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## National Minorities in International Law

### Keywords

International Law: History, Minorities, Self-Determination

# NATIONAL MINORITIES IN INTERNATIONAL LAW

JOSEPH B. KELLY\*

## I. Introduction

In international law there are a wide variety of legal beings. At one end of the spectrum is the individual, an increasingly important subject of international jurisprudence, and at the other is the state itself, the archetype of the international legal person. Between the two lie a number of entities, one of which is the national or ethnic minority group. This somewhat unfamiliar legal entity is composed of people who wish to retain their distinctive culture, but cannot find expression through an independent state of their own.

Historically, the protection of minority group rights has been a significant issue of international law. As early as 1696, the legal scholar, Victoria, wrote of the rights of the Indian peoples of the Western world in their dealings with Spain, rights which were not grounded on statehood.<sup>1</sup> Throughout the eighteenth and nineteenth centuries the concept of minority rights slowly developed, almost exclusively manifested by bilateral treaties guaranteeing religious freedom to various national groups.<sup>2</sup> By the early twentieth century protection of minorities was a major question of international law.

The concept gained its widest acceptance in the Minorities System of the League of Nations. The resulting shortlived institutional protection was brought to an abrupt halt by World War II. Since then the issue has remained relatively dormant. Only a few remnants exist today, e.g. debates over the legal status of the Palestinian organizations.

Nevertheless, there is reason to believe that the 25 years of neglect may soon come to an end. Three basic factors support this conclusion: (1) the various conditions which directly caused this neglect have either disappeared or are changing; (2) minority groups are increasingly asserting their right to existence and protection; and (3) the basic international machinery is once more available to respond to their problems.

Before these factors are considered, however, it is necessary to explore the development of minority groups as subjects of interna-

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1. FRANCIS DE VICTORIA, *DE INDIS ET DE IVRE BILLI RELECTIONS*, 115-87 of the reprinted 1696 translation in *CLASSICS OF INTERNATIONAL LAW* (1964).

2. J.A. LAPONCE, *THE PROTECTION OF MINORITIES* 23-9 (1960); see also INIS CLAUDE, *NATIONAL MINORITIES* 6-9 (1955).

tional law, including the role of the League of Nations and the United Nations, and to consider what legal rights, if any, minority groups possess under current international law.

## II. Minority Groups as Subjects of International Law

The existence of minority groups as subjects of international law stems from the development of the nation-state system. Until this century, the struggle for human rights was not principally waged by the individual against the state, but by an identifiable group (a nation) against a state in which it was not the predominant nationality. This resulted from the unique development of the European political system both before and after the Treaty of Westphalia of 1648. The system's evolution was marked by a tendency to align the state with the nation, thereby creating not a state system, but a nation-state system.<sup>3</sup> The idea of the nation-state system limits the demographic extent of the state to that of the nation.

One difficulty with the nation-state is that racial minorities are either rejected by the state or forced to lose their identity and become part of the dominant group. Language, customs or religion of the minority must be changed to that of the predominant nationality within the state before full citizenship is complete.<sup>4</sup> Casualties of this tendency to equate the nation with the state, included the integral land empires of Austria, Turkey and the tiny states of Germany and Italy.

It is natural for a nation to seek independent statehood. The nation forms the state in order to further its self-interest, to insure its survival, and to protect it from exploitation by a foreign nation-state. Initially, the resulting union of nation and state, if achieved, seldom precipitated an expansionist drive, the more immediate goal being freedom from foreign domination. Later, as will be seen, this was not always so.

Instances of abuse of minorities by the nation-state were widely publicized in the nineteenth century. This publicity sparked public approval of collective action against such abuses. One of many examples was popular support for European action against Turkey to protect the Armenians shortly after World War I.<sup>5</sup>

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3. See P. POTTER, *INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION*, at Ch. IV (1922) for a concise discussion of the rise of the present system of nation-states.

4. Max Lerner, in his introduction to *MACHIAVELLI, THE PRINCE AND THE DISCOURSES* xxxiv (1940) concisely stated this tendency of the new nation-state to force internal uniformity: "two elements were historically to enter into the composition of the Western nation-state. One was national unity and the idea of a common tongue, common culture and common economic limits. The second was a realistic concentration of power at the center in order to break down divisive barriers."

5. For a brief synopsis of the Armenian massacres during World War I see A. MOOREHEAD, *GALLIPOLI* 98-101 (1956).

A parallel development of importance was the emergence of the colonial system. The African and Asian continents were being carved up into various units controlled by European powers. This arbitrary division led, in virtually every case, to the creation of national and ethnic groups who were denied basic civil and political rights. While the abuses of the European minorities would later be the base of the Minorities System of the League of Nations,<sup>6</sup> the oppression of colonial peoples would lead to the development of the Mandate System which would deal, in substance, with many of the same problems.

In large part, the tensions of colonial expansion, combined with the abuses of European minorities and their blossoming national consciousness, served as a catalyst for World War I.<sup>7</sup> It is not surprising, then, that 1919 was a crucial year in the development of minority rights.

At that point, looking back at the experience of the nineteenth century, two goals appeared in the area of national minority rights. One was the need to protect national minorities living within the various nation-states by either giving them their own nation-state or by insuring, through supervision by an international body, equality of treatment with that of the national majority with which they resided.<sup>8</sup> The second was the desire to protect colonial peoples by either promoting their independence or insuring against their exploitation by the colonial power. This desire to solve these national minority problems inherited from the nineteenth century is clearly seen in the League of Nations' efforts to protect the rights of minorities, and to a much lesser extent in similar United Nations' efforts. The framers of the League Covenant and the U.N. Charter, and the delegates who later implemented these documents, may not have been specifically aware that they were adding some substance to the shadowy legal existence of collective groups, where the emphasis is on group rights rather than on individual human rights. Certain real problems left over from the nineteenth century were there and the League merely attempted to solve them.

### III. The League of Nations and the Minorities System

It was natural that the League of Nations should interest itself in the national minorities problem. History and recent events had shown that such groups needed protection from a nation-state. Woodrow Wilson had attempted to write international protection of minorities into the League Covenant itself, but was frustrated in his ef-

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6. See Section III *infra*.

7. P. DE AZCARATE, PROTECTION OF NATIONAL MINORITIES 1 (1967); see also CLAUDE, *supra* note 2, at 10.

8. See Section III *infra*.

forts.<sup>9</sup> The notion of minority group rights ran contrary to concepts of individualism and state sovereignty on which the League was based.<sup>10</sup> Nevertheless, through various treaties, declarations, institutions, and actions associated with the League, there developed a systematic approach to the problem which became known as the Minorities System.

As far as possible the Treaty of Versailles and related treaties drew or confirmed the boundaries of states along nationalistic lines.<sup>11</sup> The dominant theme of self-determination meant the liberation of minorities from real or fancied abuses. These abuses ran the gamut from outright physical persecution to the denial of certain social or economic rights. If a minority could protect itself by forming its own state then all "rights" of the minority would be secured.

It was, however, impossible to follow nationalistic lines completely in the formation of the new states. Therefore, to afford protection when a new nation-state contained a minority, several different steps were taken:

(a) Special minorities treaties, each containing a guarantee clause allowing direct access by minorities to the League, were concluded between the Principal Allied and Associated Powers and Czechoslovakia, Poland, Rumania, and Yugoslavia;<sup>12</sup>

(b) Provisions on the rights of minorities were included in the peace treaties with Austria, Bulgaria, Hungary, and Turkey;<sup>13</sup>

(c) Declarations pledging minority protection were made before the Council of the League by Albania, Estonia, Finland, Iraq, Latvia, and Lithuania on or after their admission to the League;<sup>14</sup>

(d) Special provisions were included in the convention regarding Memel concluded by the Allied Powers and Lithuania,<sup>15</sup> and in the

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9. P. DE AZCARATE, *PROTECTION OF NATIONAL MINORITIES* 1 (1967); see also CLAUDE, *supra* note 2, at 10.

10. CLAUDE, *supra* note 2, at 14-15.

11. *Id.* at 14.

12. *Id.* at 19-20.

13. Parts II and III of the Versailles Treaty with Germany; Parts II and III of the Treaty of Trianon with Hungary; and Parts II and III of the Treaty of Saint-Germain-in-Lay with Austria. Found in 3 *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PRACTICES AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1910-1923*, at 3346, 3553, 3136 (1923).

14. Treaty of St. Germain, arts. 2, 7, 8, and 9; Treaty of Peace with Poland, arts. 2-8; Treaty with the Serb-Croat-Slovene States, arts. 2-10. *Id.* at 3699, 3714, 3731.

15. Treaty of Peace with Hungary, arts. 54-60; Treaty of Saint Germain-in-Lay with Austria, arts. 62-69. *Id.* at 3529, 3141. Treaty of Peace with Bulgaria, arts. 49-57; Treaty of Peace with Turkey. 2 *TREATIES OF PEACE 1919-1923*, at 658, 789 (1924).

16. Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/221/43v.1 (1967).

17. Discussed in Green, *The United Nations and Human Rights*, in *THE UNITED NATIONS AND THE PROMOTION OF THE GENERAL WELFARE* (R. Osher ed. 1957).

convention concerning Upper Silesia concluded by Germany and Poland.<sup>16</sup>

These instruments guaranteed *mutatis mutandis* protection of life and liberty and freedom of religious worship for *all* inhabitants of each country. In addition, they guaranteed the following "rights" to minorities: (1) equality of legal, civil and political rights, especially for admission to public employment; (2) free use of the mother tongue in private intercourse, commerce, religion, the press, and at public meetings and before courts; (3) a right, equal to that of other nationals, to maintain at their own expense charitable, social, or educational institutions; and (4) in districts where a considerable proportion of the population belong to the minority, instruction in the state elementary schools in the language of the minority.

Without enforcement clauses, these treaties, offering minorities recourse to the League of Nations, and the declarations, spelling out the rights to be protected, would probably have been ineffective.<sup>17</sup> Realizing this, the League Council took two dramatic steps. First, and most importantly, it allowed direct petitioning to the Council by the minorities themselves. Secondly, it created Minorities Committees to consider petitions and make inquiries into facts. Then, to modify these major inroads on national sovereignty, the Council chose to establish a strict screening procedure. The Secretary-General was authorized to eliminate petitions that (1) requested severance of political relations between the minority and the state of which it was a part, (2) emanated from an anonymous or unauthenticated source, or (3) contained violent language.<sup>18</sup>

The net result of these treaties and actions was the essence of the Minorities System. The system was administered in large part by the Minorities Section of the League Secretariat.<sup>19</sup> Clearly, this was the high-water mark in international concern with minority rights.

The League acted, often successfully, as moderator in the relations between minorities and the various nation-states involved. Thus, at least superficially, a distinct limitation was placed on the internal sovereignty of these states which had received international recognition. The actual enforcement of this limitation depended, as everything ultimately depends in an international organization, upon the cooperation of the member states. The weakness of the system

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16. Convention relating to Upper Silesia, May 15, 1922, 9 L.N.T.S. 465 (1922). Discussed in I.F. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 152-158 (1958).

17. CLAUDE, *supra* note 2, at 15.

18. LEAGUE OF NATIONS ASSOCIATION, *TEN YEAR REVIEW OF THE LEAGUE OF NATIONS* 119 (1930); C. WEBSTER, *THE LEAGUE OF NATIONS IN THEORY AND PRACTICE* 212 (1933).

19. P. DE AZCARATE, *LEAGUE OF NATIONS AND NATIONAL MINORITIES* 123-30 (1945).

was thus reflective of the reluctance of the states concerned to fully cooperate.<sup>20</sup>

#### A. *The League's Actions to Safeguard Minority Rights*

From its very inception, the League Council's effort to assist minorities ran into opposition from all sides.<sup>21</sup> The small states were especially concerned. They thought the provisions were not only derogatory to their sovereign rights and an interference in their domestic affairs, but also discriminatory.<sup>22</sup> As only small powers were affected by the treaties<sup>23</sup> they thought that the Great Powers were imposing on other states obligations they were not prepared to accept in regard to their own minorities.<sup>24</sup> As a result, they "usually did everything in their power to forestall petitions by imposing obstacles to intimidate and discourage potential complainants."<sup>25</sup>

The Council was also under continuous attack from the minorities themselves on the ground that the Council did not give them an equal chance to present their case.<sup>26</sup> The German minorities outside Germany were particularly vocal. Under the inspiration of the League of Germans Abroad, a Congress of Minorities, which met annually from 1925 to 1938, was formed to pressure the Council into the strongest forms of intervention.<sup>27</sup> The German minorities were quick to petition the Council, even in trivial matters.

A third, and ultimately fatal, source of difficulty came from states who had national groups outside their borders. These states attempted to use the minority question as an excuse to regain lost territory. Germany and Hungary especially found it in the best interest of their territorial ambitions to keep the unhappy state of their minorities in other countries constantly before the public eye. This was a dangerous game played with the peace of Europe.

As Germany's territorial ambitions increased so did its alleged humanitarian interest in the protection of minorities.<sup>28</sup> It encouraged German minorities to petition the League. Between 1920 and 1929 of the eighteen different minority groups petitioning the League, German minority groups filed 18 percent of the total; in the next nine

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20. Robinson, *International Protection of Minorities and the Right of Self Determination*, ISRAEL YEARBOOK ON HUMAN RIGHTS 70 (1971).

21. CLAUDE, *supra* note 2, at 15.

22. *Id.* at 26.

23. Poland, Czechoslovakia, Rumania, Yugoslavia, Greece, Albania, Austria, Hungary, Bulgaria, Lithuania, Finland, Latvia, Estonia, Turkey and Iraq. Germany, a major power, was affected in respect to Upper Silesia.

24. WEBSTER, *supra* note 18, at 210.

25. J. ROBINSON, *WERE THE MINORITIES TREATIES A FAILURE?* 175 (1943).

26. CLAUDE, *supra* note 2, at 25-35.

27. WALTERS, *supra* note 16, at 405, 406.

28. J.B. SCHECHTMAN, *EUROPEAN POPULATION TRANSFERS 1939-45*, at 31 (1946).



years that percentage was 38 percent.<sup>29</sup> Germany's use of the minority issue was obviously prompted by self-interest.

The situation came to a head in the League in 1929. The Polish Foreign Minister, on December 15, 1929, charged before the Council that Germany was "using" her minorities in Poland as a pretext for extending the German frontier. Other states bound by the Minorities Treaties began to fear for the safety of their own frontiers, particularly those bordering Hungary. They felt that they had accepted the Minority Treaties in return for a frontier guarantee which no one was now willing to give them.

At the same time, the weaker, non-German minorities became discouraged. Petitions to the League Council peaked in 1930-31 at 204, and then declined rapidly to only four in 1938-39.<sup>30</sup> The fall-off was due to the frustrations of the weaker groups and the self-perception of the stronger groups (notably German) that they were potential majorities and thus no longer interested in minority status.<sup>31</sup>

The prestige of the Council was the principal force keeping the treaties in effect as long as they were against this three-sided attack.<sup>32</sup> Despite the difficulties, the Council was successful in the settlement of many actual cases. It received 400 petitions (excluding those from the special area of Upper Silesia), rejected about half, settled 15, and referred the rest to committees for settlement out of the glare of publicity.<sup>33</sup> On three occasions the Council applied to the Permanent Court of International Justice for an advisory opinion on points of law.<sup>34</sup>

The Council, in the final analysis, pleased no one in its handling of the Minority problems. At best it had a difficult task. The Minorities Committees of the Council are perhaps the only institution of the League of which no trace appears in the structure of the United Nations.<sup>35</sup> Nevertheless, the Minorities System was not a failure in the development of the concept of individual human rights. It

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29. *Id.*; also CLAUDE, *supra* note 2, at 45.

30. ROBINSON, *supra* note 25, at 252.

31. *Id.* at 251.

32. See WALTERS, *supra* note 16, at 402-11 for a full account of the 1928-29 crises in the Minorities System. See also L. MAIR, *THE PROTECTION OF MINORITIES* (1928) for a complete reporting of minority petitions to the League.

33. WEBSTER, *supra* note 18, at 215; PALMER & PERKINS, *supra* note 5, at 343.

34. Advisory Opinions No. 7, Sept. 14, 1923 on Acquisition of Polish Nationality, P.C.I.J. (ser. B) No. 7; Advisory Opinion No. 19, May 15, 1931 on Access to German Minority Schools in Upper Silesia, P.C.I.J. (ser. A/b) No. 40; Advisory Opinion No. 26, Apr. 6, 1935 on Minority Schools in Albania, P.C.I.J. (ser. A/B) No. 64; Judgment of Apr. 26, 1928 on Minority Schools in Supper Silesia, P.C.I.J. (ser. A) No. 15.

35. WALTERS, *supra* note 16, at 175.

was here that the rights of a group of people within a state became an international, rather than national, concern.<sup>36</sup> It was here that enumerated rights of a group as against their state were put into international treaties supervised by an international organization. It was here also that individuals had an explicit right to by-pass their state and to appeal directly to an international organization. Groups of individuals were actually placed against their own states in the international arena. The international politics involved may have been faulty because these groups eventually became pawns of various states in a political power struggle,<sup>37</sup> nevertheless, the principles which evolved were distinct inroads into the rigid rule that international law was concerned only with the relationship of states with each other and with foreign individuals.<sup>38</sup> A new legal personality, recognized in international law, was emerging. The minority group, asserting its right to maintain its group characteristics and to participate fully and equally with others in the life of the state, became a *bona fide* subject of international law.

The League attempted to protect the rights of people who for some reason needed more protection than their state was able or willing to give them. As a consequence, human rights began taking on international significance, not because the world suddenly discovered minorities had rights, but because it realized that a new basis of protection was necessary, on the international, rather than national level.<sup>39</sup>

#### B. The Mandates System and Minorities

Closely related to the question of minorities within a nation-state was the question of colonial nations under the domination of foreign states. By the end of World War I colonialism had come to be looked upon as an evil.<sup>40</sup> With this attitude in mind the framers of the

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36. WEBSTER, *supra* note 18, at 217.

37. The political overtones which minorities, along with mandates, had assumed is reflected in the following observation on committee work in the League: "The Fifth [committee] devoted itself to social and humanitarian questions and the Sixth to 'political' questions such as mandates, minorities and the admission of non members." A. ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW, 1918-1935*, at 461 (1936).

38. In Upper Silesia alone, a local international body functioning under the supervision of the League of Nations heard 2300 cases where minorities were authorized to proceed against their own state before an international commission. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956).

39. For example, art. 12 of the minorities treaty between the Principal Allied and Associated Powers and Rumania signed at Paris on Dec. 9, 1919 stated that:

Roumania agrees that the stipulation in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. [*Emphasis supplied.*]

3 TREATIES, *supra* note 11, at 3728. A "moral" objection to a continuation of colonialism

League were faced with the task of providing new governments not modeled on old colonial structures for the former German and Turkish colonies in the Pacific, Africa and the Middle East. The Mandates System, which the League adopted, was a farsighted solution to part of the problem of colonialism.

The Covenant made the following specific provisions for the international supervision of the advancement and protection of a portion of colonial peoples:

Article 22. (Former Colonies of the Central Powers)<sup>41</sup>

1. For peoples not yet able to stand by themselves, under strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization.

2. The tutelage of such peoples should be entrusted to advance nations and should be exercised by them as Mandatories on behalf of the League.

Three different classes of Mandates were created with varying degrees of control and quarantees.

The League approach to mandated colonies was surprisingly similar to that of minorities, despite the fact that minorities were handled only within the League System and not within the covenant itself.<sup>42</sup> Such a similarity can be seen in the Council supervision of minorities and mandates. In the former, it worked through the Minorities Committee and in the latter through the Permanent Mandates Commission.<sup>43</sup> Petitions could come to the Council from the mandates as well as the minorities. In both cases abusive petitions were screened. All petitions were either routed to the state containing the minority or to the Mandatory for its comments.

An interesting interplay of the mandate and minority systems occurred in the case of Iraq. Iraq was a Class A Mandate protected by Article 22. In 1932 Britain offered to withdraw as the mandatory power and to recommend Iraq for admission into the League. The Mandates Commission agreed to terminate the mandatory regime in Iraq when Iraq entered into undertakings designed to secure the protection of minorities and freedom of conscience within its territory.

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by the allied powers in the German and Ottoman colonies was evident in the pre-League debates on the proposed mandate system. WALTERS, *supra* note 16, at 58.

41. The "Council of Ten," consisting of two representatives each of the five great powers, drafted art. 22 which was adopted by the League Committee. For a summary of the compromises necessary to reach agreement see WALTERS, *supra* note 16, at 57, 58 and WEBSTER, *supra* note 18, at 44, 45.

42. WALTERS, *supra* note 16, at 173.

43. Provided for by para. 9, art. 22, Covenant of the League of Nations. For a brief discussion of its functions and manner of operation see WEBSTER, *supra* note 18, at 285-90.

For colonies not under mandate, Article 23(b) of the Covenant required that the inhabitants be treated "justly." No international machinery was, however, set up to supervise the treatment accorded such colonials by the state controlling them. Nevertheless, an international duty was recognized, which was to be further implemented under the United Nations.

The Permanent Mandates Commission found itself at first encouraged by the Assembly and treated coolly by the Council. No minority power sat on the Council, but four of the seven Council members had mandates. The Assembly, therefore, had more confidence in the Council on minorities matters than it had in colonial questions. Consequently, the Assembly became the vocal spokesman for the equitable treatment of persons residing in mandates.

In five instances the various organs of the League were particularly effective in preventing or correcting abuses in mandated territories. The Union of South Africa was called upon in 1922 in the Assembly by Haiti and India to defend its suppression of the rebellion of the Bondelzwarts tribe in South West Africa over the imposition of a dog tax.<sup>44</sup> Over 100 natives had been killed by air bombings. The Mandates Commission, after investigation, reported to the Council that the suppression was too drastic. The next rebellion in this area was dealt with by the Union of South Africa without a single loss of life.<sup>45</sup>

In 1925, a rebellion broke out in Syria, led by tribal chiefs who were resisting French policies, particularly the French effort to transform their feudal society. To end the rebellion the French bombed Damascus in October 1925. The Mandates Commission met in emergency session and made it clear that it disapproved of many features of the French administration. The French made extensive changes in officials and reform was effected. By 1927, all revolts in Syria had ceased.<sup>46</sup>

In Tanganyika, the British, as Mandatory Power, sought to correct abuses by prohibiting the sale of alcohol to natives. They also entered upon a comprehensive campaign against the tsetse fly which prevented animal husbandry in a large area. The Mandates Commission, while noting these gains, was still concerned with slavery in the mandates. It, therefore, called upon the British to justify the existence of household slavery, and the forced requisition of labor on Lake Victoria and in the distribution of government cotton seed. The British made a detailed reply, explaining their efforts to abolish slavery

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44. WALTERS, *supra* note 16, at 212.

45. LEAGUE OF NATIONS ASSOCIATION, *supra* note 18, at 116.

46. *Id.* at 117.

and the circumstances under which forced labor was used.<sup>47</sup>

The Mandates Commission, at the request of Belgium, urged an adjustment of the boundaries between Tanganyika and Ruanda-Urundi because the agreed boundary involved a loss to King Musinga of a considerable part of his territory. The British agreed and a new boundary was adopted to the satisfaction and advantage of the populations concerned.<sup>48</sup>

The Permanent Court of International Justice, in addition to the Assembly, the Mandates Commission, and the Council, contributed to the protection of the mandated people by outlining the international obligations and position of the Mandatory power in their opinion in the Mavrommatis Palestine Concessions case.<sup>49</sup>

For those colonies not under mandate, the system had a favorable effect in formulating a concept of collective rights, not only applicable to all colonies, but to all minority groups as well. First, it established the principle that peoples not able to govern themselves were the sacred trust of civilization, not to be left at the mercy of an individual state. Second, it fixed a standard in colonial administration which tended to be applied in territories beyond the scope of the Mandatory System.

#### IV. The Protection of Minorities and the United Nations

One of the most striking features of the 1946 peace discussions in Paris was the total lack of discussion about protection of minorities.<sup>50</sup> This was also the case in San Francisco where minority problems were virtually ignored.<sup>51</sup> The reasons were many.

Solicitude for the protection of minority groups, so strong at the time of the formation of the League of Nations, had begun to wane before the outbreak of World War II. As previously suggested, this change was caused in large part by the German government's use of German minorities in neighboring countries to expedite a program of national expansion.

The cases of Czechoslovakia, Poland, Memel and Danzig offer prime examples of this technique. In Czechoslovakia, the Sudeten Germans were soon controlled by the Sudeten Nazi Party, which took its instructions from Berlin. This minority began with demands for more vigorous enforcement of the minorities treaty, shifted to pleas for full autonomy, and by 1938 would settle for nothing less than

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47. *Id.* at 117, 118.

48. WEBSTER, *supra* note 18, at 287.

49. The Mavrommatis Palestine Concessions, Aug. 30, 1924, 1 WORLD COURT REPORTS 293 (1934).

50. CLAUDE, *supra* note 2, at 143.

51. *Id.* at 112.

annexation to Germany. In Munich, under the impact of these demands, England and France, vocal exponents of self-determination in 1919, were left in a dilemma.<sup>52</sup> Berlin followed similar procedures to effect the Lithuanian cession of Memel to Germany and to annex Danzig.<sup>53</sup>

These Nazi activities raised among the Allies doubts about the wisdom of continuing interwar policy into the postwar period. By the end of the war, several incidents had further changed the international outlook toward minority problems.<sup>54</sup>

The first was the misuse of minorities already discussed. This misuse not only undermined public support for minorities, it also resulted in the forcible expulsion of Germans from Eastern Europe, eliminating one minority problem by population transfer.

The second was the large population transfer of ethnic groups as they fled incorporation of their areas into the Communist orbit. This resulted in a refugee, rather than minority problem, to which the United Nations was forced to turn its attention. The third was the territorial changes in Eastern Europe which eliminated the Russian minorities in Rumania, Czechoslovakia, and Poland.

And finally, the treatment of minorities in World War II by Germany struck not at the right of the members to retain their characteristics as a separate ethnic group, but at their right to be treated as human beings. This had the effect of turning international concern from protection of group rights, some of which are often superficial, to the more fundamental individual rights of man.

#### *A. Assimilation and the Post-War Period*

Minority protection and assimilation are manifestly incompatible. Thus, it is most significant that the concept of assimilation was predominant in the development of the post-war international system. In this regard the role of the United States is of the utmost importance.

The League Minorities System had, of course, developed without any input from the United States. In 1945, however, the United States was not only present, but dominant. As with most countries of immigration,<sup>55</sup> the concept of assimilation was very popular in both the United States and in Great Britain.<sup>56</sup> While assimilationist attitudes were by no means universal,<sup>57</sup> they were clearly predominant

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52. E. WISKEMAN, *CZECHS AND GERMANS* (1938).

53. M. BALL & H. KILLOUGH, *INTERNATIONAL RELATIONS* 268 (1956).

54. *Id.* at 267-70.

55. CLAUDE, *supra* note 2, at 166.

56. *Id.* at 81-3.

57. *Id.* at 74-5.

at San Francisco.<sup>58</sup>

The Western attitude was hardened in this respect by the pro-minorities view expounded by the Soviet Union.<sup>59</sup> Thus on the brink of the Cold War, the minorities question became further distorted by political considerations. Similar political reasoning caused the anti-colonial blocs to seek separation of the issue of self-determination from the issue of minority rights.<sup>60</sup>

As a result there are few vestiges of the interwar approach to the minorities problem either inside or outside the United Nations. The Charter, like the Covenant, contains no specific reference to minorities. While such exclusion did not prevent the League from incorporating a minorities system into its functions, this was not the case with the United Nations.

During the creation of the United Nations organization, only token consideration was given to the question of minorities. In 1947, under the Human Rights Commission of the Economic and Social Council (ECOSOC), a Sub-Commission was formed on the Prevention of Discrimination and the Protection of Minorities<sup>61</sup> (hereinafter the Sub-Commission). The Sub-Commission was originally intended to be two separate commissions, one for discrimination, the other for minorities. Still functioning, it has devoted virtually all its energies to the study of discrimination of individuals, effectively ignoring minority protection.<sup>62</sup>

This situation, however, is not a manifestation of the Sub-Commission's lack of concern. Indeed, the Sub-Commission has made frequent attempts to take some action in the area of minority protection.<sup>63</sup> The chief obstacle has been the parent Human Rights Commission which "has endlessly found such interest in minorities to be 'premature' or 'untimely.'"<sup>64</sup>

Initially the Human Rights Commission authorized a study which concluded that the League Minority System was not still valid and enforceable by the United Nations.<sup>65</sup> In spite of this setback, the

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58. Hauser, *International Protection of Minorities and the Right of Self-Determination*, ISRAEL YEARBOOK ON HUMAN RIGHTS 92 (1971).

59. CLAUDE, *supra* note 2, at 170.

60. *Id.* at 173.

61. See Claude, *The Nature and Status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 5 INT'L ORGANIZATION 300-12 (1951) for a review of the early work of this Sub-Commission.

62. See, Review of Further Developments in Fields in Which the Sub-Commission Has Been Concerned, U.N. Doc. E/CN.4/sub.2/327 (1972).

63. CLAUDE, *supra* note 2, at 147.

64. Hauser, *supra* note 58, at 100.

65. Study of the Legal Validity of the Undertakings Concerning Minorities, U.N. Doc. E/CN.4/376 (1950).

Sub-Commission continued to raise the issue. For example, it strongly recommended that the draft Convention on Human Rights include specific reference to the rights of minority groups to maintain their own culture and language.<sup>66</sup> The proposal was not adopted.<sup>67</sup>

More recently, however, the Sub-Commission has begun to function, if only slightly, in the area of minority rights. After more than 20 years, the ECOSOC Council finally agreed to a Sub-Commission request to conduct a study on protection of minorities.<sup>68</sup> That study, still in progress, was first presented in the 1972 annual meeting of the Sub-Commission.<sup>69</sup> The Sub-Commission authorized the study to continue and resources to be made available to the special rapporteur.<sup>70</sup> While such activity seems slight, in the perspective of the total inactivity of the 1950's and 1960's it becomes significant. More importantly, however, such activity serves to keep the international machinery lubricated and ready to be used when the world community so demands.

#### V. The Current Legal Status of Minorities

At this point it is necessary to step back and attempt to view the precise status of minorities in international law. The basic question is: Do minority groups have a *right* to exist under international law? If such a right does exist, there are three traditional solutions. These are (1) frontier revision, (2) population transfer, and (3) the development of the non-national state.<sup>71</sup> If the right to remain a minority is not a basic human right, then the only solution would be a supervised gradual assimilation of the minority into the larger ethnic group with emphasis on the protection of the individual rather than on group rights.<sup>72</sup>

By far the most persuasive contemporary codification of an international right to exist as a minority is Article 27 of the International Covenant on Civil and Political Rights which reads:

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66. EVERYMAN'S UNITED NATIONS 194 (3d ed. 1952).

67. PALMER & PERKINS, *supra* note 5, at 414.

68. ECOSOC Res. 1418 (XLVI), U.N. Doc. E/4714 at 16-17 (1969).

69. Summary Records of the Sub-Commission Meeting 1972, U.N. Doc. E/CN.4/sub.2/SR.647 at 150.

70. Sub-Commission Res. 1 (XXV), U.N. Doc. E/CN.4/sub.2/332 at 45.

71. These three solutions are discussed in C. MACARTNEY, HUNGARY AND HER SUCCESSORS: THE TREATY OF TRIANON AND ITS CONSEQUENCES (1937).

72. For example, an individual has a right to participate in the educational system of the state, but not necessarily the basic right to receive his education in a certain language. Also, an individual has the right to a certain period of rest from labor, but not necessarily the basic right to rest on a particular day. Alfred Zimmermann's comment on the ideal international order could well be applied as the ideal treatment by a state of its minorities: "In things necessary, Unity; in things indifferent, Liberty; in all things, Charity." *Supra* note 37, at 496.



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.<sup>73</sup>

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which is composed of a group of highly qualified international experts on the subject, has interpreted Article 27 as being not only a sound conventional rule for the protection of minorities, but also a source of principles that could be applied regardless of the entry into force of the Covenant.<sup>74</sup>

Two other contemporary multilateral instruments affirm the rights of minority groups to maintain their culture and language. The first is the 1960 Convention Against Discrimination in Education sponsored by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Article 5(c) states that:

... it is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language.<sup>75</sup>

The other is the 1950 European Convention for the Protection of Human Rights, which, in Article 14, includes "association with a national minority" as one of a series of bases on which discrimination is prohibited.<sup>76</sup>

In two cases since World War II there appears to have been a peace treaty provision made for a minority guarantee on the interwar pattern. The first was with respect to the South Tyrol, an area in which Italy had pursued a policy of assimilation in the interwar period.<sup>77</sup> Later, the Trieste Settlement of 1954 between Italy and Yugoslavia contained similar express minority guarantees.<sup>78</sup> There was, however, no provision for international implementation in either of these agreements.

Even in the assimilationist minded United States, national minorities have achieved a special status. In the United States, American Indian tribes are in a class by themselves, treated since the land-

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73. International Covenant on Civil and Political Rights, 61 AM. J. INT'L L. 861 (1967).

74. Summary Records, *supra* note 69, at 150.

75. Convention Against Discrimination in Education (UNESCO), Dec. 14, 1960, 429 U.N.T.S. 93 (1962).

76. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955).

77. Treaty of Peace with Italy, 61 Stat. 1369, 1427 (1947).

78. See, Schwelb, *The Trieste Settlement and Human Rights*, 49 AM. J. INT'L L. 240-48 (1955) for a discussion of the protection of minorities by this agreement.

ing of the first European settlers not as independent states, but still as groups with enough independent legal existence to enter into treaties and to maintain tribal organizations recognized by Great Britain and the United States down to the present day.<sup>79</sup> The separate legal status of these tribes and the rights they possess are separate from other American citizens. This was evident in the negotiations in the spring of 1973 at Wounded Knee, and in the recent opinion of the United States Supreme Court wherein the court stated:

It is settled that whatever title [in mineral leases] the Indians have is in the tribe [here the Navajo] and not in individuals, although held by the tribe for the common use and equal benefit of all the members [cases cited].<sup>80</sup>

Even Title VII of the 1964 Civil Rights Act exempts Indian Tribes from its non-discriminatory employment regulations.<sup>81</sup>

On the whole, however, the approach of protecting group rights of minorities by a system of international guarantees have been replaced by guarantees of protection for the individuals who comprise these groups. The peace treaties with Italy, Rumania, Hungary, and Finland all provide that each state was to "take all measures necessary to secure to all persons the enjoyment of human rights and fundamental freedoms. . . ." In addition, the Hungarian and Rumanian treaties also contain a provision (Article 2) forbidding "any discrimination between persons of Hungarian (Rumanian) nationality on the grounds of race, sex, language or religion."<sup>82</sup>

It can be argued that the collective enjoyment of these individual rights implicitly grants minority groups the right to exist. Such an analysis ignores the fact, however, that these bilateral treaty provisions and their multilateral equivalent, the Universal Declaration of Human Rights, use the same approach as the U.S. Constitution in which rights guaranteed are those of "persons" or "citizens" and in which there is no reference to minority groups.<sup>83</sup> This type of approach clearly represents the assimilationist ideal. Any analysis

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79. It has been stated categorically that a tribe is not a legal unit of international law. See *Cayuga Indian Claims Arbitration* (Great Britain v. United States), NIELSON REP. 203, 307 (1926); also, Marshall, C.J., in *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 578 (1823). But such attempts emphasize more their lack of statehood or their lack of allegiance to and right of protection by a foreign power. The tribes stand alone in their dealings with the United States or Canada. But that does not mean that they have no legal existence any more than it could be said that an individual has no legal existence.

80. *United States v. Jim*, 409 U.S. 80 (1972). In this same case the Navajo Tribe was granted leave to file a brief as *Amicus Curiae*.

81. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1970).

82. Treaty of Peace with Roumania, Feb. 10, 1947, art. 3, 61 Stat. 1799, 1801 (1947); Treaty of Peace with Hungary, Feb. 10, 1947, art. 2, 61 Stat. 2109, 2112 (1947).

83. Particularly, the Fifth and Fourteenth Amendments to the U.S. Constitution.

which reads a great deal into these instruments must be tempered by a recognition of this element.

Another international instrument which may prove deceptive on its face is the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>84</sup> The Convention certainly aims at the protection of minorities, at least against physical and biological destruction. The Ad Hoc Committee drafting the convention had specifically wanted to include *cultural* genocide as a species to be prohibited,<sup>85</sup> but strong opposition by the United States and France defeated the idea and as a result the convention avoids all mention of cultural and political genocide.<sup>86</sup>

Thus, if read literally, the Genocide Convention may be interpreted as guaranteeing the right to exist as a minority group. In practice, however, the convention has been interpreted as guaranteeing *members* of minorities the right to exist, and not necessarily as assuring the existence of the group itself.<sup>87</sup>

One of the most striking aspects of relatively recent international agreements is the absence of reference to minority protection where such reference would seem appropriate. Most notable is the lack of provisions in the various treaties granting autonomy to former colonies with large minority populations<sup>88</sup> and in the Universal Declaration of Human Rights.<sup>89</sup> These intentional omissions tend to dampen the already weak provisions in the few treaties which deal with the subject matter.

Yet, on the whole, it appears that the various international protective measures can reasonably be interpreted as according minority groups the right to exist. An exceedingly helpful United Nations study<sup>90</sup> breaks down those areas in which protective measures have been taken. The following shows the number of protective measures taken in international treaties and instruments both before World War II and afterwards:

(1) Grants of Local Autonomy—four prewar/two postwar;<sup>91</sup>

(2) Guarantees of political representation of minorities—none prewar/eight postwar;<sup>92</sup>

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84. Convention for the Prevention and Elimination of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951).

85. CLAUDE, *supra* note 2, at 154-5.

86. Kung, *The Present Status of the International Law for the Protection of Minorities*, 48 AM. J. INT'L L. 285 (1954).

87. LAPONCE, *supra* note 2, at 34.

88. Hauser, *supra* note 58, at 100.

89. CLAUDE, *supra* note 2, at 154-55.

90. Protection of Minorities, *supra* note 14.

91. *Id.* at 47.

92. *Id.* at 48.

- (3) Protection of nationality—eleven prewar/two postwar;<sup>93</sup>
- (4) Protection of family law or personal status—four prewar/three postwar;<sup>94</sup>
- (5) Use of language:
  - a. in general intercourse—thirteen prewar/ten postwar;<sup>95</sup>
  - b. in courts—thirteen prewar/five postwar;<sup>96</sup>
  - c. in social and charitable institutions, religious and educational establishments—13 prewar/seven postwar;<sup>97</sup>
  - d. in various information media—none prewar/seven postwar;<sup>98</sup>
- (6) Social, charitable and religious institutions and educational establishments:
  - a. religious and charitable—thirteen prewar/two postwar;<sup>99</sup>
  - b. educational establishments—thirteen prewar/five postwar;<sup>100</sup>
  - c. sacred places—four prewar/one postwar.<sup>101</sup>

From this breakdown it is clear that there has been substantial international legislation to protect minorities. Additionally, on the customary law level, in some parts of the world, notably Eastern and Central Europe, the right *not* to be assimilated is considered a basic human right.<sup>102</sup> Yet not too much can be made of the combination of these factors. There are essentially two levels of protection of minorities—toleration and encouragement.<sup>103</sup> At the most, international law currently gives minority groups the right to be tolerated. Any progress in the protection of minorities will be directed either towards strengthening provisions relating to toleration of minorities, or towards creating means actually to encourage their existence. The latter course is highly unlikely and open to serious inquiry as to its desirability where it leads to chronic political instability. The former course, that is the strengthening of the basic right to be tolerated, could very well be followed in the near future. The various factors which led to 25 years of virtual inactivity are changing significantly. Furthermore, new factors exist which may increasingly push the international community towards new activity.

## VI. MINORITIES TODAY

As previously discussed, the minorities vogue in the League was replaced by a concern for individual human rights in the United Nations. It is clear, however, that the minorities problem, a strict and

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93. *Id.* at 49.

94. *Id.* at 49-50.

95. *Id.* at 50-52.

96. *Id.* at 52-53.

97. *Id.* at 53-54.

98. *Id.* at 55.

99. *Id.* at 55-56.

100. *Id.* at 56-57.

101. *Id.* at 57-58.

102. CLAUDE, *supra* note 2, at 165.

103. Robinson, *supra* note 20, at 91.

logical corollary of the principle of self determination of nations, did not disappear.<sup>104</sup>

With the rapid decline of colonialism following World War II and the concurrent emergence of nation-states all over the world, the world's minorities, locked within the borders of states, have increased rather than decreased. Violence and terrorism have marked the path of minorities as they have had to fend for themselves in the absence of any international commission or treaty system.<sup>105</sup> For example, the Tibetans, the Indians of Uganda,<sup>106</sup> the Kurds of Iraq, the Nagas of northwestern India, the Biafrans, the tribes of Upper Burma, the Huks and Mohammedan tribes of the Philippines, the Nubiana of southern Sudan, the Baltic nations, and to a lesser extent the Ukrainians, the Croats of Yugoslavia, the French Canadians and the Basque of northwestern Spain have all been unsuccessful in their efforts.

The Bengalis have been more fortunate.<sup>107</sup> However, paradoxically, their success has created two new minorities within Pakistan and Bangladesh. The reported proposed solution is a mass transfer of the Biharis (260,000) from Bangladesh to Pakistan.<sup>108</sup>

The Irish Catholic of Northern Ireland and the Palestinian Arabs are in the throes of a violent struggle for political identity, with partial success to date by the former.<sup>109</sup>

There has been some limited postwar international legal recognition of this struggle of minorities. Europe, through the Human Rights Convention sponsored by the Council of Europe, has given some help to minorities in that sector of the world. Two cases are illustrative. The first concerned the Austrians living on the Italian side of the Alps where their treatment by the Italian government was a sensitive issue in Austria. In 1961, the Austrian government charged the Italian officials with improper conduct in the trial of several Italian citizens

104. Kung, *supra* note 86, at 282.

105. Three recent texts outlining various aspects of this struggle are C. ENLOE, *ETHNIC CONFLICT AND POLITICAL DEVELOPMENT* (1973); A. RABUSHKA & K. SHEPALE, *POLITICS IN PLURAL SOCIETIES* (1972); and E. NORDLINGER, *CONFLICT REGULATION IN DIVIDED SOCIETIES* (1973).

106. See *The East African Asians Human Rights Case* (United Kingdom) heard by the European Human Rights Commission on Sept. 27, 1971 for the right of East African Asians to enter Great Britain. *Press Communiqué*, Council of Europe, c(71)22, Oct. 1, 1971. If fully adhered to by all nations the International Convention on the Elimination of all Forms of Racial Discrimination would be of assistance to minorities.

107. Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 *DEN. L. J.* 53 (1972).

108. *N.Y. Times*, Apr. 18, 1973, at 1, col. 1; *id.*, Apr. 27, 1973 at 36, col. 2.

109. On March 20, 1973, Great Britain proposed, among other things, a greater political sharing of power by the Catholic minority with the Protestant majority in Ulster. *N.Y. Times*, March 21, 1973, at 16, col. 1.

of Austrian nationality for attacks on an Italian policeman.<sup>110</sup> The Italian government finally arranged for a certain degree of local autonomy for the area.

The second was the "Belgium Linguistic Case" between the French speaking Belgians and the Belgian government over the latter's denial of the former's right to be educated in their own language.<sup>111</sup> The court held in part for the French speaking children on the basis of Article 14 of the European Human Rights Convention which guarantees the enjoyment of language without discrimination.

On a higher level, the International Court of Justice has continued the concept of a legal existence for a group not yet a state in its 1962 opinion on the mandated territory of South West Africa:

The Administrative supervision by the League constituted the normal security to pursue full performance by the Mandatory of the sacred trust toward the inhabitants of the territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.<sup>112</sup>

These actions constitute only a small response to a most serious problem. Yet the chances for more meaningful international responses are increasing. One reason for multilateral inaction has been the ideology of assimilation propounded in the United Nations by the United States. This factor is necessarily diminished as the U.S. hegemony in the United Nations declines. Moreover, the doctrine of assimilation is no longer such a sacred ideal within the United States itself, as clearly evidenced by the separatist movement and strong activism by many Black Americans,<sup>112</sup> Indians, Chicanos, Puerto Ricans and others, and the philosophical support minority group rights are receiving from diverse sectors of the society.

Other factors responsible for the world policy in the late 1940's are either weakened or have disappeared altogether. Whatever Cold War factors were important are not nearly as strong today. The colonial problems which received so much attention, to the detriment of minority rights, are for the most part solved. Finally, the bitter memories of the abuses of the League System have long since faded.

110. 4 YEARBOOK OF THE CONVENTION ON HUMAN RIGHTS—1961, at 116-83 (1962).

111. *Legal News*, Council of Europe c(68)27, July 23, 1968; 8 INT'L LEGAL MATERIALS 825 (1969).

112. Judgment in the South West African Cases (Ethiopia v. South Africa; Liberia v. South Africa, Dec. 21, 1962, [1962-1963] I.C.J.Y.B. 84; for further developments see, South West African Cases (2d Phase), July 18, 1966 wherein Liberian and Ethiopian claims against South Africa were rejected, [1965-66] I.C.J.Y.B. 83; also, Advisory Opinion of the Legal Consequences for Status of the Continued Presence of South Africa in Namibia, June 21, 1971, [1970-1971] I.C.J.Y.B. 100.

Thus, the way is more open for international cooperation for protection of minorities than at any point in the past 25 years. How much action will be taken no doubt depends on how vocal national minorities become and to what degree their problems will affect international peace and security.

## VII. CONCLUSION

There has been in this century a rise and fall of minority rights in international law. After World War II, the League and its minority consciousness passed quickly into history. While international concern for minorities is temporarily at a low point, at the very least, minority groups remain established subjects of international law. More importantly, they are still with us, increasingly vocal, and demanding their place in the national and international sun.<sup>114</sup>

It appears that the future of minorities may lie, where independence is not possible, in a form of autonomy within the particular nation-state concerned, where its members may both maintain their cultural heritage and participate fully in the benefits of the larger society. Yet their preservation now rests with the individual state, a future that, in many cases, brooks of conflict and either assimilation or extinction. It is, therefore, apparent that international cooperation to secure even tolerance of minorities may become necessary and desirable in the not so distant future. This diversity within the family of man is not something to be lightly lost. It enriches both the national and international scene. Its value has been summarized by the French historian-philosopher, Jean Danielou:

The existence of civilizations altogether unlike our own is thus by no means something to be resented, or extinguished. . . . The full beauty of mankind would be diminished by the loss of China's distinctive contribution, or that of the Arabs or the Negroes. Every race and every tongue gives expression to some irreplaceable aspect of humanity. Each language, in particular, has its own genius, its special capacity for handling certain ideas.<sup>115</sup>

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113. Hauser, *supra* note 58 at 95.

114. A recent edition of the COLUMBIA UNIVERSITY JOURNAL OF INTERNATIONAL AFFAIRS is devoted exclusively to this current interest in minorities in the nation-state. See, *Symposium, Political Integration in Multinational States*, 27 J. INT'L AFFAIRS 1-141 (1973).

115. J. DANIELOU, *THE LORD OF HISTORY* 58 (1958).

