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### Minority rights and freedom of expression: a dynamic interface

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## Chapter 1 – Protection of minority rights under international law

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*World is crazier and more of it than we think,  
Incorrigibly plural.*

- Louis MacNeice<sup>1</sup>

### Introduction

The primary function of this chapter is that of scene-setting. It introduces the main rationales for the recognition, protection and promotion of the rights of persons belonging to minorities in international law. It also explains the deep difficulties involved in defining the concept of a minority for the purposes of international law. It then provides an overview and critique of the main international treaty provisions dealing with the rights of persons belonging to minorities. This overview includes elements of historical and political contextualisation. Finally, some tentative predictions about the likely future development of minority rights will be proffered.

### 1.1 Theories of minority rights

Truly homogenous societies are virtually non-existent in contemporary Europe; any pockets of homogeneity that have managed to survive at all tend to be small and scattered. Pluralism in modern society can therefore be taken as a given. It is also a *sine qua non* of democratic society (see further, *infra*).

The choice of epigraph to introduce this chapter serves to point up the tendency to view pluralism in negative terms, rather than celebrate its enriching properties. To regard pluralism as incorrigible is to liken it to an irreversible phenomenon, an irretrievable situation or an incurable ill. According to such a logic of negativity, unfamiliarity feeds distrust and suspicion, which in turn feed tension and animosity. It is a kind of logic that suggests a slippery slope, but it also testifies to ingrained societal wariness of deviations from dominant

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<sup>1</sup> Louis MacNeice, 'Snow', in *Louis MacNeice Poems selected by Michael Longley* (London, Faber & Faber Ltd., 2001), p. 18.

social or cultural norms.<sup>2</sup> Particularly during periods of heightened societal tension – such as the present and enduring post-9/11 climate, the otherness of minorities is projected as a threat: to human rights; to societal values; to political unity; to national security. The fear of clashes between co-habiting cultures looms large (we are told) and to honour rights of participation and autonomy would invite secession and further splintering of society (we are assured) – is it any wonder that such emotive issues tend to leave politics at sixes and sevens?

This logic is preoccupied with notions of otherness, and the essence of membership of a minority group is, by definition, all about otherness. One of the greatest preliminary challenges facing the international regime for minority rights protection is to counter this logic, and to counter it resoundingly. It is only by countering prevailing attitudes that an environment conducive to the assertion of the positive and inclusive goals of minority rights protection can be created.

While certain sections of the political and media communities would not think twice about lumping minorities and immigrants together into one and the same category (and then meting out the same disparaging treatment to both), the actual definitional picture is much more complex. There is a significant hiatus between prevailing sociological understandings of the term ‘minority’ and its generally accepted meaning in the context of international human rights law. The latter is considerably more restrictive than the former, which includes the ordinary, everyday sense of the term.<sup>3</sup> Some line-drawing and qualification are therefore necessary at the very outset.

No hard-and-fast definition of a minority group has yet achieved unanimous acceptance in international human rights law. Of the definitions that have enjoyed widest currency, there is a discernible tendency to stipulate certain objective characteristics pertaining to such groups (especially ethnicity or nationality, language and religion) which would qualify them as minorities. It is also widely accepted that these objective characteristics must co-exist with a subjective criterion, namely that members of the group should share a consciousness of their status as a group (on the basis of the aforementioned objective characteristics) and a desire to preserve/develop that cohesion. The application of such criteria when determining whether a group may have minority status obviously restricts how widely the net of recognition can be cast.

A looser, more open-ended approach to the definition of minorities in sociological circles means that a broader range of social groups could be considered to have minority status. When the distinctiveness of a group does not have to be aligned in terms of shared ethnic, national, linguistic or religious characteristics, there is no shortage of other shared characteristics that could be chosen to replace them. Sexual orientation, age and (dis)ability instantly spring to mind.<sup>4</sup>

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<sup>2</sup> In this connection, it is perhaps of anecdotal interest to note that in various languages, largely synonymous terms denote foreignness and strangeness. In French, *étranger* means foreign(er) and outside(r). In Dutch, *vreemdeling* means foreigner or literally, stranger. In the Irish language, *coimhthíoch* has a variety of meanings, including alien, foreign, unfamiliar, strange, outlandish... it is only rarely used in the more positive-sounding sense of “exotic”. Indeed, an Irish proverb states that the outsider gets the blame for everything: *An mhaith is an t-olc i dtóin an choimhthígh*. This discussion is also ongoing in sociological circles. See, for example, William B. Gudykunst & Young Yun Kim, *Communicating with Strangers: An Approach to Intercultural Communication* (3<sup>rd</sup> Edition) (McGraw-Hill Companies, Inc., USA, 1997), esp. pp. 24-27.

<sup>3</sup> See further: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, p. 491.

<sup>4</sup> See further: Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990), p. 64.

The range of characteristics deemed to be constitutive of identity for the purposes of international law will be examined in s. 1.2, while the important differences between social minorities and minorities as recognised under international human rights law will be explored in greater detail in s. 1.5.

Another crucial question meriting preliminary treatment is whether there is any need for specific minority rights, given the impressive panoply of individualistic human rights enshrined in international law in the aftermath of the Second World War and fortified ever since. In order to provide an adequate answer to this question, two considerations must be addressed: (i) the purpose of minority rights/protection;<sup>5</sup> (ii) the added value of minority rights.

Minority rights can, in theory, serve any number of purposes. As will be seen in s. 1.3, international law has tended to root minority rights provisions in objectives of existence/survival and non-discrimination/equality. The right to group or cultural identity is also frequently invoked. Central to the mandate of the OSCE High Commissioner on National Minorities is conflict prevention, another aim of minority rights protection.

Combinations of purposes are also possible, and indeed, all of the goals mentioned above have been braided together by some commentators. Athanasia Spiliopoulou Akermark, for instance,<sup>6</sup> focuses on peace and security (concepts which “entail not only the absence of war and conflict but also the absence of threat”<sup>7</sup>); human dignity (which she describes as “a right to self-preservation (existence), accompanied by a right to develop one’s own personality according to an own plan of life (self-fulfilment)”<sup>8</sup>); cultural identity and diversity.

The essential reasons for seeking to protect the interests of minority groups can also be extrapolated from a pronouncement of the Permanent Court of International Justice:

[...] to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.<sup>9</sup>

While the particulars and variables are open to change, depending on circumstances, the basic puzzle/conundrum remains the same: finding optimal ways to reconcile the State’s legitimate interest in integration, on the one hand, with minorities’ interests in “non-exclusion, non-assimilation and non-discrimination”,<sup>10</sup> on the other. Integration “differs fundamentally from assimilation”; rather it “consists in the development and maintenance of a common domain where equal treatment and a common rule of law prevails, while allowing for pluralism” to

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<sup>5</sup> Athanasia Spiliopoulou Akermark has postulated that there is a significant difference between minority rights and minority protection: the latter is preferred by her, on the grounds that it is more expansive, covering the recognition of rights and other methods of protecting minorities.

<sup>6</sup> Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (The Hague, Kluwer International Law, 1997), p. 68 *et seq.*

<sup>7</sup> *Ibid.*, p. 71.

<sup>8</sup> *Ibid.*, p. 78.

<sup>9</sup> *Minority Schools in Albania*, Permanent Court of International Justice, Advisory Opinion, p.

<sup>10</sup> Asbjorn Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes – Essays in Honour of Erica-Irene A. Daes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 83-97, at 96-97.

thrive in other areas, such as culture, language and religion.<sup>11</sup> This is perhaps best qualified as equitable integration, based on the principles of parity of opportunity and parity of esteem for all sections of society.

It is important to frame the conundrum within political parameters such as these because secessionist claims and fears often distract from core minority rights. Misunderstandings of any (putative) secessionist consequences of minority rights and the true import of the right of peoples to self-determination often confound debates on minority rights: these topics (and recurrent misunderstandings of their meanings) will be treated in s. 1.3.

The added value offered by a regime of minority rights to broader human rights protection under international law will now be analysed, but only in conceptual terms. The added *substantive* value of specific minority rights will be scrutinised in s. 1.4. The very notion of minority rights was until recently considered a vexed one in international law circles. It is a close cousin of other equally vexed notions, in particular the so-called “three generations” of human rights (i.e., civil and political rights; social, economic and cultural rights, and so-called solidarity rights (eg. right to development, peace, environmental protection, etc.)<sup>12</sup>) and group rights as human rights.

On one reading, human rights inhere in every individual by virtue of his/her humanity or morality.<sup>13</sup> As such, the argument runs, there can be something very contrived about trying to ascribe *human* rights to groups *qua* groups.<sup>14</sup> Such a thesis does not in any way deny the existence of group rights; it merely objects to their classification as human rights. The argument is not merely the academic rehearsal of dogmatic nicety. Given the moral and fundamental nature of human rights,<sup>15</sup> and their ability to “trump”<sup>16</sup> other (run-of-the-mill, legal) rights, it is (or at least can be) important to have a clear idea of whether rights are also human rights.

Further refinement can be added to the debate when one begins to examine various conceptions of group rights. If these are conceived as collective rights (i.e., with all group members exercising certain rights jointly as opposed to severally), then a plausible case can be made for describing the group rights “as human rights or as closely akin to human rights”.<sup>17</sup> On the other hand, if group rights are styled as corporate<sup>18</sup> rights (i.e., exercised by a corporate (possibly even representative) body on behalf of all members of the group), then they cannot legitimately be described as human rights *stricto sensu*. Peter Jones furnishes the additional argument that “they are also rights grounded in whatever gives those corporate

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<sup>11</sup> Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Working paper submitted to the Sub-Commission on Promotion and Protection of Human Rights of the UN commission on Human Rights, 27 April 2000, E/CN.4/Sub.2/AC.5/2000/WP.1.

<sup>12</sup> For a concise overview, see: Cees Flinterman, “Three Generations of Human Rights”, in Jan Berting *et al.*, Eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (USA, UNESCO/Roosevelt Study Center, 1990), pp. 75-81.

<sup>13</sup> Jack Donnelly, “Human Rights, Individual Rights and Collective Rights” in *ibid.*, pp. 39-62, at 41.

<sup>14</sup> *Ibid.*, p. 43.

<sup>15</sup> Koo van der Wal, “Collective Human Rights: A Western View”, in *ibid.*, pp. 83-98, at 88.

<sup>16</sup> See generally: Ronald Dworkin, *Taking Rights Seriously* (Great Britain, Duckworth & Co. Ltd., 1977).

<sup>17</sup> Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights”, 21 *Human Rights Quarterly* (1999) pp. 81-107, at 88.

<sup>18</sup> “Corporate” is used here in the non-commercial sense of the term.

entities their special moral status rather than rights grounded in the status of humanity or personhood”.<sup>19</sup> This thesis has also been relied on by others.<sup>20</sup>

The foregoing has documented some theoretical tensions in the abstract debate concerning the competing merits of individual and group rights for assuring minority rights in international law, and indeed concerning the legitimacy of group rights as human rights. Some commentators, however, have sought to play down the importance of theoretical discord, opting instead to formulate the *problématique* – as they see it - in the vocabulary of liberal democratic theory:

Focusing solely on whether the rights are exercised by individuals or groups misses what is really at issue in cases of ethnocultural conflict. The important question is whether the familiar system of common citizenship rights within liberal democracies – the standard set of civil, political and social rights which define citizenship in most democratic countries – is sufficient to accommodate the legitimate interests which people have in virtue of their ethnic identity. Are there legitimate interests which people have, emerging from their ethnocultural group membership, which are not adequately recognized or protected by the familiar set of liberal-democratic civil and political rights...<sup>21</sup>

From a purely purposive point of view, it becomes apparent by returning to Akermark’s collation of justifications for the protection of minorities in international law, *supra*, that these tensions do not carry over into the practice of international law. Each of the three justifications mentioned have a different focus and necessitate different types of protection:

1. Such measures [i.e., “justifications”] may wish to ensure human dignity and the well-being of the individuals belonging to a minority. Rights which have as an underlying interest the good of human dignity, are individual human rights. This is *individual oriented minority protection*.
2. Such measures may wish to ensure the preservation of the minority group and the minority culture as such. Here the purpose of international law is to [/] protect culture, cultural diversity and pluralism. In this case the method of protection may be that of collective processes, including collective rights; This purpose of minority protection is more *group or subject oriented*.
3. Finally, minority protection may aim at preventing inter-state and intra-state conflicts, at the preservation of peace and security, in which case the protection is mainly *state oriented*.<sup>22</sup>

These findings, drawn from a debate conducted *in abstracto*, can equally be drawn from a similar debate which is informed by theory as well as a normative consideration of contemporary international law.

Under the modern international human rights regime heralded by the adoption of the United Nations Charter, individuals are typically the beneficiaries, and therefore, the subjects of human rights. Consequently, some commentators would argue that the existing range of individual rights should suffice to cover all the rights to which minorities lay claim (with the possible exception of the right of peoples to self-determination), especially if these rights

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<sup>19</sup> *Ibid.*

<sup>20</sup> For example, Jack Donnelly writes: “There is no necessary logical incompatibility between the idea of human rights and peoples’ rights (or other group rights) – so long as we see peoples’ rights as the rights of individuals acting as members of a collective group, and not rights of the group against the individual.” - Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, in Jan Berting *et al.*, Eds., *Human Rights in a Pluralist World: Individuals and Collectivities*, *op. cit.*, pp. 39-62, at 48.

<sup>21</sup> Will Kymlicka & Ian Shapiro (Eds.), “Introduction”, in Ian Shapiro & Will Kymlicka, Eds., *Ethnicity and Group Rights* (New York, New York University Press, 1997), pp. 3-21, at 4.

<sup>22</sup> Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law*, *op. cit.*, pp. 83-4.

were to be enforced more effectively than is presently the case.<sup>23</sup> This would appear to be a thesis advanced by Nigel Rodley, who favours the inclusion of such rights under existing legal safeguards for non-discrimination and equality, suggesting that “the notion of minority rights [...] is and should be treated as a conceptual diversion.”<sup>24</sup>

It is submitted here that there are two fundamental flaws in this line of argumentation. First, it underestimates the collective/group/communitarian/associative dimension to minority lifestyles and ensuing rights. This group element is an important qualitative difference between traditionally-recognised individual rights and the rights enjoyed by minorities. Indeed, all concepts of rights for minority groups are premised on the group dimension to relevant individual rights. The example of discrimination is illustrative of the importance of this group dimension as it “generally takes place because somebody belongs to a racial, political, social or linguistic community”.<sup>25</sup> As a result, discrimination usually “presupposes the existence of a minority community and the victim’s membership of that group.”<sup>26</sup> Another pertinent example is freedom of association, which is rendered meaningless for members of minority groups if assembly for the purpose of promoting cultural issues is ruled beyond the purview of this freedom.

The importance and pervasiveness of cultural interests within concepts of minority rights tie in with the second criticism of Rodley’s approach: it overestimates the potential of non-discrimination and equality provisions to guarantee all minority rights. To focus exclusively on non-discrimination and equality is to ignore the importance of cultural, educational, autonomy, identity (and other) rights for minorities. Gudmundur Alfredsson has argued that group rights are needed not only to ensure “equal enjoyment” of the aforementioned rights, but also “to otherwise approximate circumstances enjoyed by the majority, to allow individuals to draw on the strength of their groups, and to facilitate interaction of groups with the States in which they live and with international organizations”.<sup>27</sup>

A shift of focus is therefore required in order to appreciate that one key specificity of minority rights is their dual nature: the collective dimension of a distinct spectrum of individual rights. While the need for a right may be individual (eg. the right to use one’s mother tongue), the exercise of the right can conceivably be collective and therefore dependent on interaction with others (eg. the ability to *effectively* use one’s mother tongue). This is what Gabor Kardos terms “the interdependence of the individual and collective elements”<sup>28</sup> of minority rights. Further, Kardos has emphasised that the collective dimension of individual rights (i) “never removes the individual’s right to have recourse to the courts in defence of the given right” and (ii) does not “divide the right into two parts, producing separate rights for the individual and for the collectivity.”<sup>29</sup>

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<sup>23</sup> Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, *op. cit.*, p. 49.

<sup>24</sup> Nigel S. Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 17 *HRQ* 1995, p. 71.

<sup>25</sup> Gabor Kardos, “Human Rights: A Matter of Individual or Collective Concern?”, in Istvan Pogany, Ed., *Human Rights in Eastern Europe*, pp. 169–183, at 172.

<sup>26</sup> *Ibid.*

<sup>27</sup> Gudmundur Alfredsson, “A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, 7 *International Journal on Minority and Group Rights* (2000), pp. 291-304, at 295.

<sup>28</sup> *Ibid.*, p. 173.

<sup>29</sup> *Ibid.*, p.174.

In light of the foregoing observations, it can be said that rights protected as minority rights are often a fusion, or symbiotic co-existence, of individual and collective rights. There is a steadily growing body of opinion that discounts the notion that there is a clear conceptual cleavage between individual and collective rights. We can therefore conclude, along with John Packer, that no such dichotomy exists;<sup>30</sup> rather it is often a case of “continuity and complementarity” between them.<sup>31</sup>

## 1.2 Definitional dilemmas

A precise and universally-acclaimed definition of a minority has eluded the drafters of international instruments to date. This state of affairs is the product of a combination of factors, most notably intractable conceptual differences and the adoption of intensely politicised and unyielding stand-points by State authorities/representatives (see further section 1.3, *infra*).

Undoubtedly, agreement on and the adoption of a legal definition of a minority would greatly enhance legal certainty in this domain, but in the absence of such a definition (and no realistic prospects of achievement of the same), other techniques have been adopted in order to circumvent this potential obstacle to progress.

It has been asserted [in relation to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities] that “a precise definition is not necessary, that the answer is known in 90 percent or more of the possible cases, and that governmental and intergovernmental practice, including the jurisprudence of judicial organs, will eventually bring clarity to any remaining problems.”<sup>32</sup> The same confidence in an ability to identify minority groups underlies the now-famous quip by the first OSCE High Commissioner on National Minorities, Max van der Stoel, “I know a minority when I see one”,<sup>33</sup> a remark which set the tone for his tenure of the position.

This prompts two observations. First, particularly in the early years of the Office’s existence, the OSCE HCNM worked the current vagueness as regards definitions to great advantage in the discharge of his mandate. The flexibility of approach that the Office has enjoyed is a direct consequence of the definitional vacuum. It is submitted here that such flexibility is ideally suited to the particular mandate of the HCNM, *viz.* preventive diplomacy (see further, s. 1.3, *infra*). Second, although greater definitional firmness could have helped to raise levels of certainty and predictability, it could also have resulted in a more rigid and therefore restrictive approach to minority issues. The correct definitional balance to be struck remains a significant challenge for international law.<sup>34</sup>

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<sup>30</sup> John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell and Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 223-273, at 241 *et seq.*

<sup>31</sup> Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights”, *op. cit.*, p.

<sup>32</sup> Gudmundur Alfredsson & Alfred de Zayas, “Minority Rights: Protection by the United Nations,” 14 *Human Rights Law Journal* 1993, pp. 1 – 9, at p. 3.

<sup>33</sup> (paraphrasing Potter Stewart J. (speaking of pornography), in *Jacobellis v. Ohio*, 378 US 184 (1964)) Max van der Stoel, “Prevention of Minority Conflicts”, in Louis B. Sohn, Ed., *The CSCE and the Turbulent New Europe* (1993).

<sup>34</sup> For further discussion of definitional and other relevant criteria, see: Stephen J. Roth, “Toward a Minority Convention: Its Need and Content”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff Publishers, 1992), pp. 83-116, and Richard Bilder, “Can Minorities Treaties Work?”, in *ibid.*, pp. 59-82.

Meanwhile, the elusiveness of clear consensus among academics, activists and States explains why the definition designed for the application of Article 27, ICCPR, first proposed by Francesco Capotorti, then Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1979, is still very much *de rigueur* today. He defines a minority in the following terms:

[A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>35</sup>

Despite the proven ability of this definition to endure, it includes a number of features (some of which are potentially problematic) which merit further elucidation:

- Numerical inferiority
- Non-dominance
- Nationality
- Range of distinctive, constitutive characteristics
- Sense of solidarity
- Combination of objective and subjective criteria for recognition

Each of these will be addressed in turn, after briefly dealing with a crucial preliminary consideration.

Despite its well-documented failings (see further, s. 1.3, *infra*), the League of Nations can boast a jurisprudential legacy that is of certain (persuasive) value to the modern international human rights order. Some of the most fundamental principles concerning contemporary international protection for minorities can be traced to this period. Take, for instance, the seminal observation of the Advisory Opinion of the Permanent Court of International Justice (PCIJ) in the *Greco-Bulgarian “Communities”* case: “The existence of communities<sup>36</sup> is a question of fact; it is not a question of law”.<sup>37</sup> The importance of the principle articulated in the PCIJ’s observation cannot be overstated.<sup>38</sup> In effect, it means that the existence of a minority group, and consequently, the international protection to which its members are entitled, are not contingent on the official recognition of such a group by State authorities. Rather the existence of a minority is determined by various criteria, which in practice tend to be both objective and subjective. The most frequently cited criteria crop up in the Capotorti definition and will now be examined.

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<sup>35</sup> Para. 568, p. 96.

<sup>36</sup> Author’s footnote: the vogue term for ‘minority’ at the relevant time was ‘community’.

<sup>37</sup> Advisory Opinion No. 17, July 31, 1930, *Series B, No. 17*, pp. 4 – 46, at p. 22. See also the corroborating statement at p. 27: “it is incorrect to regard the “community” as a legal fiction existing solely by the operation of the laws of the country.”

<sup>38</sup> Rosalyn Higgins has asserted that the UN Human Rights Committee regards the question of the existence of minorities (under Article 27, ICCPR) to be “an *objective and verifiable fact*” (emphasis added), thereby reinforcing the PCIJ formulation: Rosalyn Higgins, “Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System” in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Vol. III) (Martinus Nijhoff Publishers, Dordrecht, 1994), pp. 195-209, at 200.

### *Numerical inferiority*

The requirement that the group be “numerically inferior to the rest of the population of a State” has given rise to what John Packer has dubbed the “problems of numbers”.<sup>39</sup> Athanasia Spiliopoulou Akermark opines that it is necessary, in the interest of legal certainty, to determine the scope of the rights accorded to national minorities.<sup>40</sup> Geoff Gilbert strikes a similar chord when he writes that “one cannot accord rights to wholly nebulous concepts”.<sup>41</sup> It is worth noting at this juncture that the proposed wording for the article to deal with minorities considered at the first session of the Drafting Committee of the ICCPR included a reference to “a substantial number of persons of a race, language or religion other than those of the majority of the population...”<sup>42</sup>

The conceptual concretisation of the scope of minority rights is also crucial from an administrative point of view, in order to specify the extent of entitlements arising out of such rights. Gilbert, again, points out that: “while a minority must be numerically smaller than the majority population, it must also constitute a sufficient number for the State to recognise it as a distinct part of the society and to justify the State making an effort to protect and promote it. There must be a group, not simply a few individuals.”<sup>43</sup> This observation is an important consideration in respect of the State’s role in ensuring distributive justice throughout its jurisdiction. While it cannot be gainsaid that some sort of proportionality in this regard generally tends towards the achievement of substantive social equality (as opposed to equality which is purely formal), the needs and desires of a group cannot and should not be calculated merely in numerical or quantitative terms. It is widely held that cognizance should also be taken of the kind of “historical inequities” alluded to in the *Lubicon Lake Band* case,<sup>44</sup> for instance.<sup>45</sup>

### *Non-dominance*

The allusion to “historical inequities” serves as a useful bridge between considerations of numerical strength and non-dominance, as in practice, both usually coincide. In addition, reference should also be made to what Patrick Thornberry has termed the “reverse minority” situation in South Africa that prevailed during the apartheid years.<sup>46</sup> This was a rare example

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<sup>39</sup> John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 260.

<sup>40</sup> Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law*, *op. cit.*, p.

<sup>41</sup> Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *HRQ* 1996, p. 162.

<sup>42</sup> The proposal *E/CN.4/21*, annex A (Secretariat) art. 46 [27], as cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, p. 493.

<sup>43</sup> Geoff Gilbert, “The Legal Protection Accorded to Minority Groups in Europe”, *XXIII Netherlands Yearbook of International Law* 1992, pp. 67-104, at 72-73.

<sup>44</sup> United Nations Human Rights Committee, Communication No. 167/1984, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, 10 May 1990, para. 33. Ted R. Gurr considers that discriminatory treatment directed at a minority grouping can be the result of widespread social practice and/or deliberate government policy, or “the residue of historical circumstances” – T. Gurr, *op. cit.*, p. 6. He has also referred to “the enduring heritage” of major historical processes in this connection, *ibid.*, p. 34.

<sup>45</sup> It is interesting to note that some commentators prefer a *tabula rasa* approach to minorities and the discrimination that has defined their history. See, for example, Cesar Birzea: “The treatment of minorities should not be directed towards the past but towards the future. In so doing, care must be taken to avoid the temptations of nostalgia, the idea of collective culpability or retroactive sanctions,” in *Human rights and minorities in the new European democracies: educational and cultural aspects*, p. 33.

<sup>46</sup> Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 9; a situation also alluded to by John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 261.

of numerical inferiority not going hand in hand with a position of non-dominance, thus thwarting the applicability of standard definitions of a minority.

It is appropriate to stress the importance of the non-dominant feature of the Capotorti definition because a major current in minority rights seeks to redress positions of societal non-dominance. This feature is therefore inextricably bound up in considerations of non-discrimination and equality, which are explored in concrete terms in section 3, *infra*.

### *Nationality*

The requirement that members of a minority group ought to also be nationals of a State has proved contentious, as it fails to provide for complicated exceptions (eg. the application of restrictive criteria for the acquisition of citizenship; foreign kinship; nomadic lifestyles; patterns of migration and immigration). While these exceptional circumstances may not always be compatible with accepted understandings of a minority under international human rights law, further reflection on the exclusionary potential of the nationality criterion would be welcome. The debate has often veered towards the desirability of the term “national minority” (which is included in many other legal texts – though without necessarily being defined). Attempts to determine the precise meaning of the term have proved particularly problematic. The various arguments that have animated the relevant debate are examined in detail in the context of the analysis of the Council of Europe’s Framework Convention for the Protection of National Minorities in section 3, *infra*.

### *Range of distinctive, constitutive characteristics*

It has been reasoned by one commentator, Ted R. Gurr, that: “In essence, communal groups are psychological communities: groups whose core members share a distinctive and enduring collective identity based on cultural traits and lifeways that matter to them and to others with whom they interact”.<sup>47</sup> He continues:

People have many possible bases for communal identity: shared historical experiences or myths, religious beliefs, language, ethnicity, region of residence, and, in castelike systems, customary occupations. Communal groups – which also are referred to as ethnic groups, minorities and peoples – usually are distinguished by several reinforcing traits. The key to identifying communal groups is not the presence of a particular trait or combination of traits, but rather the shared perception that the defining traits, whatever they are, set the group apart.

In order to facilitate the task of identifying minorities that are entitled to specific protection under international law, there is a tendency to home in on certain characteristics that collectively give shape to group identity. These characteristics should distinguish group members from the rest of the population. This exercise has revealed a preference for markers such as ethnic, linguistic and religious criteria. The centrality of generic features such as ethnicity, language and religion to minority identity is explored extensively in section 5, *infra*. For the moment, it is sufficient to draw attention to the conviction that such characteristics are so deeply ingrained in minority identity, so immutable, that they provide permanent indicators of the distinctiveness of the group.

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<sup>47</sup> Ted R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, United States Institute of Peace, 2000), p.

This kind of thinking prevailed for a long time, but more recently, it has been subjected to sustained challenges, most notably on the grounds that (group) identity cannot be regarded as a static, unchanging concept. Put simply, groups evolve and adapt and so do their identities. Another argument which has the wind in its sails at the moment is that group identity cannot be regarded as homogenous. It is a composite concept, comprising an array of individual identities. Notwithstanding the important points of commonality among these individual identities, the collective identity must also reflect its inherent variegation and nuances. A third criticism of these constitutive characteristics is that they are too traditional and restrictive. In other words, they exclusively reflect traditional markers of identity and thereby fail to countenance the possibility that groups defined in terms of their sexual orientation might be considered as a minority under international law. The suitability of these constitutive characteristics for application in contemporary times is revisited in detail in s. 1.4, *infra*.

### *Sense of solidarity*

Without wishing to invite any unnecessary semantic quibbling, the sense of solidarity referred to here can be read as being essentially a sense of cohesion. It refers to a consciousness among group members that they constitute a distinct group by virtue of sharing certain characteristics. Moreover, there must be a willingness to preserve the group. Marlies Galenkamp is highly critical of reliance (specifically by Will Kymlicka, but presumably also by others) on (as she puts it) “the wish to preserve one’s own culture”.<sup>48</sup> However, as a foil to her criticism, it could be argued (as has already been done *supra*) that culture is a defining element of minority identity, thus conferring extra legitimacy on its conception as a right to be honoured by States.

In addition to the symbolic importance of this sense of solidarity, there are very obvious practical considerations at play. In the absence of any internal feeling of cohesion within the group, any attempts to preserve the group as a group would have a presumably external or one-sided dynamic and would consequently be very contrived.

The Capotorti definition notes that the requisite sense of solidarity need not be express or formal. Rather, it can be implicit and even merely inferred from the behaviour of members of the minority group. The acceptance of implicit expressions of cohesive tendencies is to the advantage of groups that do not boast elaborate (or indeed any) internal organisational structures. Nevertheless, from an ultra-practical perspective, as has been posited by Michael Walzer, it remains a truism that “The survival and flourishing of the groups depends largely upon the vitality of their centers”.<sup>49</sup>

### *Combination of objective and subjective criteria for recognition*

As already mentioned *supra*, State recognition is never a prerequisite for determining the existence of a minority. Indeed, the United Nations Human Rights Committee has stated as

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<sup>48</sup> Marlies Galenkamp, “The Rationale of Minority Rights: Wishes Rather Than Needs?”, in Juha Raikka, Ed., *Do We Need Minority Rights? Conceptual Issues* (The Hague, Martinus Nijhoff Publishers, 1996), pp. 41-57, at 47.

<sup>49</sup> Michael Walzer, “Pluralism: A Political Perspective”, in Will Kymlicka, Ed., *The Rights of Minority Cultures* (New York, Oxford University Press, 1995), pp. 139-154, at 152.

much in its General Comment 23: “The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria”.<sup>50</sup> If this were not the case, Patrick Thornberry has argued, “the protection afforded by Article 27 would be nullified by simple legislative inaction on the part of States”.<sup>51</sup>

However, flowing from the aforementioned requirement that there be some kind of *esprit de groupe* within the group, based on its shared distinctive characteristics, along with the desire to nurture such a sense of cohesion, the definitional criteria for minorities can be described as double-barrelled (i.e., objective and subjective):

*Objectively*, the group at issue must constitute a non-dominant minority of the population (usually a relatively small percentage of the population, even if a substantial number of people), and its members must share distinctive characteristics such as race, religion or language. Some of those characteristics will be natural, immutable; others (subject to cultural constraints) may be open to change. *Subjectively*, (most) members of this group must hold or evidence a sense of belonging to the group, and evidence the desire to continue as a distinctive group.<sup>52</sup>

By way of conclusion to this section and in the interests of comprehensiveness, a couple of other significant definitions of a minority ought to be referenced. Among the earlier attempts at a legal distillation of a minority was the aforementioned Advisory Opinion of the PCIJ in the *Greco-Bulgarian “Communities”* case:

By tradition, which plays so important a part in Eastern countries, the “community” is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.<sup>53</sup>

In 1985, Jules Deschênes submitted a new definition to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities for its consideration. The Deschênes proposal was essentially a refinement of the Capotorti definition, differing only slightly from its forerunner.<sup>54</sup> The main points of difference were that it would have excluded indigenous populations, non-citizens and majority groups in non-dominant positions. It reads:

A group of citizens of a State, constituting a numerical minority in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differs from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive, and whose aim it is to achieve equality with the majority in fact and in law.<sup>55</sup>

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<sup>50</sup> United Nations Human Rights Committee General Comment 23/50, para. 5.2.

<sup>51</sup> Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 157.

<sup>52</sup> Henry J. Steiner & Philip Alston, *International Human Rights in Context*, *op. cit.*, p. 988.

<sup>53</sup> *Op. cit.*, p. 21.

<sup>54</sup> For a meticulous comparison of the Capotorti and Deschênes definitions, see: Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 7.

<sup>55</sup> UN document E/CN.4/Sub.2/1985/31.

This proposed definition failed to win “general approval” by the Sub-Commission, and the Sub-Commission itself stated as much when passing the study containing the proposed definition to the UN Commission on Human Rights.<sup>56</sup>

### 1.3 Minority rights under international law: international instruments and jurisprudence

#### *Introduction*

For present purposes, the focus will be on what can loosely be referred to as the post-World War II era; an era when concerted efforts were made to develop and systemise a modern conception of human rights law at the international and regional levels. Prefaced by a brief exploration of the *status quo ante*, the analysis will comprise the largely UN-dominated standard-setting and enforcement at the international level, as well as various comparable endeavours at the European level.

Throughout the history of international law there are examples of protective treaties concluded for the benefit of specific groups; the treaty is the paradigmatic instrument recognizing the right of minorities to fair treatment. The treaties produce a wilderness of single instances rather than any comprehensive scheme.<sup>57</sup>

The historical pattern thus described by Patrick Thornberry was interrupted, however, by the establishment of the League of Nations.<sup>58</sup> While it is widely accepted that the protection afforded minorities under the League of Nations constellation of treaties – despite its documented imperfections – represented a major development in international law, the continued direct relevance of the principles and practices it developed is disputed. The better view would appear to be that the legal inheritance in question is merely of persuasive value. This view builds on the argument that the international legal and political order underwent such fundamental upheaval during World War II that the new post-war dispensation was a completely new departure, built on new conceptual foundations and comprising new political architecture. In light of this fundamental change of circumstances,<sup>59</sup> the principle of *rebus sic stantibus* is taken to apply,<sup>60</sup> thereby prompting commentators such as Thornberry to refer to the advent of the UN taking place in a *tabula rasa* situation.<sup>61</sup>

The absolute baseline for minority rights protection is a guarantee for their existence and first and foremost their physical existence. On the basis of this thinking, “the protection of minorities through individual rights was backstopped by a convention designed [/] to prevent the most egregious violation of minority rights: the Convention on the Prevention and

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<sup>56</sup> Sub-Commission Resolution 1985/6, preambular para. 5. See further, Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, in Philip Alston, Ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992), pp. 211-264, at 222.

<sup>57</sup> Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 25 (footnotes omitted).

<sup>58</sup> For the history of the League of Nations, with a special emphasis on its efforts and achievements in the realm of minority rights protection, see: Eduardo Ruiz Vieytez, *The History of Legal Protection of Minorities in Europe (XVIIth – XXth Centuries)*; John Eppstein, *Ten Years’ Life of the League of Nations* (London, May Fair Press, 1929); Natan Lerner; Athanasia Spiliopoulou Akermark; ...

<sup>59</sup> See further, Article 62 of the Vienna Convention on the Law of Treaties, which deals with the issue.

<sup>60</sup> This was the contemporaneous approach adopted by the fledgling UN; for background details, see: John P. Humphrey, *Human Rights & the United Nations: a great adventure* (New York, Transnational Publishers, Inc., 1984), pp. 47-48.

<sup>61</sup> Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p.

Punishment of the Crime of Genocide”.<sup>62</sup> The absolute nature of the prohibition of genocide is underlined by unanimous acceptance that it constitutes a crime under customary international law as well. Indeed, the Convention codifies customary international law in this respect.

In Article I of the Convention,<sup>63</sup> the Contracting Parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II sets out the definition of “genocide”:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- ( a ) Killing members of the group;
- ( b ) Causing serious bodily or mental harm to members of the group;
- ( c ) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- ( d ) Imposing measures intended to prevent births within the group;
- ( e ) Forcibly transferring children of the group to another group.

Article III lists the acts punishable under the Convention as: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

While the final text of the Genocide Convention focuses on the physical existence of groups, serious consideration was given in the drafting process to the notion of “cultural genocide”, which was defined in one version of the draft Convention as follows:

Destroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical, artistic or religious value and of objects used in religious worship.<sup>64</sup>

In another draft text of the Convention, “cultural genocide” was taken to mean:

[...] any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

- 1 Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
- 2 Destroying or preventing the use of libraries, museums, schools, historical institutions and objects of the group.<sup>65</sup>

Together, these proposed definitions illustrate the approximate scope of the notion. The vagueness of the notion and the interpretative difficulties to which it would lead in practice appear to have been the most persuasive arguments in the intense debates which eventually

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<sup>62</sup> Charles F. Furtado, Jr., “Guess Who’s Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe” 34 *Colum. Hum. Rts. L. Rev.* 333 (2003), at p. 338-339.

<sup>63</sup> Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948; entry into force 12 January 1951.

<sup>64</sup> Article I of the Secretariat’s Draft Convention, as cited in Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 71.

<sup>65</sup> Article III of the Ad Hoc Committee’s Draft Convention, as cited in *ibid.*, p. 72.

led to a decision to drop the notion of “cultural genocide” from the Convention at a late stage in the drafting process. Thornberry concludes that “the majority opinion [in the relevant debates] seems to have been that genocide is *sui generis*, and must be differentiated from questions of human and minority rights”.<sup>66</sup>

Notwithstanding the narrow definitional focus ultimately prescribed for the Genocide Convention, the right to existence implies more than just physical existence. The right also includes the right to exist on a given territory, especially when a minority group has special (historical, cultural, religious, etc.) attachment to the same. It also includes the right of access of minorities to “the material resources required to continue their existence on those territories”.<sup>67</sup> In addition to these physical, territorial and basic subsistence rights involved in the right to existence, its “cultural and spiritual dimensions” also merit recognition.<sup>68</sup> Indeed, a case could even conceivably be built for the inclusion of a right to “permanent sovereignty over natural resources”,<sup>69</sup> at least insofar as it relates to the territorial-based cultural objectives of minority groups.<sup>70</sup>

### 1.3.1 Universal instruments with provisions concerning minority rights

An acute awareness of the urgent and perduring nature of minority rights is reflected in the institutional structures of the United Nations. Article 68 of the UN Charter provides for the creation of a Commission on Human Rights under the auspices of the Economic and Social Committee (ECOSOC)<sup>71</sup> to develop and implement the provisions of the Charter relating to human rights and fundamental freedoms. The protection of minorities comes within the remit of the Commission. Under the specific authorisation of ECOSOC, the Commission established its Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>72</sup> (later renamed as the Sub-Commission on the Promotion and Protection of Human Rights). Over time, the mandate of the Sub-Commission expanded considerably beyond its dual eponymous objectives.<sup>73</sup> In 1995, the UN Working Group on Minorities was

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<sup>66</sup> *Ibid.*, p. 73.

<sup>67</sup> Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *op. cit.*, p. 5.

<sup>68</sup> Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, in Alan Phillips and Allan Rosas, Eds., *Universal Minority Rights* (Abo Akademi University Institute for Human Rights/Minority Rights Group, Turku/Abo and London, 1995), pp. 13-76, at 40.

<sup>69</sup> See further, James Crawford, “The Rights of Peoples: ‘Peoples’ or ‘Governments’?”, in James Crawford, Ed., *The Rights of Peoples* (Great Britain, Oxford University Press, 1988), pp. 55-67, at 63-65.

<sup>70</sup> See Section 4(iv), *infra*, for citations for relevant UN HRC and ECHR cases.

<sup>71</sup> Article 7 of the UN Charter provides for the establishment of ECOSOC as one of the “principal organs” of the UN. Its functions and powers are set out in Articles 62 *et seq.* of the UN Charter. Of particular importance for present purposes is Article 62(2), which reads: “It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”. Article 62(3) is of similar importance: “It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence”. Also worthy of mention is Article 64, which empowers ECOSOC to obtain reports from specialised UN agencies. Currently, it coordinates the activities of 14 of the UN specialised agencies, 10 functional commissions and five regional commissions.

<sup>72</sup> See further: Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, in Philip Alston, Ed., *The United Nations and Human Rights* (Clarendon Press, Oxford, 1992), pp. 211-264.

<sup>73</sup> See further, *ibid.*, at 213; 222-226.

set up under the auspices of the Sub-Commission.<sup>74</sup> Relevant responsibilities have now been taken over by the Human Rights Council.

However, this (institutional) consciousness has not always translated into action. To date, no United Nations *convention* specifically addresses minority rights in an exclusive manner. Moreover, neither the United Nations Charter nor the Universal Declaration of Human Rights (UDHR) – the two foundational documents of the post-World War II regime of international human rights law - contains any specific mention of minority rights (as distinct from association with a minority as one of the listed grounds of impermissible discrimination). The initial draft (the so-called “Secretariat Outline”) of the UDHR did, however, include a provision dealing specifically with minority rights,<sup>75</sup> which read:

In states inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public<sup>76</sup> funds available for the purpose, their schools and cultural and religious institutions, and to use their own language before the courts and other authorities and organs of the state and in the press and in public assembly.<sup>77</sup>

As will duly be shown, the definitional component of this provision includes some of the main elements of other leading definitions of minority rights. Its purposive component, however, is more far-reaching than similar provisions that were subsequently incorporated into various UN treaties. Its express provision for an equitable portion of available public funding to be ear-marked for minorities to allow them to pursue the text’s stated provisions was particularly far-reaching and proved very controversial. When René Cassin revised the initial draft of the UDHR, he removed the reference to public funding because France did not allocate funds to private educational institutions.<sup>78</sup> Even without the reference to public funding, the proposed article remained so controversial that the Human Rights Commission dropped it, with the result that the draft text sent to the UN General Assembly did not include any provision focusing specifically on minority rights.

This omission is generally explained by the conceptual complexity and political sensitivity of the issue, as well as the high level of divergence in relevant State practice.<sup>79</sup> A number of States (including many Latin American States), either with assimilationist policies or particular understandings of the concept of “minorities”, claimed that minorities did not exist on their territories and were therefore opposed to the very idea of an article guaranteeing

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<sup>74</sup> It was established pursuant to ECOSOC Resolution 1995/31 of 25 July 1995. See further: Asbjorn Eide, “Commentary: Global and regional approaches to situations involving minorities”, in *Filling the Frame*, *op. cit.*, pp. 51-58, at 54-55.

<sup>75</sup> The draft text was prepared by the Division of Human Rights (i.e., John Humphrey and his staff): UN Yearbook on Human Rights for 1947 (Lake Success, United Nations, 1949), p. 484; also reproduced in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, Inc., 2001), at 270-274.

<sup>76</sup> Note to self: Humphrey, p. 69, omits the word “public”, whereas Glendon, p. 274, includes it.

<sup>77</sup> Article 46, *ibid.*

<sup>78</sup> Explanation given subsequently by the French delegate, Mr. Samuel Spanien: Doc. E/CN.4/Sub.2/SR.11, p. 20. See also: Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l’homme* (Louvain, E. Warny, 1964), p. 288; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 69.

<sup>79</sup> See, for example, Francesco Capotorti, *op. cit.*, p. 27, Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, *op. cit.*, p. 220. The changes introduced by the so-called “Cassin draft” were, in the main, more stylistic than substantive: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, *op. cit.*, at 64. The “Cassin draft” is reproduced in *ibid.* at 274-280.

special rights to minorities.<sup>80</sup> Also, in keeping with the prevailing legal thinking of the day, some of the drafters of UN Charter and the UDHR presumed that strong non-discrimination and equality provisions would assure adequate protection for the human rights of all and sundry, including minorities.<sup>81</sup> These two reasons go a long way towards explaining the omission of specific provisions for the protection of minority rights from the Charter and UDHR.

Nevertheless, the issue was not erased from the UN agenda, but continued (nominally and initially, at least) to command a high level of priority. On the same day as the UN General Assembly adopted a Resolution proclaiming the Universal Declaration of Human Rights,<sup>82</sup> it adopted another Resolution entitled “Fate of Minorities”.<sup>83</sup> That Resolution stated that the United Nations could not remain indifferent to the fate of minorities, even if the issue was fraught with complications. It called on the Sub-Commission to “make a thorough study of the problem of minorities” with a view to enabling the UN to “take effective measures for the protection of racial, national, religious or linguistic minorities”.<sup>84</sup> The Resolution was clearly intended as a sop for the non-inclusion of a specific article on minority rights in the Universal Declaration of Human Rights. Although the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities went about its task diligently, it encountered considerable political resistance in the Human Rights Commission and ECOSOC.<sup>85</sup> In fact, it has been claimed that its commitment to the question of the “fate of minorities” was one of the reasons why ECOSOC sought, unsuccessfully, to abolish the Sub-Commission in 1951.<sup>86</sup>

The ICCPR marks a shift from the line of thinking that prevailed during the drafting of the UDHR, at least insofar as its text and *travaux préparatoires* reveal concerns that the envisaged provisions of non-discrimination and equality would prove insufficient for safeguarding the rights of individuals belonging to minorities. It was clearly felt that supplementary, complementary provisions would be required to redress the envisaged shortcomings of the draft text.<sup>87</sup> This viewpoint eventually won the day, leading to the drafting and inclusion of what would become Article 27, ICCPR.

Of the existing conventions that do contain provisions treating minority rights, the ICCPR and the Convention on the Rights of the Child (CRC), are the two which lay the strongest claim to being universally applicable. However, in both cases, only one article deals specifically with minorities. Article 27, ICCPR reads:

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<sup>80</sup> Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l'homme*, *op. cit.*, at 289 *et seq.*; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 69.

<sup>81</sup> Natan Lerner, “The Evolution of Minority Rights in International Law,” in Catherine Brölmann *et al.*, Eds., *op. cit.*, pp. 77-101, at 87; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 20 and 69.

<sup>82</sup> UN General Assembly Resolution 217 A (III) of 10 December 1948.

<sup>83</sup> UN General Assembly Resolution 217 C (III) of 10 December 1948.

<sup>84</sup> UN General Assembly Resolution 217 C (III) of 10 December 1948, para. 5. For details of how the Sub-Commission went about carrying out this study, see Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, *op. cit.*, at 220 *et seq.*

<sup>85</sup> John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 56 and 69-70. See further, *ibid.*, at 103.

<sup>86</sup> *Ibid.*, at 70.

<sup>87</sup> “It was agreed that, while article 2, paragraph 1, and article 24 [26] of the draft Covenant on Civil and Political Rights contained a general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the other elements of the population. It was felt that an article on this question should be included in the draft Covenant on Civil and Political Rights.”: Commission on Human Rights, 5<sup>th</sup> Session (1949) – A/2929, Chapt. VI, Para. 183, as cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*

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 practise their own religion, or to use their own language.

Striking textual similarities reveal the extent to which Article 30, CRC, was modelled on Article 27, ICCPR:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous, shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

While there is broad consensus that Article 27, ICCPR, is the “preeminent”<sup>88</sup> provision in positive international law vouchsafing minority rights, it is also widely recognised that the provision nevertheless only offers “fairly modest”<sup>89</sup> protection. The crucial phrase, “shall not be denied” *prima facie* sets the tone for the entire article. The choice of wording seems begrudging and parsimonious. Indeed, one leading commentator went so far as to claim that “A weaker statement than the one in Article 27 could, however, be hard to imagine”.<sup>90</sup> The emergence of the final wording can be easily traced in the drafting history of the article.<sup>91</sup> An earlier proposal by the USSR for a more positive wording (“the State shall ensure to national minorities the right [...]”) was rejected for fear that “under such a text which imposed a positive obligation on States, minority consciousness could be artificially awakened or stimulated”.<sup>92</sup> It was generally felt among State delegations that the phrase, “shall not be denied the right [...]”, “seemed to imply that the obligations of States would be limited to permitting the free exercise of the rights of minorities”.<sup>93</sup>

However, in its General Comment 23, the UN Human Rights Committee has interpreted the phrase as allowing for a more positive reading than its apparent negativity would suggest. The operative paragraphs are phrased as follows:

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. [...]<sup>94</sup>

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<sup>88</sup> Henry J. Steiner & Philip Alston, *International Human Rights in Context*, p. 992.

<sup>89</sup> Manfred Nowak, “The Evolution of Minority Rights in International Law,” *op. cit.*, p. 104

<sup>90</sup> John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, p. 102.

<sup>91</sup> See further, Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, at 496; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, *op. cit.*, at 500.

<sup>92</sup> UN Commission on Human Rights, 9<sup>th</sup> Session (1953), as quoted in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, at 496.

<sup>93</sup> *Ibid.*

<sup>94</sup> See also para. 9, *ibid.*, which refers, *inter alia*, to the “specific obligations” imposed on States by Article 27, and the duty of States “to ensure that the exercise of these rights is fully protected”.

Thus, Article 27, ICCPR, not only sets out positive obligations for States, it even goes so far as to envisage the horizontal application of those obligations, as is clear from the final sentence in para. 6.1. This emphasis on the *specific* (positive) duties of States *vis-à-vis* minority rights is consistent with the *general* duties to which States Parties are bound by virtue of Article 2, ICCPR. It reads (in part)<sup>95</sup>:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

In its General Comment No. 31, the UN Human Rights Committee stresses that the obligation under Article 2(1) to “respect and ensure” Covenant rights has “immediate effect” for all States Parties and that Article 2(2) provides the “overarching framework” within which those rights are to be “promoted and protected”.<sup>96</sup> The legal obligation enshrined in Article 2(1) “is both negative and positive in nature”, implying that as well as refraining from violating any Covenant rights, States must equally “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.<sup>97</sup> Furthermore, States’ positive obligations under Article 2(1) “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”.<sup>98</sup>

The foregoing analysis of relevant General Comments establishes that States are under clear and strong positive obligations in the field of minority rights protection. It can therefore be concluded that these positive obligations serve to offset the narrowness and negativity suggested by the actual wording of Article 27, ICCPR. However, such a reading asks profound questions about the importance of the doctrine of original intent, and of the competing merits of literal and teleological/purposive approaches to the interpretation of treaties. It could also be taken as casting certain doubt on the role of *travaux préparatoires* for treaty interpretation generally.<sup>99</sup>

Article 27 offers little in the way of elucidation as to the individual/collective nature of the rights its negative formulation purports to safeguard.<sup>100</sup> As has already been demonstrated, *supra*, minority rights do not necessarily have to be individual rights. A shift of focus is required in order to appreciate the unique nature of minority rights, or, to employ its most

<sup>95</sup> Article 2.3 concerns the availability of effective remedies and their enforceability by competent authorities.

<sup>96</sup> General Comment No. 31 [80] – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2187<sup>th</sup> meeting), para. 5.

<sup>97</sup> *Ibid.*, paras. 6, 7.

<sup>98</sup> *Ibid.*, para. 8. It continues: “There may be circumstances in which a failure to ensure Covenant rights permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”. See further: Article 2(3), ICCPR.

<sup>99</sup> See in this connection: Jan Klabbbers, “International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?”, *Netherlands International Law Review* (2003), pp. 267-288.

<sup>100</sup> For a synthesis of various viewpoints on the question of whether individuals or groups are the relevant right-holders for the purposes of Article 27, see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, p. 498.

frequently-used formulation, “the rights of persons belonging to minorities”. Manfred Nowak points out that this formula was introduced at the drafting stage of the text of the ICCPR by the British delegation because according to the prevailing judicial thinking of the day, groups *qua* groups could not be the holders of rights.<sup>101</sup>

Whatever about its persuasive power, this conclusion was an inaccurate reading of international law at the time,<sup>102</sup> and even moreso when judged against the standards of today. The concept of right-holding groups was already well-established in the contemporary canon of international human rights law (eg. Genocide Convention) and it was to be reaffirmed in the context, *inter alia*, of the right of peoples to self-determination in the ICCPR and ICESCR, which would imminently be concluded. It would have been more accurate and less disingenuous for the British delegation to have argued that there was limited precedent for the recognition of group rights in international law. In sum, although practice has proven the original assertion to be incorrect, the drafters of the ICCPR rejected an exclusively group-oriented formulation of the provision securing minority rights protection.

As stated in General Comment No. 23, what is at issue in Article 27 is “a right which is conferred on individuals belonging to minority groups” to enjoy their own culture, to profess and practise their own religion, and/or to use their own language.<sup>103</sup> Francesco Capotorti, however, is at pains to point out that the final choice of phraseology for Article 27 “limits, but certainly does not exclude, the existence of purely individual rights of persons belonging to minorities (e.g., the right to hold opinions without interference).”<sup>104</sup> This interpretation of Article 27 reverberates in General Comment No. 23, which describes the right in question as being “distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they [i.e., individuals belonging to minority groups] are already entitled to enjoy under the Covenant”.<sup>105</sup> This is also consistent with Capotorti’s findings in his seminal report, where he wrote that:

Article 27 does not refer to minority groups as the formal holders of the rights described in it, but rather stresses the need for a collective exercise of such rights. Therefore it seems justified to conclude that a correct construction of this norm must be based on the idea of its double effect – protection of the group and its individual members [...].<sup>106</sup>

It has succinctly been pointed out by Patrick Thornberry that the drafters of the ICCPR created “a hybrid between individual and collective rights because of the ‘community’ requirement”, as such an approach “presupposes a community of individuals endowed with similar rights”.<sup>107</sup> This prompts him to describe the rights in question as “benefiting individuals but requiring collective exercise”.<sup>108</sup>

The use of the verb “exist” in Article 27 has generated considerable discussion, particularly as regards whether it connotes a particular degree of permanence. Relevant discussions were fuelled by General Comment No. 23, which scotches such notions. The adoption of such an

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<sup>101</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, p. 483.

<sup>102</sup> See further in this connection, Manfred Nowak, *ibid.*, p. 495.

<sup>103</sup> General Comment 23, para. 1.

<sup>104</sup> Francesco Capotorti, “Are minorities entitled to collective international rights?”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 505-511, at p. 511.

<sup>105</sup> *Ibid.*

<sup>106</sup> Francesco Capotorti, “Are minorities entitled to collective international rights?”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 505-511, at pp. 507/8.

<sup>107</sup> Patrick Thornberry, *International Law and the Rights of Minorities, op. cit.*, p. 173.

<sup>108</sup> *Ibid.*

approach by the Human Rights Committee prompted Hurst Hannum to reason that: “The Committee does not refer to the relevant legislative history to support its conclusions, and the General Comment is perhaps best interpreted as representing the personal views of Committee members than an authoritative interpretation of the text of the Covenant. At the same time, however, the [/] expansive reading is generally consistent with the more detailed principles set forth in the 1992 General Assembly Declaration”.<sup>109</sup>

The question of nationality as a criterion for determining an individual’s membership of a minority grouping must be considered in distinct contexts: that of universally applicable legal standards and that of analogous European provisions. As regards UN-sponsored standards, individuals do not have to be nationals of a given State to enjoy the rights to which members of that State’s own minorities can ordinarily lay claim. General Comment 23 is instructive in the matter of the scope of the applicability of Article 27’s provisions: “the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone”.<sup>110</sup> Thus, by way of corollary, any consideration of (degrees of) permanence of residence in this connection is redundant.<sup>111</sup>

In practice, reservations and heavy-handed declarations have been entered in respect of Article 27. It is likely that refusals to enter into the spirit of the operative article were prompted by (i) a fear that it would lead to obligations to take affirmative action (including the financial implications which such obligations would incur) in order to improve the lot of minorities, or (ii) a genuine belief that the cause of national unity would be best served by integrationist or assimilationist policies (with the assumption that similar treatment for all persons on a national territory, amounting to formal, legal equality, would be sufficient from a human rights perspective). Thornberry has commented that “some of the disclaimers on the existence of minorities in a State reveal rather tortuous and evasive reasoning”.<sup>112</sup>

France is the most eminent European country to have given formal expression to its objections to Article 27. The French Government, upon ratification of the ICCPR, declared, *inter alia*, that Article 27 of the Covenant was not applicable in France, in light of Article 2 of the 1958 French Constitution.<sup>113</sup> A similar declaration was made by the French authorities in respect of Article 30 of the CRC, upon ratification of that Convention. In its consideration of the last Periodic Report submitted by France under Article 40 of the ICCPR, the United Nations Human Rights Committee was critical of France’s continued refusal to endorse the provisions of Article 27:

The Committee has taken note of the avowed commitment of France to respect and ensure that all individuals enjoy equal rights, regardless of their origin. The Committee is, however, unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities. The

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<sup>109</sup> Hurst Hannum, “New Minority Rights for the Twenty-First Century”, in Yael Danieli, Elsa Stamatopoulou & Clarence J. Dias, Eds., *The Universal Declaration of Human Rights: Fifty years and beyond* (New York, United Nations Publishing, 1999), pp. 163-173, at 169-170.

<sup>110</sup> General Comment 23, para. 5.1.

<sup>111</sup> *Ibid.*, para. 5.2.

<sup>112</sup> Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 158.

<sup>113</sup> Article 2 of the Constitution of the Fifth French Republic (1958) reads: “La langue de la République est le français. L’emblème national est le drapeau tricolore, bleu, blanc, rouge. L’hymne national est la Marseillaise. La devise de la République est Liberté, Égalité, Fraternité. Son principe est: gouvernement du peuple, par le peuple et pour le peuple »

Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country, and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group.<sup>114</sup>

The Committee has repeatedly held France's 'declaration' made in respect of Article 27 "to be tantamount to a reservation and [that it] therefore precludes the Committee from considering complaints against France alleging violations of article 27 of the Covenant".<sup>115</sup>

### *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, has been hailed as being "a document that is more assertive than previous UN instruments".<sup>116</sup> This is largely because of its pro-active overall tenor. Article 1 enjoins States to adopt appropriate legislative and other measures with a view towards promoting minority identities; an objective (and concomitant requirement) that reverberates in Article 4.2. The Declaration, although adopted by consensus, does not create any legal obligations on the governments of its States signatories. Nor does it define minority rights or provide an exhaustive enumeration thereof. The Declaration does, however, represent a pronounced shift in the UN's approach to minority rights, moving from a negatively formulated focus on non-discrimination (Article 27, ICCPR) to the more positive-sounding language of protection and promotion. The importance of the 1992 Declaration was affirmed, *inter alia*, by references to it in the 1993 Vienna Declaration (para. 19) and Programme of Action (Section B2, paras. 25-27).<sup>117</sup> The substance of its individual provisions are analysed at appropriate junctures in s. 1.4, *infra*.<sup>118</sup>

### *UN institutional approaches to minority rights*

ECOSOC Resolution 1995/31 provided for the establishment of the UN Working Group on Minorities as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.<sup>119</sup> It acted primarily as a forum for dialogue, involving minorities, States representatives and other interested parties, until its functions were subsumed in those of the newly-created Human Rights Council.

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<sup>114</sup> Concluding observations of the Human Rights Committee: France. 04/08/97. CCPR/C/79/Add.80, para. 24.

<sup>115</sup> *C.L.D. v. France*, Communication No. 439/1990, UN Doc. CCPR/C/43D/439/1990 (1991), para. 4.3. See also, *T.K. v. France*, declared inadmissible on 8 November 1989, para. 8.6 and Appendices I and II (Annual Report 1990, A/45/40, Vol. II, Annex. X.A).

<sup>116</sup> P. Dunay, "Nationalism and Ethnic Conflicts in Eastern Europe: Imposed, Induced or (Simply) Reemerged," in I. Pogany (Ed.), *Human Rights in Eastern Europe*, pp. 17-45, at p.34.

<sup>117</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>118</sup> See further: Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update", in Alan Phillips and Allan Rosas, Eds., *Universal Minority Rights* (Abo Akademi University Institute for Human Rights/Minority Rights Group (International), Turku/Abo and London, 1995), pp. 13-76; Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Working paper submitted to the Working Group on Minorities of the Sub-Commission on Promotion and Protection of Human Rights of the United Nations Commission on Human Rights, 27 April 2000.

<sup>119</sup> The Sub-Commission was formerly called the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The position of Independent Expert on Minority Issues was established by Resolution 2005/79 of the UN Human Rights Commission.<sup>120</sup> The mandate of the Independent Expert reads as follows:

- (a) To promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;
- (b) To identify best practices and possibilities for technical cooperation by the Office of the United Nations High Commissioner for Human Rights at the request of Governments;
- (c) To apply a gender perspective in his or her work;
- (d) To cooperate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates, mechanisms as well as regional organizations;
- (e) To take into account the views of non-governmental organizations on matters pertaining to his or her mandate;

The position was created for a two-year period and its first incumbent was Ms. Gay McDougall. The Resolution establishing the position requests the office-holder to “submit annual reports on his/her activities to the Commission, including recommendations for effective strategies for the better implementation of the rights of persons belonging to minorities”. In her first annual report, the Independent Expert identified “four broad areas of concern relating to minorities around the world, based on the Declaration on the Rights of Minorities and other relevant international standards relating to minority rights”.<sup>121</sup> They are:

- (a) Protecting a minority’s existence, including through protection of their physical integrity and the prevention of genocide;
- (b) Protecting and promoting cultural and social identity, including the right of individuals to choose which ethnic, linguistic or religious groups they wish to be identified with, and the right of those groups to affirm and protect their collective identity and to reject forced assimilation;
- (c) Ensuring effective non-discrimination and equality, including ending structural or systemic discrimination; and
- (d) Ensuring effective participation of members of minorities in public life, especially with regard to decisions that affect them.

Although the holder of the specialised mandate is called an Independent Expert, this official title does not necessarily reflect any distinction of status compared with other specialised UN mechanisms/mandates. The various titles employed to designate such experts (including special rapporteurs, independent experts, representatives of the Secretary-General or representatives of the Commission) “neither reflect a hierarchy, nor are they an indication of the powers entrusted to the expert”.<sup>122</sup> Rather, the titles of the mandates are the product of political negotiations.<sup>123</sup> Part of the thinking behind the establishment of the mandate was the view that “some challenges facing minorities have not been appropriately covered by existing mandates, for structural or functional reasons. As minority issues do not constitute the main focus of the existing mandates, inevitably the mandates are unable to reflect the full range of

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<sup>120</sup> Rights of persons belonging to national or ethnic, religious and linguistic minorities, Resolution 2005/79, Commission on Human Rights (61<sup>st</sup> session, 2005).

<sup>121</sup> Specific Groups and Individuals: Minorities, Report of the independent expert on minority issues, Gay McDougall, Commission on Human Rights (62<sup>nd</sup> session, 6 January 2006), E/CN.4/2006/74, para. 22.

<sup>122</sup> Seventeen frequently asked questions about the United Nations special rapporteurs, UN Human Rights Fact Sheets, No. 27, Geneva, 2001, p. 6.

<sup>123</sup> *Ibid.*

concerns relevant to minorities”.<sup>124</sup> In other words, the need was felt to create a mechanism that would strive to make the piecemeal nature of the system of protection of minorities more coherent and integrated.

### 1.3.2 European instruments with provisions concerning minority rights

The advantages of “the regional instrument” have been enumerated by Patrick Thornberry as the following:

- Grounding in a coherent political or cultural tradition;
- Greater possibilities of inter-state cooperation through proximity;
- Closer access for members of minority groups to centres of decision-making and enhanced possibilities of participation and redress of grievances.<sup>125</sup>

These observations can hardly be gainsaid, not least because they are the progeny of the sense of shared heritage and destiny that originally led to the drafting of the ECHR. The final preambular paragraph in the ECHR, for instance, refers to (a collectivity of) “European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”. Nevertheless, with the continuing growth of the CoE, the coherence of political and cultural traditions between Member States is being increasingly questioned.<sup>126</sup> The development of the principle and a culture of subsidiarity in decision-making is also of paramount importance, as will be demonstrated, *infra*. One should, however, additionally point to legal frameworks as another factor that attests to the strengths of regional resolutions of minority issues.

Firstly, geo-political and socio-economic considerations have given great thrust to European integration, through the efforts of various European IGOs. The overarching legal structures of these IGOs are therefore applicable to many – or in some cases, most – European States. While the majority of laws adopted and enforced or monitored by relevant IGOs do not directly concern minority rights issues, they undoubtedly play a formative role in shaping the legal environment in which specific laws are adopted and applied.

Secondly, the inevitable intertwining of destinies of neighbouring States results in broad parallelisms in the development of legal systems at the national level. Put more plainly, geographical proximity leads to shared or similar origins of legal systems; similar rates and triggers of development of those systems, and similar responses to issues with which they are confronted.

Taken together, these considerations are of great contextual importance.

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<sup>124</sup> Report of the High Commissioner for Human Rights on the rights of persons belonging to minorities, E/CN.4/2004/75. para.

<sup>125</sup> Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update”, *op. cit.*, at 61.

<sup>126</sup> Such questioning is, of course, much more pronounced in the case of the OSCE, which currently comprises 56 Participating States (as opposed to the Council of Europe’s 47).

### 1.3.2(i) Council of Europe/European Convention on Human Rights

The (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>127</sup> is the veritable bedrock of human rights protection in Europe. In keeping with other international human rights instruments elaborated contemporaneously with it, the ECHR takes a predominantly individualistic approach to human rights protection and contains no provision akin to Article 27, ICCPR. In other words, no *specific* rights are envisaged for minorities as such.<sup>128</sup> This was stated emphatically by the (now-defunct<sup>129</sup>) European Commission of Human Rights in *G. & E. v. Norway*, although it did also concede that “disrespect of the particular life style of minorities may raise an issue under Article 8”<sup>130</sup>.

Nevertheless, members of minority groups are not debarred from seeking redress for their grievances via the European Court of Human Rights. Procedurally, the Convention Article that is of most relevance in this regard is Article 34, which allows for groups of individuals to petition the Court:

#### Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

In practice, cultural associations,<sup>131</sup> churches,<sup>132</sup> political parties,<sup>133</sup> media outlets,<sup>134</sup> NGOs<sup>135</sup> and villages/communities<sup>136</sup> have all been found to have *locus standi* before the Court.

From a more substantive perspective, it is also possible for individual members of minority groups to make applications to the European Court of Human Rights by virtue of Article 14, ECHR. Like Article 1 (‘Obligation to respect human rights’), ECHR,<sup>137</sup> this Article is informed by the principle of equal enjoyment of rights by all. However, as stated by the former European Commission for Human Rights in *X. v. Austria*:

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<sup>127</sup> Adopted on 4 November 1950, CETS No. 5.

<sup>128</sup> [Insert appropriate references to *travaux préparatoires* here]

<sup>129</sup> The Commission was abolished pursuant to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, CETS No. 155, 11 May 1994 (entry into force: 1 November 1998).

<sup>130</sup> *G. & E. v. Norway*, Decision of inadmissibility by the European Commission of Human Rights of 3 October 1983, Appn. Nos. 9278/81 & 9415/81, paras. 1 and 7 at pp. 35 and 38, respectively.

<sup>131</sup> *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 2 October 2001.

<sup>132</sup> *Canea Catholic Church v. Greece*, Judgment of the European Court of Human Rights of 16 December 1997, Reports 1997-VIII, paras. 30, 31.

<sup>133</sup> *United Communist Party v. Turkey*, Judgment of the European Court of Human Rights (Grand Chamber) of 30 January 1998, Reports 1998-I.

<sup>134</sup> *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30.

<sup>135</sup> *Liberty & Others v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 1 July 2008.

<sup>136</sup> *Noack & others v. Germany*, Judgment of the European Court of Human Rights of ; *Konkama & 38 other Saami villages v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 25 November 1996, Appn. No. 27033/95.

<sup>137</sup> Article 1, ECHR, reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The Convention does not provide for any rights of a ... minority as such, and the protection of individual members of such minority is limited to the right not to be discriminated in the enjoyment of the Convention rights on the grounds of their belonging to the minority (Article 14 of the Convention).<sup>138</sup>

Article 14, entitled ‘Prohibition of discrimination’,<sup>139</sup> reads as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It can thus be seen that Article 14 enumerates a non-exhaustive list of impermissible grounds for discrimination. Among the enumerated grounds are, “national or social origin” and “association with a national minority”. The ascertainment of the precise meaning of the latter term has proved highly troublesome, although not so much in the context of the ECHR as the Framework Convention for the Protection of National Minorities (discussed *infra*). The European Court of Human Rights noted, *obiter dictum*, in *Gorzelik and others v. Poland* (see further, *infra*), that the formulation of a definition of “national minority” “would have presented a most difficult task”, given the absence of such a definition in any international treaty (even the FCNM).<sup>140</sup> The Court then balked at the opportunity to discuss what the essence of such a definition might entail (although it did provide a more reasoned explanation for its stance when the case was subsequently referred to the Grand Chamber).<sup>141</sup>

No free-standing right to non-discrimination was provided for in the original text of the European Convention. Article 14 prohibits discrimination merely in relation to “the rights and freedoms set forth” elsewhere in the Convention. Thus, whenever it is invoked, Article 14 must be pleaded in conjunction with other (substantive) rights guaranteed elsewhere in the ECHR. It can only be said to be autonomous to the extent that its application does not presuppose a breach of one or more of the other substantive provisions of the Convention or its Protocols.<sup>142</sup> However, it has been noted that “there seems to be a degree of uncertainty as to when and why the Court actually proceeds to an examination of Article 14 violations”.<sup>143</sup> Protocol No. 12 to the Convention was therefore devised in order to address the fact that

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<sup>138</sup> *X. v. Austria*, Application No. 8142/78, 18 DR 88 at 92-92 (1979).

<sup>139</sup> For a general overview of the application of Article 14, see: Janneke Gerards, “The Application of Article 14 ECHR by the European Court of Human Rights”, in Jan Niessen & Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden/Boston, Martinus Nijhoff Publishers, 2004), pp. 3-60.

<sup>140</sup> *Gorzelik & others v. Poland*, Judgment of the European Court of Human Rights (Fourth Section) of 20 December 2001, Application No. 44158/98, para. 62.

<sup>141</sup> *Gorzelik & others v. Poland*, Judgment of the European Court of Human Rights (Grand Chamber) of 17 February 2004.

<sup>142</sup> *Thlimmenos v. Greece*, Judgment of the European Court of Human Rights of 6 April 2000, para. 40. See also, *ibid.*, para. 44, and *Cha'are Ve Tsedek v. France*, Judgment of the European Court of Human Rights of 27 June 2000, para. 86.

<sup>143</sup> Sia Spiliopoulou Akermark, “The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?”, *Journal on Ethnopolitics and Minority Issues in Europe* (No. 3, 2002), p. 21 of article (note: *JEMIE* is an online journal and the page number cited here refers to the page in the article itself rather than a page number in the journal, as such), available at: <http://www.ecmi.de/jemie/>.

Article 14, ECHR, is essentially accessory in character.<sup>144</sup> The pith of the Protocol is ‘Article 1 – General prohibition of discrimination’, which reads:

- (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Having obtained the requisite 10 ratifications, Protocol No. 12 entered into force on 1 April 2005. It is still too early to tell what its exact impact will be at the European level and also in the domestic legal orders of Member States,<sup>145</sup> but it is likely to eventually prove portentous.

A purely literal reading of Article 14 suggests that the provision is restrictive in scope. However, some commentators have argued that a more teleological reading of the provision belies its apparently limited character.<sup>146</sup> A key argument in this connection is that following the far-reaching precedent set in *Thlimmenos v. Greece*,<sup>147</sup> Article 14 can be activated when the grounds for acts of (direct or indirect) discrimination – and not merely the actual acts of discrimination – are considered to come “within the ambit”<sup>148</sup> of another ECHR right.<sup>149</sup>

In *Thlimmenos*, the applicant was refused membership of the Greek Institute of Chartered Accountants (thereby in effect barring him from entry into the accounting profession) because of a previous conviction for a serious crime. The serious crime in question was insubordination for having refused to wear the military uniform at a time of general mobilisation. As a Jehovah’s Witness - and therefore a committed pacifist, the applicant had refused to wear the uniform because of his religious beliefs. He was nonetheless convicted and subsequently served a prison sentence. The European Court of Human Rights was of the view that the “set of facts” involved fell “within the ambit” of a Convention provision (Article 9 - Freedom of thought, conscience and religion), thereby rendering Article 14 applicable.<sup>150</sup> It found the imposition of a further sanction on the applicant as a result of his initial conviction to be disproportionate and that “there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime”.<sup>151</sup> The Court concluded that there had been a violation of the Article 14 *juncto* Article 9, because of

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<sup>144</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177. For commentary, see: Jeroen Schokkenbroek, “A New European Standard against Discrimination: Negotiating Protocol No. 12 to the European Convention on Human Rights”, in Jan Niessen & Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, *op. cit.*, pp. 61-79.

<sup>145</sup> As regards the Irish situation: Protocol No. 12 is not one of the Protocols to the ECHR listed in the Schedules to the European Convention on Human Rights Act 2003. In consequence, the Irish Act would have to be amended in order to enable further effect to be given to Protocol No. 12 in Ireland. Pending Ireland’s ratification of the Protocol and the relevant amendment of domestic legislation, the Irish courts could – but would not be obliged to - consider the (as yet non-existent) jurisprudence of the European Court of Human Rights dealing specifically with the Protocol.

<sup>146</sup> See, in particular: Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, E.H.R.L.R. 2004, 4, 366-382; Robert Wintemute, “Filling the Article 14 ‘Gap’: Government Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2”, E.H.R.L.R. 2004, 5, 484-499.

<sup>147</sup> *Op. cit.*

<sup>148</sup> *Inze v. Austria*, Judgment of the European Court of Human Rights of 28 October 1987, para. 36.

<sup>149</sup> See further, Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, *op. cit.*, at 372. Wintemute makes this point in terms of the denial of opportunity (as opposed to discrimination *tout court*, as above).

<sup>150</sup> *Thlimmenos v. Greece*, *op. cit.*, para. 42.

<sup>151</sup> *Ibid.*, para. 47.

the respondent State's failure to introduce legislation with suitable exceptions to the rule preventing persons convicted of serious crimes from entering the profession of chartered accountants.

Some recent trends in case-law from Strasbourg would appear to bear out such a positive evaluation of Article 14's potential scope. Article 14 is increasingly being relied upon by persons belonging to minority groups seeking "[judicial] adjudication and redress"<sup>152</sup> of their complaints, and the resultant case-law has been described as "burgeoning",<sup>153</sup> if "equivocal".<sup>154</sup> There is certainly scope for building on existing precedents of members of minority groups seeking redress for their grievances by invoking the non-discrimination provision(s) of the ECHR. For example, the Court has noted that "[W]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group".<sup>155</sup>

Within this "burgeoning" jurisprudence, one can observe a growing tendency on the part of the Court to pay attention to the *particular* circumstances of *specific* minority groups, especially the Roma, Gypsies and Travellers. The disproportionately high incidence of discrimination suffered by those groups in most countries offers a plausible explanation as to why cases involving their members are featuring relatively prominently in the Court's minority-oriented case-law. It is noteworthy that "deep concern" at the "ongoing manifestations of racism, racial discrimination, xenophobia and related intolerance, including violence" against members of the aforementioned groups and the Sinti, has also been expressed in other contexts, such as the Durban Declaration.<sup>156</sup>

In its Chamber judgment in *Nachova v. Bulgaria*,<sup>157</sup> in particular, the Court showed its resolve to take a tough stance against racism. It found a violation of Article 14 *juncto* Article 2 (Right to life), ECHR,<sup>158</sup> in its substantive and procedural respects, for the failure of the State Party

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<sup>152</sup> Gaetano Pentassuglia, "Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee", 6 *International Journal on Minority and Group Rights* (1999), pp. 417-461, at 422.

<sup>153</sup> Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights" 24 *Human Rights Quarterly* (2002) 736-780.

<sup>154</sup> Patrick Thornberry, "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 137-167, at 167.

<sup>155</sup> *Hugh Jordan v. the United Kingdom*, Judgment of the European Court of Human Rights (Third Section) of 4 May 2001, para. 154.

<sup>156</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Declaration, Durban, 2001, para. 68. See also the corresponding Programme of Action, paras. 39-44. By way of aside, it should be noted that it is very important to distinguish between each of the groups mentioned as, first, they are not one and the same, and second, the principle of self-identification or choosing one's own designation, is crucial, not only for members of those groups, but also for persons belonging to minorities generally. Such distinctions and the principles on which they rest are consistent with best international practice; see further: CERD General Recommendation 27 ("Discrimination against Roma") (2000), para. 3; ECRI General Policy Recommendation No. 3 ("On Combating Racism and Intolerance against Roma/Gypsies") (1998), indent 2.

<sup>157</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 26 February 2004.

<sup>158</sup> "Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a. in defence of any person from unlawful violence;

to adequately investigate inferences of discrimination and racism on the part of its officials: (i) in the death - at their hands - of a member of the Roma community, and (ii) in the subsequent inquiry into his death. The Court referred to “the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”.<sup>159</sup> It then continued by trenchantly declaring that to treat “racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of human rights”.<sup>160</sup> The Chamber judgment in *Nachova* represented the culmination of a string of cases with similar facts, but which had less favourable results as regards the consideration of the ethnicity component.<sup>161</sup>

The Grand Chamber of the European Court of Human Rights – to which the case was subsequently referred by the Bulgarian Government – affirmed that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment”.<sup>162</sup> However, unlike the Chamber, a majority of the Grand Chamber found no violation of Article 14 in conjunction with Article 2 in its substantive respect, i.e., in respect of allegations that the events leading to the fatal shootings under examination constituted an act of racial violence.<sup>163</sup> The Chamber had shifted the burden of proof - to establish “beyond reasonable doubt” whether racism was a causal factor in the shootings - to the respondent Government. The Grand Chamber dealt with this point at length:

The Grand Chamber reiterates that in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that

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b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;  
c. in action lawfully taken for the purpose of quelling a riot or insurrection.”

<sup>159</sup> *Ibid.*, para. 157.

<sup>160</sup> *Ibid.*, para. 158.

<sup>161</sup> In the earlier case of *Velikova v. Bulgaria*, the Court had also considered whether the ethnic origin of the victim’s death, coupled with allegations of popular societal prejudice and the prevalence of racially-motivated violence against the Roma community (of which he had been a member), were relevant to the case. On that occasion, the Court held that on the basis of the evidence before it, it was unable “to conclude beyond reasonable doubt that Mr Tsonchev’s death and the lack of a meaningful investigation into it were motivated by racial prejudice, as claimed by the applicant.” – para. 94, *Velikova v. Bulgaria*, Judgment of the European Court of Human Rights (Fourth Section) of 18 May 2000. See also: *Anguelova v. Bulgaria*, Judgment of the European Court of Human Rights of 2002-IV. In *Nachova*, the Court again adduced the seriousness of the arguments of racial motivation in the killing of two Roma in police custody in the *Velikova* and *Anguelova* cases: see para. 173.

<sup>162</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145. See also: *Timishev v. Russia*, Judgment of the European Court of Human Rights (Second Section) of 13 December 2005, para. 56; *D.H. and Others v. the Czech Republic*, Judgment of the European Court of Human Rights (Grand Chamber) of 13 November 2007, para. 176.

<sup>163</sup> See also in this connection the Joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielmann, annexed to *ibid.*

approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber's approach, does not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 2 of the Convention. [...] <sup>164</sup>

Although it did not find a violation of Article 14 *juncto* Article 2 in its substantive effect, the Grand Chamber did find a violation of its procedural effect. It thus endorsed the Chamber's finding that the State authorities had failed in their duty to "take all possible steps to investigate whether or not discrimination may have played a role in the events" <sup>165</sup>.

The Court's classification of racism as "a particularly invidious kind of discrimination", which "in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction" <sup>166</sup> was further developed in its judgment in the *Timishev* case. The case involved a restriction on the applicant's right to liberty of movement solely on the ground of his ethnic origin and thus constituted racial discrimination. The Court observed that:

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds. <sup>167</sup>

The Court's judgment in *Timishev* iron-plated its earlier findings by adding that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures" <sup>168</sup>.

In another string of cases, the Court has gradually become more sensitive to the plight of Gypsies in the UK. In *Buckley*, the Court held that "[T]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases" <sup>169</sup>. Building on this statement in *Chapman*, the Court ruled that there is consequently "a positive obligation imposed on the Contracting States by virtue of Article 8 <sup>170</sup> to facilitate the gypsy way of life" <sup>171</sup>. The Court also acknowledged "an emerging

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<sup>164</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 157.

<sup>165</sup> *Ibid.*, para. 168.

<sup>166</sup> *Nachova*, para. 145. See also *Timishev*, para. 56 and *D.H. and others*, para. 176.

<sup>167</sup> *Timishev v. Russia*, *op. cit.*, para. 55.

<sup>168</sup> *Timishev*, para. 56. See also, *D.H. and others*, para. 176.

<sup>169</sup> *Buckley v. United Kingdom*, Judgment of the European Court of Human Rights of 26 August 1996, para. 76, 80, 84. See also, *Chapman v. United Kingdom*, para. 96; *Connors v. United Kingdom*, Judgment of the European Court of Human Rights of 27 May 2004, para. 84.

<sup>170</sup> [author's footnote] Article 8 (Right to respect for private and family life), ECHR, reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>171</sup> *Chapman v. United Kingdom*, Judgment of the European Court of Human Rights of 18 January 2001, para. 96. See also, *Connors v. United Kingdom*, *op. cit.*, para. 84.

international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle ([...] in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community”.<sup>172</sup>

Nevertheless, neither *Buckley* nor *Chapman* led to the finding of a violation of the Convention.<sup>173</sup> In *Connors*, however, the Court went one step further and - in its application of the same principles to the facts of the case at hand - did find a violation of Article 8, ECHR. According to Kristin Henrard, “this gradual emergence of a sub-class of more specific minority standards for a certain type of minorities confirms that the field of minority rights is maturing and becoming more refined”.<sup>174</sup> This statement has been borne out by subsequent case-law. In *D.H. and others v. Czech Republic*, a case involving procedures which led to disproportionately high numbers of Roma children being placed in segregated schools for children with mental disabilities, the Grand Chamber found a violation of Article 14 in conjunction with Article 2 of Protocol 1. The importance of the *D.H. and others* case derives both from the judgment itself and the manner in which it was reached. The Court placed considerable store by relevant findings of the Advisory Committee on the FCNM, ECRI and the Council of Europe Commissioner for Human Rights, as well as sources extraneous to the Council of Europe, such as data or conclusions from the European Monitoring Centre on Racism and Xenophobia and CERD. Its reliance on such sources demonstrated its willingness to engage with a growing body of standard-setting and monitoring texts concerning minority rights. This development is further evidence of the importance of non-binding standard-setting and monitoring work beyond its immediate focus. This kind of cross-fertilisation, or better, cross-corroboration, is conducive to overall consistency across the approaches adopted by various international (and especially Council of Europe) organs to specific themes.

Over the years, the Council of Europe has witnessed a number of abortive attempts to mainstream minority rights, either by grafting a special protocol onto the ECHR, or by elaborating a separate, multilateral convention. Many of these attempts to push the minority rights agenda within the Council of Europe have originated in the Parliamentary Assembly of the Council of Europe (PACE). Table 1 provides an overview of PACE Recommendations dealing with minority rights in general and summarises their main proposals.<sup>175</sup> It should be noted in passing that most of these Recommendations also urged (the Committee of Ministers to press) Member States to sign and ratify various relevant CoE instruments (eg. the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities, the European Charter of Local Self-Government, Protocol No. 12 to the ECHR).<sup>176</sup>

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<sup>172</sup> *Chapman v. United Kingdom*, para. 93. As discussed, *infra*, this impact of this statement was weakened by the Court’s refusal to accept that the “emerging international consensus” was concrete enough to offer jurisprudential guidance, *ibid.*, para. 94.

<sup>173</sup> See, however, the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fischbach and Casadevall in *Chapman*.

<sup>174</sup> Kristin Henrard, “Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union”, 22 *Netherlands Quarterly of Human Rights* (Issue No. 4, 2004), 559-584, at 574.

<sup>175</sup> For comprehensive treatment, see Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg, Council of Europe, 2004), Chapter 8 – ‘The evolution of the work of the Parliamentary Assembly in relation to minority protection’, pp. 387-458.

<sup>176</sup> Rec. 1201 (1993), para. 4; (1231 (1994), para. 8(i)); Rec. 1255 (1995), paras. 6, 12a; Rec. 1285 (1996), para. 16; (Rec 1300 (1996), paras. 7, 10, 11) ; Rec. 1345 (1997), paras. (4), 11; Rec. 1492 (2001), paras. (6, 9) 12; Rec. 1623 (2003), paras. 5, 11, 12; Rec. 1773 (2006), para. 13.1.

Table 1

<b>Recommendation</b>	<b>Title</b>	<b>Main points</b>
213 (1959)	Position of national minorities in Europe	<ul style="list-style-type: none"> <li>• Encourages negotiations and peaceful settlements of disputes between States concerning the status of national minorities</li> </ul>
285 (1961)	Rights of national minorities	<ul style="list-style-type: none"> <li>• Recommends CM initiative for inclusion in 2<sup>nd</sup> Protocol to ECHR of article securing cultural, linguistic, educational and religious rights of persons belonging to national minorities</li> </ul>
1134 (1990)	Rights of minorities	<ul style="list-style-type: none"> <li>• Full implementation of relevant OSCE commitments</li> <li>• CM to draft new Protocol to ECHR on protection of minority rights</li> </ul>
1177 (1992)	Rights of minorities	<ul style="list-style-type: none"> <li>• Proposed convention on protection of minorities – deficient supervisory machinery; additional protocol to ECHR preferable</li> <li>• In addition, CM to adopt declaration on principles of minority rights protection</li> <li>• CM to set up new mediation body to: observe and record; advise and forestall; discuss and mediate</li> </ul>
1201 (1993)	Additional protocol on the rights of minorities to the European Convention on Human Rights	<ul style="list-style-type: none"> <li>• Text of proposed additional protocol to ECHR</li> <li>• Definition of “national minority”</li> </ul>
1231 (1994)	Follow-up to the Council of Europe Vienna Summit	<ul style="list-style-type: none"> <li>• CM should revise decision on additional protocol to ECHR</li> <li>• Failing that, CSCE commitments should be reflected in draft framework convention and draft ECHR protocol on cultural rights</li> </ul>
1255 (1995)	Protection of rights of national minorities	<ul style="list-style-type: none"> <li>• Assessment of text of FCNM</li> <li>• Recommendations for strengthening AC</li> <li>• Provisions of Rec. 1201 for inclusion in additional protocol to ECHR on cultural rights</li> </ul>
1285 (1996)	Rights of national minorities	<ul style="list-style-type: none"> <li>• Recommendations for making AC more independent, effective and transparent</li> <li>• Resume and conclude drafting of additional protocol to ECHR on cultural matters</li> </ul>
1300 (1996)	Protection of rights of minorities	<ul style="list-style-type: none"> <li>• Completion and revision of Rec. 1285’s proposals for the AC</li> </ul>
1345 (1997)	Protection of national minorities	<ul style="list-style-type: none"> <li>• Regret that PACE proposals for election of AC not followed</li> <li>• CM to resume work on draft protocol to ECHR on cultural matters</li> <li>• Increase cooperation with EU to ensure CoE monitoring relied on</li> </ul>

		more systematically by EU
1492 (2001)	Rights of national minorities	<ul style="list-style-type: none"> <li>• CM to draft additional protocol to FCNM empowering ECtHRs or other CoE general judicial authority to give advisory opinions on interpretation of FCNM</li> <li>• CM to draft additional protocol to ECHR on rights of national minorities, drawing on Rec. 1201 and incl. the definition therein</li> <li>• Attach to CoE Commissioner on Human Rights officer with special responsibility for minority rights</li> </ul>
1623 (2003)	Rights of national minorities	<ul style="list-style-type: none"> <li>• CM to draft additional protocol to FCNM empowering ECtHRs to give advisory opinions on interpretation of FCNM</li> <li>• Revision of certain monitoring procedures under FCNM</li> <li>• Encourage AC to adopt thematic approach to issues</li> </ul>
1773 (2006)	The 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance cooperation and synergy with the OSCE	<ul style="list-style-type: none"> <li>• CM to increase signatures and ratifications (without reservations and restrictive declarations) of ECRML, FCNM and ECTT</li> <li>• CM invite States to ensure improved access to broadcast media in own languages, in accordance with leading CoE standards and 2003 Guidelines</li> <li>• CM to regularly take 2003 Guidelines into account in monitoring of implementation of ECRML and FCNM</li> <li>• CM to instruct that relevant concerns be considered in any revision of ECTT</li> <li>• Encourage further synergies between CoE and OSCE HCNM, also involving civil society</li> </ul>

The most noteworthy of the ultimately unsuccessful CoE initiatives to ensure greater prominence and protection for minority rights were:

- Proposal for a European Convention for the Protection of Minorities by the European Commission for Democracy through Law<sup>177</sup>
- PACE Recommendation 1201

The Proposal for a European Convention for the Protection of Minorities by the European Commission for Democracy through Law (hereinafter “the Venice Commission”) contains a number of noteworthy features. In substantive terms, it includes an explicit safeguard against

<sup>177</sup> Adopted by ECommDL on 8 February 1991. See further: Giorgio Malinverni, “The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law”, 12 *Human Rights Law Journal* (No. 6-7, 1991) pp. 265-273. It is interesting to note that this draft instrument was originally designed for application not only within CoE States, but also in States which had yet to join the CoE.

“any activity capable of threatening their existence” (Article 3(1)). It also guards against attempts at forced assimilation of minorities on the part of State authorities (Article 6). The particular circumstances of internal minorities (or minorities within minorities, i.e., “any region where those who belong to a minority represent the majority of the population”) is also countenanced (Article 16 *juncto* Article 15(2)). Concern for such minorities is often merely implied or derived rather than explicitly set forth in international instruments.

One cause for concern, however, is the inclusion of a so-called “loyalty clause” (Article 15). The operative provision would require “Any person who belongs to a minority shall loyally fulfil the obligations deriving from his status as a national of his State”.<sup>178</sup> At first glance, this provision may appear innocuous, or even a reasonable expectation of *quid-pro-quo* for those wishing to benefit from minority rights. Nevertheless, one must not overlook the failure of the reasonable theory behind such a provision to be matched with similar reasonableness in practice. Such clauses have frequently attracted criticism for providing States with a convenient excuse for denying minority rights to certain minority groups whose political objectives do not coincide with their own (see further, *infra*). More often than not, calls for the introduction of loyalty clauses for persons belonging to national minorities, or non-nationals generally, are inherently discriminatory and are coated in only the thinnest veneer of objectivity. The topicality of such measures is affirmed by the ongoing controversy in the Netherlands arising from a brace of parliamentary motions calling for legislative reform to make it impermissible for an individual to become a member of the Dutch Cabinet unless s/he solely holds the Dutch nationality (i.e., imposing the condition that dual nationality be relinquished)<sup>179</sup> and calling for dual nationality to cease to be legally recognised in the Netherlands generally.

The observance of States’ undertakings in respect of the Convention would have been entrusted to a new body, the European Committee for the Protection of Minorities (Article 18). The Committee would have comprised “a number of members equal to that of the Parties” (Article 19(1)), known for their “competence” (not expertise or experience!) in human rights and “in particular the fields covered by” the draft Convention (Article 19). Members would have been elected by the CoE Committee of Ministers (making the election procedure a highly political exercise); the Committee would have held its meetings in camera, gathering “as the circumstances require, at least once a year” (Articles 20-22). The highlighted provisions, if they had ever been implemented, would have amounted to serious procedural deficiencies and would have greatly hampered the efficiency of the Committee in carrying out its mandate. The proposition that it could devise its own Rules of Procedure (Article 22) would have been cold comfort in an already restricted zone of operational autonomy: (i) “[States] Parties shall provide the Committee with the facilities necessary to carry out its tasks” (Article 23); (ii) the Committee would forward States reports (see *infra*) to the CoE Committee of Ministers with its observations (Article 24(2)), and (iii) a majority of two-thirds of all Committee members would have been required before the Committee could make “any necessary recommendations to a Party” (Article 24(3)).

In adjectival terms, the proposal envisaged a separate Convention<sup>180</sup> which would rely on its own protection machinery (rather than relying upon the existing adjudicative organs of the

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<sup>178</sup> Article 15(1).

<sup>179</sup> K.S.30 166 (R 1795), Nr. 24, 15 February 2007, and K.S. 30 166 (R 1795), Nr. 21, 15 February 2007, respectively.

<sup>180</sup> See further: Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on

European Convention on Human Rights). The draft Convention foresaw three means of control: obligatory periodic State reporting (Article 24); optional State petitions (Article 25) and optional individual petitions (Article 26). As signalled in the previous paragraph, a two-thirds majority of Committee members was required before the Committee could “make any necessary recommendations to a [State] Party”, which appears quite a demanding minimum requirement for engaging with a State. The use of the term “necessary” also suggests that only very serious matters could be addressed in this context, and not matters that are not quite so extreme, yet nevertheless of considerable importance.<sup>181</sup> No provision is made for sanctions arising out of the State reporting mechanism, nor is it set out what role the CoE Committee of Ministers should play subsequent to its receipt of State reports and the Committee’s observations, apart from the vague formulation “may take any follow-up action it thinks fit in order to ensure respect of the Convention” (Article 29(3)).

The provision for inter-State complaints was styled as optional owing to the political sensitivities involved in minority issues: it was submitted that if this provision were to be compulsory, it would dissuade States from ratifying the Convention. In a confusing and self-contradictory logic, it was equally submitted that “contrary to the experience found in the framework of the ECHR, in such a politically sensitive area as minorities, a large number of State petitions would be brought”.<sup>182</sup> Similarly, the right of individual petition was rendered contingent on the State targeted by a complaint having first accepted the competence of the Committee to receive such petitions; another factor likely to limit the effectiveness of the control machinery.

PACE Recommendation 1201 proved to be a very hot political potato, for two main reasons. First, by setting out a catalogue of rights for national minorities in the form of a proposed additional protocol to the ECHR, the clear intention was to *ipso facto* render those rights justiciable. The consequences of such an approach, had it been endorsed at the highest level, would have been very far-reaching. Second, Recommendation strode boldly into territory where no other IGO-angels had ever dared to tread: it sought to bring the highly contested concept of “national minority” within firm definitional parameters. According to Article 1 of the proposed additional protocol:

the expression “national minority” refers to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.

Any possible disputes about the substantive content of the proposed additional protocol were eclipsed by the controversy surrounding the aforementioned points of justiciability and definitional scope. As it happens, the substantive articles in the draft text were largely

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Human Rights concerning the rights of minorities (AS/Jur (44) 23 and AS/Jur (44) 41) drawn up by Giorgio Malinverni, 7 January 1993. This document compares the PACE and Venice Commission approaches, albeit from a partisan perspective.

<sup>181</sup> Note in this connection the gradation in language (reflecting differing degrees of seriousness) used in the Opinions of the Advisory Committee to the FCNM, *infra*.

<sup>182</sup> Giorgio Malinverni, “The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law”, *op. cit.*, p. 269.

uncontroversial, with the possible exception of Article 11, which provided, *inter alia*, for “appropriate local or autonomous authorities” for minorities.<sup>183</sup> It did so in the following terms, which some considered to have the potential to lead to territorial destabilisation:

In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.

The draft additional Protocol put forward in PACE Recommendation 1201 was rejected by the heads of State and Government of the Member States of the Council of Europe at the Vienna Summit in 1993. Instead, the heads of States and Governments instructed the Committee of Ministers to: (i) “draft with minimum delay a framework convention specifying the principles which contracting states commit themselves to respect, in order to assure the protection of national minorities [...]”; (ii) begin drafting a protocol complementing the ECHR “in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities”. The first instruction led to the adoption of the Framework Convention for the Protection of National Minorities in 1995, but the second led only to fitful periods of work, and the project is currently in abeyance, with little evidence of intentions to reactivate it.<sup>184</sup>

Nevertheless, despite the set-back at the Vienna Summit, PACE Recommendation 1201 continues to hold some relevance as a point of reference.<sup>185</sup> Since the Summit, the PACE has consistently argued - in the face of considerable political adversity - for the adoption of Recommendation 1201.<sup>186</sup> In its Recommendation 1231, the PACE expressed its deep regret<sup>187</sup> that the Summit had not followed its Recommendation 1201, and did not hesitate to call on the Committee of Ministers to revise that decision.<sup>188</sup> The PACE stuck to its guns in Recommendation 1255, reaffirming its commitment to the principles and definition contained in Recommendation 1201; pointing out shortcomings of the FCNM; insisting on the urgency of an additional protocol to the ECHR on cultural matters and specifying the principles from Rec. 1201 which could most usefully be incorporated into the same. There is little doubt that Rec. 1201 has become an important text of reference. As noted by the PACE itself, “the political undertakings and standards” set out in the draft additional protocol contained in Rec. 1201 “have been raised to the status of legal obligations in friendship treaties drawn up between various member states of the Council of Europe”.<sup>189</sup> It even went on to speculate that “These treaty obligations might eventually acquire customary status at regional level”.<sup>190</sup>

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<sup>183</sup> It is worth noting in passing that although the draft additional Protocol provided for freedom of association for minorities, as well as certain autonomous measures, it lacked any express general provision for their effective participation in public life. See generally: Opinion on the interpretation of Article 11 of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, Venice Commission, 22 March 1996.

<sup>184</sup> For an overview of the process, see: Patrick Thornberry & Maria Amor Martin Estebanez, *Minority Rights in Europe* (Germany, Council of Europe, 2004), p. 205.

<sup>185</sup> See, for example, European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), 8 June 2005, OJ C 124 E/405 of 25 May 2006, para. 7.

<sup>186</sup> See, for example, Rec. 1285 (1996), para. 15; Rec. 1300 (1996), para. 2; Rec. 1492 (2000), para. 7 and 12 (xi).

<sup>187</sup> PACE Recommendation 1231 (1994) on the follow-up to the Council of Europe Vienna Summit, para. 5. See also, Rec. 1255, para. 4; Rec. 1285, para. 12;

<sup>188</sup> *Ibid.*, para. 8(ii).

<sup>189</sup> Rec. 1492 (2000), para. 8.

<sup>190</sup> *Ibid.*

Under PACE Order 484, the PACE's Legal Affairs Committee is required to have regard to the draft Protocol in its assessment of applicant States' suitability for admission to the CoE.<sup>191</sup> It has been pointed out that this requirement means that in practice, applicant States are expected to meet standards of minority rights protection that were deemed politically unpalatable (read: too far-reaching) by existing Member States.<sup>192</sup> In this context, it is difficult to refute accusations of double standards or a two-tiered approach, or perceptions of an "East-West divide".<sup>193</sup>

Accusations of double standards within the Council of Europe as regards minority rights protection have been propagated in various quarters and at various stages. These accusations can be explained (but that is not to say excused) by the specific historical context in which the Council of Europe's interest in minority rights was re-ignited. The catalyst was certainly the drawing back of the Iron Curtain at the very beginning of the 1990s. The CSCE played a trail-blazing role in the recognition of acute minority-related issues in the former Soviet Bloc, and the Council of Europe found itself obliged to gear up to follow that trail. Despite the fact that its own house was not in order, the Council was beginning to square up to States in Central and Eastern Europe to confront them on their track record regarding minority rights protection.<sup>194</sup> The predicament arising from this state of affairs is described by André Liebich in the following manner:

Looking eastward, the Council's mandate clearly encompassed norm setting, supervision and enforcement of minority rights. However, this mandate could only be defined in universal legal terms which, *no lens volens*, encompassed the Western States as well. There was little point in simply affirming that West Europe did not have a minority problem whereas East Europe did.<sup>195</sup>

### **1.3.2(ii) Framework Convention for the Protection of National Minorities (FCNM)<sup>196</sup>**

The Preamble to the Framework Convention states that it was conceived of pursuant to the Declaration of the Heads of State and Government of the Member States of the Council of Europe adopted in Vienna on 9 October 1993. It goes on to list – “in a non-exhaustive way” – “three further sources of inspiration for the content” of the Framework Convention, i.e., the ECHR and various relevant United Nations (UN) and C/OSCE instruments containing

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<sup>191</sup> More specifically, the PACE “instructs 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 [set out in Recommendation 1201] are respected by the applicant countries”: Point 2(ii) of Order No. 484 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, adopted by the PACE on 1 February 1993.

<sup>192</sup> See, for example, Geoff Gilbert, “Minority Rights Under the Council of Europe”, in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the 'New' Europe* (Kluwer Law International, Great Britain, 1999), pp. 53-70, at 62-63.

<sup>193</sup> See further, *ibid.*, and also, Heinrich Klebes, “The Council of Europe's Framework Convention for the Protection of National Minorities”, 16 *Human Rights Law Journal* (No. 1-3, 1995) pp. 92-98, at 92.

<sup>194</sup> There was a certain feeling of *déjà vu* in the recent accessions to the European Union as regards the attention paid to minority rights in the Copenhagen criteria (see further elsewhere in this chapter).

<sup>195</sup> André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *Helsinki Monitor* (No. 1, 1999), pp. 7-17, at 12 (see also p. 11).

<sup>196</sup> For recent, academic commentaries of the FCNM, see: Marc Weller, Ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford and New York, Oxford University Press, 2005); Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg, Council of Europe, 2004), Chapter 2.

commitments for the protection of national minorities.<sup>197</sup> The relevant documentary corpus within the UN and OSCE systems is by no means negligible (notwithstanding the fact that some documents are more political than legal in their coloration). But, as already mentioned, the crucible of inspiration has a broader circumference than merely the span of the UN and OSCE systems.

This point is of cardinal importance for the organic growth of the FCNM, as it anticipates (however implicitly) the practice of explicitly referring to international standards in the monitoring process (see further, *infra*). In this practice, pertinence should be the guiding principle, thereby inviting the invocation (where appropriate) of other types of hard and “soft law”, where appropriate. This point is further reinforced when considered in light of Article 22, which reads:

Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

The potential of Article 22 for the future development of minority rights protection is rather understated. Most States Parties to the FCNM are also subject to the ICCPR and other international treaties. In instances where Article 27, ICCPR, for example, is more generous than the FCNM in the protection it guarantees for particular minority rights, one could conceivably argue – on the basis of Article 22, FCNM - that the particular protection provided under the FCNM ought to be raised to match that of the ICCPR. Whatever about the resistance it would be likely to meet from States Parties if it were to be translated into practice, this argument does boast certain theoretical appeal.

Any analysis of the FCNM must necessarily begin with its name, which points to the type of convention it actually is: a framework; lexically, a support structure to be built upon, a structural plan or basis of a project. Key to this conception is the leeway accorded States Parties in their honouring of the commitments entered into under the Convention. This is rendered explicit by para. 11 of the Explanatory Report to the FCNM:

In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.

The discretion conferred on States as a matter of principle is compounded firstly in the consistently cautious language used throughout the FCNM and secondly in the choice of monitoring structures and processes (see further, *infra*). As noted by the PACE, the FCNM “formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the contracting states but not a right which individuals may invoke”.<sup>198</sup> Conversely, apologists for the “framework” approach underline the situational diversity among States, and the consequent need for reliance on the margin of appreciation doctrine rather than a stricter, more normative type of approach.<sup>199</sup> This view favours placing the onus on States Parties to secure appropriate legislation and other measures in order to give

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<sup>197</sup> Explanatory Report to the Framework Convention, *op. cit.*, para. 23.

<sup>198</sup> Para. 7, PACE Recommendation 1255 (1995) on the protection of the rights of national minorities.

<sup>199</sup> Frank Steketee, “The Framework Convention: A Piece of Art or a Tool for Action?”, 8 *International Journal on Minority and Group Rights* (2001), pp. 1-15, at 4.

domestic effect to the provisions of the FCNM. These two opposing schools of thought could perhaps be classed as centripetal and centrifugal, respectively.

It should be noted that to read potential for flexibility into the “vaguely defined objectives and principles” of the FCNM might well constitute no more than misplaced optimism. While one swallow does not make a summer, such a reading of the Convention backfired in *Chapman v. United Kingdom*. Significantly, the European Court of Human Rights observed that:

there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyles ([...] in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.<sup>200</sup>

Nevertheless, in a somewhat disingenuous *non-sequitur*, the Court then went on to state that it was not persuaded that:

the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court’s view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court’s role a strictly supervisory one.<sup>201</sup>

Thus, the Court spurned the opportunity at hand to engage with substantive rights envisaged by the FCNM by interpreting the vague and general wording as evidence of a lack of consensus among Contracting States. This reasoning is unsatisfactory, as the large number of ratifications (notwithstanding a certain number of interpretative declarations/reservations), must surely be persuasive evidence of a certain commonality of understanding and purpose. Whereas the Court has not repeated its apparent doubts about the solidity of the nascent consensus in certain subsequent considerations of the question,<sup>202</sup> its reluctance to engage with the implications of the consensus is a source of concern. In the past, the Court has been slow to acknowledge swells of similar practice across growing numbers of States in respect of other rights too. The Court’s judgment in *Sirbu v. Moldova*<sup>203</sup> (a case concerning, *inter alia*, Article 10, ECHR and public access to official governmental information) has been criticised for failing to give due cognisance to the fact that “[A]t the present time, most if not all Member States of the Council of Europe have put in place laws and structures allowing for varying levels of access to official documents”.<sup>204</sup> As such, the Court’s judgment “did not give any in-depth exploration to the developing nature of the right to information at the national level”.<sup>205</sup> However, the more recent decision by the Court in *Matky v. Czech*

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<sup>200</sup> *Chapman v. United Kingdom*, *op. cit.*, para. 93. See also, *D.H. and Others v. Czech Republic*, *op. cit.*, para. 181.

<sup>201</sup> *Ibid.*, para. 94.

<sup>202</sup> See, for example, *D.H. & others v. Czech Republic*, *op. cit.*, para. 181, and *Sampanis & others v. Greece*, Judgment of the European Court of Human Rights (First Section) of 5 June 2008, para. 73.

<sup>203</sup> *Sirbu and others v. Moldova*, Judgment of the European Court of Human Rights (Fourth Section) of 15 June 2004.

<sup>204</sup> Tarlach McGonagle, “Workshop Report: the Changing Hues of Political Expression in the Media”, in Susanne Nikoltchev, Ed., *IRIS Special: Political Debate and the Role of the Media – The Fragility of Free Speech* (European Audiovisual Observatory, Strasbourg, 2005), pp. 1-30, at 8.

<sup>205</sup> *Ibid.*

*Republic*,<sup>206</sup> augurs better for its willingness to give legal recognition to a right of access to information.<sup>207</sup>

Definitional uncertainty dogs the FCNM, just as it does other leading international instruments dealing with minority rights protection. The drafters of the FCNM deliberately eschewed the opportunity to fashion a definition of (national) minority, opting for a “pragmatic approach” as it was evident to them that it would have been impossible at that point in time “to arrive at a definition capable of mustering general support of all Council of Europe member States”.<sup>208</sup> One of the prevailing currents of thought amongst the drafters was that it would be better to forge ahead even without the desired ballast of a definition.

In other words, progress on minority rights protection should not be held hostage to reaching (political) consensus on an apposite definition, especially given the fear that any such definition “would most likely be based on the lowest common denominator and would, by definition, exclude any evolution”.<sup>209</sup> A closely related – if somewhat starker – argument is that any progress on minority rights protection should not be jeopardised by insistence on the prior resolution of definitional disagreements.<sup>210</sup>

Given the insoluble nature of the definitional question, this example of *realpolitik* is understandable. Furthermore, it will be recalled that many commentators subscribe to the view that minorities are generally recognisable and that borderline cases can be determined on an *ad hoc* basis (*supra*).

It is widely accepted that there is no consensus as to the meaning of the term “national minority”,<sup>211</sup> and as has already been noted, the term is particularly troublesome. Geoff Gilbert has usefully explored the essential distinction between the two “discrete meanings” of the term “national minority”.<sup>212</sup> The first, “nationality as a precondition”, insists that the recognition of minority status within a given State is contingent on members of the group being nationals of that State. In the second sense, the adjective is used rather to designate a particular type of minority in the context of a broader classification scheme. So understood, a national minority “is one that can be distinguished due to its ethnicity, religion, language, culture, or traditions, but which might also have either autonomist aspirations or, more likely, a kin-state”.<sup>213</sup>

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<sup>206</sup> *Sdružení Jihočeské v. Czech Republic*, Admissibility Decision of the European Court of Human Rights (Fifth Section) of 10 July 2006, Application No. 19101/03.

<sup>207</sup> For commentary on the Decision and an exploration of its likely implications, see: Wouter Hins & Dirk Voorhoof, “Access to State-Held Information as a Fundamental Right under the European Convention of Human Rights”, *EuConst* 3 (2007), pp. 114-126. See, additionally on this topic: Thorsten Ader & Max Schoenthal, “Access to Information on Government Action, especially from the Media Point of View”, *IRIS plus* (Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*), 2005-2; Dirk Voorhoof in Mediaforum.

<sup>208</sup> Para. 12, Explanatory Report to the FCNM.

<sup>209</sup> Frank Steketee, “The Framework Convention: A Piece of Art or a Tool for Action?”, *op. cit.*, at 6.

<sup>210</sup> Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 93.

<sup>211</sup> This was a conclusion of the Steering Committee for Human Rights (CDDH) which played an instrumental role in the drafting of the FCNM: see para. 4, Explanatory Report to the FCNM.

<sup>212</sup> Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *Human Rights Quarterly* (1996) pp. 160-189, at 165-166, 169-170.

<sup>213</sup> *Ibid.*, p. 169.

Heinrich Klebes, in his commentary on the Convention, argues that ‘national minority’ ‘refers to a minority on the national territory (the territory of the State)’.<sup>214</sup> He continues by discounting the suggestion that the notion involves an ethnic link with another nation. Gilbert, on the other hand, posits that the term, when used in a European context, has traditionally “referred to those minorities with a kin-state”.<sup>215</sup>

Another attempt to decipher the meaning of the term “national minority” could be built on extrapolation from contiguous debates waged in the United Nations. Such an approach, however, is a hopeless *cul-de-sac*. Rosalyn Higgins has posited that the UN Human Rights Committee interprets “ethnic” as subsuming “national”, but the inclusion of the latter adjective in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities suggests that the terms tend towards synonymy, or at the very least have a high degree of conceptual/semantic congruence.

Given that Higgins understands “national” as being narrower than “ethnic”, she is concerned that this could lead to a more restrictive reading of relevant provisions.<sup>216</sup> In this vein of logic, such concerns could equally arise, *mutatis mutandis*, from the wording employed in the FCNM. However, it has conversely been argued that on the basis of contextual analysis that “national” can only be taken in the UN Declaration as intended for the purposes of classification.<sup>217</sup>

*CECI N’EST PAS UNE MINORITE!*

The definitional vacuum and the introduction of the notoriously unclear term “national” minority have together given rise to a phenomenon which could be termed, after the famous painter René Magritte, “*ceci n’est pas une minorité*”.<sup>218</sup> This involves a notable tendency among States to enter (interpretative) declarations of the term (national) minority upon ratification of the FCNM. Austria, Belgium, Denmark, Estonia, Germany, Luxembourg, Poland, Russia, Sweden, Switzerland and the former Yugoslav Republic of Macedonia. All but one of these declarations are similar in tenor, explaining how the FCNM will apply *ratione personae* on their respective territories.

The exception is the Russian declaration, which has been called an “anti-declaration” by one commentator<sup>219</sup> because it categorically opposes the unilateral determination of which national minorities should be entitled to protection under the FCNM. This declaration would appear to have been motivated by concern for the fate of Russian minorities in a number of ex-Soviet States. Its integral text is as follows:

The Russian Federation considers that none [*sic*] is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of

<sup>214</sup> Heinrich Klebes, “The Council of Europe’s Framework Convention on National Minorities”, *op. cit.*, p. 93.

<sup>215</sup> Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, p. 169.

<sup>216</sup> Rosalyn Higgins, “Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System”, in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers (Vol. III)* (Martinus Nijhoff Publishers, Dordrecht, 1994), pp. 195-209, at 202.

<sup>217</sup> Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, p. 166.

<sup>218</sup> For a discussion of Magritte’s famous series of paintings, *La trahison des images* (1928/9), *Ceci n’est pas une pomme* (1964) and *Les deux mystères* (1966), see: Jacques Meuris, *Magritte* (Taschen GmbH, Cologne, 2004), pp. 128-132.

<sup>219</sup> Stefan Troebst, “From paper to practice: The Council of Europe’s Framework Convention for the protection of national minorities”, 10 *Helsinki Monitor* (No. 1, 1999), pp. 19-26, at 24.

National Minorities, a definition of the term "national minority", which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.<sup>220</sup>

Some controversy has surrounded the question of whether these declarations should be regarded as (interpretative) declarations *stricto sensu*, or reservations from the perspective of international law.<sup>221</sup> Given the silence of the FCNM on declarations and reservations thereto, recourse must be had to the Vienna Convention on the Law of Treaties.<sup>222</sup> The Vienna Convention does not provide a definition of the term 'declaration', but it does set out that a 'reservation' is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".<sup>223</sup> It would appear (*inter alia* from the *jurisprudence constante* of the International Court of Justice) that a declaration is non-binding and only aims to interpret a treaty and not to modify its legal effect. According to Maria Telalian:

It is obvious that the decisive element for making a distinction between an interpretative declaration and a reservation is to be found in the intention of the states that have made the declaration. If that intention is to simply clarify the meaning of the treaty and not to exclude or modify its legal effect in its application to that state, then the said declaration is an interpretative one.<sup>224</sup>

Telalian concludes – on the basis of an analysis of the wording of the (interpretative) statements in light of the underlying objectives of the FCNM – that one can best speak of "declarations" here, as the proposed interpretations do not go against the grain of the Convention. Declarations entered to date have tended to reinforce certain aspects of the FCNM, deny the existence of national minorities on their territories, list the various national minorities within their jurisdiction to be protected under the HCNM and link definitions of national minorities to citizenship.<sup>225</sup> As pointed out by Alan Phillips, the last-named qualification is not referred to in either the FCNM or its Explanatory Report.<sup>226</sup> Such linkage is a source of concern for this reason alone, not to mention the general controversy surrounding attempts to premise the recognition of minority groups on the criterion of citizenship.<sup>227</sup>

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<sup>220</sup> Declaration contained in the instrument of ratification deposited by the Russian Federation on 21 August 1998 - Or. Rus./Engl./Fr.

<sup>221</sup> For a detailed discussion of this question, see: Maria Telalian, "European Framework Convention for the Protection of National Minorities and its Personal Scope of Application", in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (Martinus Nijhoff Publishers, The Hague, 2002), pp. 117-135, esp. 125-134.

<sup>222</sup> United Nations Treaty Series, Vol. 1155, p. 331, adopted on 22 May 1969; entry into force on 27 January 1980.

<sup>223</sup> Article 2(1)(d), *ibid.*

<sup>224</sup> Maria Telalian, "European Framework Convention for the Protection of National Minorities and its Personal Scope", *op. cit.*, at 129.

<sup>225</sup> Provide break-down for each of these categories and refer to: Alan Phillips, *The Framework Convention for the Protection of National Minorities: A Policy Analysis* (Minority Rights Group International, London, 2002), p. 4.

<sup>226</sup> *Ibid.*, p. 4.

<sup>227</sup> Of relevance in this connection is the likely motivation behind Russia's Declaration, *supra*, i.e. the fate of Russians in Baltic countries, where the denial of citizenship has proved a *de facto* means of exclusion.

The controversy pits polarised viewpoints against one another. Some argue vehemently that human rights are not about citizenship, whereas others consider the criterion of citizenship to be “a foundational thesis”<sup>228</sup> of minority rights protection. As to the former, John Packer has argued:

[...] human rights are the entitlements of human beings, and exactly not (as a general matter) to be conditioned on citizenship. Indeed, this is one of the great achievements of the post-second world war order – that it is a matter of international concern that the State respect, protect and ensure the inherent and inalienable rights of all *human beings* within its jurisdiction, no longer leaving citizens at the mercy of their governments or aliens to depend upon the possibility (not entitlement) of diplomatic protection. Still, citizenship may be relevant for certain rights [...]<sup>229</sup>

The conflicting stance is summed up by André Liebich as: “[...] a foundational thesis, implicitly or explicitly accepted in international instruments, has been that minorities can only be composed of citizens of the state in question”.<sup>230</sup> The present analysis favours and follows Packer’s stance.

Without a definition of the foggy term ‘national minority’, there was a certain inevitability about the subsequent uncoordinated spate of unilateral interpretations by States Parties. It should be noted that the expression of such interpretations is not limited to those statements made by States Parties upon signature or ratification of the FCNM. A number of States Reports also contain further stipulations on the ambit of application of the FCNM in their countries. However, the trend towards unilateral interpretations must give rise to concerns for the consistent interpretation and application of the FCNM at the national level, particularly given the lack of scope within the monitoring structures and processes for standard-setting (see further *infra*). Another cause of concern is that States are left with too much freedom to determine the minorities to be covered under the FCNM, thereby deviating from the crucial principle established by the PCIJ in the *Minority Schools in Albania* case, namely that a minority is a question of fact (see *supra*).

The device of (interpretative) declarations is a very useful means for States to set themselves up as the ultimate arbiters of which minorities would enjoy the benefits of the FCNM within their own State boundaries. In particular, it offers them a less heavy-handed way of seeking to restrict the scope of application of the treaty to their own jurisdiction than a reservation (which involves a series of procedural formalities,<sup>231</sup> as well as carrying greater import). The usefulness of such declarations must not, however, be abused by States authorities. By employing “different labels” or “additional criteria”, declarations must not be allowed to insidiously serve as smoke-screens for the real exclusionary intent of States Parties.<sup>232</sup>

One would, however, naturally expect any excesses to be checked by the monitoring procedures. According to Frank Stekettee, notwithstanding States’ margin of appreciation in such matters, “it is incumbent on the monitoring mechanism at international level, and notably the Committee of Ministers, when ‘evaluating the adequacy of the measures taken by the

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<sup>228</sup> André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *op. cit.*, at 14.

<sup>229</sup> John Packer, “Situating the Framework Convention in a wider context”, in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), pp. 43-51, at 45.

<sup>230</sup> André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *op. cit.*, at 14.

<sup>231</sup> See further, Articles 19-23 of the Vienna Convention on the Law of Treaties.

<sup>232</sup> See further, Gudmundur Alfredsson, “A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, *op. cit.*, at 296.

Parties to give effect to the principles set out in the framework Convention', also to assess the proper application *ratione personae* and to guard against any discriminatory or arbitrary exclusions".<sup>233</sup> The Committee of Ministers has yet to pronounce its disapproval of any of the declarations submitted by States Parties to the FCNM and it would conceivably be loath to do so, given its highly political and politicised nature (see further *infra*). Nevertheless, it has urged States to exercise caution when considering whether to submit reservations and declarations, and to do so sparingly.<sup>234</sup> The Advisory Committee also scrutinises Declarations, with a view to verifying that they do not involve either arbitrary or unjustified distinctions between groups.<sup>235</sup> To date, it has "noted" a number of Declarations.<sup>236</sup> Vigilance has also been called for on the part of civil society in the policing of State declarations.<sup>237</sup>

A few words about the nature of the rights set forth in the FCNM. First of all, the phraseology broadly follows trends established by other relevant international instruments. Article 3(2), for instance, reads: "Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others". While Article 3(2) does give a favourable nod in the direction of the collective exercise of individual rights, the Explanatory Report to the FCNM curtly states that group rights as such are not countenanced.<sup>238</sup>

Gudmundur Alfredsson laments the terseness of the Explanatory Report's elaboration on the FCNM's exclusive recognition of individual rights.<sup>239</sup> It merely states: "In this respect, the framework Convention follows the approach of texts adopted by other international organisations".<sup>240</sup> Terseness is never an obvious bedfellow of accuracy, and Alfredsson would appear to be suggesting – correctly, it must be added - that this explanation is disingenuously short. The "texts" (a very vague term) referred to are not identified, nor are the relevant international organisations specified either. Even if one were to take the explanation at face value or on a very general plane, it is not totally accurate. Collective rights are envisaged in the legal and political standards of a number of organisations.<sup>241</sup>

#### *WATER IN THE WINE AND HOLES IN THE CHEESE*<sup>242</sup>

The programmatic character of the FCNM has resulted in the language chosen prioritising progress and performance over end-results. State obligations are not styled as imperatives, but usually as undertakings and endeavours. This undeniably weakens the force of the commitments.

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<sup>233</sup> Frank Steketee, "The Framework Convention: A Piece of Art or a Tool for Action?", 8 *International Journal on Minority and Group Rights* (2001), pp. 1-15, at 6.

<sup>234</sup> See further: Para. 6, Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*

<sup>235</sup> Rainer Hofmann, "Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities", *op. cit.*, at 254-256.

<sup>236</sup> See further, Kristin Henrard, "Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union", *op. cit.*, at 567 *et seq.*

<sup>237</sup> Alan Phillips, *op. cit.*, at 4.

<sup>238</sup> Para. 13. "It [the FCNM] does not imply the recognition of collective rights".

<sup>239</sup> Gudmundur Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures", 7 *International Journal on Minority and Group Rights* (2000), pp. 291-304, at 295 (footnote no. 10).

<sup>240</sup> *Ibid.*

<sup>241</sup> See, by way of example: the African Charter on Human and Peoples' Rights; ILO Convention 169; ICERD; provisions for self-determination in the ICCPR and ICESCR.

<sup>242</sup> Frank Steketee concedes that the "tortuous phraseology" of some provisions in the FCNM could be said to "read like a Swiss cheese", "The Framework Convention: A Piece of Art or a Tool for Action", *op. cit.*, at 4.

Moreover, the potential of many substantive provisions in the FCNM is considerably diluted (see Table 2 for examples), thereby attesting to the fact that it was begotten of political compromise.<sup>243</sup>

Table 2<sup>244</sup>

<u>Qualification</u>	<u>Articles</u>
substantial numbers	10(2), 11(3) & 14(2)
sufficient demand	11(3) & 14(2)
if those persons so request	10(2)
a real need	10(2)
where necessary	4(2), 18(1) & 19
where appropriate	11(3) & 12(1)
as far as possible	9(3), 10(2) & 14(2)
where relevant/in so far as [...] relevant	18(2)/19

Such dilutions typically water down the possible content of the rights provided for by a series of qualifications.<sup>245</sup> Article 11(3) is an old chestnut for the purposes of making this point. Containing seven qualifications or escape clauses, the basic right envisaged, *viz.* to display traditional names on public signposts, etc., is qualified and conditionalised almost into insipidity. It reads:

In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications.

Another example is Article 10(2). It reads:

In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

The basic right in Article 10(2) is to use a minority language in dealings with administrative authorities. The basic limitation is the commonsensical realisation that assuring such a right in practice could involve significant financial and logistical expense for States authorities, and that factors such as demand, geographical concentration and available means will all be *relevant* to States' attempts to guarantee the core right. However, all rights – civil and political as well as social and economic – imply financial commitments by States. It is beyond dispute that a lack of means can never be accepted as justification for failing to strive to implement human rights obligations at the domestic level.<sup>246</sup> As pointed out by the UN

<sup>243</sup> See further, Rainer Hofmann, “Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities”, 44 *German Yearbook of International Law/Jahrbuch für Internationales Recht* (2001), pp. 237-269, at 240.

<sup>244</sup> This table amends and supplements information provided in Alan Phillips, *The Framework Convention for the Protection of National Minorities: A Policy Analysis* (Minority Rights Group International, London, 2002), p. 3.

<sup>245</sup> See, for example, Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 94.

<sup>246</sup> See, for example, CESCR General Comment No. 3 The nature of States parties obligations (Art.2, para. 1 of the Covenant), adopted on 14 December 1990, para. 11 of which reads: “[...] even where the available resources

Human Rights Committee in the context of the ICCPR, “failure to comply with [the obligation under Article 2(2) to give effect to the Covenant rights] cannot be justified by reference to political, social, cultural or economic considerations within the State”.<sup>247</sup> This is a well-established principle of international human rights law and in practice, treaty-monitoring bodies, as well as independent human rights organisations, are increasingly relying on human rights indicators and various bench-marks to monitor governmental performance as regards the (progressive) implementation of (economic, social and cultural) rights. This approach involves measuring the willingness of a government to implement human rights against its capacity to do so; the dissociation of a lack of moral or political commitment from financial or technical incapacity reveals any real progress or regression.<sup>248</sup>

The excessively diffident tone of Article 10(2) is unhelpful as it simply invites States to excuse their failure by pointing towards inadequate means at their disposal or subjective assessments of the need for such a right to be facilitated. A further aggravating textual shortcoming is highlighted by Mark Lattimer in his critical dissection of this provision: “[...] the obligation is not to ensure that the minority language can be used; it is to ‘endeavour to ensure [...] the conditions which would make it possible to use’ the language, and all this only ‘as far as possible’”.<sup>249</sup> The ineffectual consequences of such wording can be measured by applying it analogously (as Lattimer does) to personal tax returns:

If you were not strictly required to submit a tax return, but only required to endeavour to ensure the conditions which would make it possible, if in your opinion there was a real need, and only as far as was possible, would you do it? Life is busy, and you might just not get round to it...<sup>250</sup>

Obviously, the more limiting clauses that govern a specific right or obligation, the more severe its emasculation will be. These two examples admittedly contain more limiting clauses than most other provisions of the FCNM, but they nevertheless constitute the best illustration of the point that limitations on a right or obligation can seriously curtail the faithfulness of its realisation to its intended purpose.

The traditional conceptual tug-of-war between advocates of the flexibility of formulations and those who would favour firmer phraseology is well-documented. While both stances undoubtedly boast competing merits, the approach adopted here proceeds from the *lex lata*, arguing that the effectiveness of the flexible wording of relevant provisions is contingent on the firmness with which they are applied.

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are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints [...]”. See also, paras. 1, 10, *ibid.*

<sup>247</sup> Para. 14, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 26 May 2004.

<sup>248</sup> See further, Katarina Tomasevski, “Indicators”, in Asbjorn Eide, Catarina Krause & Allan Rosas, Eds., *Economic, Social and Cultural Rights: A Textbook (Second Revised Edition)* (Kluwer Law International, the Netherlands, 2001), pp. 531-543; Asbjorn Eide, “The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights”, in *ibid.*, pp. 545-551.

<sup>249</sup> Mark Lattimer, “The Framework Convention as a catalyst for action at domestic level: the NGO perspective”, in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), pp. 58-61, at 58.

<sup>250</sup> *Ibid.*, at 59.

Section III of the FCNM (Articles 20-23)<sup>251</sup> deals with the interpretation and application of the Convention. In particular, it seeks to situate the FCNM in a broader international law context. The section opens with the requirement that persons belonging to a national minority and relying on the FCNM respect “the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities” (Article 20). However, it stops short of requiring that members of national minorities pledge or demonstrate loyalty to the State. According to the Explanatory Report to the FCNM, it is clearly the intention of Article 20 to draw attention to situations in which national minorities constitute a majority within specific geographical areas (so-called “internal minorities”).<sup>252</sup> Article 21 was designed to allay the fears of States Parties as regards possible “doomsday” scenarios resulting from minority rights, i.e., the undermining of “the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States”.

Article 23 asserts the primacy of the ECHR by stating that in the event of “the rights and freedoms flowing from the principles enshrined in” the FCNM being the subject of corresponding provisions in the ECHR, the former will be understood as conforming to the latter. Some of the positive obligations envisaged for State Parties under the FCNM go further than those set out in the ECHR, as interpreted by the European Court of Human Rights in its case-law (see section 4, *infra*). Article 23 therefore contributes to the interpretative grey area created by the non-justiciability of the provisions of the FCNM. If the FCNM’s provisions could be examined by the European Court of Human Rights, straightforward balancing tests could be engaged in. However, to date, the Court has exhibited a clear reluctance to do so - as demonstrated by the discussion of the *Chapman* case, *supra*.

#### *PROOF OF THE PUDDING*

The absence in Council of Europe instruments of any express provision for the justiciability of minority rights is widely criticised as being one of the great failings of efforts towards minority rights protection in Europe today.<sup>253</sup> Such criticism is without prejudice to the usefulness of other international legal and political mechanisms for the enforcement of minority rights.<sup>254</sup> The failure of the FCNM to render minority rights justiciable is particularly disappointing. The PACE did not mince its words when giving its view on the same: “Its implementation machinery is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to the governments”.<sup>255</sup> Given his insights into the drafting process and relevant behind-the-scenes politics, Heinrich Klebes’ fear that the PACE’s assessment could turn out to be an “understatement”<sup>256</sup> is an even more serious indictment.

The monitoring procedures of the FCNM are set out in Articles 24-26. Article 24 assigns responsibility for monitoring the implementation of the FCNM exclusively to the Committee

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<sup>251</sup> Note: Article 22 has already been considered *supra*.

<sup>252</sup> Para. 89, Explanatory Report to the FCNM, *op. cit.*

<sup>253</sup> Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers, The Hague, 2000).

<sup>254</sup> For a comprehensive overview of those mechanisms, see generally: *Mechanisms for the implementation of minority rights* (Council of Europe Publishing/European Centre for Minority Issues, Germany, 2004).

<sup>255</sup> Para. 7, PACE Recommendation 1255 (1995) on the protection of the rights of national minorities.

<sup>256</sup> Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 94.

of Ministers and Article 26 outlines the Advisory Committee's role of assistance in this regard.<sup>257</sup> Article 25 concerns the mechanics of the reporting system.

Thus, as far as the monitoring of the FCNM is concerned, ultimate control and responsibility rests with the Committee of Ministers,<sup>258</sup> thereby prompting descriptions of the relationship between the two committees as one of "tutelage".<sup>259</sup> However, notwithstanding its officially ascribed role of "assistance" in the monitoring process, the Advisory Committee remains the *de facto* power-house for the monitoring activities. This is true by virtue of the extent of its procedural/administrative involvement; its sheer hard graft and its engagement with substantive matters. It is therefore imperative that the Committee of Ministers makes greater efforts to harness the full potential for involving the Advisory Committee "in the monitoring of the follow-up to the conclusions and recommendations on an *ad hoc* basis, as instructed by the Committee of Ministers".<sup>260</sup>

The lack of a strong enforcement mechanism for the FCNM is often identified as its Achilles heel.<sup>261</sup> The question of legal enforceability is of crucial importance here. While justiciable rights generally tend to enjoy more robust protection than non-justiciable rights, it is widely recognised that justiciability, too, has its limitations and that other supplementary means of monitoring and protection are often required to shore up judicial solutions.<sup>262</sup> The drafters of the FCNM eschewed the opportunity to render the rights to be contained therein justiciable, opting instead to rely on other forms of control. As such, it continued in the vein of earlier CoE initiatives. The Venice Commission, for instance, has consistently subscribed to the view that "flexible, diplomatic solutions applied by a non-judicial body may prove more effective in this tricky field".<sup>263</sup> This stance is based on the argument that the political dimension to minority rights impinges to quite an extent on State sovereignty and is therefore less suited to traditional adjudication before the courts. The Commission has also posited that not all minority rights are justiciable, eg. statements of principle or hortatory goals and those rights that are formulated as State obligations rather than minority rights as such.<sup>264</sup>

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<sup>257</sup> Article 26 is quoted here for the sake of convenience:

"1. In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities.  
2. The composition of this advisory committee and its procedure shall be determined by the Committee of Ministers within a period of one year following the entry into force of this framework Convention."

<sup>258</sup> See Articles 24-26, FCNM.

<sup>259</sup> Stefan Troebst, "From paper to practice: The Council of Europe's Framework Convention for the Protection of National Minorities", *op. cit.*, at 25.

<sup>260</sup> Committee of Ministers Resolution (97) 10, *op. cit.*, para. 36. See also in this connection, paras. 18-20, AR4.

<sup>261</sup> Charles F. Furtado, p. 352. Also ECHR non-discrimination norms weak, compared with ICERD (pp. 352/3).

<sup>262</sup> Geoff Gilbert, *op. cit.*, p.

<sup>263</sup> Section II, para. 4 bb), Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on Human Rights, *op. cit.*

<sup>264</sup> However, as already mentioned, optimal protection for minority rights is best guaranteed by complementary judicial and non-judicial approaches, and it is worth noting that such complementarity was not ruled out by the Venice Commission either. "An 'intermediate' solution may eventually lie in recourse to the advisory competence of the [European] Court [of Human Rights], as provided for in additional Protocol No. 2 to the ECHR [...]. [...] for example, [...] either the European Committee for the Protection of Minorities (Art. 18 of the draft) or the Committee of Ministers of the Council of Europe could request an advisory opinion from the Court on a question of law concerning interpretation of the Convention." Giorgio Malinverni, "The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law", *op. cit.*, at 268. On the topic of advisory opinions from the ECtHRs, see: Para. 12(i), Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*; Boriss Cilevics, "The Framework Convention within the context of the Council of Europe", in *Filling the Frame*, *op. cit.*, pp. 28-37, at 33.

Not only is the monitoring system constructed by the text of the FCNM overtly political in character, the *modus operandi* of the Advisory Committee – agreed upon by the Committee of Ministers even before the Advisory Committee was constituted – also turned out to be highly political. At the time of its inception, it is little wonder that scepticism abounded about the Advisory Committee’s ability to overcome what seemed on paper to be formidable restrictions on the latitude within which it would have to operate.<sup>265</sup> There was a general – and well-founded – fear that the baby might be strangled at birth. Some of the anxiety stemmed from the following provisions:

29. The Advisory Committee may request additional information from the Party whose report is under consideration.

30. The Advisory Committee may receive information from sources other than state reports.

31. Unless otherwise directed by the Committee of Ministers, the Advisory Committee may invite information from other sources after notifying the Committee of Ministers of its intention to do so.

32. The Advisory Committee may hold meetings with representatives of the government whose report is being considered and shall hold a meeting if the government concerned so requests.

A specific mandate shall be obtained from the Committee of Ministers if the Advisory Committee wishes to hold meetings for the purpose of seeking information from other sources.

These meetings shall be held in closed session.

Since then, the Advisory Committee – through its own pro-activeness and the support of the Committee of Ministers – has managed to carve out increased operational autonomy for itself. Follow-up questionnaires to States Parties have become a standard feature of its work, thereby maximising the potential of Rule 29. Without the support of the Committee of Ministers, Rule 31 would have been a dead-letter. The Advisory Committee has reported its satisfaction with the backing it has received from the Committee of Ministers in this regard. Meetings with State and non-State representatives have increasingly been relied upon by the Advisory Committee in its monitoring work to great effect. Again, the support of the Committee of Ministers was needed for the Advisory Committee to breathe life into Rule 32: it gave the Advisory Committee blanket authorisation for the entire initial monitoring cycle to hold meetings with representatives of non-governmental organisations and representatives of civil society in the context of its country visits conducted upon the invitation of States Parties. This relieved the Advisory Committee of “the obligation to request a separate mandate for each such meeting as normally required under Rule 32, paragraph 2”<sup>266</sup>.

The individual State reports constitute the lynchpin of the monitoring system, thus enhancing the importance of ensuring that the reporting guidelines are clear<sup>267</sup> and that the content of the

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<sup>265</sup> See, for example, the Council of Europe Committee of Ministers Resolution (97) 10: Rules adopted by the Committee of Ministers on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, 17 September 1997 (especially paras. 29-32; 35-37).

<sup>266</sup> See further, para. 25 of Activity Report 2, which refers to the relevant decision adopted by the Committee of Ministers on 3 May 2000.

<sup>267</sup> The original outline for State reports for the first monitoring cycle of the FCNM was set out in Appendix 3 to CM Resolution (97) 10 and adopted by the Committee of Ministers on 30 September 1998, at the 642<sup>nd</sup> meeting of the Ministers’ Deputies: paras. 10, 11 (mentioning the possible need to modify them later – para. 15, Activity Report 3), Activity Report 1). The outline for State reports for the second cycle of monitoring (para. 15, Activity Report 3) was adopted by the Committee of Ministers on 15 January 2003 at the 824<sup>th</sup> meeting of the Ministers’ Deputies. See also, paras. 21, 22, Activity Report 4. Reports for the second cycle should build on those

reports themselves is both accurate and comprehensive.<sup>268</sup> While the Advisory Committee has made a point of commending the level of detail generally included in State reports,<sup>269</sup> it has nevertheless deemed it necessary to stress the need for even greater attention to detail. This has come about in two ways. First, it has now become a standard feature of the reporting process for the Advisory Committee to issue States Parties with questionnaires requiring more specific information concerning various aspects of their original reports.<sup>270</sup> The Advisory Committee has, however, been quick to point out that such requests for additional information do not have any undertones of criticism, and should rather be viewed as part of the broader process of “constructive dialogue between the Advisory Committee and the States Parties”.<sup>271</sup> Indeed, it has saluted the quality and quantity of information contained in States’ responses to these follow-up questionnaires,<sup>272</sup> noting that “in some cases, such responses have constituted a source of information comparable to the state report itself”.<sup>273</sup>

Second, in its Activity Reports, the Advisory Committee has consistently urged States Parties to make particular efforts to provide information on the implementation of the various rights vouchsafed by the Framework Convention<sup>274</sup> and “pertinent statistical data”.<sup>275</sup> As mentioned *supra*, such information is expressly required by the outlines for State reports. These requests were born of an over-reliance in State reports on legislative frameworks and a concomitant neglect of the relevant practice.

The Advisory Committee also realised at a very early stage that “in order to carry out its task effectively and in a balanced and consistent way, it may also need to seek information from sources other than the reporting States”.<sup>276</sup> It recognised the vital role which information from independent sources could play in complementing and clarifying information contained in initial State reports and thereby helping it to form a “comprehensive picture of country situations”.<sup>277</sup> The procedural decisions taken by the Committee of Ministers which have enabled the Advisory Committee “to establish and maintain free and frequent contacts”<sup>278</sup> with independent sources of information paid instant dividends, as was acknowledged by the Advisory Committee in its three most recent Activity Reports.<sup>279</sup> The Advisory Committee continues to benefit from “excellent cooperation” with NGOs, minority associations and civil society generally, which it acknowledges as being indispensable for effective monitoring.<sup>280</sup>

All of the foregoing demonstrates that there are at least four junctures at which greater attention could be paid to detail: in the State reports themselves; in the follow-up

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submitted in the course of the first cycle and thereby avoid any unnecessary repetition; States should give details of their efforts to apply the conclusions of the Committee of Ministers on the first cycle of monitoring and on the extent to which they have taken appropriate account of the various comments in the Advisory Committee’s Opinion on an article-by-article basis. The reports should also provide responses to specific questions addressed separately to States Parties by the Advisory Committee in the framework of continuing dialogue between them.

<sup>268</sup> para. 12, Activity Report 2.

<sup>269</sup> para. 12, Activity Report 2; para. 12, Activity Report 3.

<sup>270</sup> (para. 17, Activity Report 1); para. 18, Activity Report 2; para. 15, Activity Report 3.

<sup>271</sup> para. 17, Activity Report 1; para. 19, Activity Report 2; para. 15, Activity Report 3.

<sup>272</sup> para. 19, Activity Report 2.

<sup>273</sup> *Ibid.*

<sup>274</sup> para. 17, Activity Report 1; para. 13, Activity Report 2; para. 12, Activity Report 3.

<sup>275</sup> para. 12, Activity Report 3.

<sup>276</sup> para. 18, Activity Report 1.

<sup>277</sup> para. 23, Activity Report 2.

<sup>278</sup> para. 23, Activity Report 2.

<sup>279</sup> para. 24, Activity Report 2 and para. 16, Activity Report 3.

<sup>280</sup> Para. 37, Activity Report 4.

questionnaires addressed by the Advisory Committee to the States Parties; in the inward information flow from independent sources; in meetings with State and non-State actors. Each of these stages offers opportunities to prise open the very centre of pressing questions and situations. Three of them offer the Advisory Committee the opportunity to play a pro-active role in eliciting key information from States Parties, i.e., in the State reports, questionnaires and meetings with State representatives. Any reliable information received from independent sources would obviously feed into the formulation of questions for submission in writing to the States Parties or for raising in meetings with State representatives. Reliable information is therefore the lifeblood of the Advisory Committee, irrespective of whether it is received from the States themselves or from independent third parties. It is of cardinal importance that the Advisory Committee not be restricted in any way in seeking out and using information that is relevant to its work.

In a case of insult having been added to injury, one other problem trammelling the operational potential of the Advisory Committee is the problem of parsimonious funding, which has led to it being severely under-resourced. Currently, the monitoring of the FCNM is allocated less than 0.5% of the Council of Europe's budget.<sup>281</sup> This is a paltry sum and political efforts should be redoubled to ensure that this allocation is significantly increased at the earliest opportunity. The Advisory Committee has consistently been stressing – and quite rightly with increasing urgency – its dire need for greater financial and human resources. It has warned that greater financial *largesse* would be required in order to preclude the danger that the quality of its work would be further compromised due to under-resourcing, thereby jeopardising the effectiveness of the entire monitoring process.<sup>282</sup> The spiralling workload has not been matched by adequate additional resources and the situation was described as “increasingly acute” just before the commencement of the second monitoring cycle.<sup>283</sup> Calls for greater funding have also emanated from a variety of other sources.<sup>284</sup>

To sum up, granted much can and has been achieved despite textual and procedural limitations and “despite” is the key word here. This is a testament to the commitment and resourcefulness of those at the coal-face of the monitoring exercise and not an exoneration of the substantive and structural weaknesses of the FCNM. As pointed out by John Packer on the occasion of the fifth anniversary of the entry into force of the FCNM, this is not a time for resting on laurels.<sup>285</sup> Much more could be achieved:

- Consolidation of one of the AC's ongoing achievements, *viz.*, the *de facto* provision of interpretive guidance on the content of the FCNM's (largely) programmatic provisions,<sup>286</sup> thereby facilitating their implementation. This could be achieved, for example, by providing for a mechanism whereby general comments could be adopted in order to offer authoritative interpretations of the text of the FCNM.

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<sup>281</sup> Rainer Hofmann, “The Framework Convention at the end of the first cycle of monitoring (Opening plenary)”, *Filling the Frame*, *op. cit.*, p. 5.

<sup>282</sup> Paras. 30, (36), Activity Report 1; paras. 42, (44), Activity Report 2; Section 3 ii) Resources of the Advisory Committee and delays in the submission of Opinions (paras. 48-54), para. 58, Activity Report 3.

<sup>283</sup> Para. 43, Activity Report 4. See also para. 44, *ibid.*

<sup>284</sup> Para. 12(v), Rights of national minorities, PACE Recommendation 1623(2003), *op. cit.*,

<sup>285</sup> John Packer, “Situating the Framework Convention in a wider context: achievements and challenges”, *op. cit.*, at 51.

<sup>286</sup> See further, on this observation, Rianne M. Letschert, *The Impact of Minority Rights Mechanisms*, *op. cit.*, at p. 218.

- A distillation of principles from the “soft jurisprudence” of the Advisory Committee
- Greater attention to the preambular affirmation of the FCNM’s sources of inspiration and more frequent invocation of same
- Greater attention to conceptual precision and linguistic consistency in Opinions
- Increased openness and transparency of procedures
- More interaction with interested parties, especially representatives of minority groups
- Timeliness of reporting and measures for dealing with persistent delays<sup>287</sup>

In 2003, the PACE continued its criticism of certain CoE States for failing to ratify,<sup>288</sup> or sign and ratify,<sup>289</sup> the FCNM without debilitating reservations, and exhorted them to do so “swiftly”.<sup>290</sup> Other recommendations have gone a step further. Boriss Cilevics, for instance, has argued that “not only ratification, but also fair implementation of the Framework Convention must become a necessary precondition for membership in [*sic*] the Council of Europe, as is the case today with the European Convention of [*sic*] Human Rights and its Protocol No. 6”.<sup>291</sup> A useful appendix to this recommendation would be that States Parties’ adherence to the FCNM should be kept under continuous and vigilant scrutiny by the PACE and CoE Secretary General’s monitoring mechanisms.<sup>292</sup> Such scrutiny serves as an extra source of pressure for States to comply with their obligations under the Convention. While States are under a presumptive commitment to implement their obligations under international law in good faith – in accordance with the principle of *pacta sunt servanda*, as enshrined, *inter alia*, in Article 26 of the Vienna Convention on the Law of Treaties<sup>293</sup> - measures adopted to give effect to specific conventional provisions do not always live up to the expectations generated by the act of ratification. In this sense, in the absence of effective enforcement/monitoring mechanisms, there is a danger that States will, in practice, be no more than “international street angels and domestic house devils”.<sup>294</sup>

### 1.3.2(iii) Organization for Security and Co-operation in Europe

The Organization for Security and Co-operation in Europe (OSCE), which currently comprises 56 Participating States, has also been in the vanguard of minority rights protection. After an earlier emphasis on standard-setting initiatives at IGO summits, OSCE activities in the domain of minority rights protection have in recent years tended to be channelled through the Office of the OSCE High Commissioner on National Minorities (HCNM) (see further, *infra*).

<sup>287</sup> See, in this connection, Decision of the Committee of Ministers of 19 March 2003 authorising the Advisory Committee to “submit a proposal regarding the commencement of the monitoring of the Framework Convention without a state report when a state is more than 24 months behind in submitting a state report [...]”. [Note to self: para. 7, Activity Report 4, gives 15 March as date of decision].

<sup>288</sup> In this respect, it named: Belgium, Georgia, Greece, Iceland, Latvia, Luxembourg and the Netherlands). See further: PACE Resolution 1301 (2002) on the protection of minorities in Belgium.

<sup>289</sup> In this respect, it named: Andorra, France and Turkey.

<sup>290</sup> Para. 11, Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*

<sup>291</sup> Boriss Cilevics, “The Framework Convention within the context of the Council of Europe”, in *Filling the Frame*, *op. cit.*, pp. 28-37, at 33. See also, p. 32, *ibid.*

<sup>292</sup> This is already routinely taking place.

<sup>293</sup> Article 26 (*Pacta sunt servanda*) reads in its entirety: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>294</sup> Donncha O’Connell, “Beyond rights – towards interests”, *Céide – A Review from the Margins* p. 17 (January/February 1999), at pp. 17-18.

The seeds of OSCE protection for minority rights were sown in the Final Act of the CSCE Summit held in Helsinki in 1975. The Helsinki Final Act is divided into four main categories or “Baskets”,<sup>295</sup> the first of which is entitled ‘Questions relating to Security in Europe’. This Basket includes a Declaration on Principles Guiding Relations between Participating States. Principle VII of this Declaration, entitled “Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief”, and Principle VIII, entitled “Equal rights and self-determination of peoples” are the Principles most directly concerned with human – and specifically minority – rights. Principle VII, para. 4, contains the most explicit reference to minority rights:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The wording employed is clearly redolent of Article 27, ICCPR, but boasts greater suppleness. In the first place, Principle VII, para. 4, is not couched in the same negative terms as Article 27, ICCPR. The extreme caution of the “shall not be denied” formula in Article 27, ICCPR, was not considered to be necessary, given that the resultant text would be political in character, and without legal consequences for Participating States.<sup>296</sup> The importance of this shift is more symbolic than semantic. As already noted, *supra*, the negative wording of Article 27, ICCPR, belies its positive import.<sup>297</sup> Moreover, it was important to send out positive signals of intent as regards minority rights protection.

The wording of Principle VII, para. 4, is also more supple by its refusal to follow the precedent of Article 27, ICCPR, of particularising certain categories of minority and earmarking them for special protection, to the possible exclusion of other categories. The references to “full opportunity for the actual enjoyment” and “their legitimate interests” are preferable on this score. “Full opportunity for the actual enjoyment...” implies a broad conception of equality that embraces the possibility of affirmative action in order to achieve equality in fact. “Legitimate interests” creates a broader base of possible associative motivations of members of minority groups than the restrictive platform of ethnic, linguistic and religious features/interests/objectives.

Follow-up to the Helsinki Final Act (and subsequent meetings) was assured by a number of intergovernmental procedures which were progressively strengthened, notably by the Vienna and Moscow Mechanisms.

The next real milestone for minority rights protection within the OSCE system was the Copenhagen Document, 1990. As would later be the case in the UN system, a catalogue of differentiated rights grew from the seed of a solitary article planted in a more general text. The fact that this was the first standard-setting exercise for minority rights to prove successful

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<sup>295</sup> Basket I is “Questions relating to Security in Europe”; Basket II is “Co-operation in the fields of Economics, of Science and Technology and of the Environment”; Basket III is “Co-operation in humanitarian and other fields” and Basket IV is “Follow-up to the Conference”. See further: Jane Wright, “The OSCE and the Protection of Minority Rights”, 18 *Human Rights Quarterly* (1996), pp. 190-205; Jane Wright, “The Protection of Minority Rights in Europe: From Conference to Implementation”, 2 *The International Journal of Human Rights* (No. 1, Spring 1998), pp. 1-31; [Essex papers].

<sup>296</sup> This is perhaps also the reason why the drafters did not become sucked into the debate on the competing merits of individual and group-oriented rights and protection.

<sup>297</sup> Capotorti, and subsequently, General Comment 23.

at the international level undoubtedly lent it extra importance and influence.<sup>298</sup> One of the five sections in the Document, Section IV, is devoted partly to the rights of persons belonging to national minorities (as they were now called) (paras. 30-39), and partly to the adjacent objective of combating “totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds” (para. 40).

Para. 30 positions the rights of persons belonging to national minorities firmly within respect for human rights, democracy, rule of law, pluralism, tolerance and other laudable societal values. Para. 31 deals with non-discrimination and factual equality for persons belonging to national minorities, and envisages special measures being adopted by States where necessary in order to achieve these ends. Para. 32 begins with the assurance that membership of a national minority is a matter of individual choice and shall not lead to adverse consequences for individuals exercising that choice. The sub-paragraphs in para. 32 then proceed to list specific rights intended for enjoyment by persons belonging to national minorities, such as: to use their mother tongue in public and in private; to establish and maintain educational, cultural and religious organisations; to profess and practise their religion; the pursuit of unimpeded national and transfrontier connections; to receive and impart information in their mother tongue; organisational participation, both nationally and internationally. This paragraph concludes with the reminder that the rights of persons belonging to national minorities may be exercised individually or in community with other group members.

Para. 33 provides for the promotion of national minority identities and Para. 34 sets out a number of linguistic rights, such as the right to education of or in one’s mother tongue (alongside learning of official State languages) and the right to use one’s mother tongue in dealings with public authorities. The right of minorities to participate in public affairs is underscored in para. 35. The following paragraph, 36, emphasises the importance of inter-State cooperation regarding issues relating to national minorities. Para. 37 is a pretty standard “prohibition of abuse of rights” provision; Para. 38 calls on States to honour commitments towards minorities arising out of relevant treaties to which they are already party and to accede to others to which they are not, “including those providing for a right of complaint by individuals”. It is particularly noteworthy that the Document should expressly draw attention to the question of the justiciability of minority rights and, more specifically, the possibility of individual petition. Para. 39 mentions, *inter alia*, the need for cooperation between States within various international fora.

The foregoing brief bird’s-eye view of the extent of relevant provisions in the Copenhagen Document should suffice to explain the impact it has had on the drafting of subsequent international instruments (eg. UN Declaration, Council of Europe texts, including PACE Recommendation 1201 and the FCNM itself). Obviously, the fact that it was a forerunner of other major texts contributed to its impact, but it is too easy to explain impact merely in terms of happenstance. The provisions themselves are phrased in relatively straightforward language, not the stodgy, arch-conservative bureaucratic legalese that tends to rob legal texts of much of their potential. Nor was it bound by legal or other historical baggage, as could be argued about comparable UN efforts: it was pretty much a self-propelled initiative, without complicated ties to precedent. Nor were there complex administrative impediments to the realisation of the drafting exercise: instead of sub-committees interminably exchanging draft documents over periods of years, this was a text adopted by heads of States.

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<sup>298</sup> See, in this connection, its influence on the UN Declaration and the FCNM.

The Office of the OSCE HCNM was established in 1992, pursuant to the mandate set out in the CSCE Helsinki Document (“The Challenges of Change”) of that year.<sup>299</sup> The first incumbent of the Office was the former Dutch Foreign Minister, Max van der Stoep (January 1993-June 2001)<sup>300</sup> and he was succeeded by Rolf Ekeus. The Mandate sets out that the HCNM should be “an instrument of conflict prevention at the earliest possible stage”,<sup>301</sup> and charges the incumbent with the task of providing “‘early warning’ and, as appropriate, ‘early action’ at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage”, but in his/her judgment have the potential to do so.<sup>302</sup>

The HCNM’s mandate has therefore designed an Office with a very specific remit. In formal terms, this remit is strictly one of conflict prevention, in contradistinction to the earlier, overarching OSCE principles (or contiguous Council of Europe mission statements) discussed *supra*, which are grounded in democratic values of pluralism, tolerance, etc., and thereby leave greater scope for the promotion of minority rights. Such typical democracy-enhancing goals might *prima facie* seem broader than the goal of conflict prevention. However, in practice, the HCNM has tended to interpret his mandate in a pro-active manner, tracing potential for conflict to its source in States authorities’ denial of, inadequate provision for, or insufficient accommodation of, minority rights and interests (as the case may be). The deliberately purposive interpretation of the HCNM’s mandate has contributed in large measure to the achievements of the Office to date.

The HCNM is required to “work in confidence” and to “act independently of *all* parties directly involved in the tensions”.<sup>303</sup> The impartiality with which the HCNM’s duties must be discharged would seem to rule out the possibility of interventions on behalf of minority groups, hence the importance of the choice of preposition in the HCNM’s title. “On” was preferred to “for”, in order to reflect the objectives of the mandate, *viz.*, impartial conflict prevention. In practice, though, the HCNM’s interventions very often favour national minorities, but this results from the HCNM’s assessment of the specific facts of given situations, rather than a pre-determined mandate to advance the minority cause.

The HCNM is answerable to the Chairman-in-Office of the OSCE and the Committee of Senior Officials (CSO),<sup>304</sup> but enjoys considerable operational autonomy. There are three main limitations to the permissibility of the HCNM’s engagement. First, without the express consent of all parties involved (including the State), the HCNM is prevented from considering national minority issues in a State “of which the High Commissioner is a national or a resident, or involving a national minority to which the High Commissioner belongs”.<sup>305</sup> Second, the HCNM may not “consider national minority issues in situations involving

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<sup>299</sup> Section II – CSCE High Commissioner on National Minorities, “The Challenges of Change”, CSCE Helsinki Document 1992 (adopted on 9-10 July 1992).

<sup>300</sup> For an overview of his activities in this capacity, see *inter alia*: Walter A. Kemp, Ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague/London/Boston, Kluwer Law International, 2001); Wolfgang Zellner and Falk Lange, Eds., *Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities* (Baden-Baden, Nomos, 1999). A more extensive bibliography is available at: <http://www.osce.org/hcnm/documents/bibliography/#1>.

<sup>301</sup> Section II – CSCE High Commissioner on National Minorities, “The Challenges of Change”, CSCE Helsinki Document 1992, *op. cit.*, para. (2).

<sup>302</sup> *Ibid.*, para. (3).

<sup>303</sup> (emphasis added) *ibid.*, para. (4).

<sup>304</sup> Note: as a result of the Budapest Summit (“Towards a Genuine Partnership in a New Era”), 5-6 December 1994, the CSO was succeeded by the Senior Council. See further, *ibid.*, paras. (13)-(22).

<sup>305</sup> *Ibid.*, para. (5a).

organized acts of terrorism”.<sup>306</sup> This reinforces the overall preoccupation of the HCNM’s mandate with conflict *prevention*. Third, the HCNM is precluded from considering “violations of CSCE commitments with regard to an individual person belonging to a national minority”.<sup>307</sup> The purpose of this restriction is presumably to ensure that the HCNM’s duties are discharged in a non-partisan and non-particularised manner. The concern for conflict prevention is generally more acute where group situations are implicated, rather than single individuals belonging to groups.

The HCNM is relatively unhampered in its ability to draw on a wide range of information sources,<sup>308</sup> to consult a wide range of parties directly concerned in tensions,<sup>309</sup> to conduct country visits,<sup>310</sup> and to involve experts in relevant work and/or country visits.<sup>311</sup> Information about a situation involving a national minority or about any of the parties directly involved in such a situation can be collected or received by the HCNM “from any source, including the media and non-governmental organizations”.<sup>312</sup> Parties directly involved in such situations may draw up and submit specific reports on relevant matters.<sup>313</sup> The only across-the-board restriction in respect of the HCNM’s communications is set out in para. (25) of the Mandate:

The High Commissioner will not communicate with and will not acknowledge communications from any person or organization which practises or publicly condones terrorism or violence.

Para. 26 of the Mandate stipulates the parties directly concerned in tensions who can provide specific reports to the HCNM and with whom the HCNM will endeavour to communicate during visits to a participating State. The parties can be bracketed into two main categories: State governments (including, where appropriate, regional and local ramifications of government in areas of residence of national minorities);<sup>314</sup> authorised representatives of associations, NGOs, religious and other groups of national minorities directly concerned and in the area of tension.<sup>315</sup>

The HCNM is required to submit specific information about the purpose of any proposed visit to an OSCE Participating State before it is due to take place. The State authorities are then given two weeks to liaise with the HCNM in connection with the same.<sup>316</sup> Para. 25 governs all of the various activities of the HCNM during visits to Participating States.<sup>317</sup> Once *sur place*, the State authorities are to facilitate the HCNM’s travel and communications.<sup>318</sup> The HCNM may consult the parties involved and receive information in confidence from any individual, group or organisation directly concerned about the questions under immediate scrutiny. When information provided is confidential in character, the HCNM will respect its confidentiality.<sup>319</sup> States authorities may not take any measures against persons or organisations on the grounds

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<sup>306</sup> *Ibid.*, para. (5b).

<sup>307</sup> *Ibid.*, para. (5c).

<sup>308</sup> *Ibid.*, paras. (23)-(25).

<sup>309</sup> *Ibid.*, paras. (26), (26a) & (26b).

<sup>310</sup> *Ibid.*, paras. (27)-(30).

<sup>311</sup> *Ibid.*, paras. (31)-(36).

<sup>312</sup> *Ibid.*, para. (23a).

<sup>313</sup> *Ibid.*, para. (23b).

<sup>314</sup> *Ibid.*, para. (26a).

<sup>315</sup> *Ibid.*, para (26b).

<sup>316</sup> *Ibid.*, para. (27).

<sup>317</sup> *Ibid.*, paras. (27) & (29).

<sup>318</sup> *Ibid.*, para. (27). Failure to allow the HCNM entry into a State or to assure free travel and communication, will lead to the HCNM informing the CSO of the same: para. (28).

<sup>319</sup> *Ibid.*, para. (29).

that they have had contact with the HCNM.<sup>320</sup> Finally, as regards the HCNM's operational autonomy, up to three experts may be engaged by the HCNM in order to provide specific advice.<sup>321</sup> Criteria and circumstances governing the selection of experts are quite lenient, but the HCNM is required to "set a clearly defined mandate and time-frame for the activities of the experts".<sup>322</sup> The possibility of experts visiting a Participating State (only) at the same time as the HCNM is also provided for.<sup>323</sup>

Since its inception, the HCNM has been an effective agent of discreet, behind-the-scenes diplomacy. Not being hide-bound by a restrictive mandate, definitional rigidity or legal formulae certainly facilitated the adoption of a case-by-case approach. It also ensured tactical flexibility for the achievement of the HCNM's wider goals. The OSCE HCNM has also taken standard-setting initiatives concerning specific (aspects of) minority rights, thereby adding another important string to its bow.

The initiatives in question have led to the elaboration of the Recommendations on Policing in Multi-Ethnic Societies (February 2006); the Guidelines on the use of Minority Languages in the Broadcast Media (October 2003); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999);<sup>324</sup> the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February 1998) and The Hague Recommendations on the Education Rights of National Minorities (October 1996). In addition, the HCNM has also issued recommendations for the Roma and Sinti communities. The so-called "Roma Recommendations" comprise a miscellany of reports and other statements developed over the years, rather than a single set of recommendations.

A point often made about OSCE minority rights standards is that they are an important source of soft law, of *de lege feranda*. The point is supported by the example of the cross-fertilisation that has taken place in the drafting of relevant standards by various international organisations. OSCE commitments have in the past been a source of inspiration and influence for other (legal) texts and a reference point for international and national courts.<sup>325</sup> OSCE commitments have also penetrated sub-regional, bilateral treaties to very good effect, and they have been incorporated into a number of national constitutions and legislation. This tendency is sometimes referred to as the "upgrading" of political commitments.

This last statement taps into a wider discussion revolving around the competing advantages of political and legal standards. Obviously, this is a case of "horses for courses": each set of standards is designed differently to achieve different aims. Political commitments certainly have the potential to be more far-reaching than legal standards, and this potential often manifests itself in their wording. Nevertheless, it has persuasively been argued that in

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<sup>320</sup> *Ibid.*, para. (30).

<sup>321</sup> *Ibid.*, para. (31).

<sup>322</sup> *Ibid.*, para. (32).

<sup>323</sup> *Ibid.*, para. (33).

<sup>324</sup> It is worth noting in this connection that the OSCE Office for Democratic Institutions and Human Rights (ODIHR), in conjunction with the International Institute for Democracy and Electoral Assistance and the Office of the OSCE HCNM, has developed the Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (January 2001). These Guidelines focus on the implementation of the Lund Recommendations that specifically "relate to the work of the ODIHR in respect of elections" – *ibid.*, p. 1.

<sup>325</sup> See, for example, *Sidiropoulos v. Greece*, *infra*, para. 44.

practice, politically binding standards can prove just as effective as their legally binding counterparts.<sup>326</sup>

The OSCE has provided an extra dimension to minority rights protection in Europe and hitherto, it has proved a dynamic one. It remains to be seen, however, whether the initial vigour and momentum will be maintained in a rapidly evolving and thus markedly different political environment. It is too early to evaluate the extent to which OSCE commitments such as those contained in the Copenhagen Document are a product of their times, a reaction to the collapse of the Soviet Block in Central and Eastern Europe. Another relevant question concerns the evolutionary curve that is likely to be traced by the Office of the HCNM itself and whether its erstwhile pro-active approach can be maintained under different stewardship.

At one juncture the suggestion that the OSCE could “loan” the European human rights organs of the Council of Europe was mooted.<sup>327</sup> This suggestion drew on the concept of “*Organleihe*”, or organ-sharing, which has been developed in German administrative law. The central idea was that under a proposed additional protocol to the ECHR, the standards for minority rights protection being developed by the OSCE would become reviewable by the judicial organs of the ECHR in Strasbourg. The proposal was procedurally complicated and would have led to a potentially messy, tiered approach to minority rights protection (some CSCE States were not parties to the ECHR, and the protocol would have had to provide for such States to incorporate the entire ECHR...).<sup>328</sup> It ought to be stressed, however, that this proposal was floated while the OSCE standards were very much in their infancy, even predating the establishment of the Office of the OSCE HCNM.

Perhaps, then, the only element of the proposal that is worth retaining for more general contemporary debate is the possibility or desirability of organ-sharing *per se*. The main *forte* of any prospective organ-sharing arrangement between different IGOs would be its ability to maximise the experience and potential of existing bodies, thereby avoiding any unnecessary duplication of their efforts to achieve similar objectives. While it is always desirable to avoid pointless overlapping between institutions, this is usually achieved through the encouragement of complementary and synergic approaches between institutions. Indeed, a forthcoming Recommendation from the CoE PACE stresses the importance of synergic cooperation between the CoE and the HCNM in the domain of minority rights protection.<sup>329</sup>

As the approaches of the CoE and the HCNM to minority rights protection have – since the heady and formative days of the early 1990s – become rather consolidated, essential differences of substance and process are now more easily identifiable. By now, the relevant limbs of both IGOs have managed to carve out their own institutional space. This makes it easier to distinguish between the respective approaches and, by way of corollary, to determine areas of potential cooperation. Furthermore, given that no additional protocol to the ECHR has ever materialised, the possibility of the OSCE “organ-loaning” the Strasbourg judicial

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<sup>326</sup> Arie Bloed, Ed., *The Conference on Cooperation and Security in Europe: Analysis and Basic Documents*, 1972-1993 (Dordrecht, Martinus Nijhoff Publishers, 1993), pp. 22-25.

<sup>327</sup> Stephan Breitenmoser and Dagmar Richter, “Proposal for an Additional Protocol to the European Convention on Human Rights Concerning the Protection of Minorities in the Participating States of the CSCE”, 12 *Human Rights Law Journal* (No. 6-7, 1991), pp. 262-265.

<sup>328</sup> Note however, that the complexity of the mechanism proposed by Breitenmoser and Richter has made a more positive impression on other commentators. See, for example, Geoff Gilbert,

<sup>329</sup> *The OSCE guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance co-operation and synergy*, Motion for a recommendation presented by Mr Cilevics and others, Doc. 10362, 26 November 2004.

arms of the ECHR remains fanciful. Indeed, it is no longer desirable: the *modus operandi* of the HCNM has been developed along clear lines; it plays to its strengths and the aim of rendering OSCE commitments justiciable does not seem to inform relevant policy at all. As stressed by John Packer:

[...] the HCNM is not a supervisory mechanism and does not concern himself with the protection of minority rights *in general*. The HCNM is limited to acting in situations where, to use the analysis of Gurr, there is ‘the mobilization of grievance’ through the ‘coherent expression by leaders of political movements’ causing tensions which threaten international peace and stability.<sup>330</sup>

In sum, the OSCE commitments relating to minority rights protection remain primarily political in character (despite instances of their “upgrading” to legal status), as do the channels for their enforcement. They continue to wield considerable influence among policy and law-makers throughout Europe. The various sets of principles elaborated by the HCNM further edify earlier OSCE commitments. Applied and programmatic approaches to such principles have been instrumental in promoting their implementation. The overall OSCE contribution to minority rights protection must, however, also be viewed in terms of its limitations. The standards it promotes are not – of themselves – enforceable rights; their adoption is entirely contingent on the goodwill of States authorities.

### 1.3.2(iv) European Union

The erstwhile goals of the European Economic Communities (as the European Union (EU) was then known) were primarily economic cooperation and the consolidation of peace through trade. However, as consistently held by the Court of Justice of the European Communities<sup>331</sup> and as laid down explicitly in the Treaty of Amsterdam, 1997, the EU is bound by the fundamental rights regime of the ECHR.<sup>332</sup> This growing commitment to the upholding of human rights was further consolidated by the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000.<sup>333</sup> Since then, the abortive Draft Constitution for the European Union<sup>334</sup> had incorporated the Charter of Fundamental Rights of the European Union as its Part II; had provided for the accession of the EU to the ECHR, and had affirmed that fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States, “shall constitute general principles of the Union’s law”.<sup>335</sup> Most recently, certain provisions of the Treaty of Lisbon seek to strengthen the EU’s commitments to human rights (including the

<sup>330</sup> (footnotes omitted) John Packer, “Problems in Defining Minorities”, *op. cit.*, at 238.

<sup>331</sup> See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89, *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.

<sup>332</sup> Article 6.2 (ex Article F.2) of the EU Treaty now reads: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Article 6.1 sets out that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Article 29 (ex. Article K1) provides, *inter alia*, a specific legal basis for “preventing and combating racism and xenophobia”.

<sup>333</sup> Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

<sup>334</sup> OJ C 310 of 16 December 2004.

<sup>335</sup> Article I-9 of the Treaty. See further, Rick Lawson, “Human Rights: The Best is Yet to Come”, 1 *European Constitutional Law Review* (2005), pp. 27-37.

rights of persons belonging to minorities) considerably. For instance, the proposed new Article 1a to the Treaty on European Union reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Relatedly, the reworked Article 2 states that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”. Very significantly, the new Article 6.1 accords the Charter of Fundamental Rights of the European Union “the same legal value as the Treaties”.<sup>336</sup> Under the new Article 6.2, the EU “shall accede” to the ECHR.<sup>337</sup> Article 6.3 affirms that fundamental rights, as guaranteed by the ECHR and resulting from the constitutional traditions of Member States, “shall constitute general principles of the Union’s law”.

The express recognition of the rights of persons belonging to minorities as one of the founding values of the EU will give them firm constitutional grounding, which will greatly facilitate their development in the fullness of time. The provision for the Charter to acquire legally-binding force will advance the mainstreaming and consolidation of human rights within the EU and in its activities. Although the Charter does not contain provisions dealing explicitly with the rights of persons belonging to minorities, a number of its provisions are indirectly relevant, as discussed at different points in Chapter 2, *infra*.<sup>338</sup> Finally, the envisaged accession of the EU to the ECHR ought to make for the more consistent interpretation of human rights norms at the European level. The general upshot of these pending developments is that the EU’s approach to human rights and the rights of persons belonging to minorities will move no longer be largely confined to the political realm.<sup>339</sup> A more legal approach will be facilitated and necessitated.

In recent years, the EU’s main focus on minority rights had been their inclusion as one of the so-called Copenhagen criteria<sup>340</sup> governing EU enlargement. The European Council’s conclusions adopted in Copenhagen in 1993 set out that membership of the EU “requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule

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<sup>336</sup> See further in this connection: Declaration concerning the Charter of Fundamental Rights of the European Union, OJ C 306/249 of 17 December 2007.

<sup>337</sup> See further in this connection: Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 306/155 of 17 December 2007; Declaration on Article 6(2) of the Treaty on European Union, OJ C 306/249 of 17 December 2007.

<sup>338</sup> See also in this connection: Guido Schweltnus, “‘Much ado about nothing?’ Minority Protection and the EU Charter of Fundamental Rights”, *Constitutionalism Web-Papers*, ConWEB No. 5/2001.

<sup>339</sup> See further: Bruno De Witte, “Politics versus law in the EU’s approach to ethnic minorities”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 137-160; Bruno De Witte, *Politics Versus Law in the EU’s Approach to Ethnic Minorities*, EUI Working Paper RSC No. 2000/4; Kyriaki Topidi, “European Union standards and mechanisms for the protection of minorities and the prevention of discrimination”, in Council of Europe, *Mechanisms for the implementation of minority rights* (Strasbourg, Council of Europe Publishing, 2004), pp. 183-202.

<sup>340</sup> For further commentary on relevant issues, see: Manfred Nowak, “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (New York, Oxford University Press, Inc., 1999), pp. 687-698; Bruno De Witte & Gabriel N. Toggenburg, “Human Rights and Membership of the European Union”, in Steve Peers & Angela Ward, Eds., *The European Union Charter of Fundamental Rights* (Oxford and Portland Oregon, Hart Publishing, 2004), pp. 59-82; Christophe Hillion, “Enlargement of the European Union: A Legal Analysis”, in Anthony Arnall & Daniel Wincott, Eds., *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), pp. 401-418.

of law, human rights and respect for and protection of minorities”.<sup>341</sup> It has been noted that whereas the other criteria had already been recognised “as fundamental values in the European Union’s internal development *and* for the purpose of its enlargement”, “minority protection is *only* mentioned in the latter context”.<sup>342</sup> This discrepancy has been criticised for imposing on aspirant Member States additional standards to those actually recognised within the EU by existing Member States.<sup>343</sup> Nevertheless, the inclusion of minority protection in the Copenhagen Criteria had a longer-term effect of publicising and institutionalising the issue.<sup>344</sup> As the EU did not have its own standards on minority protection, the process of pre-accession monitoring of candidate States, necessarily drew on relevant standards, reporting and monitoring, carried out in other fora. There was particular reliance on the work of the Council of Europe, especially its work relating to the FCNM. As such, the EU enlargement process proved an important catalyst for aspirant Member States to develop their laws, policies and practices concerning minority protection and bring them into line with FCNM standards.<sup>345</sup>

Of the various EU institutions, it is the European Parliament that has traditionally been the most sympathetic and sensitive to the objective of advancing minority rights protection within and by the EU. The need to develop a coherent EU policy on minority rights is one of the central emphases of its 2005 Resolution entitled “Protection of minorities and anti-discrimination policies in an enlarged Europe”.<sup>346</sup> In the Resolution, it urges the European Commission to “establish a policy standard for the protection of national minorities”, based on the FCNM.<sup>347</sup> It also provides a detailed list of international texts which could usefully inform the exercise of developing “some common and minimum objectives for public authorities in the EU” concerning the protection of minority rights.<sup>348</sup>

Recent developments concerning human rights protection in and by the EU include the establishment of the European Union Agency for Fundamental Rights<sup>349</sup> and the adoption of a Multi-annual Framework (MAF) for the Agency.<sup>350</sup> The MAF for the Agency is sure to

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<sup>341</sup> Conclusions of the Copenhagen European Council, *Bulletin of the European Communities* 6-1993, Point I.13.

<sup>342</sup> (emphasis per original). Bruno De Witte, “Politics versus law in the EU’s approach to ethnic minorities”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 137-160, at 140.

<sup>343</sup> See, *inter alia*, *ibid.*

<sup>344</sup> See further: Christophe Hillion, “Enlargement of the European Union: A Legal Analysis”, *op. cit.*, at 408-409.

<sup>345</sup> See further: James Hughes & Gwendolyn Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs”, *Journal on Ethnopolitics and Minority Issues in Europe (JEMIE)* (No. 1, 2003); André Liebich, “Ethnic minorities and long-term implications of EU enlargement”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 117-136; Gabriel N. Toggenburg, Ed., *Minority Protection and the Enlarged European Union: The Way Forward* (Hungary, Open Society Institute, 2004); Antje Wiener & Guido Schweltnus, “Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights”, Constitutionalism Web-Papers, ConWEB No. 2/2004; Gwendolyn Sasse, “The Political Rights of National Minorities: Lessons from Central and Eastern Europe”, in Wojciech Sadurski, Ed., *Political Rights under Stress in 21<sup>st</sup> Century Europe* (New York, Oxford University Press Inc., 2006), pp. 239-281.

<sup>346</sup> European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), 8 June 2005, OJ C 124 E/405 of 25 May 2006.

<sup>347</sup> *Ibid.*, para. 6.

<sup>348</sup> *Ibid.*, para. 8.

<sup>349</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1, 22 February 2007. See generally: Philip Alston & Olivier De Schutter, Eds., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford & Portland Oregon, Hart Publishing, 2005).

<sup>350</sup> Council Decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, 23 January 2008, Interinstitutional File: 2007/0189 (CNS).

disappoint persons belonging to minorities. The thematic areas covered by the MAF do not include the rights of persons belonging to minorities as a separate item.<sup>351</sup> Discrimination against persons belonging to minorities is included in a wide-ranging, general focus on discrimination, but the further relevance of other focuses for persons belonging to minorities is, at best, no more than implicit. The failure to prioritise the rights of persons belonging to minorities cannot be dismissed as mere oversight, because the importance of those rights was raised at several junctures during the drafting process. First, in the proposal for the Council Decision initially put forward by the European Commission, it was acknowledged that, *inter alia*, the “protection of national minorities, minority rights and Roma issues” and “respect for cultural, religious and linguistic diversity” had been dealt with in recent European Parliament Resolutions and Council conclusions concerning fundamental rights.<sup>352</sup> The Commission’s document also acknowledged that during the public consultation on future thematic priorities for the Agency, “minority rights” was one of the issues that had been mentioned “in particular”.<sup>353</sup> Notwithstanding those acknowledgements, the Commission did not include minority rights (or specific aspects thereof) in its initial list of ten thematic areas to be included in the MAF, as set out in that very same document.<sup>354</sup> In its “Detailed explanation of the proposal”, the Commission only explained the relevance of the proposed focuses; no explanation was given as to why other focuses (eg. minority rights) had been omitted.<sup>355</sup>

In its response to the Commission’s proposal, the European Parliament suggested an amendment to Recital 2 of the draft Council Decision in order to explicitly refer to the protection of minority rights, as follows:

(2) The Framework should include the fight against racism, xenophobia and related intolerance amongst the thematic areas of the Agency’s activity ***and the protection of the rights of persons belonging to ethnic or national minorities.***<sup>356</sup>

The European Parliament’s proposed amendment was not included in the text ultimately adopted as the Council Decision, even though it had justified its proposal by referring to Recital 10 of the Council Regulation establishing the Agency, which requires that the protection of the rights of persons belonging to minorities be included in the permanent programme of the Agency.<sup>357</sup>

Finally, it should be noted that the EU Network of Independent Experts on Fundamental Rights’ Thematic Comment No. 3, *The Protection of Minorities in the European Union*,

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<sup>351</sup> Article 2, Council Decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, *op. cit.*

<sup>352</sup> European Commission, Proposal for a Council Decision implementing Regulation (EC) No 168(2007 [sic] as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012, 12 September 2007, COM(2007) 515 final, p. 3.

<sup>353</sup> *Ibid.*, p. 4.

<sup>354</sup> *Ibid.*, pp. 5-6.

<sup>355</sup> *Ibid.*, pp. 6-7.

<sup>356</sup> (The text in bold italics is the amendment proposed by the European Parliament) European Parliament legislative resolution of 17 January 2008 on the proposal for a Council decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012, Amendment 2. This text was based on an identically-titled report adopted by the Parliament’s Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Michael Cashman) on 20 December 2007 (‘Cashman Report’).

<sup>357</sup> Cashman Report, *op. cit.*, p. 6.

comprised major research and performed a very important mapping function concerning relevant standards within the EU.<sup>358</sup>

## 1.4 Projected future evolutions of minority rights

Traditionally, one of the greatest obstacles to the furtherance of minority rights protection has been the fear persistently held by States that according minority groups enhanced rights would – through the empowerment of their subjects – stimulate secession (or in the event of the minority group in question having links with a so-called kin-state, irredentism). This fear is captured in the allusion to “the spiral ‘cultural autonomy, administrative autonomy, secession’”.<sup>359</sup> These fears have persisted in the face of the development of a corpus of international law<sup>360</sup> and a large volume of cogent academic legal writings that clearly distinguish between relevant aspects of minority rights and the right of peoples to self-determination. The refractory nature of these fears confirms their deep-rooted nature and the still all-too-frequent perception of minority rights as a bogeyman of international law and politics. Having at this stage examined relevant theory and practice, it is timely to re-emphasise the importance of crafting a suitable definition of a minority group:

It may be observed that international standard-setting has out-paced articulation of, and consensus on, basic concepts. In other words, the international community has established ‘rights’ and even procedures through which to pursue respect for these rights without fully or clearly delimiting either the subjects/beneficiaries of the rights or the specific content of the rights. This opens the door to possibly unfounded or ‘unjust’ invocations of the stipulated rights and raises the prospect of social conflicts concerning the legitimacy of claimants and the full content of their rights. The lack of clarity has also led to tremendous uncertainty, unfounded assumptions and fear on the part of several interested parties, especially governments who worry that according ‘minority rights’ may be a precursor to political disintegration threatening the territorial integrity of the State. It is, therefore, imperative to clarify the matter not only for theoretical cleanliness, but also for practical reasons of the general interest – to avoid conflicts (especially armed ones).<sup>361</sup>

### 1.4.1 Troublesome taxonomies

The system of classification for different types of minorities (viz. in terms of specific characteristics, eg. ethnicity, language, religion, culture) routinely employed is broad-brush. While it may be useful for indicating more salient distinctions at the macro level, it fails to deliver on the necessary detail and precision at the micro level. This is largely a result of the blurring of definitional distinctions and the prevalence of intersectionality in practice. Identity is forged from a composition of numerous different characteristics and preferences, various permutations and combinations of which are possible. As Geoff Gilbert has argued:

Classification, in the end, is irrelevant. Minorities often straddle these classes and need guarantees about linguistic rights, religious freedom, and the protection of their culture. To categorize them adds nothing to the fact that they are a minority and minority rights should attach in general. The

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<sup>358</sup> EU Network of Independent Experts on Fundamental Rights’ Thematic Comment No. 3, The Protection of Minorities in the European Union, 25 April 2005.

<sup>359</sup> Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 96.

<sup>360</sup> For illustrative purposes, see paras. 2, 3.1 and 3.2 of General Comment No. 23 – The rights of minorities, and also by way of contrast, General Comment No. 12 – The right to self-determination of peoples.

<sup>361</sup> (footnotes omitted) John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 226.

adjectives go to the areas of protection and guarantees, rather than to the definition of those accorded that protection and those guarantees.<sup>362</sup>

This cluster of arguments has a number of corollaries. One preliminary remark is that categorisation should not be confused with definition. The purpose of categorisation is to identify the characteristics which distinguish categories – in their own right and in respect of adjacent categories; to enhance understanding of what each entails. Definition, on the other hand, is the prior and more generic exercise of seeking to trace the full circumference of a notion, of all categories taken together.

*In abstracto*, the difference between definition and categorisation can appear very fine, but *in concreto*, in the particular example of minority rights, once one recognises that minority rights are at issue, the enquiry must turn to the particular type of minority rights that are involved. This is where categorisation comes into its own and its purpose is more clearly illustrated, not at the earlier definitional stage. As will be argued, *infra*, depending on the category of minority involved, the expectations of the bearers of the rights, as well as the duties of the addressees of the rights, will be qualitatively different. Linguistic minorities do not necessarily share the same objectives and needs as religious minorities, for instance (apart from both being subject to the levelling effect of discrimination, of course).

Another of the aforementioned corollaries also helps to scotch the argument that categorisation can play an effective definitional role in this context. It centres on the question of determining which characteristic(s) should be deemed the most salient and therefore the most appropriate for definitional purposes when more than one fundamental characteristic or set of characteristics distinguishes a minority from the remainder of the population. First, in individual cases, it can be very difficult to decide - for the purposes of categorisation - which set of characteristics should prevail, or how the necessary balancing exercise should be performed.

There may not even be unanimity among group members on the question of its distinctive characteristic(s). In the event of group consensus, however, there is no guarantee whatever that State authorities would agree with that consensual collective opinion.<sup>363</sup> Endless and ultimately futile debates on sensitive-*cum*-explosive divergences of opinion could result, such as: language/dialect, religion/(cultural) practice, freedom-fighter/terrorist. It is, as Gilbert correctly concludes, much more helpful to use categorisation as a tool to point towards the specific nature of “protection” and “guarantees” required in specific circumstances (see further, *infra*). Categorisation is thus a necessary component of a broader approach of “graduated differentiation” to minority rights protection advocated by Asbjorn Eide. An approach of “graduated differentiation”<sup>364</sup> should be able to respond to “different categories of groups which might be entitled to different sets of rights ‘depending on objective criteria justifying reasonable distinctions’”.<sup>365</sup>

The very idea of group identity comprising fixed, constitutive elements is itself flawed. It is not possible to reduce individual identity (never mind group identity) to any one of its many

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<sup>362</sup> Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, at 169.

<sup>363</sup> See further: Asbjorn Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, Report submitted to the UN Commission on Human Rights - Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/34/Add.4, 11 August 1993, para.

<sup>364</sup> Asbjorn Eide, *Classification of minorities and differentiation in minority rights*, E/CN.4/Sub.2/AC.5/1996/WP.2.

<sup>365</sup> Quoted in Packer, “Problems in Defining Minorities”, *op. cit.*, p. 245.

facets.<sup>366</sup> This is widely recognised in international human rights instruments. As stated in the Preamble to the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: “Considering that religion or belief, for anyone who professes either, *is one of the fundamental elements in his conception of life* and that freedom of religion or belief should be fully respected and guaranteed”.<sup>367</sup> Instances of such “overspill” are frequent: a religious minority can simultaneously be an ethnic or linguistic minority; with religious and cultural practices/rights being particularly seamless.<sup>368</sup>

Furthermore, the traditional range of perceived fixed features (ethnicity (or nationality), language, religion or culture) is highly restricted. It fails to take account of other crucial dimensions to identity. In other words, the emphasis has tended to be placed on a certain number of innate or inherited characteristics, to the exclusion, or at least significant neglect of those that are voluntarily acquired. As stated in the Lund Recommendations on the Effective Participation of National Minorities in Public Life, “Individuals identify themselves in numerous ways in addition to their identity as members of a national minority”.<sup>369</sup> The corresponding section of the Explanatory Report to the Lund Recommendations elaborates:

In open societies with increasing movements of persons and ideas, many individuals have multiple identities which are coinciding, coexisting or layered (in an hierarchical or non-hierarchical fashion), reflecting their various associations. Certainly, identities are not based solely on ethnicity, nor are they uniform within the same community; they may be held by different members in varying shades and degrees. Depending on the specific matters at issue, different identities may be more or less salient. As a consequence, the same person might identify herself or himself in different ways, depending upon the salience of the identification and arrangement for her or him.<sup>370</sup>

The argumentation of others continues in the same vein: identity is anything but static or “immutable”; it is constructed, de-constructed and re-constructed constantly throughout the course of our lives; “We constantly define and redefine our identity through contact, dialogue and exchange, and sometimes also through conflict with others”.<sup>371</sup> There is a kind of Brownian motion of characteristics in each of us, and which particular characteristics are the most salient at any given time is determined – at least in part – by extraneous situational factors.

In sociological circles, the notion of the fluidity of individual and group identities has been developed rather extensively.<sup>372</sup> According to the theory of “liquid modernity” expounded by Zygmunt Bauman,<sup>373</sup> the “melting powers” of modernity<sup>374</sup> have caused previous

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<sup>366</sup> Peter Leuprecht, “Minority Rights Revisited: New Glimpses of an Old Issue”, in Philip Alston, Ed., *People’s Rights* (United Kingdom, Oxford University Press, 2001), pp. 111-126, at 124.

<sup>367</sup> (emphasis added) Fourth preambular paragraph, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

<sup>368</sup> See further, Yoram Dinstein, “Freedom of Religion and the Protection of Religious Minorities”, in Yoram Dinstein and Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 145-169, at 159.

<sup>369</sup> Para. 4, Section I – General Principles, The Lund Recommendations, *op. cit.*

<sup>370</sup> Para. 4, Explanatory Note to the Lund Recommendations, *op. cit.*

<sup>371</sup> Peter Leuprecht, “Minority Rights Revisited: New Glimpses of an Old Issue”, *op. cit.*, at 124.

<sup>372</sup> See further: Billig, quoted in Packer, “Problems in Defining Minorities”, *op. cit.*, p.

<sup>373</sup> See further: Zygmunt Bauman, *Liquid Modernity* (United Kingdom, Polity Press, 2000), pp. 7-8; 83-84.

<sup>374</sup> For Bauman, the crucial attribute of modernity is “the changing relationship between space and time” – *ibid.*, p. 8.

“configurations, constellations, patterns of dependency and interaction” to be “recast and refashioned”.<sup>375</sup> He continues:

It is such patterns, codes and rules to which one could conform, which one could select as stable orientation points and by which one could subsequently let oneself be guided, that are nowadays in increasingly short supply. It does not mean that our contemporaries are guided solely by their own imagination and resolve and are free to construct their mode of life from scratch and at will, or that they are no longer dependent on society for the building materials and design blueprints. But it does mean that we are presently moving from the era of pre-allocated ‘reference groups’ into the epoch of ‘universal comparison’, in which the destination of individual self-constructing labours is endemically and incurably underdetermined, is not given in advance, and tends to undergo numerous and profound changes before such labours reach their only genuine end: that is, the end of the individual’s life.<sup>376</sup>

This fluidity can even be identified in distinctive characteristics traditionally ascribed to minorities – grouped in somewhat generic terms as ethnicity/nationality, language, religion and culture - and traditionally also thought to be unchanging. It might, for instance, be expected that one’s mother tongue would be one of the most stable and constant features of a person’s life, but such an assumption is predicated on a somewhat restrictive definitional and analytical paradigm. Tove Skutnabb-Kangas and Sertac Bucak identify four different definitions of the “mother tongue” concept: origin (the language(s) one learned first); identification (internal and external); competence (the language(s) one knows best) and function (the language(s) one uses most).<sup>377</sup> From the perspective of linguistic human rights, they stress that “*mother tongue(s) is/are the language(s) one has learned first and identifies with*”.<sup>378</sup> However, they submit that under any of these definitions, a person can have two or more mother tongues, and with the exception of the “origin” definition, all definitions allow for the possibility that a person’s mother tongue might change – “even several times”.<sup>379</sup> Needless to say, such switches would almost invariably constitute gradual, protracted responses to profound changes in one’s personal circumstances or one’s social environment. For present purposes, though, the essential point is that such changes are not *per se* precluded.

Similar argumentation can be developed as regards a person’s religious affiliation. As will be demonstrated in Chapter 3, changes of religion are a fact that has to be reckoned with. While the right to renounce one’s religion, to adhere to an alternative religious faith, or to cease to profess any faith whatever are all encompassed by the right to freedom of thought, conscience and belief, as guaranteed by international law, such legal recognition has proved difficult to achieve on the international plane. Certain religious denominations consider apostasy to be a crime and vehemently dispute assertions that it is an integral element of the right to freedom of religion. Be that as it may, the European legal experience does entertain the possibility of changing one’s religion, as will be convincingly shown in Chapter 3. This mounts a further challenge to the assumption that minority groups are undifferentiated entities. They are not. They are composite entities which must necessarily admit freedom of individual choice. As such, generalist assumptions about shared or constitutive characteristics should be made with utmost caution.

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<sup>375</sup> *Ibid.*, p. 6.

<sup>376</sup> *Ibid.*, p. 7.

<sup>377</sup> Tove Skutnabb-Kangas & Sertac Bucak, “Killing a mother tongue – how the Kurds are deprived of linguistic human rights”, in Tove Skutnabb-Kangas & Robert Phillipson (in collaboration with Mart Rannut), Eds., *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Germany, Mouton de Gruyter, 1994), pp. 347-370, at 360.

<sup>378</sup> (emphasis per original), *ibid.*, at 361.

<sup>379</sup> *Ibid.*, at 361.

At the group level, the subjective element of membership is also revealed to have a “fluid and changeable nature”: “The criteria by which ethnic groups choose to identify themselves, moreover, may vary not only from group to group, but also within one group over a period of time”.<sup>380</sup> The apparent presumption of ossified group traits is challenged in societal terms by Jack Donnelly:

Human nature is thus a social project as much as it is a given. Just as an individual’s “nature” or character emerges out of a wide range of given possibilities through the interaction of natural endowment, individual action and social institutions, so the species (through the instrument of society) creates its essential nature out of itself.<sup>381</sup>

Individuals and groups can have several potential identities,<sup>382</sup> the strength of which are influenced by societal and situational factors. These identities can be real or strived after, thereby contributing to the concept of “imagined communities”:<sup>383</sup> communities or nations that are imagined and created, or, to put a more negative spin on it, fabricated.<sup>384</sup> This concept is famously - and probably also customarily - applied by theorists to nations. However, Benedict Anderson, unravelling his own theories, has extrapolated that “all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined”.<sup>385</sup> This postulation is premised on the subjectivity of group cohesion, its tenuous and often ineffable nature, and its innate resistance to qualification and quantification. Finally, it should by no means be ruled out that the virtual dimension to group identity will gain in importance in the future, given the increasing role being played in contemporary society by communications technologies that rely on and promote interaction in virtual, online fora (see further, Chapter 4.5, *infra*).

Marlies Galenkamp, while recognising that “people’s preferences are ever shifting and endogenous to political processes rather than fixed and exogenous”,<sup>386</sup> has nevertheless cautioned against any inclination to elevate mere desires to the level of rights. Her word of warning – on the grounds that it would be theoretically inconsistent to do so – merits attention.<sup>387</sup> Not every desire warrants protection by the law, much less human rights law. It is worth recalling the propelling rationales of human – and minority – rights protection: peace and security; human dignity (premised on the right to existence and the right to non-discrimination and equality); cultural identity and diversity. Mere whims should not be mistakenly dressed up as interests or desires that exert a crucial influence on the formation of one’s identity. Minority rights protection should not be stretched beyond its elastic limit to include interests of insufficient weight and substance. This is an important consideration when

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<sup>380</sup> “Definitions of the Term ‘People’”, in *Self-Determination and National Minorities*, p. 164.

<sup>381</sup> Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, *op. cit.*, p. 42.

<sup>382</sup> Crispin Jones, “Educational Rights and the Definition of Minorities”, in Deirdre Fottrell & Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 205-222, at 211.

<sup>383</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised Edition) (London, Verso Books, 1991).

<sup>384</sup> *Ibid.*, p. 6.

<sup>385</sup> *Ibid.*, p. 6.

<sup>386</sup> Marlies Galenkamp, “The Rationale of Minority Rights: Wishes Rather Than Needs?”, *op. cit.*, p. 48.

<sup>387</sup> An argument grounded in political pragmatism could also be advanced in this connection, *viz.* that minority groups themselves ought to be mindful of the tactical risks involved in overstating their demands. Obviously, there is a greater chance that reasonable or realistic demands would be granted by (mildly) sympathetic authorities. Minorities are counselled in the Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities to: “give due consideration to such legitimate factors as their own numerical strength, their demographic density in any given region (or regions), as well as their capacity to contribute to the durability of these services and facilities over time” (section entitled “General Introduction”).

it comes to legitimising special access for minority groups to limited media resources and airtime, as discussed at length in Chapter 8.

Yet this last assertion does not fully lay the matter to rest. How should distinctions be drawn between features or interests that contribute to the formation of identity? Who should be vested with the responsibility for such an important evaluation exercise – and which criteria should apply? Or should the determination of identity-forming characteristics be a purely subjective exercise, left entirely to groups themselves? What implications would such a solution have for minorities within groups and for questions of adequate representation and agency in groups which lack organisational structures?

Once one dispenses with the “fixed features” approach, it becomes very difficult to replace it with an alternative set of criteria for identifying minorities. To stick with identity-formation as the central consideration (in light of earlier comments on the fluidity of identity), determining the appropriate threshold for relevance remains problematic. One of the classical arguments for seeking to limit the criteria for recognising minorities is that doing so helps to avoid an overabundance of claims for special status and enjoyment of accruing rights. To abandon the identity criterion could result in a move towards more open-ended associational rights and lose the specific minority dimension. If the middle-ground were to be taken, the identity criterion would have to be applied in conjunction with other criteria, but there would nevertheless still have to be some cut-off point between features and points of cohesion that are serious-minded and those that are frivolous. This would have to be determined in a non-discriminatory manner.

## Conclusions

Under international human rights law, the concept of minority is at far remove from its straightforward signification in everyday language. The concept rests on a complex of quantitative, qualitative and political criteria. There is no authoritative, legally-binding definition of minority in international law, but various definitional indicia can be gleaned from a number of non-binding sources, most notably the Capotorti report, and these are widely regarded as setting the conceptual parameters for relevant discussions.

According to those definitional elements, it is necessary but not sufficient for a group to be in a position of numerical inferiority *vis-à-vis* the rest of the population in order for it to be considered a minority. It must also be in a position of non-dominance. These definitional requirements are uncontentious, unlike the further requirement that members of the group must be nationals of the State in question. That requirement is highly politicised and it is at odds with the transversal obligation on States to ensure the effective exercise of human rights for everyone without discrimination. Insistence on a nationality criterion holds considerable exclusionary potential and is open to abuse by States which are reluctant to guarantee the full panoply of human rights for immigrants or so-called “new” minorities. This criterion is sometimes packaged as a group’s traditional or historical presence in the State, which again is open to abuse by States authorities in the absence of clear criteria for determining when such a presence can be considered “traditional” or “historical” or “long-standing”. The recognition of minorities and their rights should not be contingent on such criteria, although it is conceivable that they could legitimately influence the nature and extent of State obligations that are correlative to minority rights. However, they should not be used as definitional criteria for the recognition of minorities as such.

As already mentioned, some of the definitional criteria are qualitative in nature: minority groups must display a range of constitutive characteristics that distinguish them from majority sections of the population. In practice, these characteristics are primarily ethnic, religious, cultural or linguistic. A definitional focus on constitutive group characteristics can be explained by some of the main underlying rationales for recognising the specificity of minority rights over and above human rights *simpliciter*. According to those rationales, minority rights go beyond mere guarantees of non-discrimination and equality (indeed, for those rights to be secured for persons belonging to minorities, additional (temporary) restitutive measures are often required by States) to embrace concerns for the preservation of specific, fundamental features of the collective identities of minorities. References to “fundamental” features should not be confused with “fixed” features: the fact that features are fundamental does not preclude their natural evolution or concerted development. Rather, the term points to their deep-seated character: typically, ethnic, religious, cultural or linguistic characteristics.

The focus on those particular characteristics is further explained by another definitional criterion, i.e., a sense of cohesiveness or associative purpose that is shared by group members and that is directed at the preservation of their constitutive characteristics. It could therefore be argued that other constitutive characteristics excluded from the present selection are not powerful enough in terms of their ability to sustain a distinct group identity to merit inclusion. The chosen characteristics must be seen as having unifying propensities, but without having homogenising effects. The sense of cohesiveness does not have to be explicit – it can also be implicit. This brings welcome flexibility to the definitional exercise as it cannot be assumed that groups are composed of formal, representative structures that would be mandated to issue explicit statements of cohesive purpose.

The definition outlined above manages to strike a complicated and precarious balance between a number of criteria that are difficult to reconcile. The combination of subjective and objective elements for definitional purposes represents an important safeguard against arbitrariness on the side of minorities and on the side of State authorities. Its insistence on objective criteria seeks to prevent subjective attempts by groups to inflate the concept of minority rights beyond its intended scope, while also seeking to prevent States from subjectively denying minority rights. Conversely, the inclusion of a subjective sense of belonging is designed to ensure that the existence of a minority group *qua* group is grounded in realism and not based on the subjective perceptions of some group members or of non-group members.

This Chapter – and thesis – recognises the conceptual complexities and overt politicisation involved in the definitional challenge. In most of its important respects, it follows the approximate definition outlined above, with the notable exception of the nationality criterion. The existence of minorities is a question of fact, not of law or politics. If a group satisfies all the other proposed definitional elements, then the length of time it has been present in a given State should not preclude its recognition as a minority or its ability to exercise minority rights. The question of classification of minorities (for the purpose of ascertaining their needs and the extent of State duties towards them) is a separate and subsequent question to the questions of definition and recognition. The question of the inclusion of “new” minorities under the protection of minority rights guarantees in international treaty law is very divisive. This Chapter and thesis favour their inclusion under relevant standards of protection. The highly politicised nature of the question should not detract from the imperative of securing human

rights for everyone. The importance of an effective right to freedom of expression is very often most acute for “new” minorities, recent immigrants and non-citizens, who are otherwise politically disenfranchised and are generally excluded from expressive fora and participatory structures and processes in public life. On such a view, the ability of “new” minorities to exercise their right to freedom of expression in an effective manner is a litmus test for the vigour of the right generally.

This Chapter also conducts an exploration of legal and institutional frameworks guaranteeing the rights of persons belonging to minorities internationally. Those frameworks exert a determinant influence on the shaping of legal and institutional frameworks at national and sub-national levels and are thereby of crucial importance for the realisation of the rights of persons belonging to minorities in practice.