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Transnational Measures to Protect Minorities - with particular reference to the United Nations and Arrangements in the European Region.

1. Introduction

The most striking politico-historical feature of the continent of Europe is that it has simultaneously been characterised by being inhabited by a diversity of peoples, who are determined to maintain their own traditions and culture, and by their having a common experience of state-building on a territorial basis. The Council of Europe, created in 1949, was designed to overcome divisions and conflicts in Europe. Its member states, and those who have designed and operated its institutions, have continously experienced the pulls arising from two both legitimate, but contradictory, approaches . These approaches are:

> " a model of society based on the universality and equality of rights for all its members, the enjoyment of these rights being the responsibility of the State; [and]
> a desire for identity through belonging to a community with its own specific culture, religion, ethnic origin and way of life: in short, the right to be oneself."[1]

At different periods, especially after European Wars, when borders were redrawn or new states were created or when centralising ideologies held sway in certain states, one or other approach might predominate. Recently, with slackening of tension between the two power blocs characterising Europe since 1945, there has been an increase in national separatist ideology, followed by fears that this will threaten the territorial integrity and sovereignty of existing states and lead to hostilities and grave human rights' violations. In addition, as M. Jean-Pierre Worms put it in the Parliamentary Assembly of the Council of Europe, there is a second important factor generally applicable:

> " It has to do with socio-cultural development in Europe. We are dealing with people who are better informed and better educated, and so more desirous of governing themselves and more capable of doing so. This is depriving all the major collective structures which established and guaranteed individual and collective identities - political parties, trade unions, states and state structures - of their legitimacy.
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> At the same time, people are rejecting to some extent the standardising effects of the state's administrative management structures and machinery. Men and women belonging to an international culture spread through instantaneous world-wide communication, feel rootless; this is why they are again looking for roots, for a basic identity and for strong identity principles. They are also going back to minority feelings, to the sense of belonging to minority nations.

> Not recognising the legitimacy of these aspirations, trying to crush them by legislating to eliminate differences, a fortiori by resorting to violence or repression, is neither acceptable in principle ... nor realistic. Hence the need to protect, through clearly stated and internationally guaranteed principles, these rights of minorities and to harmonise them as securely as possible with the obligations of citizenship.
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> ... A very delicate balance ... the dignity of majorities, as well as minorities, ... is at stake. And it is also and above all peace within states and peace between states which is at stake."[2]

The tragic events in Yugoslavia and parts of the former U.S.S.R. show that populations are so interwoven that independence will not eradicate the problem of minorities - someone is always in the minority. Such patterns are replicated in the majority of states, whether in Europe or elsewhere. If minorities are oppressed and denied full equality and positive participation, they become adversarial and the unity of states is put at risk. When supported by neighbouring states, where the majority is ethnically the same as the discontented minority, the stability of states and international peace are threatened. To give members of minorities rights to express their distinctive characteristics in common with their co-members does not threaten states' integrity and identity. On the contrary, denying minorities instruments of protection and self-expression of their identity leaves them no choice but to challenge, in an inevitably violent manner, the state framework to which they are subjected. In fact, that is why it is necessary for all states to attempt to make arrangements which will enable satisfaction to be given both to individualistic and group demands and to community needs embodied by the state[3].

Another advantage of such arrangements is that the cultural inheritance of the whole state is enriched, with cross-fertilisation, rather than narrow exclusivity stultifying cultural broadening.

Within Europe the primary instrument for progress along these lines is the Council of Europe, although the Conference for Security and Co-operation in Europe (CSCE) has recently become particularly significant in providing political channels and procedures for addressing minority tensions. The CSCE has a much wider membership than the Council of Europe. CSCE experts have reported that

> " friendly relations among their peoples, as well as peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created ... In states with national minorities democracy

requires that all persons, including those belonging to national minorities, enjoy full and effective equality of rights and fundamental freedoms and benefit from the rule of law and democratic institutions." [4]

2. Commonwealth States and Minority Problems

Contrary to the prevailing wisdom concerning states beyond the European continent, minority questions and minority rights are also relevant to their own societies. The major reason why most political leaders outside Europe have characterised minority issues as irrelevant is that their attention has for much of this century been focussed on achieving and implementing their own rights to self-determination. In the process of acquiring constitutions the approach, encouraged by the Colonial Office, the India Office and the Commonwealth Relations Office, was pragmatic adoption of constitutional models, permitting diversity in unity by way of federation, or, in certain cases, of communal representation systems with specified proportions of representatives from different communities.[5] Later, after adoption of the European Convention on Human Rights and Fundamental Freedoms 1959, incorporation of bills of rights, including provisions for equality of citizens and prohibition of discrimination, was a condition on the grant of independence. Political leaders were too busy building nations to concern themselves much with minority and communal provisions, which in any event were perceived as perpetuating divisions, indeed, even seen as relics of divide and rule. The imperial conceptual legacy of categorising in terms of "tribes", whom leaders of new states wished to weld into one nation, also obscured the fact that such groups were effectively minorities. Again, when, relatively recently, international protections for indigenous peoples began to develop, this process was thought of more as a necessary corrective to colonial history. Such a perspective was natural, because of emphasis on the Americas and states settled by Europeans. Furthermore, the indigenous peoples themselves insisted that they be not categorised as minorities, being fully aware that minority rights are far less extensive than the extensive protections and rights being developed by the UN Working Group on Indigenous Populations, which is preparing a Draft Universal Declaration on the Rights of Indigenous Peoples.[6] That indigenous peoples' rights are more extensive is clear from the important International Labour Organisation Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries, which has recently come into force.[7] The Convention recognises that indigenous rights comprise economic rights, such as possession over land and natural resources, and political rights, in particular autonomy, a degree of self-government and recognition of existing treaties between indigenous peoples and states. In sum, many other concepts and institutional arrangements have obscured the fact that minority issues are relevant in all states, and that growing international interest in standards and collective international enforcement must be of concern to all in rela-

tion to their own jurisdictions. As good internationalists, Commonwealth political leaders will also recognise, when problems are categorised in that frame, that dissatisfied minorities constitute potential threats to state stability and peace.

3. The Growth of International Minorities' Protections

Paradoxically, it is in large measure out of protections for minorities and the need to remedy deficiencies in minorities' protection systems that the modern concept of internationally declared and protected individual human rights developed.

Beginning with the 16th and 17th century treaties of peace (Nurnberg 1532, Westphalia 1648, Oliva 1660) guarantees of religious freedom and equality were given to minority religions. In the 1856 Treaty of Paris the European "Christian" Powers made Turkey guarantee religious, cultural and linguistic freedom to all her subjects. These precedents were expanded with the series of treaties after World War I.[8] Those treaties set up a system of protection of minorities under the guarantee of the League of Nations. The heart of the system was five Minorities Treaties, concluded between the Allied and Associated Powers and the newly established states (Poland and Czechoslovakia) and enlarged states (Serbia, Romania and Greece).[9] Similar obligations were imposed in special chapters of the treaties with four vanquished states (Austria, Bulgaria, Hungary and Turkey).[10] There were also four later treaties for special cases (Polish-Danzig Convention 1920, Sweden - Finland agreement re the Aland Islands 1921, Geneva-Polish Convention on Upper Silesia, and Lithuanian and Allied Powers re Memel 1924). Additionally five states, on admission to the League between 1921 and 1932, made declarations, noted by it in League Resolutions and preceded by the Assembly of the League recommending that the states concerned would ensure the application of the principles laid down in the minorities treaties. (Albania 1921, Lithuania 1922, Latvia 1923, Estonia 1923, and Iraq 1932).

These treaties inter alia committed the states to stipulations regarding nationality and options regarding nationality (with a duty on persons opting to transfer their residence to the state of their chosen citizenship); protection of life, liberty and freedom of religious practices; equality of all nationals before the law, equality of civil and political rights and equality of treatment and security in law and in fact; non-discrimination in public employment in exercise of professions and industries; rights to maintain religious, social and educational institutions; rights of language and exercise of religion; the grant of adequate facilities for minority languages, including primary schools giving instruction in such media (Czechoslovakia did not limit this to primary schools); and a equitable share of public funding for educational, religious and charitable purposes in areas where there was a considerable proportion of nationals of the country belonging to minorities. Special rights were given certain minorities (Jews in Greece, Poland and Romania; the

Valachs of Pindus in Greece; Moslems in Albania, Greece and the Serb-Croat-Slovene Kingdom; and Romanians south of the Carpathians in Czechoslovakia). Broadly speaking , the treaties ensured two types of right: equality of treatment with the majority and special provisions to protect the groups' "special needs" to safeguard their languages, religions and cultures. Some authors suggest that there was really one purpose: equality and non-discrimination in fact.[11] This is borne out by the Permanent Court's judgement on Minority Schools in Albania that to insist on reserving the education of all Albanians to state schools and to close all private schools would in fact deny equality of linguistic treatment and would result in discrimination by denying the means for preserving minority "peculiarities", traditions and national characteristics.[12]

The League developed a procedure to render the guarantees effective. One measure was a right of petition to the League, with petitions being processed by the Secretariat and sent to the state concerned and the League Council. There was also a Minorities Committee to examine each petition, from which a Council member might refer it to the League Council. The Treaties themselves allowed reference to the Permanent Court of International Justice when there were differences between the Government of the state involved and the Member of the League Council or a Treaty Party concerning the interpretation or application of the minorities' provisions. The Court also gave Advisory Opinions at the Council's request, giving many important judgements of principle. Nonetheless, states subject to the minority regimes resented being singled out, the minorities themselves were not satisfied, passionate nationalism and revanchism replaced reason in Europe, the authority of the League withered and World War II supervened. Unfortunately, the wrong conclusion was drawn: minorities' regimes were tainted by the League's failure, whereas the real lesson is that no institution can withstand vast human tides of passion, intolerance, dictatorship, violence and ideologies which believe in force, but that at other times regulatory institutions are useful.

4. Minorities' Protections under the United Nations[13]

Despite attempts by Hungary in 1946 to secure an elaborate treaty for the protection of minorities, there was no reference to minorities in the UN Charter or the Universal Declaration of Human Rights. However, the Charter does prohibit distinctions on the grounds of "race, ... language, or religion", and the Universal Declaration has a more detailed formulation in its article 2.

Subsequently, in the International Covenant on Civil and Political Rights 1966, the UN produced a binding prohibition (for those states which ratify) on denial of rights to culture, religion and language in respect of persons belonging to minorities. Article 27 of the Covenant 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 the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The Human Rights Committee, a body of independent experts which receives reports on the observance of the Covenant, can, where a state has ratified the procedure in the Optional Protocol, also receive individual petitions. It has given significant opinions on a number of communications alleging violations of Article 27.[14]

Other international agreements bearing on minority rights' issues include the Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, 1948), the UN Convention on the Elimination of All Forms of Racial Discrimination (which has a Committee which receives communications alleging discrimination - CERD) and the UNESCO Convention against Discrimination in Education 1960. States ratifying or acceding to any of these agreements undertake to bring their national laws and administrative and legal practices into conformity.

There are also Declarations of minimum standards, such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

Despite the UN's initial failure to mention minorities or to maintain the League's regime, General Assembly resolution 217 C (III) stated that the Organization "could not remain indifferent" to the fate of minorities. In 1947 the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a body of independent experts was established. This reports to the Commission on Human Rights, an inter-governmental body. Human rights issues and the "prevention of discrimination" aspect of its mandate have been the main foci of the Sub-Commission's attention, whereas, apart from debate on the invaluable study of the Special Rapporteur, Mr. Capotorti, prepared between 1971 and 1977, minorities as such for many years occupied relatively little Sub-Commission time. After a recommendation in the Capotorti Report (1977) a Working Group of the Commission of Human Rights laboured for thirteen years from 1978 on a Draft Declaration on Minority Rights (paradoxically submitted by Yugoslavia).[15] Only after lengthy delays, because of definitional issues, was a Draft finalised in 1991. On 18 December, 1992 this was approved by the General Assembly.[16]

Meanwhile, in the UN Sub-Commission from 1989, when Mr. Eide's work on "Peaceful and Constructive Solution of Problems involving Minorities" commenced, more international attention was focussed on the problems affecting minorities as such and on the internal arrangements made by states to ensure respect for and

full equality of rights for all citizens, particularly including minorities.[17] The Sub-Commission considers communications in the confidential "1503" procedure, applicable where there has been a consistent pattern of violation of human rights. However, communications tend to be focussed on large scale individual human rights' breaches, rather than on complaints that a minority as such is being maltreated.

5. The Declaration on the Rights of Persons Belonging to National or Ethnic , Religious and Linguistic Minorities

The 18 December 1992 Declaration is of course only declaratory and thus a "political statement" and unenforceable. Nonetheless, it is an important pointer to future developments. It is a significant step towards furthering the understanding that states are multi-ethnic plural societies. It agrees principles for the treatment of minorities. In particular, states have agreed to promote the identity of minorities (article 1) and to have due regard to the legitimate interests of minorities in national policies and programmes and of co-operation and assistance among states (article 5).

The Declaration has already been a source of proposed regional instruments - some of its provisions are discernible in the Draft Protocol prepared by the Parliamentary Assembly of the Council of Europe and in the Draft Convention for the Protection of Minorities, Proposal of the European Commission for Democracy through Law. Various forms of enforcement machinery, political or judicial, will doubtless be engrafted, but the underlying concepts and scope of the future European standards are likely to be broadly similar. Because the Declaration is an international instrument and is in force - thus affecting all Commonwealth states - whereas European instruments are still in embryo, this paper provides an analysis of the UN Declaration on the rights of persons belonging to minorities.

Certain features need noting:[18]

(a) The rights are those of "persons belonging to" minorities and are not rights of the minority groups as such. This is in line with article 27 of the Covenant, which describes the rights of individuals rather than of groups.

(b) The title of the Declaration adds "national" to the minorities listed in Article 27. One meaning would be that the standards are to apply only to those having the nationality or citizenship of the state applying them. In an Explanation of vote to the Human Rights Commission, Germany, adopting this meaning, made it clear that "minority rights belong to the nationals of the state where they live," and that the "rights may not be interpreted as entitling any group of persons living in the territory of a state, for instance foreign nationals living under the

terms of immigration laws, to form within that state separate communities". Nigeria took a different view, referring to "... public intolerance of immigrants, including refugees; and widespread xenophobia, often leading to attacks on foreigners". A slightly broader meaning, but one which would still exclude aliens from protection, is the meaning given "nations" or "national minorities" in an Eastern European context. According to that usage a national minority is a distinct group of persons ethnically united by common descent, language, culture and history and identified with a particular territory. Thus states may contain several "nations" or "national minorities" within their territorry with all such persons being citizens.[19]

More in line with the Eastern European meaning, but not limited to groups traditionally inhabiting the state's territory, is yet another meaning derived from the wording of the Declaration. If "national" is taken in its context of "national or ethnic, religious and linguistic" it would appear that it relates to personal characteristics of the persons belonging to minorities and not to legal characteristics, such as the status of citizenship. If this contextual meaning is adopted, immigrant groups of recent origin (who in many states form large minorities) would be entitled to the protection of the Declaration.

(c) There is no definition of "minority". Those who drafted the Declaration considered that the use of the adjectives national or ethnic, religious and linguistic constituted sufficient definition in itself. (If definition had been a sine qua non, agreement might never have been reached: 13 years were largely devoted to definitional disputation.)

(d) The preamble lists international instruments which indicate disapproval of assimilationist and discriminatory measures. According to the preamble the Declaration was "inspired by" article 27. It is thus not just "based on" article 27 or tied to its limitations, with the article's negative phrasing ("shall not be denied"). The Declaration represents a continuation and a new beginning, with UN organs, agencies and treaty-bodies being expected to take the new standards into account and to "contribute to full realisation of the rights and principles ... in the Declaration" (article 9).

(e) Article 1 provides that the existence and identity of minorities shall be protected by states within their territories. States are also to encourage conditions for the promotion of identity. This goes well beyond the tentative phrasing of Covenant article 27. In short, the declaration proposes "identity and existence" as fundamental attributes of groups, with states being mandated to adopt measures on minorities' existence and identity.

(f) Rights of persons belonging to minorities are set out in article 2, which commences by elaborating on Covenant article 27, adding that the rights to culture etc., may be exercised "in private and in public, freely and without interference or any form of discrimination". Wide-ranging participation rights for minority group members are specified, including the right "to participate effectively in cultural, religious, social, economic and public life," and in national and regional decisions concerning the minority to which they belong. The importance of the rights was underlined by Austria: the "clear description" in the text meant that members of minorities could "participate in all forms of public life in their country, thereby helping to shape their own destinies ... contributing to the political environment in which they lived".

How participation is to be achieved was not specified, but mediation by minority organizations is not excluded, because article 2.4 affirms the right to establish and maintain minority associations. Participation for minorities in a complex society is likely to move towards greater decentralization, which facilitates continuing involvement of persons. Local government is not analytically the equivalent of self-government, but it requires dialogue, even partnership, between groups and states. The right of members of minorities to establish and maintain their own associations is supplemented by contact rights (article 2.5), including "contacts across frontiers with citizens of other states to whom they (the members of minorities) are related by national or ethnic, religious or linguistic ties".

(g) The collective dimension is expanded by article 3. This provides that rights may be exercised "individually as well as <u>in community with other members of their group</u>," and that no disadvantage shall result to any persons from exercise or non-exercise of rights. The "non-exercise" provision underscores the rule that "membership" of groups can never be compulsory.

(h) Article 4 sets out the required state measures in favour of "persons belonging to minorities". The fundamental requirement of non-discrimination is reflected, and the adjective "full" before "equality before the law" emphasises that equality should not be given a restricted meaning. In terms of article 4(2) states shall

> " take measures to create favourable conditions to enable persons belonging to minorities to express and develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and international standards".

This qualification is necessary to meet occasional abuses by minorities, for example where group traditions incorporate practices inconsistent with human rights.

(i) Articles 5,6 and 7, seek to ensure that the legitimate interests and rights of minorities are considered in national policies and programmes and in international cooperation. Planning for development is an obvious example. However, the articles are not limited to "development". They significantly complement participation rights, recognising that national "policies and programmes" with significant economic and social as well as cultural dimensions need to regard minorities. The co-operation provisions relate to confidence-building between states, although the reference to "mutual understanding" in article 6 also implies confidence-building between minorities and states. International sharing of information and experiences on minorities is likely to assist in developing models of good practice, promoting peaceful and constructive solutions of problems.

(j) Article 8 "balances" minority rights with the integrity of the state and the enjoyment by all persons of universally recognized human rights. Article 8.3 implies that measures for minorities are generally compatible with equality and that measures to ensure minorities' effective enjoyment of rights should not prima facie be considered as contrary to the principle of equality or as discriminatory. The creation of favourable conditions for minorities is regarded by some as preferential and privileged treatment. This is a misconception: only with collective enjoyment of the special rights can minorities have opportunities to enjoy their culture and language and profess their religion to an extent similar to that enjoyed by the majority, which takes state provision of such facilities for granted. Affirmative action is sometimes the only way of ensuring equality. For this reason special rights and positive action necessarily involve differential provisions, but these are not discriminatory; rather they are measures to ensure "full equality before the law".

6. Future Developments in the UN System

As already indicated, the Declaration represents a cautious advance on existing law by, moving to positive statements of rights and giving a limited collective dimension to the rights in terms of group description, protection of identity and existence, exercise of rights, freedom to form associations, and the contact rights necessary to support the whole conception.

On the other hand, the Declaration contains no explicit reference to autonomy or self-determination.[20] Many states fear

that demands for secession follow from the concept of self-determination - fears strengthened by recent developments in Central and Eastern Europe and the Caucasus. However, the right of self-determination is confined to "peoples", interpreted, certainly so far as concerns secession rights, as applying only to "the whole people" of states. Self-determination is not vested in ethnic components of existing states. If "minority-friendly" perceptions are to prevail, a primary requirement is that the developing concept of autonomy is not treated as the equivalent of legal self-determination. If "autonomy" were so treated, it would also be perceived as threatening the unity of states and territorial integrity.[21] Since minorities cannot look to legal self-determination, it is all the more important that they be treated sympathetically so as not to become alienated and disruptive. In that way their loyalty is more likely to be secured. That sensitive treatment of minorities enhances the stability of states was the view of the UN Secretary-General in recommending the Declaration and increasingly effective UN machinery to deal with human rights.[22] As already indicated, "autonomy" is still a developing concept. It covers a broad spectum of self-governing powers, ranging from self-management in particular areas such as education, through local government, to other delegated functions up to the level of self-government of the group, and should not be regarded as a technical term.[23] Guidance as to its potential scope is given by article 27 of the UN Draft Declaration on Indigenous Rights. This reads:

> " Indigenous peoples have the right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, employment, social welfare in general, traditional and other economic and management activities, land and resources administration, the environment and entry by non-members, as well as internal taxation for financing these autonomous functions."

Contributions to the elaboration of the concept of "autonomy" will come not only from the draft declaration on indigenous peoples, but from Mr. Eide's study on national arrangements, for example, in Denmark for Greenland and the Faroe Islands, Italy for the South Tyrol, and Spain for the Basque and Catalan regions.

A UN Convention on Minorities could further advance standards, although such a prospect appears remote. In the interim, the text of the Declaration will function as a body of principles available to the international community, a constant reference point and a guide for states in their action and legislative and administrative practices. The Commission Working Group charged with drafting the Declaration suggested monitoring measures to accompany it . In his opening address to the 1992 Human Rights Commission, the Under-Secretary-General for Human Rights, Mr. Jan Martenson, ventilated the establishment of a working group or Special Rapporteur on minorities, a proposal favoured by some delegations. Another development would be to extend communica-

tions machinery to deal with minorities' complaints (as the League did). It would also be relatively easy to accord minorities facilities, like those of access to UN fora currently accorded non-governmental organisations.[24]

7. The Council of Europe

As mentioned at the outset, the Council of Europe was designed to overcome divisions and conflicts in Europe and to achieve greater unity between its members on the basis of democracy, human rights and the rule of law. The Council emphasised individual human rights, rather than minority rights. Indeed, despite the Lannung Report,[25] and intermittent reminders by the Parliamentary Assembly, the Committee of Ministers as recently as 1973, rejected the idea of further provisions to protect minorities. Even so, certain aspects of individual rights protection assist minorities, particularly rights of freedom of conscience and religion, of expression and association, to education and absence of discrimination. Thus in a sense, it can be said that from its inception, even though there were no specific minority protections, and its governing body was for a long period disinclined to expand minority protections, the Council of Europe nonetheless held a multi-cultural, multi-ethnic, non-denominational view. However, because the Convention was not specifically directed towards to minorities, it was not very helpful in addressing their collective problems.

Article 14 of the European Convention on Human Rights provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... race, colour, language, religion ... national origin, association with a national minority".

The article was interpreted by the Commission and European Court of Human Rights as conferring no additional positive rights, merely relating to the other human rights articles, which must not be discriminatorily applied. Accordingly, the article (and the Convention) gave no positive protection, which is necessary if rights are effectively to be exercised in community. The series of Belgian linguistic cases conclusively showed that state schooling in the language of a minority member could not be insisted upon.[26] Other decisions restrictively interpreting the scope of rights (e.g. of an elected representative in a municipal council to use the language of his choice) meant that Art 14 was not applicable, although the impact was a discriminatory one.[27]

An important new development in the Council of Europe has been adoption of the European Charter for Regional or Minority Languages - a Council of Europe Convention of 22 June 1992. Member States will have to base their legislation upon it. (By 1 February 1993, 11 member states had signed the Convention.) The

Charter's purpose is cultural, being designed to protect languages as a threatened aspect of Europe's cultural heritage. Not being designed to protect linguistic minorities, it does not give individual or collective rights to speakers of regional or minority languages. Obviously, however, there will be an impact on members of minorities. It needs emphasing too that the approach is not one of competititon between languages. Rather it adopts an inter-cultural and multi-lingual approach in which all languages have a proper place.

An indication of the scope of operation of the Charter is that it contains extensive provisions concerning the use of minority languages in education, public services, the media, cultural facilities and economic and social life. The Charter also provides for trans-border co-operation.

One aspect is omitted from the Charter: it does not deal with the situation of new, often non-European, languages of recent immigrants. The presence of large numbers of such language speakers can give rise to problems of integration. The Ad Hoc Committee of Experts on regional or minority languages in Europe, which drafted the Convention, believed that, if necessary, such problems should be addressed in a separate legal instrument.[28]

A proposal to adopt a Protocol on the rights of minorities is under consideration by a Committee of Government Experts for the Protection of National Minorities, due to report to the Steering Committee for Human Rights by the end of July 1993. The Parliamentary Assembly of the Council of Europe has repeatedly recommended such a Protocol.[29] If approved and ratified, citizens of states party to the Protocol would have access to the European Commission and Court of Human Rights.

An alternative approach by the European Commission for Democracy through law (the "Venice Commission) is for a European Convention for the Protection of Minorities.[30] This does not involve the judicial machinery of the Commission and European Court of Human Rights to enforce the comprehensive list of rights it has proposed. Instead, it envisages establishment of a European Committee for protection of minorities. The Committee would receive periodic state reports, state petitions and individual petitions (optional). In fact, the machinery is similar to that in the CSCE, namely, political in character.[31] Both the Parliamentary Assembly's and the Venice Commission's proposals have now been sent to a committee of experts to examine them in the light of the complimentarity of the work of the Council and Europe and the CSCE, while bearing in mind work within the United Nations. In view of the urgency of the matter, the Council of Europe's Parliamentary Assembly has called on the Committee of Ministers to speed up its work schedule as a matter of urgency, so that the meeting of Heads of State and Government in Vienna on 8 and 9 October 1993 will be able to adopt a protocol on the rights of minorities and open it for signature on that occasion.[32]

One significant development has already occurred: the treatment of minorities in states intending to join the Council of Europe is to be a factor in their admission. On 1 February 1993 the Parliamentary Assembly instructed its Committee on Legal Affairs and Human Rights

> " to make scrupulously sure when examining requests for accession to the Council of Europe that the rights included in this protocol are respected by the applicant countries".33

The Parliamentary Assembly has also asked the Committee of Ministers to provide the Council of Europe with a suitable mediation instrument - which would to some extent act as an ad hoc mechanism for protection of human rights and for resolving minority problems. Such an idea has already been agreed in principle in relation to European states not yet members of the Council of Europe.

8. The Conference on Security and Co-operation in Europe (CSCE)[34]

The Conference consists not only of Council of Europe member states, but also of Eastern and Central European states, the U.S.A. and Canada. The Conference states were party to the Helsinki Final Act 1975 and agreed in Principle III of their Declaration of Principles to respect the rights of persons belonging to minorities before the law and to afford them full opportunity for the actual enjoyment of human rights. At subsequent CSCE meetings there has been considerable development of texts. Having in the concluding document of the CSCE meeting held in Vienna from 4 November 1986 to 15 January 1989 agreed to protect and create conditions for the promotion of the identity of national minorities on their territory and to ensure their full equality, there was elaboration of detailed rights at the 5-29 June 1990 Copenhagen meeting of the Conference on the Human Dimension of the CSCE. By Chapter IV of the Concluding Document the participating states declared:

"31. The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.

32. ... Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right

- to use freely their mother tongue in private as well as in public; ...

- to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs; ...

  Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group. No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights.

33. The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. They will take the necessary measures to that effect after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each State ...

34. The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.

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

35. The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.

    The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

36. The participating States recognize the particular importance of increasing constructive co-operation among themselves on questions relating to national minorities. Such co-operation seeks to promote mutual understanding and confidence, friendly and good-neighbourly relations, international peace, security and justice."

Thereafter, the CSCE Heads of States declared at the 19-21 November 1990 Paris meeting that identity of minorities would be protected and persons might freely express and develop it (Charter of Paris, 21 November 1990). To carry this forward, experts on minorities met in Geneva from 1-19 July 1991, giving a firm steer in the direction of minorities' protections. High level political commitments were repeated at the 10 September to 4 October 1991 CSCE meeting in Moscow. The meeting reinforced the conflict-prevention machinery developed at the Vienna Conference. The basis of the machinery is dialogue and co-operation between states, designed to bring about amicable settlement before disputes degenerate into violent conflict. States may spontaneously, or at the request of another state, invite the assistance of a CSCE mission of experts to contribute to the resolution of the questions. Failing a state's establishment of a mission of experts, the requesting state may initiate establishment of a mission of CSCE rapporteurs. There is also another rapporteur procedure in cases of particularly serious threats to the human dimension. Stimulated by the tragic events in the former Yugoslavia, other mechanisms, like a conciliation and arbitration court, have been suggested.

The most recent development has been that the CSCE states decided, by their July 1992 Helsinki Decisions, to establish a CSCE High Commissioner on National Minorities. The High Commissioner will provide "early-warning" and, as appropriate, "early action" in regard to tensions involving national minority issues. Acting under the aegis of the Committee of Senior Officials, who between CSCE Council meetings act as the Council's decision-making agents, the High Commisioner will strengthen the Conference's ability to deal with ethnic tensions. Over and above this is institutionalisation of a CSCE Council, administrative stuctures and liason machinery. Part of the machinery, particularly interested in minority questions, is the Conflict Prevention Centre (CPC) and the Office for Democratic Institutions and Human Rights (ODIHR). These new institutions will in time make significant contributions to peaceful resolution of minority problems. Clearly, protecting minorities is seen by all European states as an essential element in confidence and security building.

9. The European Communities

The European Communities have no instruments which as such govern the treatment of minorities. There is, nonetheless, a great deal of human rights law in the European Community, some of which (for example, the general principle of equality, whereby differentiation between comparable situations must be based on objective factors, say in relation to equal pay for workers) might, in special circumstances, protect members of minorities.

Notable among EC human legal rights are freedom of movement of workers, the right of establishment and the freedoms of association and of collective bargaining. A significant aspect is that the European Court interprets the EC Treaties and the decisions of Community organs in accordance with the common traditions, percep-

tions and ideas of its Member States, using human rights concepts and international human rights and standards (the European Convention on Human Rights and the two UN Covenants) as statements of principle in terms of which EC and Member States' measures are to be interpreted and adjudged. Summing up the human rights position in an EC context, there are now two solemn statements of principle on human rights, a Declaration on Fundamental Rights adopted by the European Parliament in April 1989 and a solemn declaration made later in 1989 by the EC Heads of States, the Community Charter of Fundamental Social Rights for Workers. There is also a body of EC human legal rights constituted by Directives and European Court judgments, themselves in accordance with international human rights standards. Finally, there is the higher law of the Treaties.

Parallel to the work of the CSCE and the Council of Europe, the EC has defined its attitude to the new states of Europe.

> "They have decided to take a common approach making the recognition of the new states subject to their observation of the provisions of the human dimension, including those relating to minorities. To this end, they are demanding that these states guarantee the rights of national and ethnic groups and minorities in compliance with undertakings made within the framework of the CSCE. Furthermore, whenever the Community negotiates agreements of association with Eastern European states, it has acquired the habit of introducing a clause containing the same stipulations and providing for the suspension of the agreement should this clause not be observed." 35

The EC has been particularly involved in the recognition of the various republics constituted out of the former Yugoslavia . It appointed an Arbitration Committee to assess whether the republics complied with various requirements, including aceptance of the provisions relating to human rights and the rights of ethnic and national groups contained in the draft Convention on Yugoslavia of 4 November 1991. Opinions were given on Slovenia and Macedonia as fulfilling the conditions, whereas Croatia needed to supplement its constitutional law. Unfortunately, the Yugoslavia experience of recognition shows that even though some preventive measures were taken by requiring constitutional arrangements, in extreme circumstances rights are not barriers to brutality and ethno-nationalism. That in no wise diminishes the need for preventive measures and protections . Had positions been clearer at the outset, there would have been deterrents to the development of extreme circumstances: coping with matters <u>in medias reas</u> is always an inadequate expedient.

10. CONCLUSIONS

Methods of protecting minorities by both political and judicial procedures are being developed by the UN, the CSCE, the Council of Europe and the European Communities. If fully developed, they will assist in reducing the likelihood of dissension . It is in the self-interest of states not merely to support new standards for the protection of minorities, but to ensure that relevant international conventional law and the machinery of enforcement are strengthened: in that way their societies will be more stable and they are less likely to face localised or even regional conflicts and to have to grapple with the difficulties occasioned by influxes of refugees. Self-interest of states and protection of minorities should not be seen as contradictory, but as mutually supportive.

C. Palley
30.3.1993.

FOOTNOTES

1 CSCE, Contribution of the Council of Europe to the CSCE meeting of experts on national minorities, Geneva, 1-19 July 1991, p.4.

2 Parliamentary Assembly of the Council of Europe, Official Report, 42nd Ordinary Session, 1 October 1990, col. 399. M. Worms, as Rapporteur to the Committee on Legal Affairs and Human Rights, has actively propagated measures enabling the Council of Europe to play a conciliating role in conflicts involving minorities and urged the adoption of machinery for implementation on the ground of declarations of principle concerning the recognition, protection and promotion of national, ethnic, cultural, linguistic or religious minorities. See especially Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on the Rights of Minorities by M. Brincat and M. Worms, 29 January 1992, AP-Doc. 6556 and Report on an additional protocol on the rights of Minorities to the European Convention on Human Rights, by M. Worms, 19 January 1993, Doc. 6742. Both Reports led to Parliamentary Assembly Recommendations and Orders (Recommendations 1172 (1992) and 1201 (1993) and Orders 472 (1992) and 484 (1993). The Committee on Legal Affairs and Human Rights has been instructed by the Assembly to examine follow-up action and to do its utmost to promote adoption of an additional protocol on the rights of minorities.

3 Council of Europe, Committee on Legal Affairs and Human Rights, Rights of Minorities - study on the rights of minorities and the enforcement procedures of a "Commission for Minorities", F. Benoit-Rohmer, 31 June 1992, Doc. AP-AS/ Jur. (44) 8.

4 CSCE, Report of the CSCE meeting of experts on national minorities, Geneva, 1-19 July 1991, p.2.

5 Indeed, during the period until 1939 no prudent international law adviser would have used the term "minorities," which might have aroused the interest of League of Nations' members and provoked them into thought about whether the concept of minorities and minorities regimes required extension outside Europe.

6 The Working Group's latest report and the Draft Declaration are contained in UN doc E/CN.4/Sub. 2/1992/33.

7 5 September 1991.

8 The best accounts are in C.A. Macartney, National States and National Minorities, New York, Russel and Russel, 1968, and in F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N., New York, 1979 (E/CN.4/Sub.2/384/Rev.1). See also P. Thornberry, International Law and the Rights of Minorities, Clarendon Press, Oxford, 1991.

9 Treaties of Versailles 1919 (re Poland), Saint-Germain-en-Laye 1919 (Czechoslovakia), Saint-Germain-en-Laye 1919 (Serbo-Croat-Slovene State), Paris 1919 (Romania), Sevres 1920 (Greece). The treaties had virtually identical clauses.

10 Saint-Germain-en Laye 1919 (Austria), Neuilly-sur-Seine 1919 (Bulgaria), Trianon 1920 (Hungary) Lausanne 1923 (Turkey).

11 E.E. Vierdag, The Concept of Discrimination in International Law with Special Reference to Human Rights, Martinus Nijhoff, The Hague, 1973, 146-7.

12 P.C.I.J., Series A/B No 64 (1935) at p.17.

13 See especially P. Thornberry, International Law and the Rights of Minorities, Oxford, 1991; F. Ermacora, "The Protection of Minorities Before the United Nations", 182 Receuil des Cours (Hague Academy of International Law)(1983, IV) 247; and G. Alfredsson and A. de Zayas, "Minority rights:Protection by the United Nations", 14 H.R.L.J. 1 (1993).

14 For example, in Chief Ominayak and the Lubicon Lake Band v. Canada (Comm. No. 167/1984, Views of 26 March 1990) the Committee held that historical inequities and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band (Cree Indians) and constitute a violation of Article 27. Earlier, in Sandra Lovelace v. Canada 2 H.R.L.J. 158 (1981), the Committee held that statutory restrictions of the right to residence on a reserve of a person belonging to the minority concerned must have a reasonable and objective justification. Although Article 27 did not as such guarantee the right to live on a reserve, there was interference with Sandra Lovelace's access to her native culture and language "in community with other members", there being no place outside the reserve where the community existed, so that this entailed denial of rights under Article 27.

15 By January 1993 UNHCR estimated that 3 million former Yugoslav citizens had been forced to leave their homes as refugees due to inter-ethnic conflict. About 600,000 were refugees outside Yugoslavia: "The Policies of UNHCR in Central and Eastern Europe" by O. Andrysek, paper at The Hague, 29 January 1993, p.5.

16 GA res. 47/135.

17 See Progress Report, by the Special Rapporteur, Mr. Eide, UN doc. E/CN.4/Sub.2/1990/46; preliminary report taking account of Sub-Commission views, UN doc. E/CN.4/Sub 2/ 1991/43; and second report, UN doc. E/CN.4/Sub-2/1992/37. Mr. Eide's final report is expected in July 1993. The

author of this paper proposed Mr. Eide's study: "Possible ways and means to facilitate the peaceful and constructive resolution of situations involving racial, national and linguistic minorities," UN doc. E/CN.4/Sub.2/1989/43. Internal constitutional and other legal and administrative arrangements are essential elements in accomodating minority conflicts: see C. Palley, Constitutional Law and Minorities, Minority Rights Group Report No.36, 1978. See also "The Status of Minorities and Ethnic Groups in the Member States of the Council of Europe", Expert's Report by Professor E. Grisel, 28 July 1988, Council of Europe, Doc. 6294 Appendix I, AS/Jur. (40) 7.

18 I am indebted to Professor Thornberry for sight of his unpublished article "Emerging UN Standards for the Protection of Minorities: The UN Draft Declaration", November 1992.

19 According to this Eastern European usage there are, for example, national minorities of Hungarians in Serbia, Romania and Slovakia. In contrast the Western European usage of "nation" refers to all citizens of the state and not to certain groups united by ethnic traditions and history.

20 The right of a "people" freely to choose its international status, namely whether it wishes to be governed in an independent state or as part of another state, whether federal or unitary. This right belongs only to dependent peoples (colonial at the time) and to peoples subject to foreign domination. Once exercised, separate "peoples" within an existing state cannot again separately exercise external self-determination, although the "people of the state as a whole" may do so.

The question of self-determination has been confused by distinctions between rights to external self-determination (choice of international status) and internal self-determination. The latter refers to the right of the people of a sovereign (independent) state to elect and keep the government of its choice: A. Cassese, International Law in a Divided World, Clarendon Press, 1986, p.134. Choice of government structure comes within the concept.

The principle of self-determination does not authorise action to dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states, but that general rule has been impliedly qualified as being inapplicable where an independent state does not have "a government representing the whole people belonging to the territory without distinction as to race, creed or colour" (1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations , G.A. Res. 2625, (XXXV)). Relying on that qualification, Professor Ermacora would apply both external and internal self-determination to "peoples" in European states which are either non-democratic or non-pluralistic: "Rights of Minorities and

Self-determination in the Framework of the CSCE" in The Human Dimension of the Helsinki Process, ed. A. Bloed and P. Van Dijk, Martinus Nijhoff, Dordrecht, 1991, at pp. 205-6. Professor Ermacora acknowledges that the principle of territorial integrity has to be taken into account when exercising the right to self-determination, which has to be interpreted in such a way that its exercise does not lead to changes in borders. This still begs the question of whether a particular population group is "a people" or "a minority" within the whole "people". In his study, The Right to Self Determination, United Nations, New York, 1981, (UN doc. E/CN.4/Sub.2/404/Rev.1) the Special Rapporteur, Professor A. Cristescu, at pp. 39-41, pointed to the difficulties in defining the concept of "a people" and the necessity for not confusing "a people" with ethnic, religious or liguistic minorities. Minorities who seek self-determination argue that they are not "mere minorities" or "communities", but "peoples," and claim both external and internal self-determination (the rights to independent statehood - which must mean border changes - and self-government). This stance has been taken by the Turkish Cypriots and some national minorities in the former U.S.S.R.

21 The Sub-Commission's Working Group on Indigenous Populations has been developing the concept of autonomy for indigenous peoples. They have sometimes used the term "self-determination", although making it clear that this does not comprehend external self-determination.

22 An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping, UN doc. A/37/277 - S 24111, 17 June 1992, para.18.

23 See G. Alfredsson, "Minority Rights and a New World Order", in Broadening the Frontiers of Human Rights, ed. D. Gomien, Scandinavian University Press, 1993, pp. 65-67. See also H. Hannum, Autonomy, Sovereignty and Self-determination: the Accomodation of Conflicting Rights, University of Philadelphia, 1990.

24 Alfredsson, op.cit., pp. 74 and 76.

25 Council of Europe, Parliamentary Assembly, Doc. 1299, 26 April 1961, which led the Parliamentary Assembly to invite the Committee of Ministers to include in the Second Additional Protocol an article guaranteeing national minorities rights not referred to in the Convention - broadly along the lines of what was to become article 27 of the UN Covenant on Civil and Political Rights.

26 European Court of Human Rights, Cases relating to certain aspects of the use of languages in education in Belgium, Series A, Vol. 6.

27 Applicant No. 10650/83 (Clerfayt, Legros and Others v. Belgium 17.5.85).

28 European Charter for Regional or Minority Languages. Explanatory Report, Strasbourg, 7 July 1992, DELA (92) 2, p.4.

29 The most recent recommendation is 1201 (1993), 1 February 1993. A proposed text for an additional protocol approved by the Assembly was annexed.

30 See G. Malinverni, "The draft Convention for the Protection of Minorities / Proposal of the European Commission for Democracy through Law", 12 HRLJ 265-273 (July 1991).

31 Various proposals and recent developments are discussed in Rights of Minorities - Study on the rights of minorities and the enforcement procedure of a "Commission for Minorities", F. Benoit-Rohmr, 30 June 1992, Strasbourg, Council of Europe Doc.AS/Jur (44) 8.

32 Recommendation 1201 (1993), 1 February 1993, para.9.

33 Council of Europe, Parliamentary Assembly, Order No. 484 (1993), February 1993, para. 2 (iii) .

34 See Y. Dinstein and M. Tabory (eds.), The Protection of Minorities and Human Rights, Martinus Nijhoff Publishers, 1992, Dordrecht; F. Ermacora in A. Bloed and P. van Dijk, op.cit, n. 20 supra, at pp. 197-206; and D. McGoldrick, "Human Rights Developments in the Helsinki Process" in R. Beddard and D.M. Hill (eds.), Emerging Rights within the New Europe, Southampton Papers in International Policy Number 2 (1992), 17-48.

35 F. Benoit-Rohmer, Rights of Minorities, at pp. 8-9, cited in n. 31 supra.