at least twelve million refugees, one of the biggest human migrations of history.[33] More importantly being the first major act of genocidal activity since the Nuremberg trials and adoption of the General Assembly Resolution 96(I), it was to reflect, on a practical plane the weaknesses that were inherent in the issue of physical protection of minority groups. It is submitted that while the Nuremberg trails set a clear precedent, the tone of the General Assembly, in Resolution 96(I) was declaratory of the principles of international law and was binding on all States, including those that emerged subsequent to the adoption of the Resolution.[34]

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rural property went to succour the needy and not so needy refugees from India" T Wright Jr "Center-Periphery Relations and Ethnic Conflict in Pakistan- Sindhis, Muhajirs and Punjabis" CP (1991), 299-312, 303.

33 F D'Souza and J Crisp, *The Refugee Dilemma*, (London: MRG) 1984, 6; Kuper *Genocide*; J Rehman "State-building, Self-Determination and Indian Muslim Refugees" 3 (2) *CSA* (1994), 111-129; B Whitaker *et al*, *Biharis of Bangladesh*, (London: MRG) 1977, 7.

34 "Such resolutions [passed by State representatives] are authority for the content of customary law only if they claim to be declaratory of existing law. A clear example is resolution 96(I) of 11 December 1946, which says that 'the General Assembly....affirms that genocide is a crime under international law'. But such declaratory language is surprisingly rare". (footnotes omitted) Akehurst "Custom as a source of international law" 47 *BYIL* (1974-5), 1-53, 6. On the position of new states Akehurst says "According to traditional theory, new States are bound automatically by all rules of customary law in existence at the time when they become independent. The theory is not accepted by writers (especially writers from communist states) who believe that custom is an implied agreement between states and the new states are not bound without their consent. However such writers are prepared to infer consent from entry into relations with other States unless the new States make reservations expressly with holding its consent. The qualification reduces the element of consent to a fiction; but since such reservations are never made in real life, the practical results is the same as the result produced by the traditional theory. The attitude of new states of Asia and Africa is sometimes lacking in clarity and consistency. At times they deny that they are bound by certain rules which harm their interests; but they accept other rules with out question, as if those rules were binding on them automatically and not solely because the new states had consented to those rules...The traditional theory is in keeping with what has been said above about dissenting states. A state can 'opt out' of a rule of customary law by dissenting before the rule becomes well established, but not afterwards. Unfortunately for the new states, most rules of customary law were well established before the states concerned became independent; independence came too late for them to dissent effectively" *ibid. 27-28;* Y Dinstein "International Law as a Primitive Legal System" 19 *NYUJILP* (1986-7) 1-32, 9; "No single state can say on its admittance into the community of nations that it desires to be subjected to such and such rules of international law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exceptions of those which are binding upon such states only as are parties to a treaty creating the rules concerned" R Jennings and A Watts (eds.) *Oppenheim's International Law*, (Harlow: Longman) vol. i, 1992, 9th edn Peace, 14-15; G Fitzmaurice "Some Problems

The debates of the United Nations clearly reflect the view that both India and Pakistan recognised the international legal obligations relating to the protection of minorities.[35] On the other hand it was equally clear that as far as this issue of protection of minorities was concerned, the whole environment was one of charges and counter-charges of incompetence, indifference, of being accomplices or participants to genocide.[36] Hence Pakistan's official declaration to the Security Council stated

> "It became clear that [the government of India] were determined to leave no Muslims in East Punjab. The Pakistan government appealed to the government of British Commonwealth to arrange a conference to find ways and means of removing the serious threat to the peace and security of the Sub-continent, but Indian government opposed this proposal".[37]

Although both the governments of Pakistan and India promised to undertake strict measures to ensure the protection of their minorities, subsequently reconfirmed by the 1950 treaty,[38] it is submitted that their acts failed to put these intentions into practice. Both States have denied having any involvement into the genocidal conflict. There were no serious investigations, and no trials were held for involvement of individuals in acts of genocide.[39] While millions were devastated, both the States of India and Pakistan were in a position to refute any imputability as well as deny any complicity with any acts of genocide.

Regarding the Sources of International Law" *Symbolae Verzijl*, (La Haye: Nijhoff) 1958, 153-176, 165-166.

35 See LeBlance, *op.cit note* 11.

36 3 SCOR, supp for Nov. 1948, 77. "The government of Pakistan reported to the Security Council that it had made repeated efforts to persuade the government of India to arrest the course of 'genocide' in East Punjab and the neighbouring areas, but without success" K Hasan, *Pakistan and the United Nations*, (New York: Manhatten Publishing Co), 1960, 38.

37 3 SCOR, Supp for Nov. 1948, 77-8 ; also see No 64 289th-290th meeting 7 May, 21, 312 meeting, 3 June supp for June 1948, 78.

38 131 UNTS 3 (8 April 1950).

39 Personal interviews.

9.3.2 Genocide in the former East Pakistan

There is substantial evidence to suggest that Pakistan had been involved in committing large-scale violations of human rights including physical extermination of various minorities in the former East Pakistan.[40] The reason that led to such an unfortunate scenario lie primarily in large scale discrimination and attempts at forced assimilation of the Bengalis of East Pakistan and treating it as a colony of West Pakistan.[41]

The alleged atrocities, including large-scale genocide, was a consequence of the civil war which began following a decision of the military leaders to postpone the calling of the National Assembly which was also to frame a new, democratic constitution for Pakistan. The Assembly members had been elected through the general elections held in the country in December 1970, the first ever based on adult franchise. The Awami League (the main Bengali opposition party) scored a dramatic and overwhelming victory, obtaining 167 of 313 in the National Assembly. It had an overwhelming victory in East Pakistan having gained 160/162 seats (Table 10). The unequivocal and complete support which the Awami League had, is reflected from the fact that the party managed to win all but two seats in the National Assembly. The election results came as a shock to the West Pakistan military and politicians and their unwillingness to allow the Awami League to frame a new constitution (based on their 6 points manifesto seeking greater autonomy) and form the government led to the postponement of the calling of the session of the Assembly.

This gesture of the West Pakistan army was, however, widely perceived in East Pakistan as another move to deny the Bengalis their legitimate democratic rights. Sheikh

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[40] A Mascarenhas, *The Rape of Bangladesh*, (Dehli: Vikas Publications) 1971; ICoJ, *op.cit note* 7; Kuper, *Genocide*, 76-80; R Jahan "The Bengalis of East Pakistan" in Potter, *44-61*.

[41] See *infra* chapter 10 and 11; V Nanda "Self-Determination in International law The tragic tale of two cities-Islamabad and Dacca" 66 *AJIL* (1972), 321-336; Nanda "A Critique of the United Nations inaction in the Bangladesh crises" 49 *DenLJ* (1976) 53-67; Suzuki "Self-Determination and World Public Order: Community response to territorial separation" 16 *Va.JIL* (1978) 779-862;

Mujib-ur-Rehman, the Awami League leaders' call for a general strike led to large-scale civil disobedience movement with a refusal to pay taxes and a total strike in government businesses and offices. The West Pakistan rulers, instead of ameliorating the political grievances of the Bengalis, attempted to resolve the problems through use of military force. On the 25th of March 1971, the Pakistan military struck with devastating brutality, with the intention of "weeding-out" all opposition, and the country of all anti-Islamic elements, in particular the Hindus.

However, the official contention remains that the military actions taken after 25 March 1971 were purely to bring the civil war to an end. According to the White Paper that was produced by Pakistan government

> "the action of Federal government on 25 March 1971, was designed to restore Law and Order, which had broken down completely during the Awami League's non-violent non-co-operation movement".[42]

The real picture, however was completely different. It was in fact the denial of the legitimate demands of the rights of Bengalis with the postponement of the calling of the newly elected National assembly to draft a constitution for Pakistan which prompted the non-co-operation movement and the decision instead to coerce the Bengalis through brutal use of force that created a law and order situation. According to ICoJ

> "the charge that there had been a complete breakdown of Law and order is not justified, at least up to 24 March. The breakdown of Law and order which then occurred was a consequence of the breakdown in talks, of the decision to re-assert the authority of the army, and of armed resistance to that decision".[43]

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[42] Government of Pakistan, *White Paper on the Crises in East Pakistan, Introduction,* 5 August 1971 (Islamabad: Government of Pakistan press) 1971.

[43] ICoJ, *op.cit note* 7, 23.

4.3.2.1 The Scale and extent of genocide

The scale of the atrocities committed by the West Pakistan forces were horrendous and difficult to find parallels with. According to J Salzburg the atrocities committed in East Pakistan included

> "Killing and torture; mistreatment of women and children; mistreatment of civilians in armed conflict, religious discrimination, arbitrary deprivation of property, suppression of the freedom of speech, the press and assembly, suppression of the right of migration".[44]

Exact figures are not available although it is estimated that between 1-3 million[45] people died and roughly 10 million were forced to become refugees.[46] The events subsequent to March 1971 make it quite obvious that the army was determined to physically exterminate at least certain sections of the population. It has been contended by the West Pakistan military and political leaders that while the military action against *Mukhti Bhani*, students and other opposition groups was conducted in order to bring the civil war to an end the action, against political opponents does not come within the existing definition of genocide. As we have already discussed, unfortunately, the definition as provided in Genocide Convention has a major gap in which "political genocide" could be condoned. On the other hand, the physical extermination of Hindus, it can be said with certainty, comes within the ambit of the definition of genocide as

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[44] Cited in Nanda "Self-Determination in International law" *op.cit note 41*, 331-332.

[45] Figures have varied considerably according to the political inclination of the authority. Jahan *op.cit note* 40, puts the figure at between 1-3 million 257; Kuper *Genocide*, 79; Kuper *Prevention of Genocide*, 48. According to Whitaker "Three million has become established as the number of people who were killed in all during the period of terror between March and December 1971"; Whitaker *et al, op.cit note 33*, 8.

[46] "In the early 1970's ten million people left what is now Bangladesh and fled to India" P Hyndman "Developing Refugee law in Asia Pacific Region: Some issues and prognosis" 1 *AsYIL*, (1990), 19-44, 23.

provided by the Convention and there was clearly an intent to wipe them out. Affirming our point ICoJ report states

> "as far as the three groups are concerned, namely members of the Awami League, students and Hindus, only Hindus would seem to fall within the definition of `a national, ethnical, racial or religious group'. There is overwhelming evidence that Hindus were slaughtered and their houses and villages were destroyed simply because they were Hindus. The oft repeated phrase `Hindus are enemies of the state' as a justification for the Killing does not gainsay the intent to commit genocide; rather does it confirm the intention. *The Nazis regarded the Jews as enemies of the state and Killed them as such. In our view there was a strong prima-facie case that the crime of genocide was committed against the group compromising the Hindu population of East Bengal".*[47]

According to Professor Nanda

> "On 25 March, 1971, the Pakistani military struck Dacca without warning and initiated a reign of terror throughout East Pakistan which continued with increasing intensity until December 1971. Villages were burned; Civilians were indiscriminately killed; Hindus were sorted out and massacred as were university teachers and students, lawyers, doctors, Awami League leaders and Bengali military and police officials. The horrors of these events prompted observers to accuse the Pakistan armed forces and razakars, the local volunteer militia who were collaborators of Pakistani armed forces in East Bengal, of committing selective genocide, particularly to deprive East Pakistan of Bengali leadership".[48]

The sheer brutality with which the campaign was conducted to exterminate the Bengalis, and in particular the Hindus, provides one of unfortunate examples of human history. ICoJ opine

> "The principle features of this ruthless operation were indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community, the attempt to exterminate or drive out of the country a large part of the Hindu population; the arrest, torture and killing of Awami League activists,

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47 ICoJ, *op.cit note* 7, 57. (emphasis added).

48 Nanda "A Critique" *op.cit 41* (footnotes omitted) 55.

students, professional and business men and other potential leaders among the Bengalis, the raping of women, the destruction of villages and towns; and the looting of property. All this was done on a scale difficult to comprehend".[49]

4.3.2.2 The Role of the United Nations Organs

In the face of this clear evidence of massive violations of individual and collective rights including large scale genocide, the organs of the United Nations remained unwilling or unable to take any action.[50] Under the United Nations Charter the key guardian of international peace and security is the Security Council. Although the extent to which the Security Council could act in situations where there are gross violations of human rights but may not have any international dimensions is not crystal clear, it nonetheless has the discretion to determine under the provisions of Chapter VII whether there exists a threat to international peace and security.[51]

According to article 39, the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". It is arguable that since the start of the conflict in March 1971, on numerous occasions, action was called for on

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[49] ICoJ *op.cit note* 7, 26-27.

[50] Throughout this so-called reign of terror "the United Nations failed to use its available machinery to deal with the situation either with a view to terminating the gross violations of human rights which were occurring or to deal with the threat to international peace which they constituted" *ibid.* 98.

[51] See P Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force,* (Amsterdam: Het Spinhuis) Inaugural Lecture at the University of Amsterdam 22 January, 1993, 16-23; also see I Brownlie "Humanitarian Intervention" in J Moore (ed.) *Law and Civil War in the Modern World,* (Baltimore: John Hopkins University Press), 1974, 26; '[A] finding of a 'threat to the peace' is, to a large degree, a political decision on the part of the Council and so such a finding as regards a wholly internal situation is not precluded. Generally, however, the permanent members are not going to exercise this discretion unless the situation has potential international repression which could affect their interests or even involve them in an escalating conflict" N White, *The United Nations and the Maintenance of International Peace and Security,* (Manchester: Manchester University Press), 1990, 36; R Higgins, *The United Nations: Appearance and Reality,* Josephine Onoh Memorial Lecture, (Hull: University Press), 1993, 10; J Morris "Haiti: State Sovereignty, Self-interest and the New World Order" in Kritsiotis 40-70, 55.

the part of the Security Council. Indeed, the memorandum of the Secretary-General in July 1971 makes the point very clear when he says

> "...I have reluctantly come to the conclusion that the time is past when the international community can continue to stand by, watching the situation deteriorate and hoping that relief programmes, humanitarian efforts and good intentions will be enough to turn the tide of human misery and potential disaster. *I am deeply concerned about the possible consequences of the present situation, not only in the humanitarian sense, but also as a potential threat to peace and security and for its bearing on the future of the United Nations as an effective instrument for international co-operation and action".*[52]

There were serious political differences on the issue of East Pakistan in the Security Council and it was "seized" of the matter only after active hostilities broke out between India and Pakistan in December 1971, nine months after the civil war had started with its consequent violations of human rights and mass exodus of refugees. Ultimately when it did begin its deliberations on 4th December, the political and ideological differences immediately came to surface.

The Indian and Pakistan governments charged and counter-charged each other. While the Indian representative accused Pakistan of denying the legitimate aspirations of autonomy to the Bengalis and of committing genocide,[53] the Pakistan delegate refuting all these allegations counter-charged India of provoking and encouraging a secessionist movement.[54] The issue became a pawn in the hands of the major powers, with the US and China supporting Pakistan and asking for an immediate cease-fire and military withdrawal, and the Soviets siding with India and insisting on the immediacy of a political settlement in East Pakistan. Ultimately these political and ideological differences prevented any form of action with the Soviet Vetoing a draft Resolution.

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[52] UN Document S/10410 p1 (italics added), Dec. 3, 1971; UN Press Release SG/SM 1516 2 August, 1971.

[53] S/PV/1608, 8, 18, 32.

[54] S/PV/1608, 7.

Given this impasse in the Security Council, the matter was then referred to the General Assembly, who could take action under the Uniting for Peace Resolution.[55] There was a sense of urgency in the General Assembly and a strong consensus on the ways things should operate. It must, however, be noted that this consensus suggests that the prime concern of the members was upon the insistence of the territorial integrity, State sovereignty and the retention of status quo. Kuper accurately describes the situation

> "The basis of this consensus [in the General Assembly] was the commitment to two general principles of international relations between independent states, namely, respect for their sovereignty and their territorial integrity, and non-interference in their internal affairs. To this must be added the fear of fragmentation as a result of the exercise of the right to self-determination".[56]

The Indian invasion of East Pakistan in December 1971 was unacceptable to the majority and the action was deplored in the General Assembly.[57] Indeed, the vote on the issue overwhelmingly

> "reflected the disapproving attitude by most states to the secession of Bangladesh from Pakistan and India's armed intervention. Many of them were no doubt anxious to discourage dissident minorities in their own states from taking the same course....The US on December 12 requested that the Security Council be re-convened due to `India's defiance of world opinion' in respecting the General Assembly's call for cease fire and withdrawal of troops".[58]

The actions taken in other UN organs, including those specifically related to Human Rights had shown a similar unease. The issue was brought before Sub-

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55 GA Res. 377 (V).

56 Kuper, *Prevention of Genocide*, 58.

57 The General Assembly vote was 104-11 (10 abstentions) calling for an immediate cease-fire and instant withdrawal of Indian troops GA Resolution 2793 XXVI, 7 December 1971.

58 ICoJ, 85; According to the then United States Ambassador to the UN, George Bush, the Pakistani military action in March "does not.. justify the actions of India in intervening militarily and places in jeopardy the territorial integrity and political independence of its neighbour Pakistan". S/VP. 1611, December 12, 1971, 11.

Commission largely as a result of the initiatives of those international Non-Governmental Organisations, which have a consultative status with the ECOSOC. J Salzburg, a representative of the International Commission of Jurists, added his voice to the plea that the Sub-Commission take action under the mandate of ECOSOC Resolution 1235 (XLII). However, the stance adopted by members of the sub-commission was far from being satisfactory and conspicuously failed to show any real concern for the violations of the rights of the Bengalis.

Mr Janis, the Indian observer pointed to the human rights situation and in particular, the influx of millions of refugees into India.[59] The representative of Pakistan, Mr Khan challenged these assertions, arguing that the present matter was beyond the scope of the consideration of United Nations bodies since it affected the territorial integrity of States.[60] As to other members of the Sub-Commission, the participation remained minimal, and only three members actually participated in the debates,[61] and indeed one of them remained opposed to any discussion in the belief that these matters fell within the domestic jurisdiction as provided by article 2(7) of the UN Charter.[62]

Although there was some consideration of the conflict, the concern that was shown, at most related to humanitarian issues. Only one member, Branimic Jankovic from the former Yugoslavia deplored the apathetic approach urging the members of the Sub-Commission not to remain silent as a matter of individual conscience argued "that when faced with a situation affecting tens of thousands of persons, members were inclined to suppress their feelings and conscience. But in such a situation, the sub-commission should not remain silent...".[63]

The Sub-Commission unfortunately remained silent, and failed to take any action under Res. 1235 (XLII). The sounds of silence, however were not only characterised in

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59 For his comments see UN Doc E/CN.4/Sub SR.625-35, 1971, 139-144.
60 For his comments *ibid.* 145-6.
61 *Ibid.* 74-75, 146-147.
62 *Ibid.* 74
63 *Ibid.* 74-75.

the Sub-Commission, but transcended through the entire fabric of the UN organisation. The Commission on Human Rights did not meet at all during the East Pakistan crisis. Although, the treaty based body of the Convention on the Elimination of All forms of Racial Discrimination did meet twice during 1971, it failed to show any real concern for violations of human rights.

The crisis of East Pakistan had its roots in the racially discriminatory and undemocratic political and constitutional stance of the West Pakistan politicians and army, and Pakistan being a party to the said convention, the committee had the mandate to inquire into greater detail the constitutional and political shortcomings of Pakistan. Having decided that Pakistan's report was not adequate, the committee in its April session asked Pakistan, alongside 16 other States to provide supplementary information at the committee next session due in September. No subsequent action was undertaken in its September session nor did Pakistan comply with the committee's earlier requests. Admittedly there was some consideration of the matter in the Economic and Social Council in July 1971[64], and in the third committee of the General Assembly,[65] though the focus of the concern related largely to humanitarian aspects.

While the UN remained deadlocked over the issue, the fate of East-Pakistan was sealed by the final Indian invasion and surrender of the Pakistani troops in December 1971. The failure of the United Nations to take any positive action, and its inability to make any constructive use of the array of its human rights instruments were echoed in the comments of the Indian Ambassador when he exclaimed "what, indeed, has happened to our convention on genocide, human rights, self-determination and so on".[66] Reflecting on the general disillusionment Salzburg writes

> "The United Nations never deliberately considered the massacres of at least several hundred thousand persons and the perpetration of forms of

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64 8 UN Monthly chronicle (No 8) 1972 August-September, 1971.
65 *Ibid.* (No 11) 124-126, December 1971.
66 S/PV/606, 32.

> gross violations of human rights in Bangladesh, formerly East Pakistan, from March to December 1971. The United Nations non-response to these tragic events represents a serious omission in the exercise of its responsibility to promote human rights. Prompt United Nations consideration of the human rights violations when they were first reported might have prevented further violations as well as the secession of Bangladesh from Pakistan and the hostilities between India and Pakistan. The Bangladesh experience vividly illustrates the inextricable relationship between the United Nations Charter principles of promoting human rights and maintaining peace and security. It also illustrates unfortunately, that member states consider that the charter's principles of non-interference in matters essentially within the domestic jurisdiction of a member state may prohibit UN intervention until a situation reaches a level of international conflict incapable of a non-violent solution. Scholars of UN affairs should consider the implications of Bangladesh experience in terms of UN capability to prevent human right violations".[67]

9.3.2.3 Role of India

It remains clear that ever since active civil war started on 25 March 1971, Indian actions, in providing active military support to *Mukhti Bhani* (the insurgent group) and its subsequent engagement in the military operations towards the end of November 1971, with the invasion and occupation of some of Pakistan's territory and capture of its military armament were in breach of the customary and treaty norms of non-intervention into the affairs of another State.

It seems doubtful that even after the pre-emptive strikes on the part of the Pakistan military on Indian territory, the full scale invasion of India could be sufficiently justified simply on the orthodox and traditional grounds of self-defence.[68] It has to be conceded that India was forced to accept nearly 10 million refugees and their maintenance was

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[67] J Salzburg, "United Nations Prevention of Human Rights violations The Case of Bangladesh" 27 *IO* (1973), 115-127, 115.

[68] Fonteyne treats India's stance on the issue of self-defence as "some vague and controversial allegations of self-defence by Indian spokesmen" J Fonteyne "The Customary International Law doctrine of Humanitarian Intervention: Its Current validity under the United Nations Charter" 4 *Cal.WILJ* (1974), 203-270, 204; also see J-P Fonteyne "Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in cases of Mass influx of Refugees" 8 *AYBIL* (1978-80) 162-184.

having serious consequences for the Indian economy. Equally it needs to be noted that the treatment of the Hindu population by Pakistan, particularly with reference to the 1950 treaty did provide India with a more immediate concern than the rest of the international community. On the other hand, Indian political motives remain extremely important and could not be overlooked.

It is clearly arguable that while Indian politicians occasionally and rather inconsistently relied upon the doctrine of humanitarian intervention,[69] India had strong political interests in the breaking-up of the State of Pakistan, and that the invasion and subsequent defeat of Pakistan army was not so much prompted by humanitarian concerns or a desire to uphold the principles of human rights and self-determination but by a desire to break up it arch enemy, whose existence it had with grave reluctance and only grudgingly accepted. After all as Franck and Rodley correctly point out

> "...no one was more icily indifferent to the Hungarian freedom fighters dying on the streets of Budapest than India's foreign minister Krishna Menon, who contemptuously declared `[W]e can not say that a sovereign member of this Assembly...can be called upon to submit its elections and everything else to the United Nations'. India could scarcely have invaded Hungary as it did Bangladesh. But Delhi could have expended some moral prestige it enjoyed in the international community on taking the Soviets to task, thereby raising some of the `invisible' costs of that draconian operation. Instead Mr Menon dismissed the Hungarian struggle for independence and self-determination as no more than an electoral dispute and so beyond the legitimate concern of his country or international community. Yet when India saw a chance to partition Pakistan, its representative went into some detail to enlighten the Security Council as to the failure of East Bengali elections, equating humanitarian and political rights and calling for their international and eventually unilateral enforcement; and Soviet Ambassador Malik even, in part sought to justify the Indian invasion on grounds of Pakistan's political irregularity. `In view of that expression of will' he said to Pakistani Ambassador `as represented by the convincing figures of 167 seats in Parliament of East Pakistan out of total of 330 in the Parliament, why have you decided to deprive these members of the parliament of the right that is theirs to exercise the confidence placed in them by the peoples as

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[69] *Ibid.*, 204; "We are glad that we have on this particular occasion absolutely nothing but the purest of motives and the purest of intention; to rescue the people of East Bengal from what they are suffering" *per* Indian Ambassador S/PV/606, 18.

expressed through their will? Why is it desired to deny them the right to work freely in the legislative body'".[70]

Equally instructive is Nanda's argument when he says "As to India's motives, it unquestionably must have welcomed the opportunity to split Pakistan into two countries and weaken it, thereby minimising the perceived threat to India from a stronger Neighbour".[71] India itself has been involved in a number of instances notably in Kashmir, Nagaland and Punjab where it has *prima facie* denied the minorities aspirations of autonomous development or self-determination.[72]

9.3.2.4 Issue of Punishment of individuals involved in genocide

If the East Pakistan saga was to exemplify the view that in an environment where political concerns predominate any humanitarian values, making the *prevention* of the physical extermination and genocide of minorities difficult and cumbersome, the *punishment* of those involved in such crimes was to prove impossible. Despite the coming into effect of the Genocide Convention, article IX of which provides the International Court with the compulsory jurisdiction to settle dispute amongst contracting parties in relation to "interpretation, application and fulfilment of the Convention", States have remained reluctant to bring any such disputes before the International Court. The tragedy of East Pakistan was also, at long last, to break the silence of this provision of the

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70 Frank and Rodley, "After Bangladesh The Law of Humanitarian Intervention" 67 *AJIL* (1973), 275-305, 293-294.

71 V Nanda, "Tragedies in Northern Ireland, Liberia, Yugoslavia and Haiti, Revisiting the validity of Humanitarian Intervention" Part 1 20 *DenJIL* (1992), 305-334. 319.

72 "The Kashmir and Naga repression's by India have scarcely raised an international eyebrow and the Indians, with impunity, have been able to scorn the international presence-the UN military observers who are supposed to supervise the old truce lime. The repression of political freedom in Kashmir and elsewhere in India scarcely make more convincing New Delhi's role as a disinterested champion of principles of freedom and Self-Determination beyond its boundaries". (footnotes omitted) Frank and Rodley *op.cit note* 70, 296. On Kashmir see A Lamb *Kashmir A Disputed Legacy, 1846-1990,* (Hertfordshire: Roxford Books) 1991.

Convention, with the proceedings instituted being the first ones in the 20 year history of the Convention.[73]

Ironically it was neither Bangladesh, India or any other State sympathetic to the cause of the Bengalis that initiated the action but the Pakistan government itself which brought interim proceeding against India as a tactical move.[74] India, which had the custody of Pakistan's prisoners of war, had agreed with Bangladesh that it would hand over to Bangladesh several thousand individuals who would then be charged with a number of war crimes including genocide. On 11 May 1973 Pakistan, in an attempt to prevent the trials and to secure their repatriation to Pakistan, filed an application with the ICJ instituting proceedings against India seeking interim measures of protection.[75]

Pakistan had been of the view that India was acting in violation of the third and fourth Geneva Convention of 1949 by detaining 92,000 Pakistani prisoners of war whom India had a duty to repatriate. Similarly in Pakistan's view were any trials to be conducted, Bangladesh would neither have the jurisdiction nor provide an appropriate forum. It claimed jurisdiction to try the persons accused of genocide in its own tribunals contending that Bangladesh could not provide a "competent tribunals" as was envisaged by article VI of the Genocide Convention since the atmosphere prevailing in those trials would be highly emotional and extremely prejudicial to the accused.[76] Pakistan in its application sought the following interim measures

> "(1) That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals detained in India.

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[73] In relation to Article IX which provides for the jurisdiction of the ICJ, the imprint of Pakistan remains significant. Pakistan's allegations in relation to cultural genocide as conducted by India led the Indian delegate to fear a clause providing for the courts jurisdiction "would make it possible for an unfriendly state to charge, on vague and insubstantial allegations that another state was responsible for genocide within its territory" UN GAOR, Sixth Committee (103 mtg) 437 (1948).

[74] *Trial of Pakistan Prisoners of War*, ICJ Reports 1973, 347; H Levie, "Legal aspects of the continued detention of the Pakistani Prisoners of War by India" 67 *AJIL* (1973), 512-516.

[75] I Hussain, *Issues in Pakistan's Foreign policy*, (Lahore: Progressive Publishers), 1988, 214.

[76] See *The case concerning the Trial of Prisoners of War (Pakistan v India)*, ICJ pleadings, 3-7.

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangladesh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of any other Government or authority in this respect has been adjudged by the Court".

However, already in April 1973, Bangladesh had announced that it would proceed to try 195 Pakistani nationals "for serious crimes, which include genocide, war crimes, crimes against humanity, breaches of article 3 of the genocide convention, murder rape and arson".[77] It also legislated an International Crimes (Tribunals) Act in July 1973 providing for the trials of those accused 195 prisoners, and had requested a number of experts to come and observe as trial observers.

The case before the international Court was to prove short-lived never proceeding to a discussion of the merits, being settled by agreement between India and Pakistan in August 1973, and leading to Pakistan's Declaration of 14 December to drop the suit against India.[78] Through the aforementioned accord India and Pakistan reached an agreement for the repatriation of 91,000 prisoners of War and civil internees that were held by India, save for the 195 soldiers that were alleged to have been primarily involved in committing war crimes and genocide.[79] Sufficient evidence, it is submitted, would have been available at that time to try those involved in war crimes, crimes against humanity and genocide. As far as trials for genocide were concerned Bangladesh had already accepted that it was obliged to act in accordance with the provisions of the Genocide convention.

It would be appropriate here to counter the two objections raised subsequently by the Pakistan government. The first one relates to the territorial jurisdiction of Bangladesh, that Bangladesh could not be an appropriate forum to try persons accused of committing

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[77] Press release, April 17 1973 reprinted in Paust and Blaustein, *War Crimes Jurisdiction and Due Process A Case Study of Bangladesh*, (Unpublished Documents) 1974, 54.

[78] India-Pakistan Agreement on Repatriation of Prisoners of War 12 ILM (1973) 1080-84.

[79] *Ibid*; also see India-Pakistan: Agreement on Bilateral Relations and statements on its implementation, 3 July 1972, 11 ILM (1972), 954-957; India-Pakistan: Joint statement on the implementation of the Simla Agreement, *ibid.* 958-962.

genocide. However a closer analysis of article VI exposes the fallacy of this argument. Article VI requires such trials to take place "by a competent tribunal of the State in the territory of which the act was committed, or by such penal tribunal as may have jurisdiction". Since there is no restriction as to the timing of the coming to existence of a new State, it would have seemed perfectly compatible with the intentions of the article, firstly to treat Bangladesh as "the State in the territory of which the act was committed" and secondly to regard the newly formed government as having jurisdictional competence to try the alleged offenders.[80] It is clear that Bangladesh as a successor State to Pakistan could appropriately and legitimately claim jurisdiction, to try war crimes and crimes against humanity and genocide.[81]

The other objection relates to the absence of implementing legislation criminalizing acts of genocide and putting in effect the provision V of the Convention in either Pakistan or Bangladesh. As we have noted already, at all material times Pakistan was a party to the Genocide Convention, although it had not adopted any domestic legislation to give effect to its provisions. It nonetheless remains clear, it was bound under international law by the provisions of the Convention as article 1 of the Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes against Humanity states "even if such acts do not constitute a violation of domestic law of the country in which they were committed". Hence it could be stated with a degree of certainty that it was not an issue of jurisdiction, evidence or even the custody of the accused but one of the politics of international law.

Despite the fact that Bangladesh had emerged as an independent sovereign State and was *prima facie* in a position to try war criminals, it needed recognition and political and economic support from the international community. Pressure was introduced by

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[80] Paust and Blaustien, *op.cit note 7*, 21.
[81] *Ibid.*

Pakistan with the refusal to release nearly 400,000 Bengalis which included both civilians and former members of armed forces.[82] According to Paust and Blaustein

> "Pakistan, contrary to the letter and spirit of the 1949 convention placed even more pressure on Bangladesh by refusing to release some 400,000 Bengalis (civilians and former members of Pakistan Armed forces) who were being held in Pakistan and utilised as pawns in complicated power game."[83]

Pakistan, alongside China put further pressure on Bangladesh by refusing to recognise it as an independent State[84] and indeed the urge to pressurise was so strong that it led to China's casting of the first veto as a permanent member of the Security Council barring membership of Bangladesh.[85] The first application of Bangladesh (for United Nations membership) was vetoed by China, the grounds given were the alleged refusal of Bangladesh to comply with General Assembly Resolutions concerning repatriation of prisoners and withdrawal of foreign troops.[86] The grounds on which this veto was casted, related to the claim that Bangladesh, in refusing to repatriate Pakistani prisoners of war, had acted in violation of the 1949 Geneva Conventions,[87] which as Paust and Blaustein comment

> "was a curious twist of the Geneva Conventions, especially in view of the obligations of Bangladesh and India to prosecute those accused of grave breaches of the Conventions. China and Pakistan clearly had no intentions to fulfil their obligations to prosecute violations of international law. Political considerations were far more important than fulfilment of international legal responsibility".[88]

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82 Washington Post, August 26, 1972..

83 *Op.cit* note 7, 35.

84 Keesings 25-31 March, 1974, 26423; Washington Post, August 30 at 18

85 See SCOR, 27th Year, Supp for July, August and September. S/10759; SC 1660th meeting, 25 August 1972, GAOR, 27th Session, Annex Agenda Item 23, Doc A/8776; UN Monthly Chronicle August-September 1972, 24.

86 *Ibid.* 1659 meeting, August 1972 (11-1 China, 3 Guinea, Somalia, and Sudan).

87 *Ibid.*

88 *Op.cit* note 7, 36. cf. H Levie "Legal aspects of the continued detention of the Pakistani Prisoners of War by India" 67 *AJIL*, (1973), 512-516; H Levie "The Indo-Pakistani agreement of August 28, 1973" 68 *AJIL* (1974), 95-95.

The accountability for genocide and physical extermination of minority groups was unfortunately compromised by political ideals. In an agreement signed in Delhi on 9th April 1974, it was agreed to repatriate the 195 alleged perpetrators of genocide and other crimes of international law, implicitly recognising that none of these men involved would ever be tried or held accountable for the genocide committed in the former East Pakistan. As far as the issues of human rights were concerned the only act that emerged was an apology by the government of Pakistan stating that it condemned and deeply regretted any crimes that may have been committed.[89]

9.4 CONCLUSIONS

The present study has attempted to exemplify that in the absence of States upholding and protecting the rights of minorities and punishing those involved in violating these rights, it is difficult to promote or protect the rights of minorities. There are a number of substantive weaknesses in the whole prohibition of genocide; States like Pakistan have not hesitated to capitalise on these. The case of East Pakistan provides one of the most unfortunate incidents of State authorities engaging and perpetuating acts of genocide. However, despite the presence of substantial evidence of physical extermination and genocide of minorities, the international community generally failed to take any concerted action. Indian actions, it is contended, were prompted by political consideration, though they nonetheless helped Bengalis in ridding themselves of an ugly form of oppression and persecution.

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[89] Bangladesh-India-Pakistan: Agreement on the Repatriation of Prisoners of War and Civilian internees, 13 ILM 1974, 501-505 para 13; New York times April, 1974, at 3 col. 1.

A sadder and perhaps more unfortunate element of the whole saga, is the fact that no trials could be held for war crimes, crimes against humanity and genocide; international community failed once again to hold responsible and punish those individuals who had conducted such activities. Accountability for genocide was compromised by political interests. Professor Cherif Bassiouni's comments could provide a befitting conclusion to our present debate

> "Notwithstanding the enormous victimzation and the apparent effort of Bangladesh, abetted by India, to prosecute such violation, political considerations prevailed and Bangladesh did not carry out its intentions. It did so in exchange for political recognition by Pakistan and once this recognition was given, India returned the Pakistani detainees and accused war criminals who thus escaped individual criminal responsibility".[90]

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[90] C Bassiouni, *Crimes against Humanity and International Criminal Law,* (Netherlands: Sijthoff) 1992, 230.

CHAPTER TEN

MINORITIES AND THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

10.1 INTRODUCTION

Earlier discussion has attempted to establish that the contemporary regime relating to individual human rights is based on the principles of equality of treatment and non-discrimination.[1] Although the general prohibition in relation to non-discrimination is widely entrenched into the legal and constitutional framework of almost every State, it is submitted that in many ways international law lacks in providing any detailed measures necessary to uphold this right, or in defining adequately its parameters.[2]

The case of Pakistan vividly reflects the problems which the issue of discrimination and inequality could generate. It is worth re-calling that the State itself was formed primarily due to the fact that the Muslim minority of British India feared submission and discrimination by an overwhelming Hindu majority and the treatment as second-class citizens in a United India[3]. The hostile attitude of the two communities towards each other and a general unacceptability to reconcile their differences, forced the British colonial masters to acknowledge the separate existence of the Muslim minority and to introduce separate electorates and separate representation. Immediately prior to independence and partition of British India despite their linguistic, ethnic and cultural differences Muslims came to regard themselves as constituting a single homogenous group, and conceived themselves to be intrinsically different from other communities living in the Sub-Continent.

Although the fear of being discriminated in a Hindu majority State became the driving force leading to the ultimate creation of Pakistan, the carving out of a State on

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1 See *supra* chapter 6 and 7.

2 *Ibid.*

3 See C Kennedy "Policies of Redistribution Preference in Pakistan" in N Nevitte and C Kennedy, (eds.) *Ethnic Preference and Public policy in developing states,* (Lynne Reinner Publishers Inc.) 1986, 63-107, 64; C Ali, *The Emergence of Pakistan,* (New York: Columbia University Press) 1967, 6.

religious lines, nonetheless resulted in the presence of a considerable number of religious minorities principally Hindus, Christians and Sikhs. After the emergence of Pakistan with Muslims as an overwhelming majority the issue of equality and discrimination adopted ethnic and regional connotations. Ethnic and linguistic minorities, in particular the Bengalis and Baluchis led the charge of discrimination, and of forced assimilation.[4]

While endorsing the view that the principles, at least of racial non-discrimination and equality are firmly entrenched in international law and reflected through custom and treaty law, the present chapter critically analyses these principles in relation to their substance and effective implementation. On the substantive front, the main focus of criticism lies in the apparent generality or vagueness of these principles, providing States like Pakistan the opportunity to adopt *de facto* discriminatory policies. As far as the issue of the possible implementation mechanisms is concerned, it is contended that they remain woefully inadequate in particular where the government in power itself is unrepresentative and has established its authority through unconstitutional means.

10.2 INTERNATIONAL LEGAL OBLIGATIONS

Pakistan's international legal obligations in relation to the prohibition of discrimination based on race, religion, sex and language, like an overwhelming majority of other States, flow from its admission in the United Nations and ratification of the UN Charter.[5] Ever since its independence in August 1947, Pakistan has manifested

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[4] R Wrising "The Baluch Frontier Tribes of Pakistan" (ed.) R Wrising, *Protection of Minorities, Comparative Perspectives,* (New York: Perganom Press) 1981, 277-312.

[5] On 30 September, 1947, the General Assembly decided to admit Pakistan as a member of the United Nations see GAOR, Second Session, 92nd Plenary meeting, 311; UN Doc. A/CN.4/149, 7; On Pakistan's International Status see D O'Connell, *State Succession in Municipal and*

strong support for the principle of equality and non-discrimination for all individuals regardless of race, colour religion and sex. It actively participated in the preparation and adoption of the Universal Declaration of Human Rights, despite resistance from certain religious elements protesting that some provisions of the Declaration were contrary to the spirit of Islam.[6] This active participation was prompted by a belief, in the words of its representative Begum Ikramullah, in the dignity and worth of man. She stated

> "....It was imperative that the peoples of the World should recognise the existence of a code of civilized behaviour which would apply not only in international relations but also in domestic affairs".[7]

Pakistan's policies have at least in terms of constitutional manifestations affirmed the principles of the Universal Declaration.[8] The first constitutional document, i.e. the Objective Resolution that was adopted in March 1949 is clearly based on these principles, and indeed the fundamental rights provided in the first constitution of 1956 resemble conspicuously with the provisions of the Declaration.

Subsequent constitutions of 1962 and 1973 have also based themselves on the principles of equality and non-discrimination. Part II of the present Constitution, the 1973 Constitution (as amended), following closely the line of Universal Declaration provides *inter alia* for a number of fundamental rights including Freedom of

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International Law (Cambridge: Cambridge University Press) vol. ii, 184-187; A Gledhill, *Pakistan, The Development of its Laws* (London: Stevens and Sons Ltd) 1957, 65.

6 It needs to be noted that Saudi Arabia, a conservative Muslim State, abstained from voting in favour of the Declaration on grounds that it provided for certain provisions unacceptable to Islam; A Robertson and Merrills, *Human Rights in the World, An Introduction to the Study of international Protection of Human Rights 3rd edn.* (Manchester: Manchester University Press) 1989, 70.

7 GAOR, 3rd Session, Part 1, third Committee, 90th meeting., 1st Oct. 1948, 37.

8 "The Pakistan Constitution has the distinctive privilege of incorporating in its chapter I, about two thirds of the thirty fundamental human rights enumerated in the United Nations Declaration of Human Rights" CJ M Haleem, "The Domestic Application of International Human Rights Norms" in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights* Norms, (London: Human Rights Unit) 1988, 91-108, 106.

Association (Article 17), Freedom of speech (Article 19), Freedom to profess religion and to manage religious institutions (Article 20), safeguard against taxation for purposes of any particular religion (Article 21), safeguard as to educational institutions in respect of religion (Article 22), equality of all citizens before law (Article 25), non-discrimination on the basis of religion, race, caste, sex, residence etc. in access to public places and services (Article 26) and preservation of language script and culture (Article 28).

In the international forum Pakistan has demonstrated not only its commitment towards establishing a regime of non-discrimination and equality of treatment for all individuals regardless of race, religion and sex but initiated moves to protect its religious minorities. In 1950, it entered into treaty obligations with India in relation to the protection of its minorities and established a ministry to ensure the observation of these international obligations.[9]

Pakistan was also actively involved in the adoption of a number of international instruments including the International Covenants. Indeed, in so far as the issue of protection of groups is concerned Pakistan has taken an extremely firm and positive stance. The views of Pakistani delegates on the subject of "cultural" genocide have already been noted.[10] Similarly, during the debates on Article 27 of ICCPR the Pakistani representative treated it as the most significant Article in the entire Covenant.[11] Pakistan also played a key role in the preparation of the Convention on the Elimination of All forms of Racial Discrimination, and was in fact the third State to

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9 131 UNTS (1950).

10 *Supra* Chapter 9.

11 Begum Aziz Ahmed "considered [article 27] to be the most important in the whole Covenant. The existing text was satisfactory, and she was prepared to vote for it as it stood.....There were several religious minorities in Pakistan whose sentiments had always been respected and protected by law. In Pakistan, freedom of religion, language and culture was not only advocated but practised with pride".A/C.3/SR.1104, 14 November, 1961, paras 15-17.

have ratified it,[12] an apparent reflection on the part of the State towards establishing a regime of racial non-discrimination.

10.3 APPLICABILITY OF THE INTERNATIONAL NORMS RELATING TO EQUALITY AND NON-DISCRIMINATION

10.3.1 Political Self-Interests and the Exploitation of the Gaps in Existing Norms

10.3.1.1 Non-Recognition of Ethnic and linguistic Groups on which Non-Discriminatory Norms could be Applied

In the face of its international legal commitments, the constitutional practices of Pakistan, however seem equivocal. Undoubtedly it has been the historic factors and the urge to build a nation-State which forced successive governments to adopt assimilative policies even at the expense of discrimination against a number of ethnic, linguistic and religious groups. One strand of this discriminatory stance is reflected in the official position that no ethnic, racial and linguistic minorities existed in Pakistan with the implication that racial and ethnic discrimination could not possibly exist within the State.[13]

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[12] "Pakistan was among the very first states to sign the Convention and the third to ratify it" 6th periodic report of Pakistan before the Committee, CERD/C/66/Add.10 para 8.

[13] The term minority has been used in the present 1973 Constitution on a number of occasions (see for example the Preamble, article 2(a) and 36). However there is no definition of what constitutes a minority. The meaning of minority that was taken by the drafters of the constitution and has been subsequently adopted is that minorities necessarily means religious minorities (personal interviews). For a confirmation of these views see the proceedings of CERD discussed *infra*; According to the ICoJ "It is only the non-Muslim religions that are formally recognised by the government and the constituting minorities and for whom special, albeit not entirely favourable, arrangements are considered appropriate. The only way in which the interests of various linguistic and cultural groupings in the provinces can be protected, therefore is through the

Considering the ethnic, racial and linguistic composition particularly prior to the secession of East Pakistan this view seems patently inaccurate. However this assumption reflects the realisation of the sensitive nature of the issues involved. Combined with the non-recognition of racial or linguistic minorities, there has been a conspicuous move towards assimilation of different groups into a *Pakistani nation with one language, culture and ideology.* Since religion was the only bond which brought the otherwise desperate groups under the umbrella of Pakistan, it has featured prominently in Pakistan's constitutional developments. However, while it appears that Islam has been used excessively to inculcate a sense of unity, in the process religious minorities have been singled out and discriminated heavily.

A close analysis of Pakistan's successive constitutions affirm the view that explicit recognition has only been accorded to the existence of religious minorities. Similarly with the knowledge at hand that international protection could depend on the official recognition of the existence of minorities,[14] despite criticisms Pakistan showed great reluctance to admit the presence of minorities other than religious minorities, which incredible though it may seem, remained the official stance even in the context of the former East Pakistan.

State reports submitted by Pakistan to CERD, which operates under the auspices of the Convention on the Elimination of All forms of Racial Discrimination are particularly revealing in this respect.[15] While, as noted earlier, although the convention does not deal specifically with minorities, the situation of racial groups necessarily overlaps with those of minorities. Hence, quite frequently State parties are confronted with the discussion relating to discrimination issues faced by minorities.[16]

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constitutional provisions establishing provincial government and assemblies" ICoJ, *Pakistan Human Rights After Martial Law Report of a Mission* (Geneva) 1987, 115; R Wrising, *op.cit note 4*, 277-312, 294.

14 "What must be emphasised...is the fact that international protection of minorities does depend on official recognition of their existence" Capotorti, 12, para, 61.

15 *Supra* chapter 6.

16 *Ibid.*

Combined with this view of the absence of ethnic and linguistic minorities, there also has been the assumption that there does not exist any form of racial discrimination. Indeed, Pakistan, while referring to the events which led to the secession of East Pakistan, asserted "at no time was the imputation of racial discrimination or differentiation a component of [the] grievances or a cause of friction between the regions of Pakistan".[17]

In the truncated Pakistan this policy of non-recognition of ethnic and linguistic minorities has become even more pronounced. During the consideration of the fourth periodic report before the committee the representative of Pakistan stated that the reason behind non-inclusion of information relating to ethnic composition had been due to the reason that

> "his country had no data about it's people based on their race, colour, descent or national or ethnic origin. If the committee wished to obtain information about the languages spoken in Pakistan, however, they could easily be supplied with it in the from of tables taken form the report in 1972 population census. His government had supplied information about religious minorities, because it had viewed the question of discrimination against the background of the country's history. *In Pakistan, there were no racial or ethnic minorities but only religious minorities which represent less than 5% of the population*".[18]

Understandably this stance has often come under criticism from the members of the Committee. Several members were extremely surprised by this statement and doubted its accuracy leading to a considerable debate. One member of the committee Mr Nabavi put two basic question to the representative of Pakistan

> "The first concerned the composition of the population of Pakistan. When the third report had been considered, it had been suggested that in its fourth report, Pakistan should furnish information about its ethnic minorities. According to the reply which had just been given Pakistan did not have any ethnic minorities, but only religious

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[17] A/9018, para 164.

[18] (Italics added) CERD/C/SR.322 para 3.

> minorities. Despite that answer, it ought still to be asked whether the population of Pakistan was made up of a single race and really consisted of a single ethnic group".[19]

Another member of the committee, Mr Nettel, referring to Pakistan's second report which had contained information relating to the population of backward areas with inhabitants complying with tribal customs and laws wondered as to the extent which these customs and traditions reflected differences of ethnic origin. In his earlier comments, Mr Nettel had stated that he

> "found it difficult to understand that in a country of the size of Pakistan there were no groups of people differing by race or ethnic origin. Moreover to state that `minorities in Pakistan are essentially religious minorities' seemed to him to imply that there were other minorities, unless a religious minority and an ethnic minority were held to be the same thing. In any case, even if there were no ethnic minorities or racial discrimination, there was no reason why provisions concerning the protection of ethnic and racial minorities should not be included in the Constitution of Pakistan, as provided in the Convention".

These queries produced a swift response from Mr Sattar, Pakistan's representative. While not inclined to perceive religious minorities identical or the same as ethnic minorities, he was firmly of the view that racial distinctions "had no part in the tradition or history of the country".[20] In reply to Mr Nettel's earlier question, he had this to say

> "The sentence at the beginning of page 2 stating that minorities in Pakistan were `essentially' religious minorities might be clearer if the word `essentially' were deleted. He could nevertheless assure Mr Nettel that the minorities in Pakistan were religious in origin".[21]

This same approach is exhibited again in the fifth periodic report which claims

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[19] *Ibid.* para 5.
[20] *Ibid.* para 42.
[21] *Ibid.* para 43.

> "The people of Pakistan being of a relatively homogenous racial group and following the precepts of Islam, which is a universal religion advocating tolerance for people belonging to every race have not faced the problem of racial discrimination. It has, therefore not been necessary to enact any new laws or administrative measures to deal specifically with racial discrimination other than already existing in the country".[22]

This view was once more criticised by several members and one member commenting on it viewed that

> "if all states parties to the Convention adopted the same criteria to decide whether it was necessary to enact new laws or measures designed to prevent racial discrimination, they would be practically, exempt from discharging this obligation under the Convention, since almost all the religions of the World preached equality and tolerance".[23]

The line of representation on the part of Pakistan, however is continued in subsequent reports and in their discussions. In its eighth report it is asserted that "Racial discrimination is therefore not only unknown in the country but is anathema to the people of Pakistan when practised elsewhere in the World".[24]

The report continues to state

> "The government, regrets, however, that it is unable to provide any further information of this nature as data on ethnic origin are not collected in the country's decennial census or otherwise. This is in itself a striking illustration of the non-existence of racial prejudice and testifies to the absence of any feeling of racial discrimination or exclusiveness in Pakistani society. This is not to deny the prevalence of a number of different languages in the various parts of the country or the existence of religious minorities".[25]

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22 Fifth periodic report CERD/C/20/Add.15, para 1.
23 GAOR 33rd session supplement No 18 A/33/18, para 253; CERD/C/SR391.
24 CERD/C/118/Add.15 para 1, Eighth periodic report.
25 *Ibid.* para 3.

During the consideration of the Eighth periodic report, Pakistan's representative Mr Hussain said

> "The report provided ample information on the steps taken to protect the rights of minorities, who in Pakistan were religious, not ethnic minorities. The constitution granted all rights to minorities and, where necessary, they had been given special treatment".[26]

A closer analysis of Pakistan's approach on the issue of racial discrimination or on the recognition of the existence of racial and religious minorities, is itself however self-defeating in many ways. In a number of its reports, particularly before the CERD, detailed lists of legislative and administrative provisions are provided which are meant to counter racism and racial discrimination. This at least, implicit recognition, is also reflected in the replies of Pakistan to Human Rights Commission in relation to the "Rights of persons Belonging to National, Ethnic, Religious or Linguistic minorities". Similarly in its "Declaration on Minorities" the Government of Pakistan undertook that "minorities shall be integrated and accepted in the general stream of national life without affecting their religious and cultural identities and that special measures shall be adopted to help and support the underprivileged sections of the society, irrespective of their creed, caste or colour"[27] and that in, order to protect and promote the interests of the minorities a cultural council had been set up.[28]

As we have already noted, successive constitutional documents have also recognised the possibility of the existence of linguistic and ethnic minorities with a wide number of provisions prohibiting discriminatory practices. A numbers of Laws have also been in force to prevent and punish acts which are against racial harmony or promote racial and ethnic discord[29].

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[26] CERD/C/SR.713 (Consideration of the Eighth report by Pakistan).

[27] UN Doc E/CN.4/1298/Add.3 para 3.

[28] *Ibid.* para 4.

[29] See e.g. section 505 of the Pakistan Penal Code; section 153-A of the Pakistan Penal Code 1860; section 99-A of the Code of Criminal procedure 1898; The Security of Pakistan Act 1952 and

On the other hand, it is worth reiterating the point that the mere presence in constitutional and legislative provisions forbidding discrimination based on race, nationality, ethnic origin, language or religion *per se* can not be interpreted as constituting recognition of the existence of ethnic, religious or linguistic minorities. This sentiment is also echoed by Special Rapporteur when he observes that "as far as the question of implicit recognition, it should be pointed out that general constitutional provisions forbidding discrimination based on race, national or ethnic origin, religion or language can not be interpreted as constituting a recognition of ethnic, religious and linguistic minorities".[30]

10.3.1.2 POLITICAL AND IDEOLOGICAL CONCERNS AND THE ISSUE OF NON-DISCRIMINATION

(i) Religious Discrimination

The point was made earlier that political and ideological concerns have a greater tendency to conflict with issues relating to religious equality. Although racial problems have been extremely disruptive, there seems to be a greater consensus amongst the international community in relation to the prohibition of racial discrimination.[31] Religious discrimination is unfortunately evidenced in a number of States,[32] particularly where Islam is the official religion.[33] In this respect the case of Pakistan is quite revealing for the State was, in fact, created in the name of Islam, as a

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section 3 of the Political Parties Act 1962. These provisions are provided in the fifth periodic report of Pakistan.

30 Capotorti, 13, para 65.

31 *Supra* chapter 6.

32 Van Dyke; E Benito; A Krishnaswami, *Study of Discrimination in the matter of Religious Rights and Practices, E 60. XIV.2, 1960.*

33 Benito *ibid.*; Krishnaswami *ibid.*

safe-haven for the Muslims of the Indian Sub-continent. Hence as far as the probable influence of religion on other constitutional and political issues is concerned, Pakistan perhaps represents an extreme example, although the treatment that has been accorded to religious minorities is no worse than a number of other States. Religious identity formed the genesis of the struggle of self-determination for an independent State for the Muslims of British India. Although the precise implications of such a policy were not considered in any great depth, it was obvious that the partition on account of religious denominations would necessarily mean that substantial religious minorities would become part of the two new States.[34] The initial official position of Pakistan clearly reflected a secular note. On 11 August Pakistan's founder and first governor-general said in his speech to the Constituent Assembly

> "Now I think we should keep that in front of us as our ideal and you will find that in the course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State".[35]

The successive constitutional provisions, as we have already mentioned briefly, following this secular line have generally tended to establish a tolerant environment. Indeed one of the first steps which the first Constituent Assembly undertook was the passing of the Objective Resolution in March 1949. The Resolution relies heavily on the Universal Declaration on Human Rights. It pledged (inter alia) that Pakistan's first constitution should make adequate provisions for the non-Muslims to freely profess and practice their religion and this tolerant spirit is also reflected in the provisions of the 1956, 1962 and 1973 Constitutions.[36]

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[34] K Sipe, *The Political, Economic and Social Consequences of Partition, Related Migration, Karachi's Refugee Crises,* (Ann Arbor: Microfilms) 1984, 9.

[35] M A Jinnah, Constituent Assembly of Pakistan, Debates, vol. I, 20, August 11, 1947.

[36] For a detailed analysis see *infra* Chapter 11.

Although according to Article 2 of the present constitution, Islam is to the State Religion of Pakistan, article 20 provides-Subject to law, public order and morality

> (a) every citizen shall have the right to profess, practise and propagate his religion; and
> (b) every religious denomination and every sect thereof shall have the right to establish, maintain its religious institutions.

Article 27(1) states

> No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth

Despite the presence of these and as we noted a number of other provisions, on a practical plane, it has become equally clear that the presence of constitutional provisions in themselves have not guaranteed a regime of equality and non-discrimination. In its initial years of independence the Hindus and Sikhs who were left behind in Pakistan not only became an object of persecution and discrimination, their mere presence was regarded as a threat to the integrity of Pakistan. The fortunes of the treatment that has been accorded to religious minorities has fluctuated with the political environment. Despite the constitutional guarantees their position has ranged from being regarded as anti-State and disloyal citizens at one end of the spectrum to those who may well be accepted into the community provided they were content to acknowledge their subservient position.

Indeed, the inherent tensions between principles of religious orthodoxy as against building up a secular non-discriminatory State are reflected throughout the history of Pakistan. In particular prior to the secession of East Pakistan, the Hindu minority of East Pakistan often felt discriminated and was frequently persecuted. As Callard points out

> "Those Hindus who did remain, principally in East Bengal, showed their willingness to accept the new state of Pakistan. But it would be impossible to pretend that they welcomed the events of 1947. They found themselves separated from friends and relatives and cut off from major centres of commerce and education. Those in West Pakistan witnessed and suffered several months of killing and looting and endured total uncertainty as to the safety of their persons and possessions. In East Bengal, where with rare exceptions communal violence since partition has been avoided, the Hindus could not help but wonder whether it was their turn next. And every where they have had to bear a constant burden of suspicion and obloquy. All the sins, real or imagined, of the Indian government have been levelled at the Hindus of Pakistan"[37]

Unfortunately, the Hindu community both prior to and even after 1971, has been a continuous target of suspicion and often treated as fifth column. Political expediencies, have often allowed the Hindus to be treated as scapegoats for the general incompetence of the governments in power. As we have already noted, while Islam has been used as a rallying force for political ends, conversely and for the same political purposes Hindus have been treated as anti-State and anti-Islamic elements, persecuted and even becoming victims of genocide.

Since 1971 the change in the political dynamics has also affected not only the treatment accorded to religious minorities, but also the constitution of the minorities themselves. The focus of attention after the secession of East Pakistan has turned towards sects which, despite considerable tensions previously had been allowed to claim themselves as Muslims. In the truncated Pakistan, the position of religious minorities unfortunately does not provide a promising reflection. Although the constitution of Pakistan has granted fundamental rights including freedom of religion, and the prohibition of discrimination on grounds of religious beliefs, there has been evidenced considerable amount of resentment and discrimination against such religious

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[37] K Callard *Pakistan A Political Study,* (London: Allen and Unwin) 1957, 237

communities as Christians, Hindus, Parsis, as well as other sects like Zikris,[38] Shais,[39] and Ismailis.

The group that has faced the worst forms of discrimination is the Ahmadis. Ahmadis are followers of Mirza Ghulam Ahmad who claimed to be the promised Imam Mehdi as had been prophesied in various gospels. The main conflict between the orthodox section of the Muslims and the Ahmadis is that the latter claim that Mirza was the last prophet, a claim incompatible to the belief of the majority of Muslims.[40] The doctrinal debate relating to the basic tenants of Ahmadi philosophy in particular their beliefs as to Khatam-i-Nabuwat (the finality of the Holy Prophet Mohammed) is shrouded in controversy.[41]

Whatever may be the exact position, it remains clear that contemporary Ahmadi doctrine produces an interpretation which does not attempt to antagonise the orthodox Muslims.[42] Despite these concessions, and a firm belief in belonging to the Muslim *Ummah*, Ahmadis have been a constant target of discrimination and persecution. The anti-Ahmadi sentiments which had been simmering ever since the Ahmadis left their traditional homeland of Qadian in India to move to Rabwah in Pakistan after partition, boiled over in early 1950's and were evident in the severe anti-Ahmadi movement of 1953.[43] Although several of the demands of the campaigners of

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38 S Harrison "Ethnicity and Political Stalemate in Pakistan" in A Banuazizi and M Weiner (eds.) *The State, Religion and Ethnic Politics, Afghanistan, Iran and Pakistan,* (Lahore: Vanguard) 1987, 276-298, 276.

39 S Querishi "The Politics of the Shia Minority in Pakistan: Context and Development" in D Vajpeyi and Y Malik, (eds.) 109-138.

40 See F Daud, *Violations of Human Rights in Pakistan: The Case of Ahmadiyya community,* Unpublished LL.M Dissertation, University of London, 1992, 6-8.

41 C Kennedy "Towards the Definition of a Muslim in an Islamic State The Case of Ahmadyya in Pakistan" in D Vajpeyi and Y Malik, (eds.) 71-108.

42 Kennedy *ibid.* 89; ICoJ, *Pakistan: Violations of Human Rights After Martial Law,* (Geneva) 1987, 103-4.

43 Government of Punjab, *Report of the Court of Inquiry constituted under the Punjab Act II of 1954 to inquire in to the Punjab disturbances of 1953,* (Lahore: Superintendent of Government Printing Press), 1954; also see M Munir, *From Jinnah to Zia,* (Lahore: Vanguard) 1982; M Rashidi, *Islamic Jammuhira Pakistan Mee Quadianiat 1947-1983,* (Lahore: Muktabai Bisath) 1983 (Urdu).

the 1953 anti-Ahmadi movement were given consideration, or at least an impression was given that they were being considered seriously, it was not until 1974 that through an amendment to the Constitution Ahmadis were declared non-Muslims.[44] The amendment added Ahmadis to the list of non-Muslims and defined them as

> "A person who does not believe in the absolute and unqualified finality of prohpethood of Muhammed (peace be upon him) the last of the prophets, in any sense of the word or of any description whatsoever, after Muhammed (peace be upon him), or recognises such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or law".[45]

Despite the fact the Ahmadis were declared non-Muslim it did not have an immediate adverse impact on their position, alongside other religious communities within the society[46] and it was only during the Islamization period of President Zia that patent discrimination against religious minorities particularly the Ahmadis was evidenced.[47] Equally the restraints and enlightened judiciousness which the courts had shown prior to the beginning of *Nizam-Mustafa* (Islamic Order) were missing during Zia's period. In 1981, the Lahore High Court applying the 1974 constitutional amendment retroactively ruled that Ahmadis (being non-Muslims) could not inherit land from Muslims.[48]

Under pressure from fundamentalist Ulema, President Zia on 26 April 1984, issued an anti-Ahmadi Ordinance which added two Clauses to Pakistan Penal Code. According to s298B

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44 Constitutional (2nd amendment) Act 1974 Act XLIX 1974.

45 Article 260(3) Constitution of Pakistan (as amended), 1973.

46 See *Abdar Rahman Mabashir v Amir Ali Shah (1978) PLD 113.*

47 It has been contended that as far as the overall Islamization process as initiated by General Zia which ostensibly aimed to bring the whole society within the fold of Islam, it was more in the nature of "political noisc" and mere rhetoric rather than anything concrete; see C Kennedy "Islamization and Legal Reform in Pakistan 1979-1989" 63 *PAffs* (1990), 62-77; C Kennedy "Repugnancy to Islam-Who Decides? Islam and Legal Reform in Pakistan" 41 *ICLQ* (1992), 769-787.

48 *Mohammed Ashraq v. Mst Niameut Bibi PLD (1981) Lahore 520.*

(1) Any person of the Qadiani group or the Lahori group (who call themselves "Ahmadis" or any other name) who by words, either spoken or written, or by visible representation-

(a) refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Mohammed (Peace be upon him), as "Ameer-ul-Mumineen", "Khalifat-ul-Mumineen", "Khalifat-ul-Mumineen", "Khalifat-ul-Muslimeen", "Sahaabi" or "Razi Allah Anaho";

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammed (Peace be upon him), as Ummul-Mumineen;

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammed (Peace be upon him), as Ahle-bait; or

(d) refers to, or names, or calls, his place of worship as Masjid;

shall be punished with imprisonment or description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Quadiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as "Azan" or recites Azan as used by the Muslims, shall be punished with imprisonment or either description for a term which may extend to three years and shall also be liable to fine.

According to s 298C

Any person of the Qadiani group or Lahori group (who call themselves "Ahmadis" or by any other name), who directly or indirectly, poses himself as a Muslim, or calls or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words either spoken or written, or by visible representation in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

In 1986, through Criminal Law Amendment Act, a new clause was introduced in the Pakistan Penal Code. The new Article 295C provides

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet (Peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

A subsequent amendment to section 295C made death penalty mandatory for anyone defiling the name of Prophet Mohammed,[49] which apart from reversing an emerging trend in the international community for the abolition of death sentence, allows for the application of a vague provision against the probable political and personal opponents of the complainants. Through the Qisas and Diyat Ordinance, 1992, the maximum punishment for breaching section 295A has been increased from two to ten years.[50]

In an environment charged with religious intolerance, which clouds the judicious and equitable instincts of a judge, it has not been surprising to note that the various challenges against these ordinances have failed.[51] In a lengthy judgement the Federal Shariat Court, in *Mujibur Rahman v. Government of Pakistan*[52] the Court had upheld the validity of these anti-Ahmadi ordinances. Apart from a commentary which is full of biased and derogatory remarks against the Ahmadi values and belief, Fakhre Alam CJ, it is submitted, misconstrued the spirit of Article 18 (wrongly stated by him as Article 28) of the *Universal Declaration of Human Rights, 1948* when he said "There in nothing in this charter to give to the citizens of a country the right to propagate or preach his religion".[53] While the attempts before the Supreme Court to declare Ordinance XX of 1984 have failed, the Lahore Session Court recently

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49 See *Muhammed Isamail Qureshi v. Pakistan PLD 1991 FSC 10* where the FSC held that alternative punishment of life imprisonment as provided in S295C as repugnant to Islam and ordered that this alternative punishment be deleted; HRCP, *Pakistan State of Human Rights 1991,* (Lahore: Maktaba Jadeed Press) 1992, 121; AI, *Pakistan, Open letter to Political Parties,* Index; ASA 33/04/93 September 1993, 5; Times, "Boy escapes hanging in Pakistan" 24-2-95; Independent "Boy 14 escapes death sentence" Independent 24-2-95.

50 See PPC 295-A (as amended), *The Major Acts 1994,* Punjab Law Publications, 85.

51 See *Zaheerudin V State* 1993 SC MR 1718; also see *Mirza Khurshid Ahmad v. Government of Punjab PLD 1992 Lah 1.*

52 *PLD 1985 FSC 8.*

53 *Ibid.* 117; This attitude can be contrasted with the views of AI, which in its 1991 report on Ahmadis states "Legislation which provides for imprisonment and even death on grounds of religious conscience violates the right to freedom of religion contained in Article 18 of the Universal Declaration of Human Rights and is contrary to the 1981 UN Declaration on Elimination of All forms of intolerance and of Discrimination based on Religion and Belief" AI, *Violations of human Rights of Ahmadis,* ASA 33/015/91 September 1991, 1.

sentenced two Christians Salamat Masih and Rehmat Masih to death under S295. The case provoked considerable international concern over the obvious injustice that was being dispensed. The High Court subsequently quashed the convictions on the basis of insubstantial evidence, although Bhatti J delivering the Judgement of the Court was careful not to criticise or challenge the patently vague provisions in question. While the two accused fled the country and their families were forced to leave their homes for fear of reprisals, religious zealots have pledged to go before the Supreme Court and have the High Court verdict overruled.[54]

Some concern has been shown, albeit inadequate, by the international community over the passage of the aforementioned laws. In August 1985, the United Nations Sub-Commission on the Prevention of discrimination and protection of minorities expressing "grave concern" at the promulgation of these ordinances of 1984 which "violate the right to liberty and security of persons, the right to freedom from arbitrary arrest or detention, the right to freedom of thought, expression, conscience and religion, the rights of religious minorities to profess and practice their own religion and the right to effective safeguard".[55] Similarly, despite the recent media attention over Pakistan's blasphemy laws it is unlikely that the present government would be in any position to change the said laws.

The present section has attempted to show that governments are often pressurised by militant elements. States like Pakistan, where religion plays a fundamental role these pressures could have a phenomenal impact on the fortunes of the governments--something which national politicians cannot afford to ignore. Similarly, while "attempts to resolve conflicts between religious law and human rights norms may be fruitless where religious doctrine insists upon the unavailability of the

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[54] 7 April Daily Jang, 1995.

[55] United Nations Sub-Commission Resolution, 1985/21, UN Doc E/CN.4/1986/5 (1985), 102,; Hannum, 68; AI, *op.cit* note 53, 10.

sacred law or its supremacy over human rights norms"[56] it remains extremely difficult for international law to impose any sanctions for the failure to respect any of the human rights obligations.

(ii) Discrimination Based on Language and Ethnic Origin

Discrimination based on language and ethnic origin is interrelated phenomenon in the case of Pakistan and have had serious repercussion on the perceptions of minority groups. The issue of ethnicity is discussed in greater detail in the next chapter, the aim of the present discussion merely being to identify how Pakistan's policy makers in a desperate bid to build a nation-State have adopted strategies which have proved to be patently discriminatory.

Linguistic dissonance, like that of religion has had a fundamental role in establishing the fortunes of the peoples of the sub-continent. Indeed, the Hindi-Urdu conflict was one of the main causes of hostility between the Muslim minority and the Hindu majority[57]. After the creation of Pakistan, Urdu was adopted as the sole State language despite the fact that less than 10% of the total population had any understanding of it[58]. The Bengalis bitterly resented this linguistic policy. There were considerable riots and bloodshed before Bengali was provided with a national status. While the 1956 Constitution did provide an equal status to Bengali and Urdu, in actual fact, Bengali like other regional languages continued to remain subservient. Linguistic discrimination was one of the key issues which led the Bengalis to civil war and ultimate secession.

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[56] D Sullvian "Advancing the Freedom of Religion through the UN Declaration on Elimination of Religious intolerance" 82 *AJIL* (1988), 487-520, 515.

[57] F Fatehpur, *Pakistan Movement and Hindi-Urdu Conflict,* (Lahore: Sangeemeel Publications), 1987; P Brass "Muslim Separatism in the United Provinces" *E&PW*, (1970), 167-187.

[58] A Mascarenhas, *The Rape of Bangladesh* (Dehli: Vikas Publication) 1971, 16

Subsequent to the secession of East Pakistan, Urdu has remained the official language despite the fact that this policy is bitterly resented by Sindhis, Pukhtuns and Baluchi minorities. As the 1981 census shows Urdu is "commonly spoken" by only 7.6 % of households in Pakistan, a very small proportion of the total population. In international circles Pakistan has continued its policy of not only denying that the issue of linguistic dissonance has been evidenced in Pakistan, but also that there are no linguistic minorities within Pakistan.

Pakistan's ninth periodic report before CERD explicitly states "There are no linguistic minorities in Pakistan".[59] Not unnaturally, this view has been doubted by observers and by members of the committee itself. During the consideration of the seventh report one of the committee members expressing his concern at the position adopted by the Pakistan government in relation to linguistic policies said

> "the 7th report stated that the national language was Urdu; however reports on the 1961 census indicated that Urdu was the native language of at most 8% of the population, where as there were other, much more widespread languages, such as Punjabi, which was the mother tongue of forty seven million people out of a total of 84 million inhabitants, that is to say 56% of the population. He wondered, how it was possible that a language with so little currency as Urdu was established as Pakistan's national language. It was regrettable that the report gave no detailed data on the ethnic composition of the country".[60]

Members of the linguistic minorities are antagonistic at the continuation of this linguistic policy for not only do they remain at a natural disadvantage in competing in a foreign language while attempting to seek employment in the Public sector and receiving higher education, but also there are substantial claims that even if they do qualify their prospects of promotion are jeopardised due to their linguistic background.

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[59] CERD/C//149 (ninth periodic report).
[60] CERD/C/SR/630 para 59.

The position of language is of prime importance to all States regardless of their level of development and it can be cogently argued that international law provides only a tenuous protection of linguistic rights. Hannum accurately reflects this sentiment when he says

> "Linguistic rights are not specifically protected under international human rights law, except in a relatively restricted. The two Covenants do prohibit discrimination on the basis of language, and it is clear that no one can be, for example, imprisoned, denied the right to enter or leave, or forbidden from participating in Public affairs on the grounds that he/she speaks a particular language. On the other hand is there a right for every citizen to have an election ballot in a language in which that education may be offered? Does the prohibition of discrimination on the basis of language mean that there can be no `official' language".[61]

The newly independent States of Africa and Asia have, in particular, found it difficult to adopt satisfactory linguistic policies. Ironically, in a number of instances the usage of colonial language has been seen as less divisive than a single indigenous language. In the case of Pakistan, while English remained the official language of the elite, Urdu has gradually been overtaking as the medium of higher education. A resurgence of English as the official medium, and its recognition as the medium of education may take away some of the bitterness that is generated by the continued use of Urdu, although according to critics the lesser developed linguistic minorities would still remain at a grave disadvantage.

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[61] Hannum, 11.

10.4 AMBIGUITY IN THE MEANS OF ACQUIRING DE FACTO EQUALITY

As we have noted in an earlier chapter international instruments as well as State policies reflect tensions when the matter of ensuring genuine equality for various ethnic, linguistic and religious groups is debated. In pursuance of Article 1(4) and 2(2) of the Race Convention, adopting policies of affirmative action indicates a positive move.[62] However, as we shall see from the case of Pakistan, policies of preference cause a variety of other problems, and international legal instruments do not provide any satisfactory answer. Pakistan reflects vividly the problems faced by a number of States, which despite having adopted rigorous policies of affirmative action have found it difficult to overcome perceptions of inequality.

In the case of Pakistan, two interrelated features have been crucial in providing the impetus to introduce, continue and to expand these policies of preferences. The first primary factor was that of ethnic diversity amongst the various regions of the country[63]. At the time of the creation of Pakistan, there was a striking ethnic diversification amongst the indigenous population, with various ethnic communities at different level of economic, political and sociological development. Over the years, this diversity has increased in the sense that a significant number of Pakhtuns, Baluchis and Punjabis currently reside outside their provinces. Not only have the Pakthuns come to be predominant in Quetta, the provincial capital of Baluchistan, but also since the Soviet invasion of Afghanistan and the consequent civil war millions of Afghan refugees, a majority of whom are ethnic Pakhtuns, have been dispersed into various parts of Punjab and Sindh. Over the years there has also been what has described as

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62 *Supra* Chapter 8.

63 S Zaidi "Regional Imbalance and National Question in Pakistan-Some Indications" 11 *E&PW* (1989) 300-314.

the "trickling" of a significant amount of people primarily from India, and Bangladesh,[64] and successive governments have been under-tremendous political pressure to allow a number of ethnic groups to enter the country, in particular the Biharis.[65]

A second, albeit significantly related factor which provided the initial impetus to the introduction of the policies of preferences was a realisation of wide differences in the levels of development between various regions of the country. East Bengal, as we shall shortly consider, was historically less developed and severed artificially from West Bengal. Equally, in West Pakistan, there were underdeveloped regions, including the Baluch territory and areas of what are currently known as FATA and Azad Kashmir.

Amidst these complications the quota system was first introduced, initially, only for the Central Superior Services.[66] The disparity between the two wings was the main reason given for initial introduction and it was at that time confined to candidates seeking entry to officer level ranks in federal bureaucracy. According to the provisions 20% of the vacancies in the Central Superior Services were to be filled on merit. The remaining 80% to be filled under the following regulations: East Pakistan 40%, Punjab and Bahwalpur 23%, Karachi 2%, and Sindh, Khairpur, NWFP, Frontier States, Tribal areas, Baluchistan and Azad Kashmir and Kashmir refugees 15%.[67]

The quota system was soon expanded much further and was given the status of having a statutory exception in the 1956[68] and 1962[69] constitutions. The rationale

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64 C Kennedy and N Nevitte (eds.), *Ethnic Preference and Public Policy in Developing States,* (Lynne Reinner Publishers Inc.) 1986, 64.

65 B Whitaker *et al, The Biharis of Bangladesh,* (London: MRG) 1978; Feature film, *Prisoners of Conscience,* released by Mohajir Quami Movement on 5 November 1994; Daily Jang, *Major asked to pressurise Pakistan for repatriation of Biharis,* Friday 18 November, 1994.

66 R. Braibanti "The Higher Bureaucracy of Pakistan" in Braibanti *et al,* (eds.) *Asian Bureaucratic systems Emergent from the British Imperial Tradition,* (Durham: Duke University Press) 1966, 265.

67 *Ibid,* 149.

68 Article 17 (1), Government of Pakistan, *Constitution of Pakistan 1956,* (Karachi: Government of Pakistan Printing Press), 1956.

behind the initial implementation of the quota was to ameliorate the inequalities between East and West Pakistan. A number of other constitutional provisions[70] also enunciated the genuine recognition of the problems facing economic disparities.

Despite these efforts the picture remained gloomy and discriminatory practices continued to exist and were clearly visible where they mattered most. Although it would appear that the introduction of the quota system did have some success, it is also clear that the ethnic and linguistic groups in particular the Bengali majority did not have a proportional share at the higher levels of decision-making. The Bengalis despite being in a majority were rarely involved in making decisions crucial to their independent existence. The military which contained an overwhelming majority from West Pakistan remained directly or indirectly in control of the government ensuring that Bengalis were excluded from political decision-making.

Even after the secession of East Pakistan, and with it the elimination of the most vehement argument of institutional imbalance and inequity, the quota system has thrived in the otherwise infertile soil of regional animosity. In fact during the period of Prime Minister Bhutto, immediately after the secession of East Pakistan, the quota system became more comprehensive at federal level and was as follows: 10% merit; 50% Punjab (including Islamabad); 7.6% Urban Sindh (Karachi, Hyderabad and Sukkar); 11.4% rural Sindh (areas not included in the urban quota); 11.5% NWFP; 3.5% Baluchistan; 4% Northern areas and centrally administered Tribal Areas; and 2% Azad Kashmir.[71] The quota system was also established in the provincial bureaucracy and most institutions of higher education. Indeed, the expansion of the quota system is reflected now in all aspects of public and private life.

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[69] Article 240, Government of Pakistan, *Constitution of Pakistan, 1962,* (Karachi: Government of Pakistan Printing Press), 1962.

[70] See for instance Article 145(4) of the 1962 Constitution.

[71] GOP, Establishment Division, memo no. F8/9/72 TRV, August 31, 1973.

In the last decade the quota system has been further expanded. There are currently special reserved seats available for former militia officers in competitive entry exams at Federal and Provincial levels.[72] There are also a wide range of quotas for specialist interests in institutions of higher education; there are special reserved seats for children of medical doctors, military officers, central government and provincial government officers. There are also quotas for hockey and cricket players and foreigners.[73] In a number of institutions, there are special seats to be filled by the discretion of the provincial governor. A number of affirmative action provisions exist for the benefit of religious minorities mainly operating in the sphere of relaxation of age limit for the Federal Service examinations. Although, these provisions are welcomed by religious minorities the overall impact seems negligible for these minorities as it is rare for members of Scheduled caste or others to in fact have obtained such a high level of education to aspire for governmental offices.

A number of studies do indicate that overall the quota system has had some success in making the bureaucracy more representative, nonetheless there are fixed costs of the system. It can also be argued that policies of preferences have failed to achieve any long term benefits, perhaps most conspicuously reflected in the failure to erase perception of inequality and discrimination amongst the Bengalis, subsequently leading to a successful sessionist movement.

Many of the in-built "flaws" in affirmative action are exacerbated by the system in which it is operated in Pakistan. As typical of any affirmative action programme, often the people with less merit and ability are given preference over others more able.

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72 Federal Public Service Commission Act 1980

73 For an instance of the Courts upholding the validity of the quota for Children of sportsmen and doctors see *Naseem Mohmood v. KEMC, PLD,* Lah 272; The high stakes that admissions to some institutions of higher education has resulted in protracted judicial challenges, see *Mohammed Iqbal Kahn Naizi v. Vice Chancellor University of Punjab* PLD 1979 SC1; *Rahmatullah Khan v University of Punjab* PLD 1979 SC 33, *Shahida Khatoon v. Government of Sind and 2 Others* PLD 1982 Kar 454; *Mohammed Anwar v. Government of NWFP, PLD,* 1980 Pesh 83.

Pakistan is rife with regional favouritism and clan patronage and very often there is a major tussle between the selectors and regional representation is a more dominant criterion than the merit. Furthermore the implementation of the system is usually cumbersome and time-consuming making potential candidates weary, and to seek employment in the private sector. Increased regional representation has also served to reinforce invidious distinctions between various regions of Pakistan

> "The systems reliance on small merit reservation, its use of widely publicised, regional based distinctions of performance in scoring examinations, and its variability in determining relevant qualifications or levels of skill lead many to believe that job seekers from the more favoured regions bear the burnt of government's attempts to equalise access to bureaucracy or to the professions".[74]

The perceptions of inequity and unfairness are increased due to the presence of an imbalanced institutional and constitutional framework; extensive periods of military dictatorships have exacerbated perceptions of inequalities. The struggle of ethnic and linguistic minorities, prominently the Bengalis but also on the part of the Baluchis, the Sindhis and the Pakthuns reflects the strength of the nexus between the establishment of representative institutions on the one hand and a regime of non-discrimination and equality of treatment on the other.

The unfortunate picture of Pakistan's relationship with democracy is reflected from the fact that no general elections based on universal franchise were held until December 1970, by which time the frustrations of ethnic communities had concretised into rather radical demands. When the elections were ultimately held, the determination on the part of the West Pakistan army and politicians not to allow the establishment of representative Constituent Assembly to draft a new Constitution led to the civil war and ultimate secession of East Pakistan.

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[74] Kennedy and Nevitte (eds.) *op.cit note 64,* 85.

In the truncated Pakistan, absence of representative institutions has been an issue which has featured prominently. Indeed, the 1977 General elections, the first ones held under the 1973 Constitution having been rigged[75] led to eleven years military dictatorship of President Zia. The patently unrepresentative and dictatorial government of President Zia was, in many ways, repressive and intolerant to allow any freedom of expression; his eleven year rule came particularly hard upon religious as well as ethnic and linguistic minorities of Pakistan. Indeed, after coming into power in 1977, General Zia suspended the 1973 constitution, alongside its provisions on fundamental rights. In the international arena, Pakistan, however, maintained that changes in Pakistan, had mainly been of a political nature and in no way affected the extent or availability of constitutional grantees of constitutional guarantees of the fundamental rights of citizens. According to the ninth periodic report before the Committee,

> [in Pakistan] "...Political and Civil rights were freely exercised, perhaps more than in several other states. The judicial system was functioning in a fully normal fashion. All institutions were intact; political changes had not effect on them. However, those political changes were normal in every country which had the right to choose a political system that suited its people and did not have to import political systems from abroad".[76]

In a political environment where the constitutional framework has remained unsettled and open to abuse by successive governments to advance their personal interests with the judiciary often submitting to the will of the government, the position of minorities remains precarious. In the absence of democracy and representative institutions, all individuals of the State suffer from inequality and discrimination;

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[75] See the *Supreme Court Judgement in Begum Nusrat Bhutto v. the Government of Pakistan* PLD (1977) SC. 639.

[76] Consideration of the Seventh periodic report CERD/C/SR.484 para 47.

though, the plight of members of minority groups is particularly precarious and open to victimisation.

10.5 CONCLUSIONS

The case of Pakistan, in so far as issues relating to equality and non-discrimination are concerned presents complexities. Ever since its existence the State has been a battlefield of antithetical visions of various ethnic, linguistic and religious communities and is still recovering from the trauma of 1971. Despite the presence of a number of ethnic and linguistic minorities, Pakistan has shown reluctance to recognise their existence; non-recognition of minorities may not be absolutely fatal to attempts on the part of international law to accord protection to those groups, though it would strain immensely the already fragile protection that international law provides to those groups. Religious minorities of Pakistan, the Ahmadis and more recently the Christian community have continued to be discriminated and persecuted. The legislation regarding blasphemy, it is contended, is highly discriminatory and has opened the way for large scale persecution.

It is also contended that in a generally repressive, intolerant and undemocratic environment all individuals, majorities as well as minorities would suffer, though the problems of minorities would be particularly acute and pronounced. Minorities in a State like Pakistan, which has had a history of long and stressful periods of military dictatorships and arbitrary rule could expect little in the way of genuine equality and non-discrimination; in such instances international law can not dispense whatever little it promises.

SECTION B

EMERGING RIGHTS

CHAPTER ELEVEN

MINORITIES AND THE ISSUE OF AUTONOMY

11.1 INTRODUCTION

The present chapter, through studying the case of Pakistan makes the claim that autonomy for minorities, is at best an emerging right in international law. It argues that a general consensus amongst the international community on this issue is difficult to be found. A primary difficulty with the issue involving a right to autonomy, as we have already considered, is the considerable ambiguity surrounding the concept itself.[1] Generalities may not be appealing to pragmatism; taxonomies of the State structures are too complex for the dispensation of a global antidote to every affliction generating from minority-majority conflicts.[2] In exacerbating these conflicts, minorities, as well as the interests of their trans-national sympathisers may also have a role to play; States fear that the ambiguities in the concept of autonomy and minority rights may be exploited. The experience of Pakistan directs towards the point that the lacuna between autonomy and the rather explosive concept of self-determination or self-government may not in fact be very wide.

On the other hand, the present discussion attempts to highlight a significant point; meaningful autonomy can in many instances, provide a satisfactory alternative to radical demands of secession in the name of self-determination. In the present context our earlier discussion needs to be recalled.[3] State policies in relation to the granting of autonomy, it is submitted, is often heavily influenced by historical and geopolitical factors and the following section, while analysing the difficulties in the recognition of

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1 See the discussion *infra* chapter 7.

2 See R Wrising, (ed.), *Protection of Ethnic Minorities Comparative perspectives* (New York: Pergamon Press) 1981; J Sigler, *Minority Rights: A Comparative analysis* (London: Greenwood press) 1983; Hannum; H Hannum, (ed.) *Documents on Autonomy and Minority Rights,* (Dordrecht: M. Nijhoff), 1993.

3 *Ibid.*

the right to autonomy concentrates on a number of these historical and geo-political and constitutional factors.

11.2 DILEMMAS OF RECOGNITION OF A RIGHT TO AUTONOMY AND THE ARTIFICIAL NATURE OF PAKISTAN

11.2.1 Issues of distinct identity and the minorities of Pakistan

The territorial boundaries of Pakistan reflect the existence of a number of civilisations; ethnic, linguistic, cultural and religious groups having their own distinct identities.[4] These distinctions were equally manifest at the time of the establishment of Pakistan. Although the euphoria generated by the prospect of an Islamic State of Pakistan temporarily overwhelmed these differences, it did not take long for these multifarious cultural, linguistic and sociological diversities to re-emerge.

Although Islam as the religion of a majority of the people of Pakistan had influenced their cultures and traditions, it could not be stated categorically that it was the all important over-riding factor, concealing all other cultural and traditional traits.[5] The indigenous traditions were deeply ingrained in all the ethnic and linguistic groups. Whereas East Pakistan was a largely homogenous community, this was not the case for West Pakistan. Although each of the major ethnic groups was predominant in their own provinces with their own language and cultural heritage, their associations and

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4 See generally K Ali, *A New History of India and Pakistan* (Karachi: Pakistan Book Centre) 1992; C Ali, *The Emergence of Pakistan*, (New York: Columbia University Press), 1967; L Williams, *Pakistan Under Challenge* (London: Stacey International) 1975.

5 L Buchhiet, *Secession The Legitimacy of Self-Determination* (Yale: Yale University Press) 1978, 198; L Ziring *Pakistan: The Enigma of Political Development*, (Dawson: Westview) 1980, 136; J Rehman "Ethnicity, Islam and the Constitutional Developments of Pakistan" paper presented at the Centre for Indian Studies, University of Hull, 22 February, 1995; C Kennedy, "Policies of ethnic preferences in Pakistan" 24 *AS* (1984), 688-703.

affiliations were different. The various regions of the Western "wing" were separate cultural entities in their own right.

> " It could be said the regions of Pakistan were separate cultural entities up to the time Pakistan became independent. In speech, diet, dress, social customs and values and interests, the regional folk shared little in common except their devotion to Islam. Each was proud of their peculiar cultural heritage and generally speaking reluctant to adopt to what they considered to be alien ways".[6]

The position was complicated by the fact that the provinces, could not be called potential nations, as some units contained more than one ethnic or linguistic group within their provincial boundaries.

11.2.2 Bengalis

The story of the Bengali struggle against West Pakistan domination, is in fact a struggle for the realisation of demands for autonomy and self-government.[7] It was the failure to allow a measure of this autonomous development that subsequently concretised in demands for session in the name of self-determination.[8] Historically the pre-independent Bengal, had remained a focal point, as far as the struggle of autonomy for the Muslims was concerned. Although Bengali culture, convictions and language bore considerable influence of the dominant Hindus, Islamic tradition carried as strong a value as any other Muslim region of British India.

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6 Ziring *op.cit note* 5, 136.

7 R Jahan, *Pakistan The Failure of National Integration* (New York: Columbia University Press) 1972; G Chaudhury, "Bangladesh: Why it happened" *I Affs* (1972), 242-249; A Mascarenhas, *The Rape of Bangladesh* (Dehli: Vikas Publications) 1971; V Nanda "Self-Determination in International Law: the Tragic Tale of Two Cities Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *AJIL* (1972), 305-334; V Nanda "Self-determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect" in Y Alexander and R Friedlander, *Self-Determination National, Regional and Global Dimensions* (Boulder, Colorado: Westview Press) 1978, 193-220.

8 *Supra* Chapter 9.

Prior to the creation of Pakistan, despite strong religious fervour the position of Bengal in a future constitutional framework, and in particular its association to an independent Islamic State remained a subject of debate and controversy. When Pakistan was subsequently established, the Bengalis immediately began to have second thoughts about their new union with the Western Pakistan. Indeed, despite the heavy reliance on the values of autonomy, self-government and regionalism, unfortunately after the creation of Pakistan, these ideals were realised more through their infringement than through practice.[9]

Soon after the creation of Pakistan, the political elite started introducing policies which Professor Claire Palley has termed as "domination devices"[10] Integration into a nation State was to be achieved at whatever cost including the imposition of elite ethnic groups' political, economic, cultural and linguistic standards[11]. Moreover many of Pakistan's National leaders, in its early days, were not indigenous, but had their origins in the provinces of British India where Muslims had been in a minority and were in fact refugees in the new State of Pakistan.[12] They have been described as "national elite" by Jahan.[13] Although having spearheaded the Pakistan movement, this national elite failed to produce any constructive policies and consequentially found themselves at odds with the indigenous communities

The Bengalis, in particular, felt as if under some form of "alien or colonial domination". In 1952 Language riots broke out in East Bengal, when central

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9 See the various amendments to *the Independence Act 1947; and the Government of India Act 1935.*

10 Palley, 4.

11 Jahan *op.cit note* 7; Chaudhury *op.cit note* 7; A Kamal, *Political and Constitutional Dilemmas,* (Karachi: Pakistan Law House), 1987.

12 J Rehman "Self-determination, State-building and the Muhajirs The Role of Indian Muslim Refugees in the Constitutional Development of Pakistan" 3(2) *CSA* 1994, 111-129; T Wright Jr "Indian Muslims Refugees in the Politics of Pakistan" *Journal of Commonwealth and Comparative Politics* (1974), 199-205; T Wright Jr "Center-Periphery Relations and Ethnic Conflict in Pakistan Sindhis, Muhajirs and Punjabis" *CP* (1991), 299-312; F Ahmad "The Rise of Muhajir Separatism" *JAAFFs* (1989), 97-129.

13 Jahan *op.cit note* 7, 24.

government insisted on Urdu being the sole official language. The growing rise of ethnicity was reflected through the formation of Awami-league (the first Muslim opposition party to the ruling Muslim League in 1949) anti-basic principles committee report movement followed by a draft constitution, birth of United Front which ultimately routed the Muslim League in the provincial elections of March 1954.

The platform for this victory was the twenty one point manifesto, exclusively based upon greater provincial autonomy, representations based upon population and Bengali being given equal status to Urdu. They felt discriminated in every aspect of life, and even some of the legitimate historical factors resulting in East Bengal overall underdevelopment (which had been inherited from the colonial rule) were often swept aside as a mere propaganda on the part of West Pakistan to perpetuate their rule and to exploit the Bengalis. Bengali representation in the politics had remained limited, just as it had been in military and bureaucracy-they represented less than 5% in military and about 30% in bureaucracy (Table 11). The vernacular elite felt highly frustrated at their exclusion from political decision making and detested the highly political-administrative centralised stance of the federal government. Similarly the economic policies followed by the Federal government were attacked by the Bengalis as highly discriminatory. There is also evidence to confirm the discriminatory and inequitable position adopted by the Federal government in relation to the allocation of resources. According to Jahan

> "During the first decade the Central government allocated 2/3 of its developmental and non-developmental funds to West Pakistan. There was a similar disparity in the allocation of foreign aid. The central government did much to develop the private sector through its economic and fiscal policies and its control of foreign exchange, import licensing, and capital issues. Here again there was interwing disparity in allocations...the disparity, whatever its economic rationale, led to the charge of discrimination against the Bengalis towards the central government. The Bengalis were particularly dissatisfied with the `one economy' policy of the government, which failed to take into

> consideration the essential differences in economic patterns and the geographical separation between the two wings....what irked the Bengalis most and gave special impetus to their demands for autonomy was the transfer of resources from East to West Pakistan. Through a surplus in international trade and a deficit in interring trade, a sizeable amount of East Pakistan's foreign exchange earning was diverted to western wing".[14]

In our present discussion, an essential element of autonomy would be to allow the provincial governments a right to operate. In East Bengal, however, the elected provincial government was dismissed by the central government in May 1954-the essential spirit of autonomous development was negated.[15] The frustrations were exacerbated by the failure of the first Constituent Assembly to produce a constitution.[16]

One of the stumbling blocks in the forming of the Constitution had been the representation of Bengalis in a future legislative assembly and the degree of their autonomy in future constitutional arrangements; "domination devices" in the political sphere were introduced to curb the voting power of Bengalis. Despite considerable opposition from the minority ethnic groups of West Pakistan it was decided to amalgamate the four provinces of the western wing into a single province of "one-Unit". Bengalis being the majority of the population it was aimed that parity be established with the two provinces having equal voting rights.

A constitution that was ultimately formulated, Pakistan's first "indigenous" constitution[17] provided for two provinces West Pakistan and East Pakistan (formerly

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[14] Jahan *op.cit note 7*, 34-35.

[15] *Ibid.* 29.

[16] See *Moluvi Tamizuddin Khan v The Federation of Pakistan PLD 155 Sind 96; The Federation of Pakistan v Moulvi Tamizuddin Khan PLD (Federal Court of Session 155; Akbar v The Crown PLD (Federal Court 1955) 387; Usif Patel v The Crown PLD; Special Reference to the Federal Court PLD (Supreme Court) 1955, 435;* for a thorough consideration of the constitutional issues see I Jennings, *Constitutional Problems in Pakistan*, (Cambridge University Press), 1957.

[17] Entered into force 23 March 1956; See *the Constitution of the Islamic Republic of Pakistan* (Karachi: Government of Pakistan Printing Press), 1956; text also available in S Mahmood, *Constitutional Foundations of Pakistan*, (Lahore: Jang Publishers) 1989, 247.

East Bengal).[18] Fundamental rights defined in part II were guaranteed to everyone and any laws inconsistent to these were to be null and void. However in so far as a promise for autonomy was concerned Pakistan's first constitution dispensed very little. While Bengali was accepted as an official language, Bengalis, despite their overall majority were denied a majority in the central legislature. Similarly the demands of the Bengali autonomists that only defence, foreign affairs and currency should be under the jurisdiction of the Federal government proved unacceptable. As far as the ethnic and religious minorities of Western Pakistan were concerned, their aspirations for ideals of autonomy were completely negated. The constitution confirmed the merger of 1955[19] and endorsed the "One-Unit system" by which all provinces of West Pakistan and former princely States were combined into one province.

In view to these deficiencies it was not surprising that the constitutional system, collapsed succumbing to a military coup. Military dictatorships are not congenial to representative democracy or accept easily ideals of regional autonomy or decentralisation. President Ayub's 11 year tenure did not provide any exceptions to this general rule. His 1962 constitution was devoid of any broader vision for autonomy or minority rights;[20] more damaging perhaps were his contemptuous views about the Bengalis

> "East Bengalis, who constitute the bulk of the population, probably belong to very original Indian races.... Until the creation of Pakistan they had not known any real freedom or sovereignty....In addition they have been and still are, under considerable Hindu culture and linguistic influence.....As such they have all the inhibitions of a downtrodden race and have not yet found it possible to adjust psychologically to the requirements of the new born freedom".[21]

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18 Article 1(2) *ibid.*
19 In compliance with the West Pakistan Act 1955.
20 See the Constitution of the Republic of Pakistan (Karachi: Government of Pakistan Printing Press), 1956; text also available in S Mahmood, *op.cit note* 17,628.
21 M Khan, *Friends not Masters,* (London, Oxford: University Press) 1967, 187.

Ayub's regime has been legitimately criticised on knowingly exacerbating the "explosive schisms with in Pakistan".[22] In his 1954 memorandum General Ayub had called for treating "Bengalis as equal partners" by providing them "as much autonomy as possible and that means that in addition to the subjects already in their hands, communications, except inter-provincial industries, commerce, health should be handed over to the provinces, leaving defence, foreign affairs, currency in the hands of the Centre"[23]-suggestions which in fact had been the basis for the 21 point manifesto of United Front. However subsequent to attaining power, Ayub followed a highly centralised bureaucratic system, failing to recognise the possibilities of regional autonomy.

It is also of interest that the six point manifesto of Awami League that emerged in 1966, upon which it achieved an overwhelming success in Pakistan's first general elections in 1970, were nothing more than a synthesis of claims of meaningful autonomy. These were as follows;[24]

(1) The character of the government should be Federal and Parliamentary.

(2) The Federal government shall be responsible for only defence and foreign affairs.

(3) There shall be two separate currencies mutually or freely convertible in each wing.

(4) Fiscal policy shall be the responsibility of the Federating units.

(5) Separate accounts shall be maintained of the foreign exchange earnings of each of the federating units.

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[22] O Noman, *Pakistan A Political and Economic History since 1947* (London: Kegan Paul International) 1990, 27.

[23] General M Ayub Khan, *Memorandum on the Political situation of Pakistan,* (Government of Pakistan, National Printing Press: Karachi), 1954.

[24] *Bangladesh Documents* 22-33; also available, H Rizvi, *The Military and Politics of Pakistan,* (Lahore: Progressive Publishers) 1986, 174-5.

(6) Federating units shall be empowered to maintain a militia or parliamentary force.

As we have noted in an earlier chapter, there remains the possibility of considerable variation in models of Autonomy.[25] Considering the aforementioned demands of Awami League, it can be argued that in fact what was being asked for was meaningful "internal self-determination" and "self-government in a manner not inconsistent with State sovereignty". The focus of the present work has not been upon the constitutional issues of Pakistan, though it needs to be noted that the in case of Pakistan effort to formulate a constitution has unfortunately proved to be nothing but lamentable; successive "Constituent Assemblies" being traumatised over such issues as the position of Islam and Sharia (Islamic Law), role of the army, Federalism and autonomy.[26] For international lawyers, a significant lesson that emerges in so far as the conflict between West and East Pakistan was concerned, was that the inability to formulate an acceptable constitutional framework based upon regional autonomy, and the failure to grant genuine internal self-determination ultimately led to the painful and tragic events of 1971.[27] Pakistan came into existence as a State in 1947, though its first general elections based on universal adult franchise could not be held until December 1970. Such a delay may still not have proved to be an unmitigating disaster had Pakistan's military ruler General Yayha Khan, honouring his word, allowed the Constituent Assembly in which the Awami League had a majority to come into session and draft a democratic constitution. The consequences, for this postponement were tragic, resulting in a civil war and the ultimate secession of East Pakistan. The concern of the international community unfortunately has not been so pronounced on the

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25 *Supra* Chapter 7.

26 J Rehman, "Constitutional Dilemmas and Ethnic Minorities of Pakistan" JLS forthcoming, 1995; Noman, *op.cit note 22.*

27 V Nanda, "Self-determination in International Law: the Tragic Tale of Two Cities Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *AJIL* (1972), 321-336; ICoJ, *The Events of East Pakistan 1971*, (Geneva, 1959).

subject of representative democracy and internal self-determination; a subject so essential to the rights of majorities and minorities alike.[28]

11.2.3 Baluchis

The subject of autonomy has also been at the forefront of the political and constitutional aspirations of other ethnic and linguistic minorities of Pakistan. The Baluch in this respect deserve particular attention and concern; their historical position reminisces of the Kurds[29]; both were kindred branches of the same tribe that migrated from what is now Syria several centuries ago[30] and both were forcibly incorporated into the new nation-States of Asia despite promises of independent Statehood.[31]

The Baluch nationalists, in particular, have had serious reasons to complain; they point to their largely independent history, prior to and during the British rule of India, and to the agreement reached between British Government, the Government of Kalat and the Government of Pakistan on 4th August 1947, article 1 of the agreement provided

> "The Government of Pakistan recognises the status of Kalat as a free and independent state which has bilateral relations with the British Government, and whose rank and position is different from that of other Indian states".[32]

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28 V Nanda, "A Critique of the United Nations Inaction in Bangladesh" 49 *Den LJ* (1975) 53-67; J Salzburg ,"United Nation's Prevention of Human Rights Violations The Case of Bangladesh" 27 *IO* (1973) 115-127.

29 S Harrison, *In Afghanistan's Shadow Baluch Nationalism and Soviet Temptations,* (New York: Carnegie Endowment for International Peace 1981) 1981, 10.

30 S Harrison "Ethnicity and the Political stalemate in Pakistan" in A. Banuazizi and M. Weiner (eds.) *The State, Religion and Ethnic Politics Afghanistan, Iran and Pakistan,* (Lahore: Vanguard Press) 1987, 271.

31 On Kurds see Chapter 7 *Supra.*

32 Cited in I Baloch "The Baluch Question in Pakistan and the Right to Self-Determination" in W-P Zingel *et al,* (ed.) *Pakistan in its fourth decade* (Deutshes Orient-Institut) 1983, 188-209, 197.

In view of the agreement it was not surprising to note that, on 15 August 1947, the Khan of Kalat declared the independence of Kalat, a decision endorsed by the Kalat assembly.[33] Amalgamation with Pakistan or the dismemberment of Kalat was unacceptable to the Khan; while absorption into Pakistan meant a loss of identity, the dismemberment of Kalat State was "tantamount to the political castration of the Baluch".[34] One of the prominent leaders of the Baluch ideal of autonomous development, Ghaus Bux Bezenjo stated before the Assembly

> "We have a distinct culture like Afghanistan and Iran, and if the mere fact that we are Muslims requires us to amalgamate with Pakistan, then Afghanistan and Iran should also be amalgamated with Pakistan. They say we Baluch cannot defend ourselves in the atomic age. Well, are Afghanistan, Iran and even Pakistan capable of defending themselves against the superpowers? If we cannot defend ourselves, a lot of others can not do so either. They say we must join Pakistan for economic reasons. Yet we have minerals, we have petroleum and we have ports. The question is, what would Pakistan be without us?"[35]

Ignoring these political aspiration the Pakistan authorities relied heavily on the decision of the Baluch leaders in Quetta on June 29, 1947 to merge with Pakistan, deliberately concealing the fact that these leaders had been appointed by the British, and their Assembly's decision related to the small tract of land know as British Baluchistan.[36]

Not unnaturally Baluch rulers remained unhappy and often rebellious with Pakistan's continual interference in what they regarded as their domestic affairs and despite constant threats of coercion, and actual usage of force it was not until 1955 that the rulers of these independent territories formally agreed to cede their states. The element of a probable claim of secession on the part of Khan of Kalat was used as a

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33 Harrison *op.cit note* 30, 24-25.
34 Cited in Harrison *ibid.* 25.
35 *Ibid.*
36 *Ibid* 24.

major issue which led to the abrogation of Pakistan's first constitution in October 1958, the arrest of the Khan, and the promulgation of Martial law.[37]

Of all the provinces of the present Pakistan, Baluchistan remains the largest but most desolate and least developed and with the terrain covering 42% of the total area, the tiny indigenous population of around 4% is undoubtedly the poorest of all the regions. Comparisons are hard to draw with Punjab, the most developed and politically influential province. A mere 0.7% of the total industry is situated in Baluchistan province and representation of Baluchis in the Federal government is next to negligible. A majority of the Baluch grievances have stemmed from this economic and political deprivation. Baluchistan has economic resources which the successive Federal governments have explored and exploited; natural gas deposits were found in the Sui area and have been used to fuel the needs of most provinces. Baluchistan coast also provided with new port possibilities and the harbour of Gwader was developed in the 1960's.[38] The benefits of these projects to Baluchistan have proved to be negligible and as the Baluchi consciousness expanded, the people have begun to acutely sense the exploitation they had been forced to undergo.[39]

After the secession of East Pakistan in 1971, the Baluch and Pakhtun minority representatives had formed strong pressure groups, ultimately forcing the then President Bhutto to make fundamental concession on the subject of regional autonomy in the new constitution. This was reflected through a number of the provisions of the 1973 constitution. Article 28, for instance, provided for "any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose".[40] According to article

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37 L Ziring *op.cit note 5*, 163.

38 S A Zaidi "Regional imbalance and the national question in Pakistan-some indications" *E&PW* (1989), 300-314, 310-314; H Alavi, "Nationhood and Nationalities of Pakistan" *E&PW* 1989.

39 R Wrising, *The Baluchis and Pathans* (London: MRG) 1987, 8.

40 The Government of Pakistan, *The Constitution of the Islamic Republic of Pakistan, 1973,* (Karachi: Government of Pakistan Printing Press), 1973.

33, State shall discourage parochial, racial, tribal, sectarian and provincial prejudices amongst the citizens. Article 37 committed the State to eradicate economic and social inequality among various regions, with Article 39 requiring all sections of the state to participate in the employment of armed forces. While Article 247 reaffirmed the separate legal status of tribal areas under Frontier crimes regulations, Article 251(3) provided the right of Provincial Assemblies to adopt measures for the teaching, promotion and use of a provincial language in addition to Urdu, the National language.

The constitution also gave more powers to smaller provinces in several ways. The upper house of the Assembly i.e. the Senate was to consist of the same number of representatives from each province.[41] A Council of Common Interest (CCI) was set up in which provincial chief ministers were represented to formulate policies regarding part II of the Federal legislative list.[42] CCI consisted of Chief Ministers of provinces and an equal number of ministers of the federal government which were nominated by the Prime Minister. The CCI would look into matters such as complaints of interference in water supply.[43] The proceeds of federal excise duties on natural gas and hydro-electric power were to be paid to the provinces in which these sources of power were situated.[44]

A National Finance Commission was established consisting of Federal and provincial ministers and other members to advise on matters of revenues between Federation and the provinces.[45] As in the 1956 and 1962 constitution, fundamental rights were guaranteed and principles of State policy were provided. According to Chapter II Part III Parliament was to comprise of the National Assembly and the Senate. The National Assembly was a chamber consisting of 200 representatives directly elected and generally considered to serve for a term of 5 years. The aim of the

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41 *Ibid.* Article 59.
42 *Ibid.* Articles 153-4.
43 *Ibid.* Article 155.
44 *Ibid.* Article 155.
45 *Ibid.* Article 160.

senate was to provide equal representation to all the provinces.[46] Each province elected 14 members, 5 nominees were elected from FATA, two from the Federal Capital elected by the National Assembly in Members of the executive administration of the province.[47]

Part V of the constitution described the relationship between the Federation and the Provinces. Whilst the Parliament had the sole authority to legislate on matters on the Federal list, both Centre and Provincial Assemblies could make laws on matters on the concurrent list. In spite of all these measures, the 1973 constitution left sufficient room for an authoritarian rule. Part X allowed the President to declare a proclamation of emergency with power to suspend fundamental rights during an emergency. Indeed once the Constitution had come into force an emergency was declared, accompanied by the suspension of fundamental rights articles, a state of affairs which was to continue well over a decade until after the 1985 elections.

Indeed, if the Baluchis were to anticipate that their minority aspirations would be realised, this was not to be the case. The year 1973 saw the beginning of a long hard drawn battle on the part of Baluchis against the central government with military operations against the Baluchis being authorised only one month after the Constitution came into operation. This was to lead to a major confrontation when 80,000 (mainly Punjabi) troops were engaged in an armed confrontation with as many as 55,000 Baluchis.[48] The casualties were not insignificant although again no precise figures are available. According to Baloch

> "The Pakistan armed forces suffered about 8000-10,000 casualties. The number of guerrillas and their casualties is not reliably known. Thousands of civilian Baluch were killed in the military action

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[46] *Ibid.* Article 51(1).
[47] *Ibid.* Article 59(1)
[48] Wrising *op.cit note 39,* 11.

> and in the bombardments by Pakistan Air force and thousands migrated to Afghanistan or took refuge in Sind..".[49]

Baluchis, like the Kurds, can be regarded as a "people", though such a recognition would of course open the Pandora's box of what is the definition of a "people" in international law[50]. If the Baluch in fact are a "people", then does their expression of self-determination include a right to secede?[51] Divided between Pakistan, Iran and Afghanistan whims of historical misfortunes have prevented the Baluchis from independent Statehood. Indeed, Baluch nationalists argue that had it not been for the British strategic interests to maintain the buffer State of Afghanistan against possible Russian aggression, and equally to carve up the Baluch territory, the contemporary status of Baluchistan would now be different.[52]

In the years prior to 1971, despite forcible incorporation into Pakistan, Baluch political leaders would have been content with a federal system of government and regional, linguistic and cultural autonomy. Instead the "One-Unit" system was thrust upon them; a highly centralised bureaucratic system, abolishing provincial boundaries with the failure to provide any recognition to the Baluch language or culture. The system of "One-Unit" ultimately collapsed under the pressure of the Bengali civil war and secessionist movement, though as we have noticed the failure to implement and follow the spirit of the 1973 constitution has revived past grievances and memories of a secessionist civil war.

Significantly for our purposes, a majority of the Baluch grievances have stemmed from denial of political and economic autonomy. The demand is for a re-adjustment of power with the Federal government only in charge of foreign affairs and currency. Baluchis detest the Punjabi and Muhajir domination in the Civil bureaucracy

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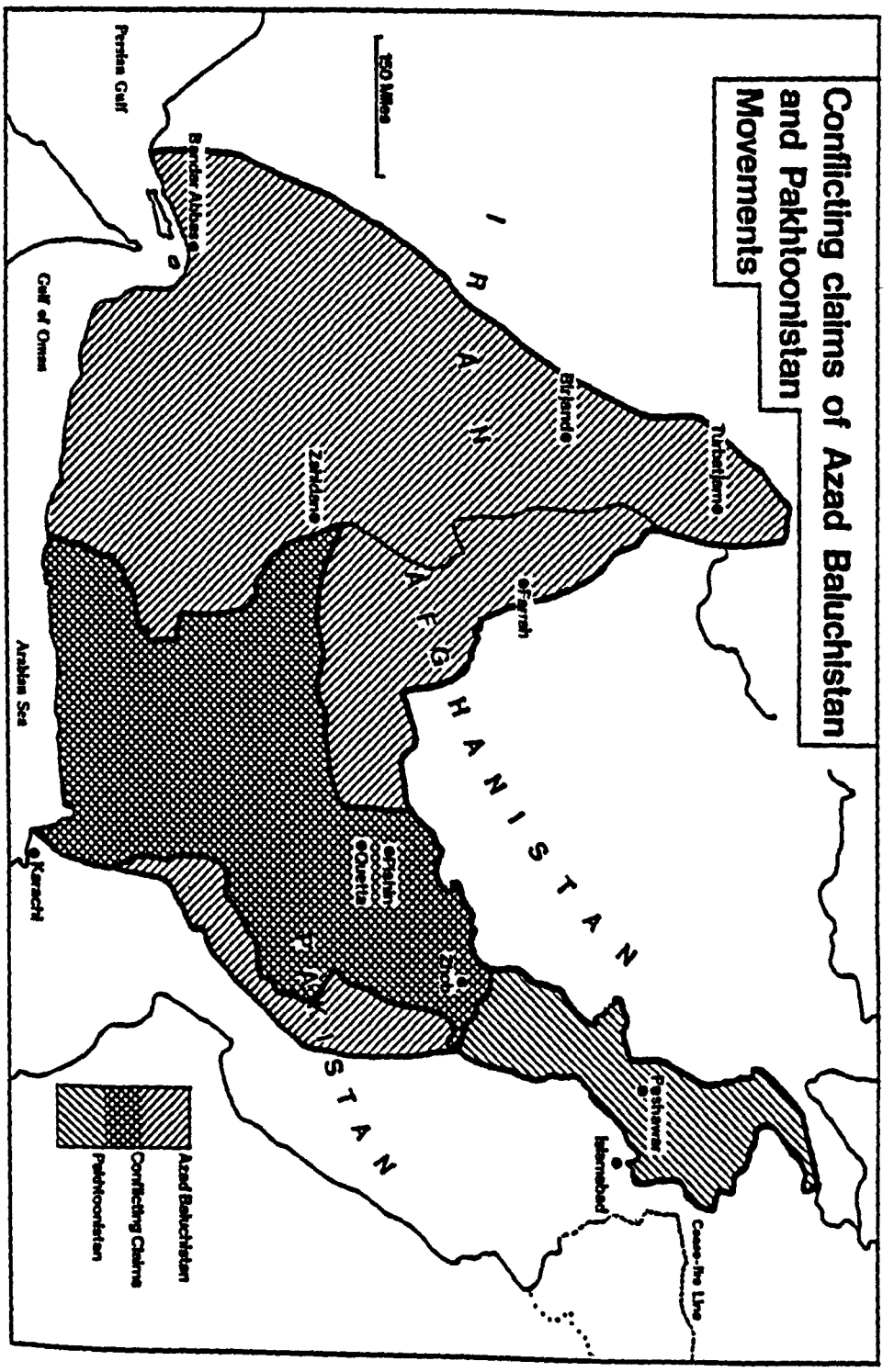
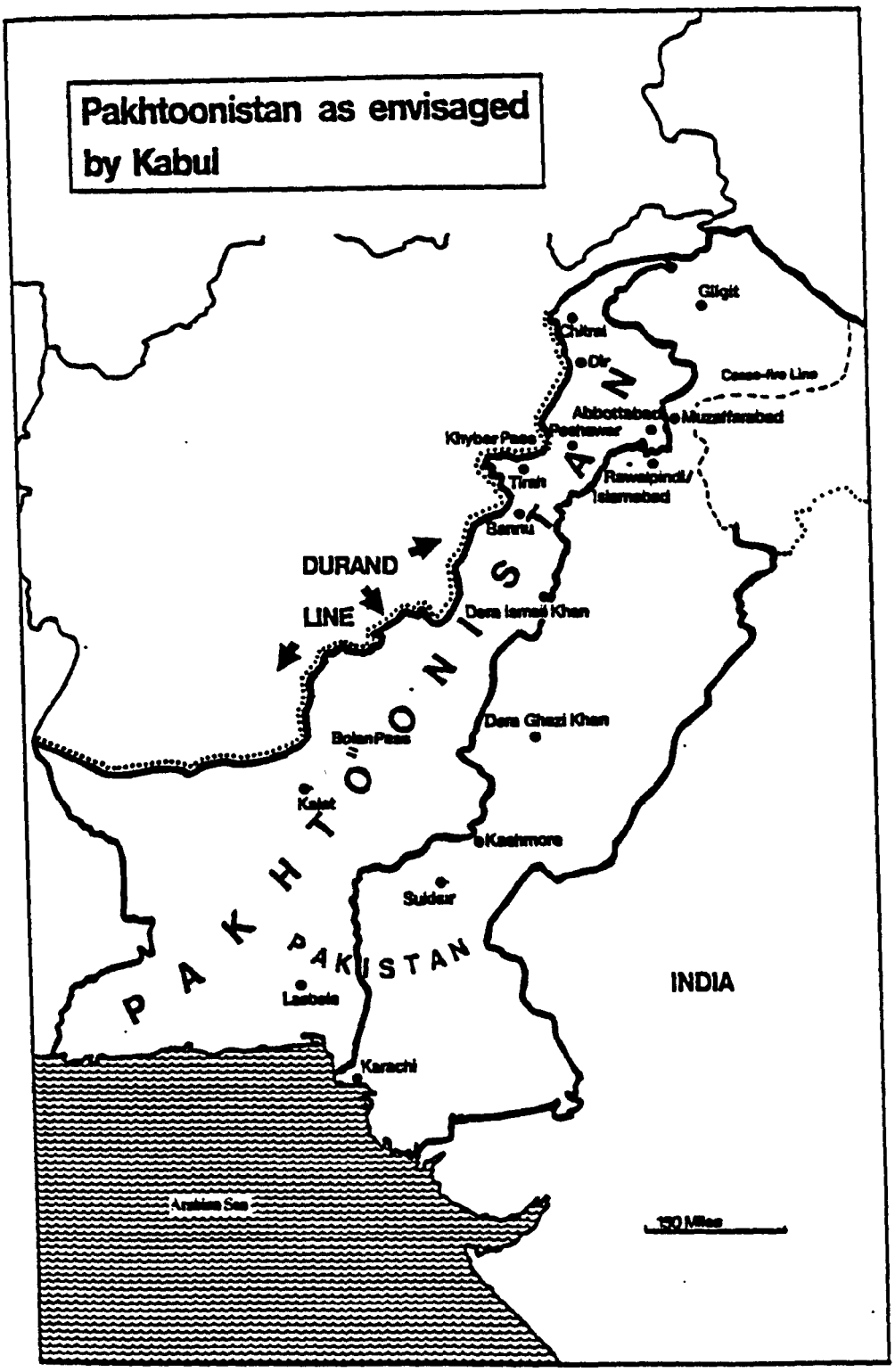
[49] Baloch *op.cit note 32,* 205.
[50] *Supra* Chapter 2.
[51] *Ibid.*
[52] *Personal interviews during 1993-4.*

MAP 4: Conflicting claims of Azad Baluchistan and Pakhtoonistan Movements



MAP 5: Pakhtoonistan as envisaged by Kabul



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and the Punjabi constitution of the army is seen as a symbol of brutality. They seek Baluchistan for the Baluch people a province having unfettered local authority over almost everything provincial ranging from decision-making as regards the curriculum for secondary education to the exploitation of natural resources and the allocation of development funds.

11.2.4 The Pakhtuns

In 1893 the British drew the Durand line separating India from the mountain State of Afghanistan. However, the Afghans never really accepted this boundary and nationalists point out that it divides a "people" with common tradition and history and continues to deprive Afghanistan from acquiring a much desired outlet to open sea.[53] Although, it is clear that by 1946, immediately prior to the partition of India, M A Jinnah had had a stranglehold on the affairs of NWFP, controversy is still generated when some Pakthun nationalists highlight the fact that the referendum that had been organised by the British, which led to 99% vote in favour of joining Pakistan could not be regarded as conclusive. They firstly point out that in the referendum the Pakhtuns were not given the option of union with Afghanistan (being only limited to union with either India or Pakistan) and secondly that a not so insignificant proportion (largely supporters of *Khudai Khidmat gars* commonly known as the Red Shirts) in fact boycotted the referendum.[54]

On the other hand it is equally clear that the creation of the Pakistan State was opposed by the Afghans who consorted with the Indian National Congress before

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53 Ziring *op.cit note* 5, 236.

54 Wrising *op.cit note* 39, 5; also see A Mohabbat "Pakthun National Self-Determination: The Partition of India and Relations with Pakistan" Unpublished Ph.D. dissertation, Saint Louis University, 1979.

Partition and were led to believe they would gain the port of Karachi if the Pakistan movement failed.[55] Such anti-Pakistan groups like Ghaffar Khan's *Khudai Khidmat gars* wanted a home land for the Pakhtuns and having it renamed as "Pakhtunistan". The Afghan leaders appealed to the ethnic sensitivities of the Afghans and urged upon the inhabitants of NWFP to join Afghanistan when it became clear that the British departure was imminent.

Indeed Afghanistan was the only State to cast a vote of opposition to Pakistan's membership of the United Nations. Its territorial dispute with Pakistan has been a long-standing and enduring one. Afghanistan, has since 1947 claimed either a substantial portion of the territory of Pakistan to be incorporated within Pakistan or the creation of an independent "Paktunistan".[56] Equally, Afghanistan has continued to provide overt support to the Pakhtun nationalistic sentiments across the border. A former President of Afghanistan Mohammed Daud remained a strong critic of the policies of Pakistan, which, in his view, reflected forced assimilation of the Pakhtun Nation into Punjabi nation-State. Successive Afghan governments in fact are suspected of strongly supporting the Pakhtunistan movement and the "Pakhtunistan" issue has heavily burdened Afghan-Pakistan relations ever since 1947 and has even led to outbreaks of armed violence especially in the early 1950's and 1960's.

During the period of Soviet occupation there remained a threat of direct invasion in Pakistan. Currently however, with the influx of millions of Afghan refugees, although the threat of a secessionist movement seems to have subsided, the issue of integration and autonomy of Pakhtuns has remained a matter of considerable debate.

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[55] *Ibid.* also see J Verzijl, *International law in Historical Perspective,* (Leydon: Sijthoff) 1968, Part II, 424.

[56] See the views of M Shafiq, Minster for foreign Affairs, General Assembly, 27th session, 10th October, 1972, cited in United Nations Monthly Chronicle, November 1972, 104; In 1969, the postage stamps of Afghanistan incorporated most of the NWFP and Baluchistan in the Afghan state, Ziring *op.cit note 5,* 236.

From the socio-economic position it is clearly evident that the Pakhtuns have far less reason to feel aggrieved than their compatriot Baluchis and Sindhis. In contrast to the contemptuous view that the dominant Punjabis are reputed to hold for the Baluchis and Sindhis, Pakhtuns enjoy much more respect. More importantly unlike others, Pakhtuns are not totally excluded from the economic and political power structure of the country. Pakhtuns have traditionally held important civil and military posts and even nowadays there is still significant Pakhtun controlling influence and the expansion in the military and bureaucracy over the last two decades has not been at the expense of the Pakhtun members of the establishment.

The position of relative power and prestige amongst other minorities does not mean that the "Pakhtunistan" issue is completely dead. Pakhtuns have also a proud history and the bitter resentment of their forced entry into Pakistan is a constant reminder of their nationalist ideology. Currently Pakhtuns nationalism evinces in the alleged discrimination against NWFP in the allocation of development expenditures in agriculture and industry. Allegations have been levelled against Islamabad for holding back electrification of the province, so as to discourage industrial development, for local raw produce being transferred to factories of other provinces, funds for agricultural development being arbitrarily channelled to other Punjabi dominated areas. Some of the grievances are very typical and in line with complaints brought forth by embittered Sindhis, Baluchis and Muhajirs. Punjabi civil servants have continued to play a dominating role in provincial administration and in the same account Islamabad continues to resist Pakhtun nationalist efforts to upgrade Pashtu language in higher education.[57]

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[57] "Battle of languages in Northern Areas" The News International 17 December, 1994.

11.2.5 Sindhis and Muhajirs

The conflict between the Sindhis and the so-called Muhajirs has relatively recent origins; a consequence of the large-scale exchange of population at the time of the partition of India.[58] The contemporary conflict in many ways reminisces all those where an indigenous people which, being the target of persecution and forced assimilation, is attempting to preserve its identity and independent existence. Sindhi is the term used to denote the indigenous peoples of the region of Sindh. Sindhi history is an ancient one and goes back 5000 years; the region, historically having enjoyed a considerable measure of autonomy, allowed it to establish its own culture and tradition. It had also developed, over generations, written literature around which provincial identity could form.[59] However, after the partition of India in August 1947, a vast majority of the Sindhi Hindus and Sikhs were forced to flee; they were replaced by several millions Muslims from provinces which now form part of India. Although there is a certain amount of slipperiness in the term Muhajirs, the term is generally used for Muslim refugees primarily from Bombay and west the coast of India who came to settle in the urban areas of Sindh province.[60]

For the Muhajirs who migrated to Sindh the experience was subsequently to be agonising. Their new homelands were to prove breeding grounds for the antithetical visions of cultural, linguistic and religious autonomy. However, and as we have indicated earlier, for many years Pakistan's political arena was dominated by Muhajirs. According to Callard, from 1947-52, Pakistan's political system was controlled by

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58 A Salim, *Sulagta Howa Sind* (Lahore: Jang Publishers) 1990; A J Siddique, *Muhajir Quamiat,* (Karachi: Shibal Publishers) 1987 M Ali, *Sindh Khamoshi Ki Awaz* (Urdu) (Lahore: Fiction House), 1994; K Athar, *MQM Ki Khani, Altaf Hussain Ki Zubani Safar-i-Zindgani,* (Lahore: Jang Publishers) 1988.

59 On the historical aspects of Sindh see Dr Khuro's excellent works; H Khuro, *Sindh Through Centuries* (Karachi: OUP); H Khuro, *The Making of Modern Sind* (Karachi: Indus Publishers) 1978; also see M Rahman, *Land and Life in Sindh, Pakistan* (Lahore: Ferozsons Pvt Ltd) 1993.

60 B Ali "Sind and Struggle for Liberation" *E&PW* 7 March 1987, 402-405, 402; "Economic Reasons for Ethnic Clashes", October-Nov. 1986, Muslim India, January 1987, 41-42. 41.

about 20 individuals, the majority of whom were Muhajirs.[61] In 1947, Jinnah himself a cutchi-speaking Khoja Ismali from Bombay assumed the role of Governor General. The cabinet with L A Khan, a Muhajir from United Provinces (though originally from Karnal district in East Punjab) as the prime minister, comprised mostly of Muhajir politicians[62]. By creating 6 new seats in the newly established Constituent Assembly through co-option of its own members, the Muhajir representation was increased. Several of its members who were residents of West Pakistan were provided with East Bengal seats. At the provincial level Muhajir strength was manifested even more strongly. In Punjab and Sindh Provincial Assemblies seats, were provided for the new arrivals.

Similarly in the prestigious Civil Service the Muhajirs established a predominant hold. Being of urban orientation, a considerable number moved to the big metropolis of Karachi and Hyderabad, subsequently complicating Pakistan's laws of ethnic preferences with a rural urban distinction. The modern and urbanised Muhajirs, with official patronage alongside their entrepreneurial skills, quickly established themselves. More divisive was the constant Federal intervention into provincial affairs. As early as August 1947, Jinnah Dismissed Khan Sahib's provincial ministry in North West Frontier Province (NWFP). In April 1948 Jinnah backed the ouster of M A Khuhro, an indigenous Sindhi, Sindh's first Chief minister, although at that time he enjoyed the support of a majority in the provincial assembly which had been occasioned by his opposition to the removal of Karachi from the Federal provincial control. Muslim Sindhis were left at a disadvantage; no comparisons could be drawn between the "refugees" and there Sindhi hosts. Language, culture, politics, and society was all very different. Sindh was quickly swamped by an alien culture which immediately began to dominate not only Sindh but also the entire country. In Sindh

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[61] K Callard, *Pakistan A Political Study,* (London: Allen and Unwin) 1957, 25-26.

[62] L Binder, *Religion and Politics in Pakistan,* (Berkeley: University of California Press) 1961, 205.

the Sindhis dropped to a bare majority or less in seven principle cities. Their case has been accurately described, thus as one of a region

> " in which a peripheral people feel in danger or actually have been swamped : numerically economically, and culturally, within their own land by newcomers or invaders. In this context, Sind is comparable to the state of Assam in India (inundated by Bengalis) and now to the Sikhs in Punjab (a bare majority over Hindus). For analogies outside of South Asia one might look at the reaction of the Malays to their Chinese minority until Singapore seceded, to the Palestinian and Lebanese `numbers game', to the swamping of Tibet by Hans Chinese settlers and of Kazakistan by Russians in the `second world' of communism, to the Basques (except that they are more prosperous than the average Spaniard), and in general to all cases of ethnic numbers reversal".[63]

Sindhi economy had traditionally been agricultural with very little industry and very few market towns; the Muhajirs represented a more advanced and urban capitalist culture which they had brought from the towns and cities of India.[64] Not only did they have a large entrepreneurial class along with an administrative and educated petty bourgeoisie service they also had a large and well trained working class. Immediately after partition, Karachi was detached from Sindh and made into a Federal district. The Consequences were enormous, resulting in the abolition of Sindhi within Karachi's Federal offices and replacement of Urdu speaking office workers, closing down of Sindhi department at the University of Karachi and ban of Sindhi in University examinations in Karachi. The Muhajir identity was quickly established within the new State and they emerged as the ruling ethnic group. They were educationally far superior,[65] considered themselves culturally superior, their new home city was consolidated as the country's capital and above all they had taken a leading role in its

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[63] T. Wright *Jr. op.cit note 12*, 303.

[64] S A Zaidi, "Sindhi vs. Muhajir in Pakistan-Contradiction, Conflict, Compromise" *E& PW* 18 May 1991, 1295-1302, 1295-1296; P Brass "Muslim Separatism in UP Social context and Political strategy before partition" 167-186 Annual Number, *E&PW* (1970)

[65] In the early years they had a literacy rate of 70%.

creation. The continued bias in favour of Urdu, retention of One-Unit, heavy reliance on bureaucracy (with considerable Muhajir elements), encouragement of private enterprise and settlement of Muhajir property claims were some of the benefits derived from the Ayub era.

With the passage of time however, the main Muhajir party, the Muslim League was discredited with its failure to sustain any popularity. Absence of constructive policies and strong leadership, "cashing-in on the popular patriotism and the gratitude on the part of electors for having achieved Pakistan"[66] and the rise of indigenous political parties, all contributed to the downfall of the League. There was also considerable increase in the Punjabi-Pakthun military influence over national affairs leaving Muhajirs in a relatively subordinate position.

As far as the Sindhis were concerned their cause was championed by Z A Bhutto, an indigenous Sindhi and Pakistan's first elected Prime Minister. Acutely aware of the Sindhi grievances he tried to reduce the provincial alienation. A serious complaint on the part of the Sindhis had been their lack of representation at the Provincial and Federal level, in institutions of higher education. To improve the Sindhi proportion in the civil service, lateral entry programme was introduced. To help increase the number of indigenous Sindhis 11.4% seats were reserved for them in the Federal bureaucracy.[67] To curb bogus domiciles the Provincial Assembly passed an ordinance laying down strict rules for the Definition of a "rural Sindhi".[68] The Sindh Permanent Residence Certificates Rules, which came into operation in 1971 provide for the most thorough scrutiny of individual's credentials. Direct District Magistrates were asked to follow a rigorous procedure, a comprehensive exercise of which, despite Provincial courts consolatory intervention, was bound to benefit the indigenous Sindhis

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66 K Azfar, "Constitutional Dilemmas in Pakistan" S Burki and C Baxter (eds.), *Pakistan under Martial Law 11 years of Zia-ul-Haq,* (Lahore: West view Press Pakistan Book Co-operation) 1991, 58.

67 C Kennedy, "The Politics of Ethnicity in Sindh" 31 *AS* (1991), 994-5.

68 C Kennedy, *Bureaucracy in Pakistan, 1987,* (Karachi: OUP) 109-152.

at the expense of Urban Muhajirs. More importantly many Sindhis were appointed to national and provincial offices. Indeed, the "nationalistic" agenda of Bhutto was targeted at the Muhajir entrepreneurs of Karachi and aimed at redressing the balance in favour of the Sindhis.

Many in the Muhajir camps bitterly detested these moves on the part of Prime Minister, perceiving them as attempts to promote the interests of Sindhis, at the expense of Muhajirs. There was a strong contingent of Muhajirs which took an active part in the civil unrest during 1977, culminating in the successful military coup of General Zia-ul-haq. While the General's 11 year military rule can generally be regarded as favourable to the Muhjairs, they could never reoccupy their initial authoritative position. It is interesting to note the Muhajir Charter of Demands *Karadad-i-Maquasid* which can be treated as their expression of autonomy. These included *inter alia*

> (1) Adequate representation in provincial as well as federal government departments on the basis of population
> (2) only those person should be treated as domiciled (in Sindh) who have been living (there) for the last twenty years and who spent their earnings in the province
> (3) only the real Sindhis, including Muhajirs, should be given the right of voting
> (4) seat reservation for Muhajir students in colleges should be on the basis of their population
> (5) Pakistanis from Bangladesh should be allowed to settle in Pakistan
> (6) outsiders should not be allowed to buy any property in Sindh; allotments already made should be cancelled
> (7) Local bus services (mainly owned by Pathans and Afghans) should be nationalised; Police officers, and mostly Punjabis and others accused of persecution of Muhajirs should be arrested.[69]

A number of demands presented by both the Sindhis and the Muhajirs coincide.[70] These include a ban on any further settlements of Punjabis and Pakhtuns

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[69] J Das Akhtar "Civil Pols Results Sharpen Ethnic Clashes in Pakistan" Organiser December 20, 1987, 16.

into Sindh and restriction on the sale of properties and allotment of businesses to those not domiciled in Sindh. More importantly the demand is for greater provincial autonomy and less interference from Islamabad. Equally, Sindhis and Muhajirs demand that those who are involved in the administration of the province should be those who are domiciled in the province.

On the other hand there are serious disagreements between Muhajirs and Sindhis themselves.[71] A fertile source of conflict is the provincial language. Muhajirs, want to maintain Urdu (their mother language) as the official language, something unacceptable to Sindhis. Another difficult area is the repatriation of Biharis from Bangladesh.[72] Muhjairs claim that the Biharis of Bangladesh must be repatriated to Pakistan. This, however is unacceptable to Sindhis who fear an influx of Biharis in Sindh resulting in their complete loss of cultural and linguistic identity. Indeed, the issue of Biharis has been a sore spot in efforts to reach any agreement between the political parties of Pakistan, and contributed to the downfall of Benazir Bhutto's government and subsequently that of Main Nawaz Sharif.

11. 3 CONCLUSIONS

Pakistan in reality, using Rupert Emerson's terminology, has failed to emerge as a nation, but merely resembles a "nation in hope".[73] It was a union of otherwise disparate people; Kashmiris, Punjabis and Bengalis divided between India and Pakistan, Pakthuns split between Pakistan and Afghanistan and Baluchis between Iran, Afghanistan and Pakistan. Each community having a different language, culture and tradition found the others at different levels of social, political and economic

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70 "A Plea for Peace and Amity in Sindh" Dawn 13 March, 1993.

71 "Pakistan-Language riots in Sind" Keesings Contemporary Archives 25518 October 14-21, 1972; "Tackling the Sindh Situation" Frontier Post 11-5-94.

72 B Whitaker *et al*, *The Biharis of Bangladesh* (London: MRG), 1978; Keesings Contemporary Archives 25833.

73 R Emerson, *From Empire to Nation*, (Cambridge: Mass: Harvard University Press) 1960, 94.

development. Equally, as we have noted, there has remained considerable interest on the part of the former USSR, India and Afghanistan in sharing the spoils of a fragmented Pakistan.

Pakistan, is certainly not the only State to have confronted such problems; new States that emerged from the rubble of decolonization have had to face the tremendous task of building up a State comprising peoples of different ethnic, linguistic, cultural, religious and tribal affiliations. Indeed, it would be an oversight to neglect the difficulties that some States have had to face in the nation-building process. Dissension amongst the political elite as to finding the right balance between notions of autonomy as against this nation-building project often led to breakdown of any constitutional mechanisms.

For these new States in particular, it would appear that a right of autonomy is a difficult right to concede. The inherent ambiguities in the concept, makes States reluctant to allow any concessions to minorities. For States like Pakistan, notions of autonomy portend ominously on their own existence; the lacuna, it is feared, between the concept of autonomy and self-determination is not very wide. Conversely, the lesson which international lawyers and statesmen ought to learn is that autonomy could provide a viable and satisfactory alternative to demands of secession. It can be, and it has been, argued that had the political elite of West Pakistan allowed democratic institutions to work, and had allowed the Bengalis an essential linguistic and cultural autonomy, a full expression of self-determination could have taken place within the original frontiers of Pakistan.

PART V

CONCLUSIONS

CHAPTER TWELVE

CONCLUDING COMMENTS

12.1 RIGHTS AND SUBJECTS OF INTERNATIONAL LAW

Earlier in the century, Oppenheim, the leading international lawyer, wrote

> "Several writers maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether he be a subject of a member State of the Family of Nations, or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty and property, the right of practising any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such a guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this Law".[1]

Since 1945, however, a number of international and national instruments have related themselves closely to the promotion and protection of individual human rights, leading to a general belief that Oppenheim's views could no longer be endorsed. Indeed according to the latest edition of the work

> "International law is no longer...concerned solely with States.....It is no longer possible, as a matter of positive international law, to regard States the only subjects of international law, and there is an increasing deposition to treat individuals within a limited sphere, as subjects of international law".[2]

The progression of human rights law has generally been in the direction of according protection to the individuals against their States with the "anti-State" stance flowing "from the assumption that individual persons must be protected

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1 L Oppenheim, *International Law A Treatise*,, vol. i, Peace, (London: Longman) 1st edn, 1905, 346.

2 R Jennings and A Watts (eds.) *Oppenheim's International law*, (Harlow: Longman) 9th edn, vol. ii, Peace 1992, 846, 848-9; E Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International levels* (New York: United Nations) 1992.

from the abuse of power of parliaments, governments and public authorities".[3] Despite the considerable advance in the cause of human rights, in reality, States continue to remain the main creators and bearers of rights and duties; the limited intrusion which international human rights law may make in the domestic jurisdiction of States is only acceptable to the extent that it does not in any way challenge their territorial integrity or the authority of the governments in power.[4] Article 34 of the Statute of the International Court of Justice declares "Only States may be parties in cases before the Court":[5] at the international level, the limited procedural capacity which individuals may have before certain treaty-based bodies, such as the Human Rights Committee, is granted at the behest of the States themselves.

Whereas the path and progress of international law is determined by sovereign and independent States, some minorities have proved extremely capable of indulging in lasting conflicts, thereby threatening both the territorial integrity of the existing States and those who hold the reigns of power.[6] This resilience, on the part of minorities, is sometimes matched with demands and declarations fashioned in their vision of the world order, but foretelling an ominous future for the existing State system.[7] States are not keen to espouse the cause of minorities, especially if this propagation could lead to the support of an alternative and challenging constituency.

If the existence of a procedural capacity is the primary measure of assessing whether an entity has rights under international law, then minorities may

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3 F von Prondzynski, *Freedom of Association and Industrial Relations A Comparative Study*, (London: Mansell Publishing Limited) 1987, 1.

4 See *supra* chapters 5-7.

5 1945 UKTS 67; 1946 Cmnd 7015.

6 See *supra* chapter 1.

7 See e.g. *The Universal Declaration of the Rights of Peoples*, Algiers 4 July 1976 in particular Articles 19-21, quoted in full in I Shivji, *The Concept of Human Rights in Africa*, (London: Codesria Book Series) 1991.

well be excluded from any such contention. On the other hand there is dicta to support of the view that procedural capacity need not be an essential prerequisite for having recognised rights and duties. In the *Peter Pazmany case* the PCIJ stated "it is scarcely necessary to point out that capacity to posses civil rights does not necessarily imply the capacity to exercise those rights oneself".[8] Similarly, the Permanent Court's successor, the ICJ, in the *Reparations case* stated "subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[9]

12.2 INTERNATIONAL LAW AND THE LIMITS OF MINORITY RIGHTS

There may be some disagreement as to the adequacy of the rights granted to minorities under international law, although the research into the subject has taken the view that international law is in itself an extremely difficult medium for effectively safeguarding whatever rights that are granted to minorities. Having said that, a theme that has emerged from the present study tends to suggest that international laws relating to the protection of minorities cannot be regarded as immutable. Professor Kunz once remarked that "he who dedicates his life to the study of international law is sometimes struck by the appearance as if there were fashions in international law just as neckties".[10] After the Second World War, with the establishment of the United Nations, any independent concern for the rights of minorities more or less absorbed into the wider aspiration of protection of individual human rights. The issue of minority rights remained peripheral to human

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8 *The Peter Pazmany University v. the State of Czechoslovakia,* 1933 PCIJ Ser A/B No 61, 231.

9 *Reparations for injuries in the service of the United Nations, Advisory Opinion,* ICJ Reports 1949, 174.

10 J Kunz, "The Present Status of International Law for the Protection of Minorities" 48 *AJIL* (1954) 282-287, 282

rights law; the existence of minorities, although in many ways real and palpable only occasionally becoming the focus of human rights law. Unlike the League of Nations which had a limited, yet discernible vision on minorities, both an inability and an unwillingness to consider the position of minorities characterised the approach of the United Nations. Kunz's remarks relating to the changing fashions in international law were ironic, though crudely reflective of this mood. He wrote "At the end of the first World War `international protection of minorities' was the great fashion: treaties in abundance, conferences, league of Nations activities, an enormous literature. Recently this fashion has become obsolete. Today the well dressed international lawyer wears human rights".[11]

To some extent fashions and trends of international society have changed in the last fifty years when concern for the plight of minorities may not be so much of a minority fashion. A number of international and regional instruments, pioneered by the recently adopted United Nations General Assembly Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, point towards a progression in a more positive direction. It is also the case that the apparent end to the "Cold-war" and the emergence of the "New World Order" appears to have removed some of the inherent tensions which for so long engulfed international law and politics, although, in so far as the protection of the rights of minorities is concerned, as the contemporary events indicate, there is not much cause for optimism.

In this tumultuous period it seems difficult to come to any firm conclusions. It may well be that, at least, in theoretical terms, international instruments are coming to acquaint themselves more intimately and directly with minorities; for many international lawyers the forlorn hope remains "that international law is beginning to understand the minorities question better. The

[11] *Ibid. 282.*

architecture of any eventual regime for minorities may be glimpsed as a distant building, even if the details and intricacies are not yet clear".[12]

In contemporary terms the political geography of the post-colonial World poses a difficult set of questions. Many States, particularly those which have emerged from the rubble of decolonisation, have found various ethnic, cultural, linguistic and religious groups at different levels of social, economic and political development. It probably is the case that the hazards of nation-building have consequentially blinded the political elite of an awareness of these sociological, cultural and economic distinctions. It may have numbed their sensitivities for noble values such as tolerance and charity, negating their self-proclaimed ideals of preserving distinct identities, autonomy, self-government and self-determination, though it may well be a product of the unwillingness to accept ideological or political differences.

On the other hand, practical realities must not be overlooked. The legacy of the colonial era, although encouraged and established by the colonisers to prop-up their empires, has made integration of desperate groups into elements of nation-State a considerably hazardous job.[13] Modern developments in international law must acknowledge the complexities that are generated with these taxonomies, and not imprudently encourage the fragmentation of existing States. If the right to self-determination is not to exhaust itself or degenerate into perpetual anarchy, it must be regarded as a continuum of rights; forming a natural lineage between individual human rights at one end of the spectrum to meaningful "internal" self-

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[12] P Thornberry, "International and European Standards on Minority Rights" Miall, 14-21, 21.

[13] "It was always understood by States emerging from colonialism that there would be problems associated with the fact that their boundaries had been settled by the Colonial powers on the basis of political interests that did not necessarily coincide with their own. In the case of the emerging African States the problem of inherited boundaries has been particularly acute, and the tribes have often straddled the new frontiers yet have continued to feel themselves a unit". R Higgins, "General Course on Public International Law", *Rec. des Cours*, (1991) 167.

determination at the other, catering adequately for all peoples to pursue their political, economic, social and cultural development.

12.3 MINORITY RIGHTS AND *DE LEGE FERENDA*

The existence of present norms of international law could, at least in theory, be contrasted with a policy of *De Lege Ferenda.*[14] The absence of a consensus definition in international law has provided States with an opportunity to deny the existence of minorities within their boundaries. It is accepted that the absence of this definition may not in itself render the whole ideal of minority protection redundant, and that any subsequent definition that would be established could not radically differ from that provided by the Special Rapporteur.[15] On the other hand a fuller exposition of the concept of a minority in an international legal instrument nonetheless seems a crucial task if further progress towards minority protection is to be made.

Some changes, it is contended, need to be made to the Capotorti definition in order to provide a more comprehensive and fuller protection of certain minorities. Capotorti's definition limits itself to the numerical inferiority of the group in question. Following the line adopted by Dinstein, and Palley, it is submitted that other factors such as the socio-political, and economic strength of a particular community should also be considered in determining the status of a minority.[16] Issues of nationality clearly fall within the jurisdictional domain of States, and States jealously guard their prerogatives to determine nationality of

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14 Thornberry, 396.
15 *Ibid.*.
16 *Supra* chapter 2.

individuals.[17] The stringent exercise of rules relating to naturalisation beg the questions of the rights of groups who despite their long-standing and almost permanent character of residence are deemed in municipal laws as non-nationals. Indeed, the enduring nature both in terms of the duration of their residence and the suffering that certain groups of migrant workers, refugees and stateless persons are subjected to, requires a reconsideration of the rights that are provided to them by contemporary international law.[18]

The procedures set up by Economic and Social Council including that of Resolution 1503 have proved to be of limited value for minorities.[19] The lack of effectiveness which surrounds Resolution 1503 procedure results from its confidential and highly time-consuming nature and fear of intervention in the domestic affairs of the State. The procedure also reflects that States with a strong political clout could avoid investigation and political recrimination whereas those politically isolated or "disfavoured" could become targets of pressure and intimidation, a practice which would probably feature more extensively after the demise of the Soviet Union. We are reminded of the cynical comments of Ian Guest when he says that Resolution 1503 procedure "has become truly dangerous to human rights-and that it offers a useful refuge to repressive regimes".[20]

In the present State-centred international order it may well be unrealistic to suggest an ambitious and interventionist approach. Instead of adopting a confrontational stance it might be worthwhile to attempt to establish a constructive dialogue with the governments concerned; what cannot be achieved through

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17 P Weis, *Nationality and Statelessness in International Law,* (Alphen aan den Rijn: Sijthoff and Noordhoff) 1979, 2nd edn. 240-241.

18 R Lillich, *Rights of Aliens under Contemporary International Law,* (Manchester: University Press), 1984.

19 P Alston, "The Commission on Human Rights" (ed.) P Alston, *The United Nations and Human Rights,* A Critical Appraisal (Oxford: OUP) 1992, 126-210,148-155; J Donnelly, *International Human Rights* (Oxford: Westview Press) 1993, 12; Thornberry, 397.

20 Cited in Alston *ibid.* 153.

coercion and intimidation might just be available through persuasion and dialogue. The development of innovatory institutions as the High Commissioner on National Minorities set up in July 1992, could aim to bring pressure on States to improve their individual human rights and collective group rights record.[21] The setting up of a High Commissioner for human rights in December 1993 is also a welcome sign.[22] In so far as the protection of collective rights is concerned, as noted earlier, it is encouraging to observe an increasing number of regional and international instruments dealing directly with the position of minorities, though the need for adopting an international convention dealing specifically with minorities remains a real and urgent one.

The solemn phoenix of hope that arose out of the frustrating experiences of Bangladesh and indeed continues to flourish is the fruition of the work of non-governmental organisations. Like innumerable situations, it was the non-governmental organisations who drew the initial attention to the atrocities being committed in East Pakistan; the meagre consideration which the Sub-Commission gave to the violations of human rights in East Pakistan was largely due to the intervention of non-governmental organisations. Indeed, at each stage of the conflict, starting from the civil war to the return of prisoners of war, a number of organisations including the Amnesty International (AI), the International Commission of Jurists (ICoJ) and the International Committee of Red Cross (ICRC) provided invaluable support.

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21 CSCE Helsinki Decisions, 35 ILM 1992, 1385; A de Zayas, "The International Judicial Protection of Peoples and Minorities" in C Brolmann, R Lefeber and M Zieck, *Peoples and Minorities in International Law* (Dordrecht: M. Nijhoff), 1993, 253-287, 282; A Bloed, "The OSCE and the issue of National Minorities" in A Phillips and A Rosas (eds), *Universal Minority Rights*, (Abo Akademi/ MRG: Turku/Abo and London), 1995, 113-122, 116-119.

22 See the UN Chronicle, March 1994; A Clapham, "Creating the High Commissioner for Human Rights: The Outside story" 5 *EJIL* (1994), 556-568; G Alfredsson, "Minority Right: A Summary of existing practice" in A Phillips and A Rosas (eds), *op.cit* note 21, 77-86.

The role of the non-governmental organisations is to be applauded for their contribution towards protection of human rights in our analysis of the case of Pakistan, which is also of importance to minorities and indigenous peoples in general. Unhindered by restrictions and restraints which prevent States to act, a number of non-governmental organisations with consultative status in accordance with Article 71 of the United Nations Charter have often brought to light the glaring violations of individual and collective rights. Information on violation of these rights is often scarce or unavailable and non-governmental organisations do a commendable job in highlighting these violations, a living testimony of which is reflected in the completion of the present work.

The focus of attention of many of the non-governmental organisations, it would appear, has traditionally been on the implementation issues relating to the civil and political rights. These steps need to be coupled with action relating to violations of economic, social and cultural rights which are of direct relevance to groups or minorities. The standard-setting activity of the United Nations for the elaboration of instruments relating to the rights of minorities, despite the adoption of the recent General Assembly Declaration, remains unimpressive. The Convention on the Rights of the Child bears the marks of the phenomenal role of a number of non-governmental organisations not only in the drafting of the Convention but also in initially raising the issue.[23] A similar impetus has been provided by non-governmental organisations in presenting the concerns of the indigenous peoples and religious minorities on the international agenda.[24] The

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[23] C Cohen, "The role of NGO's in the drafting of the Convention on the Rights of the Child" 12 *HRQ* (1990) 137-147; A Cassese, "How could Non-Governmental Organisations use United Nations bodies more effectively" 1 *UHR* (1979), 73-80; D Tolbert, "Global Climate Change and the Role of International Non-Governmental Organisations" Unpublished paper, University of Hull, 1991. D Freestone, "The United Nations Convention on the Rights of the Child" in D Freestone (ed.) *Children and the Law: Essays in honour of Professor H. K. Bevan,* (Hull: University Press) 1990, 288-323.

[24] See I Brownlie, *Treaties and Indigenous Peoples,* (ed.) F Brookfield., *The Robb Lectures* (Oxford: OUP) 1991, 58; N Lerner, "The 1989 ILO Convention on Indigenous populations: New

draft convention on minorities prepared by Professor Felix Ermacora and his colleagues at Vienna while acting for the Minority Rights Group (MRG)[25] could provide a useful guide for the drafting of a binding international instrument.[26]

The present work has concentrated on the position of ethnic, linguistic and religious minorities, although in actual practice the concept of a "minority" is much wider - it includes all those who are vulnerable and inarticulate, suffering from discrimination and dispossession. If this wider and all-embracing concept is acceptable, then the spectrum of specific concerns magnifies itself into the larger whole of individual human rights; vindication of these human rights becomes axiomatic to the promotion and protection of the rights of minorities.

Ideals of human rights are sacrosanct and worthy of appreciation; they are designed for every individual, though their observance and respect blends into more specific minority aspirations and it can be readily accepted that without respect to individual human rights, rights of minorities cannot be salvaged. Individual and collective rights are not monolithic, they imbibe claims of a rational and tolerant environment and rest on a platform of representative institutions.

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standards?" (eds.) Y Dinstein and Mala Tabory, *The Protection of Minorities and Human Rights,* (Dordrecht: M. Nijhoff) 1992, 213-232; Benito.

25 UN Doc E/CN.4/NGO/231 (1979), text could also be found in J Fawcett, *The International Protection of Minorities*, (London: MRG) 1979; produced in its Appendix C.

26 See also S Roth, "Towards a Minority Convention: Its need and content" in Dinstein and Tabory (eds.), *op.cit note 23,* 83-116.

TABLE 1: Demographic differences between East and West Pakistan

	TOTAL POPULATION (MILLIONS)		POPULATION DENSITY (PERSONS/ SQ ML)		URBANIZATION (PERCENTAGE)		LITERACY (PERCENTAGE)	
	1951	1961	1951	1961	1951	1961	1951	1961
East Pakistan	41.9	50.8	701	922	4.3	5.2	21.1	21.5
West Pakistan	33.7	42.9	109	138	17.8	22.5	16.4	16.3

Source: Adapted from Pakistan, Ministry of home and Kashmir Affairs, Home Affairs Division, *Population Census of Pakistan,* 1961, Vol 1, pt. ii, statements 2.3, 2.11, 2.14; pt iv, statements 4.1, 4.4.

TABLE 2: Frequency of languages commonly spoken as mother tongue in Pakistan (percentage of population)

	EAST PAKISTAN		WEST PAKISTAN		PAKISTAN	
LANGUAGE	**1951**	**1961**	**1951**	**1961**	**1951**	**1961**
Bengali	98.16	98.42	0.02	0.11	56.40	55.48
Punjabi	0.02	0.02	67.08	66.39	28.55	29.02
Pushtu	-	0.01	8.16	8.47	3.48	3.70
Sindhi	0.01	0.01	12.85	12.59	5.47	5.51
Urdu	0.64	0.61	7.05	7.57	3.37	3.65
English	0.01	0.01	0.03	0.04	0.02	0.02
Baluchi	-	-	3.04	2.49	1.29	1.09

Source: Adapted from Pakistan, Ministry of Home and kashmir Affairs, Home Affairs Division, *Population Census of Pakistan,* 1961, Vol 1, pt iv, statement 5.3.

TABLE 3: Frequency of major languages spoken as additional tongues (percentage of population)

	EAST PAKISTAN		WEST PAKISTAN		PAKISTAN	
LANGUAGE	1951	1961	1951	1961	1951	1961
Bengali	0.29	0.55	0.01	0.03	0.17	0.32
Punjabi	-	0.01	1.98	1.18	0.84	0.52
Pushtu	-	-	0.96	0.47	0.41	0.21
Sindhi	0.01	0.01	1.16	1.57	0.50	0.69
Urdu	0.46	0.72	8.85	7.28	4.03	3.59
English	1.31	0.83	2.63	2.07	1.87	1.38

Source: Adapted from Pakistan, Ministry of Home and Kashmir Affairs, Home Affairs Division, *Population of Pakistan,* 1961, Vol 1, pt iv, statement 5.3.

TABLE 4: Religious distribution in Pakistan
(percentage of total population)

	EAST PAKISTAN		WEST PAKISTAN		PAKISTAN	
	1951	1961	1951	1961	1951	1961
Moslem	76.8	80.4	97.1	97.2	85.9	88.1
Hindu	22.0	18.4	1.6	1.5	12.9	10.7
Christian	0.3	0.3	1.3	1.3	0.7	0.8
Other	0.9	0.9	0.0	0.0	0.5	0.4

Source: Adapted from Pakistan, Ministry of Home and Kashmir Affairs, Home Affairs Division, *Population Census of Pakistan,* 1961, vol 1, pt 1, statement 2.18, Table 5.

TABLE 5: Population distribution by religion, 1972 Census

Locality/ division	*Total population*	*Muslim*	*Caste Hindu*	*Scheduled Caste*	*Christian*	*Budhist*	*Parsi*	*Others*
Pakistan	62461883	60434659	296837	603369	907861	4318	9589	205250
Islamabad	234813	231609	75	37	2955	58	79	--
N.W.F.P.	8032324	7998232	2162	2852	12828	77	39	16134
Punjab	37610159	36610508	6569	54836	786494	1386	375	149991
Sindh	14155909	13212500	271530	543922	95777	2736	8923	20521
Balochistan	2428678	2381810	16501	1722	9807	61	173	18604

Source: Population Census Organization

Note: The table excludes the population of Federally Administered Tribual Areas, Kohistan Area of Hazasra District and Provincially Tribal area ajoining hazara District where specials Census schedules were used, which did not permit tabulation as given in this table.

TABLE 6: Population distribution by religion, 1981 Census

Locality/ division	*Total population*	*Muslim*	*Ahmedi*	*Christian*	*Hindu*	*Parsi*	*Sikh*	*Budhist*	*Others*
Pakistan	84253644	81450057	104244	1310426	1276116	7007	2146	2639	101009
Islamabad	340286	331167	1183	7846	36	35	3	5	11
N.W.F.P.	11061328	11003937	11360	38583	4428	459	324	58	2179
Punjab	47297441	46110205	63694	1061037	29268	1766	832	756	24883
Sindh	19028666	17556712	21210	176898	1221961	4305	393	1714	45473
Baluchistan	4332376	4257628	5824	20131	19598	439	189	106	28461
F.A.T.A	2198547	2190408	973	5931	825	3	405	--	2

Source: Population Census Organization.

TABLE 7: Population by sex, urban/rural areas, 1972 Census

Population **(in thousands)**

Region/ Province	Total			Urban			Rural		
	Both sexes	Male	Female	Both sexes	Male	Female	Both sexes	Male	Female
PAKISTAN	65309	34833	30476	16594	9027	7567	48715	25806	22909
ISLAMABAD FEDERAL AREA	235	130	105	77	46	31	158	84	74
PUNJAB	37610	20211	17399	9183	4977	4206	28427	15234	13193
SINDH	14156	7574	6582	5726	3131	2595	8430	4443	3987
N.W.F.P.	8389	4363	4026	1196	647	549	7193	3716	3477
FATA	2491	1266	1225	13	8	5	2478	1258	1220
BALOCHISTAN	2428	1289	1139	399	218	181	2029	1071	958

Source: Population Census Organization

TABLE 8: Language commonly spoken in households by Province
(1981 Population Census)

		Languages								
Province	*Total*	*Urdu*	*Punjabi*	*Pushto*	*Sindhi*	*Baluchi*	*Brohi*	*Hindko*	*Siraiki*	*Others*
Pakistan	100	7.60	48.17	13.14	11.77	3.01	1.20	2.43	9.83	2.81
N.W.F.P	100	0.83	1.10	68.30	0.05	0.04	0.01	18.13	3.95	7.59
F.A.T.A	100	0.01	0.10	99.70	0.05	0.01	0.00	0.02	0.00	0.09
PUNJAB	100	4.27	78.68	0.76	0.08	0.57	0.01	0.04	14.90	0.69
SIND	100	22.64	7.69	3.06	52.40	4.51	1.09	0.36	2.29	5.97
BALUCHISTAN	100	1.37	2.24	25.07	8.29	36.31	20.68	0.13	3.08	2.82
ISLAMABAD	100	11.23	81.72	4.16	0.18	0.16	0.01	0.60	0.10	1.83

(In per cent)

Source: Pakistan's Eighth Periodic Report to CERD, CERD/C/118/Add 15, Annex I

TABLE 9: Religious Minorities 1991
(Unofficial figures as presented by HRCP)

Christians	1,800,000
Hindus and Schduled castes	1,800,000
Ahmadis	140,000
Parsis	9,597
Buddhists	3,615
Sikhs	2,940
Others	1,383,700

Source: HRCP, *State of Human Rights in Pakistan 1991*, (Lahore: Makataba Jadeed Press) 1992, p 119.

TABLE 10: Pakistan National Assembly Elections, 1970-1

Party	*Punjab seats*	*Sind seats*	*NWFP seats*	*Baluchistan seats*	*W Pakistan seats*	*W Pakistan %*	*E Pakistan seats*	*E Pakistan %*	*Total seats*	*Total %*
AL	-	-	-	-	-	-	160	98.8	160	55.3
PPP	62	18	1	-	81	58.7	-	-	81	27.0
NAP	-	-	3	3	6	41.3	-	-	6	2.0
PML(Q)	1	1	7	-	9	6.5	-	-	9	3.0
PML(C)	2	-	-	-	2	1.4	-	-	2	0.7
CML	7	-	-	-	7	5.1	-	-	7	2.3
PDP	-	-	-	-	-	-	1	0.6	1	0.3
JUP	-	-	6	1	7	5.1	-	-	7	2.3
JUI	4	3	-	-	7	5.1	-	-	7	2.3
JI	1	2	1	-	4	2.9	-	-	4	1.3
IND	5	3	7	-	15	10.9	1	0.6	16	5.3
Total	82	27	25	4	138	100-0	162	100-0	300	100-0

Note: These figures only represent the general seats. There were 13 addtional seats reserved for women of which AL won 7.

Source: Craig Baxter, 'Pakistan Votes, 1970', *Asian Survey,* XI, March 1971, p. 211.

TABLE 11: East Pakistani representation in the military establishment, 1963 (percentage of total)

	Commissioned Officers	Junior Commissioned Officers	Warrant Officers	Other Ranks
Army	5%	7.4%		7.4%
Air Force	17%		13.2%	28.0%

	Branch Officers	Chief Petty Officers	Petty Officers	Leading Seamen and Below
Navy	5%	10.4%	17.3%	28.8%

Source: Pakistan, National Assembly, *Debates*, March 8, 1963, pp. 30-31.

APPENDIX A:

1. DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

GENERAL ASSEMBLY RESOLUTION 47/135
[Adopted 18 December 1992. UN Doc. A/RES/47/135]

The General Assembly,

Reaffirming that one of the main purposes of the United Nations, as proclaimed in the Charter of the United Nations, is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,

Noting the importance of the even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Welcoming the increased attention given by human rights treaty bodies to the non-discrimination and protection of minorities,

Aware of the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,

Considering that the United Nations has an increasingly important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular through the relevant mechanisms of the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities, in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the important achievements in this regard in regional, subregional and bilateral frameworks, which can provide a useful source of inspiration for future United Nations activities,

Stressing the need to ensure for all, without discrimination of any kind, full enjoyment and exercise of human rights and fundamental freedoms, and emphasizing the importance of the draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in that regard,

Recalling its resolution 46/115 of 17 December 1991, Commission on Human Rights resolution 1992/16 of 21 February 1992, by which the Commission approved the text of the draft declaration on the rights of

persons belonging to national or ethnic, religious and linguistic minorities, and Economic and Social Council resolution 1992/4 of 20 July 1992, by which the Council recommended it to the General Assembly for adoption and further action,

Having considered the note by the Secretary-General (A/47/501),

1. *Adopts* the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the text of which is annexed to the present resolution;

2. *Requests* the Secretary-General to ensure the distribution of the Declaration as widely as possible and to include the text of the Declaration in the next edition of *Human Rights: A Compilation of International Instruments;*

3. *Invites* United Nations agencies and organizations and intergovernmental and non-governmental organizations to intensify their efforts with a view to disseminating information on the Declaration and to promoting understanding thereof;

4. *Invites* the relevant organs and bodies of the United Nations, *inter alia,* treaty bodies and representatives of the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities, to give due regard to the Declaration within their mandates;

5. *Requests* the Secretary-General to consider appropriate ways for the effective promotion of the Declaration and to make proposals thereon;

6. *Requests* the Secretary-General to report to the General Assembly at its forty-eighth session on the implementation of the present resolution under the item entitled 'Human rights questions'.

ANNEX

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The General Assembly,

Reaffirming that one of the basic aims of the United Nations, as proclaimed in its Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion,

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

Desiring to promote the realization of the principles contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide,

the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular the Commission on Human Rights, the Subcommission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments on promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Taking into account the important work which is carried out by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the need to ensure even more effective implementation of international instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in this Declaration, individually as well as in community with other members of their group, without any discrimination.

2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in this Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before

the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, including exchange of information and experiences, in order to promote mutual understanding and confidence.

Article 7

States should cooperate in order to promote respect for the rights set forth in this Declaration.

Article 8

1. Nothing in this Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.

2. The exercise of the rights set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in this Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in this Declaration, within their respective fields of competence.

APPENDIX B:

Agreement between India and Pakistan 1950 concerning Minorities (Extract)

A. The Governments of India and Pakistan solemnly agree that each shall ensure to the Minorities throughout its territory complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality. Members of the minorities shall have equal opportunity with members of the majority community to participate in the public life of their country, to hold political or other office, and to serve in their country's civil and armed forces. Both Governments declare these rights to be fundamental and undertake to enforce them effectively. It is the policy of both Governments that the enjoyment of these democratic rights shall be assured to all their nationals without distinction.

Both Governments wish to emphasize that the allegiance and loyalty of the minorities is to the State of which they are citizens, and that it is to the Government of their own State that they should look for the redress of their grievances.

APPENDIX C:

The Proclamation of Independence

Mujibnagar, Bangladesh
Dated 10th day of April, 1971.

Whereas free elections were held in Bangladesh from 7th December, 1970 to 17th January, 1971, to elect representatives for the purpose of framing a Constitution,

AND

Whereas at these elections the people of Bangladesh elected 167 out of 169 representatives belonging to the Awami League,

AND

Whereas General Yahya Khan summoned the elected representatives of the people to meet on the 3rd March, 1971, for the purpose of framing a Constitution,

AND

Whereas the Assembly so summoned was arbitrarily and illegally postponed for an indefinite period,

AND

Whereas instead of fulfilling their promise and while still conferring with the representatives of the people of Bangladesh, Pakistan authorities declared an unjust and treacherous war,

AND

Whereas in the facts and circumstances of such treacherous conduct Banga Bandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million of people of Bangladesh, in due fulfilment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh.

AND

Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented

....

tortures, amongst others on the civilian and unarmed people of Bangladesh,

AND

Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government,

AND

Whereas the people of Bangladesh by their heroism, bravery and revolutionary fervour have established effective control over the territories of Bangladesh,

We the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a Constituent Assembly, and

having held mutual consultations, and

in order to ensure for the people of Bangladesh equality, human dignity and social justice,

declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Banga Bandhu Sheikh Mujibur Rahman and

do hereby affirm and resolve that till such time as a Constitution is framed, Banga Bandhu Sheikh Mujibur Rahman shall be the President of the Republic and that Syed Nazrul Islam shall be the Vice President of the Republic, and

that the President shall be the Supreme Commander of all the Armed Forces of the Republic.

shall exercise all the Executive and Legislative powers of the Republic including the power to grant pardon,

shall have the power to appoint a Prime Minister and such other Ministers as he considers necessary.

shall have the power to levy taxes and expend monies,

shall have the power to summon and adjourn the

Constituent Assembly, and
do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.

We the elected representatives of the people of Bangladesh do further resolve that in the event of there being no President or the President being unable to enter upon his office or being unable to exercise his powers due to any reason whatsoever, the Vice-President shall have and exercise all the powers, duties and responsibilities herein conferred on the President,

We further resolve that we undertake to observe and give effect to all duties and obligations that devolve upon us as a member of the family of nations and to abide by the Charter of the United Nations.

We further resolve that this proclamation of independence shall be deemed to have come into effect from 26th day of March, 1971.

We further resolve that in order to give effect to this instrument we appoint Prof. Yusuf Ali our duly Constituted potentiary and to give to the President and the Vice-President oaths of office.

Sd/- PROF. YUSUF ALI
Duly Constituted Potentiary.
By and under the authority
of the Constituent Assembly
of Bangladesh.

APPENDIX D

Registered No. DA-1

The Bangladesh Gazette

Extraordinary

Published by Authority

FRIDAY, JULY 20, 1973

PART III—Act of the Bangladesh Parliament

BANGLADESH PARLIAMENT

Dacca, the 20th July, 1973

The following Act of Parliament received the assent of the President on the 19th July, 1973, and is hereby published for general information:—

ACT No. XIX OF 1973

An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.

WHEREAS it is expedient to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war cirmes and other crimes under international law, and for matters connected therewith;

It is hereby enacted as follows :—

1. Short title, extent and commencement.—(1) This Act may be called the International Crimes (Tribunals) Act, 1973.

(2) It extends to the whole of Bangladesh.

(3) It shall come into force at once.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) "auxiliary forces" includes forces placed under the control of the Armed Forces for operational, administrative, static and other purposes;

(b) "Government" means the Government of the People's Republic of Bangladesh ;

(c) "Republic" means the People's Republic of Bangladesh ;

(d) "service law" means the Army Act, 1952 (XXXIX of 1952), the Air Force Act, 1953 (VI of 1953), or the Navy Ordinance, 1961 (XXXV of 1961), and includes the rules and regulations made under any of them ;

(e) "territory of Bangladesh" means the territory of the Republic as defined in article 2 of the Constitution of the People's Republic of Bangladesh ;

(f) "Tribunal" means a Tribunal set up under this Act.

3. Jurisdiction of Tribunal and crimes.—(1) A Tribunal shall have the power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the following crimes.

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely :—

(a) Crimes against Humanity : namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated ;

(b) Crimes against Peace : namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances ;

(c) Genocide : meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as :

(i) killing members of the group ;

(ii) causing serious bodily or mental harm to members of the group ;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ;

(iv) imposing measures intended to prevent births within the group ;

(v) forcibly transferring children of the group to another group ;

(d) War Crimes : namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent commission of any such crimes.

4. **Liability for Crimes.**—(1) When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone.

(2) Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.

5. **Official position, etc. not to free an accused from responsibility for any crime.**—(1) The official position, at any time, of an accused shall not be considered freeing him from responsibility or mitigating punishment.

(2) The fact that the accused acted pursuant to his domestic law or to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal deems that justice so requires.

6. **Tribunal.**—(1) For the purpose of section 3, the Government may, by notification in the *official Gazette*, set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members.

(2) Any person who is or is qualified to be a Judge of the Supreme Court of Bangladesh or has been a Judge of any High Court or Supreme Court which at any time was in existence in the territory of Bangladesh or who is qualified to be a member of General Court Martial under any service law of Bangladesh may be appointed as a Chairman or member of a Tribunal.

(3) The permanent seat of a Tribunal shall be in Dacca:

Provided that a Tribunal may hold its sittings at such other place or places as it deems fit.

(4) If any member of a Tribunal dies or is, due to illness or any other reason, unable to continue to perform his functions, the Government may, by notification in the *official Gazette*, declare the office of such member to be vacant and appoint thereto another person qualified to hold the office.

(5) If, in the course of a trial, any one of the members of a Tribunal is, for any reason, unable to attend any sitting thereof, the trial may continue before the other members.

(6) A Tribunal shall not, merely by reason of any change in its membership or the absence of any member thereof from any sitting, be bound to recall and re-hear any witness who has already given any evidence and may act on the evidence already given or produced before it.

(7) If, upon any matter requiring the decision of a Tribunal, there is a difference of opinion among its members, the opinion of the majority shall prevail and the decision of the Tribunal shall be expressed in terms of the views of the majority.

(8) Neither the constitution of a Tribunal nor the appointment of its Chairman or members shall be challenged by the prosecution or by the accused persons or their counsel.

7. **Prosecutors.**—(1) The Government may appoint one or more persons to conduct the prosecution before a Tribunal on such terms and conditions as may be determined by the Government; and every such person shall be deemed to be a Prosecutor for the purposes of this Act.

(2) The Government may designate one of such persons as the Chief Prosecutor.

8. **Investigation.**—(1) The Government may establish an Agency for the purposes of investigation into crimes specified in section 3; and any officer belonging to the Agency shall have the right to assist the prosecution during the trial.

(2) Any person appointed as a Prosecutor is competent to act as an Investigation Officer and the provisions relating to investigation shall apply to such Prosecutor.

(3) Any Investigation Officer making an investigation under this Act may, by order in writing, require the attendance before himself of any person who appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

(4) Any Investigation Officer making an investigation under this Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case.

(5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person:

Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.

(6) The Investigation Officer may reduce into writing any statement made to him in the course of examination under this section.

(7) Any person who fails to appear before an Investigation Officer for the purpose of examination or refuses to answer the questions put to him by such Investigation Officer shall be punished with simple imprisonment which may extend to six months, or with fine which may extend to Taka two thousand, or with both.

(8) Any Magistrate of the first class may take cognizance of an offence punishable under sub-section (7) upon a complaint in writing by an Investigation Officer.

(9) Any investigation done into the crimes specified in section 3 shall be deemed to have been done under the provisions of this Act.

9. **Commencement of the Proceedings.**—(1) The proceedings before a Tribunal shall commence upon the submission by the Chief Prosecutor, or a Prosecutor authorised by the Chief Prosecutor in this behalf, of formal charges of crimes alleged to have been committed by each of the accused persons.

(2) The Tribunal shall thereafter fix a date for the trial of such accused person.

(3) The Chief Prosecutor shall, at least three weeks before the commencement of the trial, furnish to the Tribunal a list of witnesses intended to be produced along with the recorded statement of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges.

(4) The submission of a list of witnesses and documents under sub-section (3) shall not preclude the prosecution from calling, with the permission of the Tribunal, additional witnesses or tendering any further evidence at any stage of the trial :

Provided that notice shall be given to the defence of the additional witnesses intended to be called or additional evidence sought to be tendered by the prosecution.

(5) A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and the prosecution at the time of the commencement of the trial.

10. **Procedure of trial.**—(1) The following procedure shall be followed at a trial before a Tribunal, namely :—

(a) the charge shall be read out;

(b) the Tribunal shall ask each accused person whether he pleads guilty or not-guilty;

(c) if the accused person pleads guilty, the Tribunal shall record the plea, and may, in its discretion, convict him thereon;

(d) the prosecution shall make an opening statement;

(e) the witnesses for the prosecution shall be examined, the defence may cross-examine such witnesses and the prosecution may re-examine them;

(f) the witnesses for the defence, if any, shall be examined, the prosecution may cross-examine such witnesses and the defence may re-examine them;

(g) the Tribunal may, in its discretion, permit the party which calls a witness to put any question to him which might be put in cross-examination by the adverse party;

(h) the Tribunal may, in order to discover or obtain proof of relevant facts, ask any witness any question it pleases, in any form and at any time about any fact; and may order production of any document or thing or summon any witness, and neither the prosecution nor the defence shall be entitled either to make any objection to any such question or order or, without the leave of the Tribunal, to cross-examine any witness upon any answer given in reply to any such question;

(i) the prosecution shall first sum up its case, and thereafter the defence shall sum up its case:

Provided that if any witness is examined by the defence, the prosecution shall have the right to sum up its case after the defence has done so;

(j) the Tribunal shall deliver its judgment and pronounce its verdict.

(2) All proceedings before the Tribunal shall be in English.

(3) Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpretor.

(4) The proceedings of the Tribunal shall be in public:

Provided that the Tribunal may, if it thinks fit, take proceedings in camera.

(5) No oath shall be administered to any accused person.

11. **Powers of Tribunal.**—(1) A Tribunal shall have power—

(a) to summon witnesses to the trial and to require their attendance and testimony and to put questions to them;

(b) to administer oaths to witnesses;

(c) to require the production of document and other evidentiary material;

(d) to appoint persons for carrying out any task designated by the Tribunal.

(2) For the purpose of enabling any accused person to explain any circumstances appearing in the evidence against him, a Tribunal may, at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary:

Provided that the accused person shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Tribunal may draw such inference from such refusal or answers as it thinks just;

(3) A Tribunal shall—

(a) confine the trial to an expeditious hearing of the issues raised by the charges;

(b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.

(4) A Tribunal may punish any person, who obstructs or abuses its process or disobeys any of its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine which may extend to Taka five thousand, or with both.

(5) Any member of a Tribunal shall have power to direct, or issue a warrant for, the arrest of, and to commit to custody, and to authorise the continued detention in custody of, any person charged with any crime specified in section 3.

(6) The Chairman of a Tribunal may make such administrative arrangements as he considers necessary for the performance of the functions of the Tribunal under this Act.

12. Provision for defence counsel.—Where an accused person is not represented by counsel, the Tribunal may, at any stage of the case, direct that a counsel shall be engaged at the expense of the Government to defend the accused person and may also determine the fees to be paid to such counsel.

13. Restriction of adjournment.—No trial before a Tribunal shall be adjourned for any purpose unless the Tribunal is of the opinion that the adjournment is in the interest of justice.

14. Statement or confession of accused persons.—(1) Any Magistrate of the first class may record any statement or confession made to him by an accused person at any time in the course of investigation or at any time before the commencement of the trial.

(2) The Magistrate shall, before recording any such confession, explain to the accused person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him

and no Magistrate shall record any such confession unless, upon questioning the accused making it, he has reason to believe that it was made voluntarily.

15. Pardon of an approver.—(1) At any stage of the trial, a Tribunal may with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any of the crimes specified in section 3, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the crime and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) Every person accepting the tender under this section shall be examined as a witness in the trial.

(3) Such person shall be detained in custody until the termination of the trial.

16. Charge, etc.—(1) Every charge against an accused person shall state—

(a) the name and particulars of the accused person;

(b) the crime of which the accused person is charged;

(c) such particulars of the alleged crime as are reasonably sufficient to give the accused person notice of the matter with which he is charged.

(2) A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.

17. Right of accused person during trial.—(1) During trial of an accused person he shall have the right to give any explanation relevant to the charge made against him.

(2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

(3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.

18. No excuse from answering any question.—A witness shall not be excused from answering any question put to him on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:

Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.

19. **Rules of evidence.**—(1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.

20. **Judgement and sentence.**—(1) The Judgement of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based :

Provided that each member of the Tribunal shall be competent to deliver a judgement of his own.

(2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.

(3) The sentence awarded under this Act shall be carried out in accordance with the orders of the Government.

21. **Right of appeal.**—A person convicted of any crime specified in section 3 and sentenced by a Tribunal shall have the right of appeal to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence :

Provided that such appeal may be preferred within sixty days of the date of order of conviction and sentence.

22. **Rules of procedure.**—Subject to the provision of this Act, a Tribunal may regulate its own procedure.

23. **Certain laws not to apply.**—The provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872 (I of 1872), shall not apply in any proceedings under this Act.

24. **Bar of Jurisdiction.**—No order, judgment or sentence of a Tribunal shall be called in question in any manner whatsoever in or before any Court or other authority in any legal proceedings whatsoever except in the manner provided in section 21.

25. **Indemnity.**—No suit, prosecution or other legal proceeding shall lie against the Government or any person for anything, in good faith, done or purporting to have been done under this Act.

26. **Provisions of the Act over-riding all other laws.**—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

S. M. RAHMAN,
Secretary.

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APPENDIX E:

BANGLADESH-INDIA-PAKISTAN: AGREEMENT ON THE REPATRIATION OF PRISONERS OF WAR AND CIVILIAN INTERNEES*

[Done at New Delhi, April 9, 1974]

BANGLADESH, INDIA, PAKISTAN AGREEMENT SIGNED IN NEW DELHI ON APRIL 9, 1974

On July 2, 1972, the President of Pakistan and the Prime Minister of India signed an historic agreement at Simla under which they resolved that "the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the sub-continent". The Agreement also provided for the settlement of "their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon".

2. Bangladesh welcomed the Simla Agreement. The Prime Minister of Bangladesh strongly supported its objectives of reconciliation, good neighbourliness and establishment of durable peace in the sub-continent.

3. The humanitarian problems arising in the wake of the tragic events of 1971 constituted a major obstacle in the way of reconciliation and normalisation among the countries of the sub-continent. In the absence of recognition, it was not possible to have tripartite talks to settle the humanitarian problems as Bangladesh could not participate in such a meeting except on the basis of sovereign equality.

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*[Reproduced from the text provided by the Embassy of Pakistan at Washington, D.C.

[The Agreement between India and Pakistan on the release and repatriation of detained persons, signed on April 9, 1974, appears at I.L.M. page 603. The Agreement between India and Pakistan on the repatriation of prisoners of war, signed on August 28, 1973, appears at 12 I.L.M. 1080 (1973). The Simla Agreement and the statement concerning its implementation appear at 11 I.L.M. 954 (1972).]

4. On April 17, 1973, India and Bangladesh took a major step forward to break the deadlock on the humanitarian issues by setting aside the political problem of recognition. In a Declaration issued on that date they said that they "are resolved to continue their efforts to reduce tension, promote friendly and harmonious relationship in the sub-continent and work together towards the establishment of a durable peace". Inspired by this vision and "in the larger interests of reconciliation, peace and stability in the sub-continent" they jointly proposed that the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons except those Pakistani prisoners of war who might be required by the Government of Bangladesh for trial on certain charges.

5. Following the Declaration there were a series of talks between India and Bangladesh and India and Pakistan. These talks resulted in an agreement at Delhi on August 28, 1973 between India and Pakistan with the concurrence of Bangladesh which provided for a solution of the outstanding humanitarian problems.

6. In pursuance of this Agreement, the process of three-way repatriation commenced on September 19, 1973. So far nearly 300,000 persons have been repatriated which has generated an atmosphere of reconciliation and paved the way for normalisation of relations in the sub-continent.

7. In February 1974, recognition took place thus facilitating the participation of Bangladesh in the tripartite meeting envisaged in the Delhi Agreement, on the basis of sovereign equality. Accordingly, His Excellency Dr. Kamal Hossain, Foreign Minister of the Government of Bangladesh, His Excellency Sardar Swaran Singh, Minister of External Affairs, Government of India and His Excellency Mr. Aziz Ahmed, Minister of State for Defence and Foreign Affairs of the Government of Pakistan, met in New Delhi from April 5 to April 9, 1974 and discussed the various issues mentioned in the Delhi Agreement, in particular the question of the 195 prisoners of war and the

completion of the three-way process of repatriation involving Bangalees in Pakistan, Pakistanis in Bangladesh and Pakistani prisoners of war in India.

8. The Ministers reviewed the progress of the three-way repatriation under the Delhi Agreement of August 28, 1973. They were gratified that such a large number of persons detained or stranded in the three countries had since reached their destinations.

9. The Ministers also considered steps that needed to be taken in order expeditiously to bring the process of the three-way repatriation to a satisfactory conclusion.

10. The Indian side stated that the remaining Pakistani prisoners of war and civilian internees in India to be repatriated under the Delhi Agreement, numbering approximately 6,500, would be repatriated at the usual pace of a train on alternate days and the likely short-fall due to the suspension of trains from April 10 to April 19, 1974 on account of Kumbh Mela, would be made up by running additional trains after April 19. It was thus hoped that the repatriation of prisoners of war would be completed by the end of April, 1974.

11. The Pakistan side stated that the repatriation of Bangladesh nationals from Pakistan was approaching completion. The remaining Bangladesh nationals in Pakistan would also be repatriated without let or hindrance.

12. In respect of non-Bangalees in Bangladesh, the Pakistan side stated that the Government of Pakistan had already issued clearances for movement to Pakistan in favour of those non-Bangalees who were either domiciled in former West Pakistan, were employees of the Central Government and their families or were members of the divided families, irrespective of their original domicile. The issuance of clearances to 25,000 persons who constitute hardship cases was also in progress. The Pakistan side reiterated that all those who fall under the

first three categories would be received by Pakistan without any limit as to numbers. In respect of persons whose application had been rejected, the Government of Pakistan would, upon request, provide reasons why any particular case was rejected. Any aggrieved applicant could, at any time, seek a review of his application provided he was able to supply new facts or further information to the Government of Pakistan in support of his contention that he qualified in one or other of the three categories. The claims of such persons would not be time-barred. In the event of the decision of review of a case being adverse the Governments of Pakistan and Bangladesh might seek to resolve it by mutual consultation.

13. The question of 195 Pakistani prisoners of war was discussed by the three Ministers, in the context of the earnest desire of the Governments for reconciliation, peace and friendship in the sub-continent. The Foreign Minister of Bangladesh stated that the excesses and manifold crimes committed by these prisoners of war constituted, according to the relevant provisions of the U.N. General Assembly Resolutions and International Law, war crimes, crimes against humanity and genocide, and that there was universal consensus that persons charged with such crimes as the 195 Pakistani prisoners of war should be held to account and subjected to the due process of law. The Minister of State for Defence and Foreign Affairs of the Government of Pakistan said that his Government condemned and deeply regretted any crimes that may have been committed.

14. In this connection the three Ministers noted that the matter should be viewed in the context of the determination of the three countries to continue resolutely to work for reconciliation. The Ministers further noted that following recognition, the Prime Minister of Pakistan had declared that he would visit Bangladesh in response to the invitation of the Prime Minister of Bangladesh and appealed to the people of Bangladesh to forgive and forget the mistakes of the past.

in order to promote reconciliation. Similarly, the Prime Minister of Bangladesh had declared with regard to the atrocities and destruction committed in Bangladesh in 1971 that he wanted the people to forget the past and to make a fresh start, stating that the people of Bangladesh knew how to forgive.

15. In the light of the foregoing and, in particular, having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past, the Foreign Minister of Bangladesh stated that the Government of Bangladesh had decided not to proceed with the trials as an act of clemency. It was agreed that the 195 prisoners of war may be repatriated to Pakistan along with the other prisoners of war now in the process of repatriation under the Delhi Agreement.

16. The Ministers expressed their conviction that the above agreements provide a firm basis for the resolution of the humanitarian problems arising out of the conflict of 1971. They reaffirmed the vital stake the seven hundred million people of the three countries have in peace and progress and reiterated the resolve of their Governments to work for the promotion of normalisation of relations and the establishment of durable peace in the sub-continent.

Signed in New Delhi on April 9, 1974 in three originals, each of which is equally authentic.

Sd/-	Sd/-	Sd/-
(Kamal Hossain)	(Swaran Singh)	(Aziz Ahmed)
Minister of Foreign Affairs	Minister of External	Minister of State
Government of Bangladesh	Affairs	for Defence and
	Government of India	Foreign Affairs
		Government of Pakistan

APPENDIX F:

[EMBARGOED FOR 27 JULY 1994]

amnesty international

PAKISTAN

Use and abuse of the blasphemy laws

JULY 1994 SUMMARY AI INDEX: ASA 33/08/94

DISTR: CO/SC

Several dozen people have been charged with blasphemy in Pakistan over the last few years; in all the cases known to Amnesty International, the charges of blasphemy appear to have been arbitrarily brought, founded solely on the individuals' minority religious beliefs or on malicious accusations against individuals from the Muslim majority community who advocate novel ideas. The available evidence in all these cases suggests that charges were brought as a measure to intimidate and punish members of minority religious communities or non-conforming members of the majority community; hostility towards religious minority groups appeared in many cases to be compounded by personal enmity, professional or economic rivalry or a desire to gain political advantage.

As a consequence, Amnesty International has concluded that most of the individuals now facing charges of blasphemy, or convicted on such charges, are prisoners of conscience, detained solely for their real or imputed religious beliefs in violation of their right to freedom of thought, conscience and religion.

The majority of those charged with blasphemy belong to the Ahmadiyya community, but Christians have increasingly been accused of blasphemy. Among them is a 13 year-old boy who is alleged to have written blasphemous words on the walls of a mosque, despite being totally illiterate.

A common feature of accusations of blasphemy in Pakistan is the manner in which they are uncritically accepted by prosecuting authorities, who themselves may face intimidation and threats should they fail to accept them. Ill-treatment in custody is frequently reported, and may be exacerbated by the emotional manner in which charges of blasphemy are brought and publicized and the accused vilified by their accusers. Amnesty International is therefore concerned that trial procedures, including pre-trial

procedures, in cases involving blasphemy charges do not meet international standards for fairness.

Following legal changes in 1991, the death penalty is the mandatory punishment for the offence of blasphemy under section 295-C of the Pakistan Penal Code. So far, two men have been sentenced to death; their appeals are pending. While nobody has so far been judicially executed after having been found guilty of blasphemy, at least four Christians charged with blasphemy have died, one in suspicious circumstances in jail and three at the hands of armed attackers. The changes in legislation relating to religious offences have contributed to an atmosphere of religious intolerance in which fanatics sometimes consider themselves entitled to take the law into their own hands. On 5 April 1994, Manzoor Masih, a Christian man charged with blasphemy, was shot dead in Lahore; his two co-accused and an escort were injured. A few days later, a Muslim practitioner of indigenous medicine, was stoned to death by a mob which believed him to be a Christian and to have burned pages of the Koran. They tried to set his body on fire while he was probably still alive and dragged his dead body through the streets of Gujranwala.

Amnesty International is gravely concerned that after several recent instances of violence against members of the religious minorities or on religiously motivated grounds, neither the government nor any of the opposition parties have publicly condemned such acts and that the government does not appear to have taken all possible measures to ensure the safety of members of the religious minorities.

Amnesty International welcomes the government's recent announcement that steps would be taken to amend the penal code and the code of criminal procedure to curb the abuse of the blasphemy laws but is not aware so far of any concrete legislative measures having been taken to that end. The organization reiterates its call to the Government of Pakistan:

- **to ensure that the laws against blasphemy are not abused to imprison prisoners of conscience;**
- **to immediately and unconditionally release such persons who are being held solely for the exercise of their right to freedom of religion;**
- **to drop the charges of blasphemy against such persons;**
- **to ensure that while the blasphemy laws, especially section 295-C, remain on the statute book, everyone charged with blasphemy receives a fair trial;**
- **to ensure the safety of anyone charged with blasphemy and that no such person be subjected to any form of ill-treatment;**
- **to declare a moratorium on carrying out the death penalty and to take steps to abolish the death penalty for this offence;**
- **and to adopt international standards for the protection of the rights of religious minorities and to accede to the relevant international human rights instruments.**

This report summarizes a 30-page document, *Pakistan: Use and abuse of the blasphemy laws* (AI Index: ASA 33/08/94), issued by Amnesty International in July 1994. Anyone wanting further details or to take action on this issue should consult the full document.