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Minority rights and freedom of expression: a dynamic interface

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Chapter 5 – Normative coupling of freedom of expression and minority rights

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*“‘Since when,’ he asked,
‘Are the first line and the last line of any poem
Where the poem begins and ends?’”
- Séamus Heaney¹*

Introduction

Chapter 4 explores a selection of theories on freedom of expression and the media, particularly from the perspective of persons belonging to minorities. The present chapter will demonstrate that many of the principles, theories and issues addressed in Chapter 4 are also reflected in the various provisions guaranteeing the right to freedom of expression under international law. The citation from Séamus Heaney introducing this chapter is equally applicable to legal standards. They do not begin or end with textual formulations. They incorporate – to varying extents – drafting processes, historical and teleological purposes and their normative and societal impact. This premise explains the inclusion of the forthcoming focuses on such peri-textual aspects of international legal standards.

5.1 An underexplored nexus (minority rights/freedom of expression) of international law

The leading provisions in international law concerning the right to freedom of expression will be subjected to close scrutiny at various junctures in Chapters 6 and 7. For present purposes, it is sufficient to note that the most important of those provisions are Article 19, UDHR, Article 19, ICCPR and Article 10, ECHR. As already noted in earlier chapters, Article 27, ICCPR, is the leading provision concerning minority rights. It is important to signal, by way of introduction to this chapter, that the absence of explicit and extensive linkage between the

¹ Séamus Heaney, “The Fragment”, in *Electric Light* (London, Faber & Faber Ltd., 2001), p. 57.

aforementioned provisions guaranteeing freedom of expression and minority rights, can be explained largely by historical and political reasons. Whereas the US (along with Britain and France) championed the cause of freedom of expression (or “freedom of information”, to use the UN parlance of the time), the USSR and its allies championed the rights of minorities. The ideological polarisation that defined the Cold War also precluded the possibility of the synergic application of freedom of expression and minority rights. Early evidence of this polarisation was to be found in the political pressure brought to bear by both sides concerning the creation of sub-commissions to the Commission on Human Rights. This pressure was applied along the above-mentioned lines and resulted in the establishment of a Sub-Commission on Freedom of Information and of the Press, on the one hand, and a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, on the other hand.² It has been noted that “This was but the beginning of continual finger-pointing by American and Soviet UN representatives at the respective weaknesses of their countries”.³

5.1.1 Generalist international law: tentative tendencies

5.1.1(i) Actual couplings

No provision of *generalist* international human rights treaty law couples the right to freedom of expression and the rights of minorities *in an explicit and detailed way*.⁴ Article 17(d) of the Convention on the Rights of the Child comes closest, by requiring States Parties to “encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”. However, this provision did not enjoy an entirely smooth passage through the drafting process. From the introduction of the draft proposal to “[E]ncourage the mass media agencies to have particular regard to the linguistic needs of minority groups”,⁵ quibbling began over the most appropriate wording to designate “minority groups”. In due course, the relevant *termini technicus* evolved to refer to the linguistic needs of “the child who belongs to a minority group or an indigenous population”,⁶ before its final wording was settled on.

Whereas proposed alternative wordings such as “indigenous population” and “indigenous child” drew criticisms from various quarters, it was an intervention by the Turkish observer specifically targeting the formulations, “minority group” and “indigenous population”, that

² For commentary, see: John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 20.

³ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, *op. cit.*, at 36.

⁴ Article 27, ICCPR, of course, states *inter alia* that persons belonging to minorities shall not be denied the right “to use their own language”. That provision could therefore be described as “explicit”, but not as “detailed” insofar as it does not explore or reflect the (potential) extent of the intersectionality of the rights in question.

⁵ The Baha’i International Community (an NGO with consultative status with ECOSOC) submitted a proposed wording on the topic which included the following provision: “encourage mass media agencies to disseminate their child-oriented programmes not only in the official language(s) of the State but also in the language(s) of the State’s minority and indigenous groups”. However, this proposal was not considered by the 1983 Working Group. See further: E/CN.4/1983/62, Annex II (E/CN.4/1983/WG.1/WP.2/WP.29); Sharon Detrick, Jaap Doek & Nigel Cantwell, Eds., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (The Netherlands, Martinus Nijhoff Publishers, 1992), p. 281.

⁶ Text as adopted by the Working Group at first reading, E/CN.4/1988/WG.1/WP.1/Rev.2, pp. 14-15; Sharon Detrick *et al.*, *op. cit.*, p. 288.

proved the most pointed.⁷ He argued that the failure in various international fora to reach consensual definitions of these concepts meant that the proposed subparagraph would be “non-applicable”.⁸ He deployed this argument in the context of his more general view that the subparagraphs in the draft article as superfluous to its introductory part and argued that “it should not be the role of this Convention to give detailed guidance as to what the States Parties should do in implementing the article”. Thus, he urged the deletion of all subparagraphs, or as a second-best option, the deletion of subparagraph (d) at least. When the draft text was adopted without accepting his suggestions, the observer for Turkey reiterated his position and added that “there would be no alternative by States Parties but to interpret, under the circumstances, these terms according to their national law”. He rounded off his intervention by mooted the possibility of adopting a reservation to that effect when the Convention would be opened for signature.⁹

The coupling of freedom of expression and minority rights in Article 17(d) is shored up to a limited extent by other sub-sections of Article 17. For example, Article 17(a) obliges States Parties to “encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29”. In turn, Article 29 – which focuses on the goals of education – explicitly recognises the importance of developing respect for a child’s “own cultural identity, language and values [...]”,¹⁰ and of cultivating understanding, tolerance and other virtues.¹¹ Finally in this connection, Article 17(b) requires States to “encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources”.

Despite the dearth of successful couplings of the right to freedom of expression and minority rights in international treaties, there have been a few examples of “near misses”, both in the context of the United Nations and the Council of Europe.

5.1.1(ii) Attempted couplings: United Nations¹²

In 1948, a draft Convention on Freedom of Information was drawn up by a United Nations Conference on Freedom of Information.¹³ Some of the exchanges at the Conference were no more than early rehearsals of ideological stances *vis-à-vis* freedom of information/expression that would soon come to typify relevant debates in the Cold War era.¹⁴ As such, some of the conference proceedings have been disparagingly described as a “dialogue between the deaf”.¹⁵ Despite this criticism, the conference was “hailed as a great success”¹⁶ – at the time -

⁷ Considerations 1989 Working Group, E/CN.4/1989/48, pp. 53-55; Sharon Detrick *et al.*, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, *op. cit.*, p. 289.

⁸ *Ibid.*; Sharon Detrick *et al.*, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, *op. cit.*, p. 290.

⁹ *Ibid.*

¹⁰ Article 29.1(c), CRC.

¹¹ Article 29.1(d), CRC.

¹² The author is grateful to David Goldberg for helpful exchanges on events dealt with in this subsection.

¹³ United Nations Conference on Freedom of Information: Final Act (Lake Success, New York, United Nations Publishing, 1948).

¹⁴ John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 35.

¹⁵ *Ibid.*, at 53.

¹⁶ *Ibid.*

due to its adoption of three draft conventions,¹⁷ 43 resolutions and draft articles for the international bill of rights. Subsequent procedures and events quickly altered enthusiasm for the achievements of the conference. John P. Humphrey, who was the executive secretary of the conference, believed that the conference would indeed have been a “great success” if the three draft conventions had been opened for signature and ratification immediately after the conclusion of the conference. He explained the failings of the post-conference procedures as follows:

If the countries invited to the conference had been asked to give their delegations full powers to sign any conventions approved by it, the three conventions would undoubtedly be in force today. But because it was thought that their prestige and authority would be enhanced if the conventions were approved by the United Nations before they were opened for signature, the three drafts together with the rest of the final act were sent to the Economic and Social Council for further action. This gave the opposition the time to organize its forces as well as unlimited time in which to press its point of view. In ECOSOC and later in the General Assembly, there began a long and frustrating process of discussion and amendment. In brief, the amendments which the communist and developing countries forced on the United Nations were from the Western point of view so radical that the draft conventions became unacceptable. What was coming to the surface was the resentment felt in many countries toward the monopolistic practices of the great news-gathering agencies, and the too simple concept of freedom of information current in the West, particularly among professional journalists. And as so often happens, the opposition overreacted.¹⁸

Thus, the draft Convention on Freedom of Information came to be further discussed in ECOSOC and the General Assembly. If ever a drafting process was going nowhere in a hurry, this was it! Ultimately, the draft convention never saw the light of day.¹⁹ Nevertheless, the draft text, as originally drawn up in 1948, contained some provisions that were of particular relevance to minorities. For instance, the following excerpt from Article 3 of the draft Convention merits consideration:

Each Contracting State shall encourage the establishment and functioning within its territory of one or more non-official organizations of persons employed in the dissemination of information to the public, in order to promote the observance by such persons of high standards of professional conduct, and in particular:

[...]

(e) To counteract the persistent spreading of false or distorted reports which promote hatred or prejudice against States, persons or groups of different race, language, religion or philosophical conviction.²⁰

If adopted, this provision would have accorded minorities a measure of protection which they do not enjoy under contemporary international law. The wording of the introductory sentence is somewhat abstruse, but it seems to concern the free (i.e., unhindered) operation of media entities which are independent of State control. The defining purpose of such media entities

¹⁷ The three draft conventions focused on: the gathering and international transmission of news; the institution of an international right of correction, and freedom of information. Of the three, only the convention concerning the institution of the international right of correction was formally adopted and entered into force.

¹⁸ *Ibid.*

¹⁹ In 1951, the draft Convention was revised by an *ad hoc* committee of the UN General Assembly and in 1959, the Third (Social, Humanitarian and Cultural) Committee of the General Assembly proceeded to have a detailed discussion of the *ad hoc* committee's revised text (now comprising 19 articles). From 1959 through 1961, the Third Committee managed to approve the text of the Preamble to the draft Convention, as well as Articles 1-4. Lack of time prevented further discussion of, or progress on, the remainder of the *ad hoc* committee's revised draft text. Further discussion of the draft text was postponed therefore until the following year's session, and that self-same exercise in procrastination was repeated every year until 1973, whereafter the agenda item completely disappeared without explanation!

²⁰ Draft Convention on Freedom of Information, *Yearbook of the United Nations 1947-48*, pp. 593-595.

would be the promotion of professional quality in the media sector. The description of the State duty (“shall encourage”) is not necessarily oxymoronic: rather, it insists that the obligation on States is an imperative one, but that the obligation is merely to “encourage” the creation and operation of media entities.

It is, however, para. (e) that would have filled a gap in international law, by virtue of its focus on “false or distorted reports which promote hatred or prejudice against” particular groups. Promotion would – most likely – involve a lower evidentiary standard than “incitement” – the *ne plus ultra* of free expression according to the current canon of international law and a term which has a distinct meaning in criminal law generally. The elements of falsity or distortion would also cover sensationalist reporting, stereotyping, and a range of other journalistic and presentational styles not currently covered *per se* by existing standards.

So far, so good, but what about the likely consistency of this enhanced protection for minorities (as the subjects of particular types of reporting) with a robust system of free expression? A crucial consideration would be whether the promotion of hatred or prejudice would be judged subjectively or objectively. Second, while the lower evidentiary standard implied by promotion could diminish the level of protection for vigorous, abrasive types of expression, the extent to which this would be so could, perhaps be offset by a strict insistence on the persistency with which the false or distorted reports would be spread. A final – and empirically verifiable²¹ – cause for concern is the danger that States authorities would seek to (ab)use the criteria of falsity and distortion in order to silence opponents of governmental authority or policy.

Whereas Article 3(e) may have had the potential to influence practices of portraying minorities in the media, the manna of participatory rights of access to the media was not to be found elsewhere in the draft Convention. On the contrary, Article 5, for example, stated that: “Nothing in the present Convention shall prevent a Contracting State from reserving under its legislation to its own nationals the right to edit newspapers or news periodicals produced within its territory.” The naked fear of foreign influence on the shaping of news or public opinion is exposed by this provision; a fear that has not fully been dispelled, as shown by the drafting of the FCNM (see further, Chapter 1, *supra*).

5.1.1(iii) Attempted couplings: Council of Europe

A number of attempts were also made to explicitly couple the right to freedom of expression with the rights of minorities in the European Convention on Human Rights. The first occurred during the drafting process of the Convention and the second (discussed *infra* in the context of Article 9, FCNM) concerned a proposal to review Article 10 of the Convention in the mid-1990s.

The *travaux préparatoires* of the European Convention on Human Rights document efforts to ensure that the final text of the provision on freedom of expression would expressly refer to certain particularised interests of minorities. At an early stage in the drafting process, one of the Irish representatives, James Everett, submitted that the Convention should secure for all citizens “and particularly for any minority in their country [...] freedom of speech and

²¹ Ref. to relevant ARTICLE 19 texts on “false news”.

expression of opinion generally; freedom of association and assembly; freedom from discrimination on account of religion or other political opinion”.²²

More specifically, at a later stage in the drafting process, another one of the Irish representatives,²³ William Norton, pressed *inter alia* for the amendment of Article 10(2) of the draft Convention so that it would “stipulate that no restriction should be imposed on the right of national minorities to give expression to their aspirations by democratic means”.²⁴

While the *travaux* do not reveal any conscionable objections to this proposal, it seems that its ultimate omission from the final text can be best explained by the fact that it hitched its fortunes on those of the agenda to secure broader and stronger protection for minority rights in the nascent Convention. That agenda was set out in specific, formal terms as “the need for an examination of the problem of the wider protection of the rights of national minorities, with a view to a more precise definition of the rights of these minorities”.²⁵ When that broader agenda failed to prevail, the specific proposal to amend Article 10(2) was, in effect, similarly doomed.²⁶

What would have been the impact of such wording, had it been adopted? Any attempt to answer this question will be necessarily speculative, but there are good grounds for believing that its impact could have been far-reaching, not least if it had been embedded in the constellation of broader minority rights that was simultaneously being lobbied for in the drafting process.²⁷ One likely consequence of the proposal would have been to give firm

²² *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. I, p. 104.

²³ Although Everett and Norton were both members of the same political party (the Labour Party), it is unclear to what extent their respective interventions were synchronised. As Ireland was extremely homogeneous at the time, it might appear here to be an unlikely champion of minority rights. However, it is most likely that the interventions were born out of concern for the interests and welfare of the Catholic/nationalist minority in Northern Ireland (this theory has been given credence by other commentators, especially in respect of Everett, see: Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration* (Council of Europe Publishing, Strasbourg, 2000), p. 51). In the post-war period, the Council of Europe was the first international forum in which Ireland managed to participate (its application to join the United Nations was blocked until 1955) and initially, at least, most of the Irish delegates saw involvement in the emergent and then fledgling Council as an opportunity to bring the festering issue of the political partition of the island of Ireland to a wider international audience. The so-called “sore thumb” of partition dominated Irish foreign policy at the time. See further: Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration*, *op. cit.*, esp. pp. 41-42. Moreover, the then-wording of Articles 2 and 3 of the Irish Constitution laid territorial claim to the six counties comprising Northern Ireland. In 1998/9(?), the wording of these Articles was amended in a constitutional amendment endorsing the content of the Good Friday Agreement. Crucially, in that amendment, the territorial claim was dropped, to be replaced by more conciliatory language cherishing all traditions on the island of Ireland). See further: J.M. Kelly; James Casey [details of latest editions].

²⁴ *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. V, p. 60. See also, *ibid.*, p. 274, where this shortcoming is criticised in same breath as omission of right of political opposition.

²⁵ Letter by Sir David Maxwell-Fyfe, Chairman of the Committee on Legal and Administrative Questions [of the Consultative Assembly] to the Chairman of the Committee of Ministers, 24 June 1950. The need to address the issue of minority rights was pointed out in a Report by the Committee on Legal and Administrative Questions to the Consultative Assembly (Doc. 77, para. II) and Maxwell-Fyfe’s letter duly reminded the Committee of Ministers of that fact. See further, Vol. V, p. 40.

²⁶ This reading of events is seemingly corroborated by comments by another Irish delegate, to the effect that the signing of the draft Convention was intended as an “instalment on what the peoples of Europe want” – T.F. O’Higgins, *The Irish Independent*, 17 August 1950, quoted in Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration*, *op. cit.*, p. 72.

²⁷ In general terms, the case for greater protection of minority rights was consistently championed throughout the drafting process by a Danish representative, Mr. Lannung. See, in particular, Vol. I, p. 54; Vol. V, p. 22.

protection to the expression of minorities' secessionist aspirations, as long as they would be articulated in accordance with the precepts of democracy. The safeguarding of such a right for minorities would enter into direct collision with the entitlement of States authorities – specified in Article 10(2) - to restrict the exercise of the right to freedom of expression in the interests of “territorial integrity”. *Prima facie*, it is very difficult to see how these conflicting standpoints could be reconciled in practice, without leading to the neutering of one or the other. If the freedom of expression of minorities were to trump the legitimate restriction of expression on the grounds of “territorial integrity”, States comprising volatile political enclaves where independence/secession movements enjoy widespread support, would be deprived of one of their most convenient justifications for political repression and censorship of expression. The European Court of Human Rights has found time and again that State measures interfering with the right to freedom of expression based on the objective of preserving territorial integrity can be a mere sham for discrimination against, or repression of, political opposition.²⁸ The coincidence of political opposition and secessionist minorities is not unusual, thus rendering minorities more susceptible than other sections of the population to measures clamping down on expression that could jeopardise territorial integrity.

5.1.1(iv) Attempted couplings: assessment

The purpose of documenting these “near misses” in international law can hardly be dismissed as mere academic indulgence. They provide very valuable insights into: (a) the general sensitivity of minority issues in the immediate post-World War II period; (b) the fearful determination of States to restrict the freedom of expression of certain (often minority) groups on account of the clear nexus between strong protection for freedom of expression and effective political participation.

(a) As we have already seen in Chapter 1, *supra*,²⁹ the Universal Declaration of Human Rights contains no provisions explicitly protecting minority rights. Another Resolution, entitled “Fate of Minorities”,³⁰ was adopted by the UN General Assembly on the same day as the Resolution proclaiming the Universal Declaration.³¹ The Resolution, “Fate of Minorities”, called for a “thorough study of the problem [*sic!*] of minorities” so as to enable the UN to “take effective measures for the protection of racial, national, religious or linguistic minorities”. Thus, in one fell swoop, the importance of minority rights was recognised (at least nominally) and sidelined.

One could argue that the collapse of the League of Nations system, compounded by the atrocities of the Second World War, had left a gaping void in the international law-making arena. In such a standardless and structureless context, it was - perhaps - not unreasonable to insist that any novel approach to the protection of minority rights (which, we must not forget, was a much more contentious concept then than it is nowadays) be grounded in a “thorough study of the problem of minorities”. However, given the widespread political apprehensiveness-*cum*-nervousness about explicitly recognising and protecting minority rights (especially without clearly defining their content in advance), this insistence could not but have had dilatory consequences and led to a *de facto* sidelining of the issue of minority rights.

²⁸ [List and detail relevant cases, esp. those against Turkey]

²⁹ p. 17.

³⁰ UN General Assembly Resolution 217 C (III) of 10 December 1948.

³¹ UN General Assembly Resolution 217 A (III) of 10 December 1948.

The “fate” of proposals to explicitly enshrine minority rights protection in the draft European Convention on Human Rights proved similarly inauspicious. Mr Lannung, a Danish representative, presented a Report on “the problem of the wider protection of the rights of national minorities”³² and the Committee on Legal and Administrative Questions of the Consultative Assembly of the Council of Europe “unanimously recognised the importance of [the] problem”.³³ However, stressing that its task was “to draw up a list, not of fundamental rights, which must be defined in a general declaration, but only of those which appeared suitable for inclusion in an immediate international guarantee”,³⁴ the Committee decided to adhere to the fundamental rights listed in the operative article [Article 2] of the draft Resolution under consideration – which did not include minority rights *per se*. Again tracking the course of events in the UN General Assembly, the Committee also decided to put on formal record, its “approval in principle of M. Lannung’s declarations” and to “draw the attention of the Committee of Ministers to the need for a subsequent examination of the problem, with a view to defining more exactly the rights of national minorities”.³⁵

The foregoing historical perspectives reveal clear instances of parallelism in UN and Council of Europe approaches to the protection of minority rights. Essentially, the parallelism may be summarised as prioritisation in principle being reduced to procrastination in practice. Political wariness towards the active development of minority rights was very much the order of the day in both IGOs. Any effective attention paid to minority rights was largely subsumed in wider focuses on equality.

(b) The second useful purpose of analysing the aforementioned “near misses” of international treaty law is the opportunity this affords to explore relevant issues and interlinkages. By way of brief review, the main examples given *supra* involved: additional protection for certain groups from false or distorted reports promoting hatred or prejudice; prohibiting non-nationals from editing newspapers or news periodicals, and the right of minorities to express their aspirations by democratic means. Individually and collectively, these examples implicate not only the right to freedom of expression and minority rights, but several of the other fundamental rights mentioned at the beginning of this chapter as qualitatively strengthening the right to freedom of expression. The first example – enhanced group protection from hatred and prejudice – clearly lies at the heart of the right to non-discrimination and equality. The second example is not only discriminatory, but restrictive of participatory rights. The third example also involves participatory rights and implicitly the right to self-determination.

A number of underlying concerns can be detected. Firstly, there is the societal imperative of countering hatred and prejudice. Secondly, one can sense across the other two examples a fear of/respect for the ability of the media to influence and shape public opinion. Hence, States’ determination to retain control of political and cultural narratives on their own territory and to prevent non-nationals from influencing those narratives by taking up editorial positions in newspapers. While the third example need not necessarily involve the media, it does pay homage to the importance of being able to contribute to the shaping of public debate and relevant (national) narratives. Once again, two key axes are discernible here: the axis of

³² First Session of the Consultative Assembly of the Council of Europe, Strasbourg, 10 August - 8 September 1949; Sitting of the Committee on Legal and Administrative Questions, 5 September 1949: *Collected Travaux*, Vol. I, p. 200 (see also Eighth Sitting of the Consultative Assembly, 19 August 1949, p. 54).

³³ *Ibid.*, pp. 200; Fifteenth sitting of the Consultative Assembly, 5 September 1949, *ibid.*, p. 220.

³⁴ *Ibid.*, p. 222; see also, *ibid.*, p. 200.

³⁵ *Ibid.*, at 222; 200.

expression and its perlocutionary effect of influencing public opinion, on the one hand, and the axis of expression and effective political participation, on the other hand.

5.1.2 General State obligations

Traditionally, discussions about civil and political rights have been presumptively framed in terms of negative liberty. This is a notion which has been given much of its contemporary theoretical shape by Isaiah Berlin. Drawing on the intellectual tradition of Locke, Mill, Constant, de Tocqueville and others, Berlin has articulated one of the key tenets of the notion as follows:

there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling.³⁶

The notion of negative liberty is therefore centrally concerned with the demarcation of zones of personal autonomy and agency on the one hand, and legitimate State action on the other. Essentialising the concept, Berlin describes the zone of non-interference by the State as “liberty *from*; absence of interference beyond the shifting, but always recognisable, frontier”.³⁷

Often associated with civil libertarianism, hostility to intervention by State authorities has particularly strong resonance in the realm of freedom of expression. This is a hostility of principle: distrust of governmental motivation for the regulation (read: restriction) of expression;³⁸ fear that paternalistic State impulses would encroach on moral and intellectual freedom; inevitable slippery slope arguments, such as: “repression has no stopping place. Once begun, it can quickly move all the way to a totalitarian system”.³⁹

History provides ample evidence that these arguments of principle and these fears have a very real basis. This historical legitimacy, in turn, lends much persuasive force to the negative conception of civil and political rights generally and freedom of expression in particular. Yet, such an exclusively negative conception is necessarily incomplete. A positive conception of liberty – with its implicit recognition of positive State obligations - is not only possible, but potentially complementary to its negative counterpart.

In order to appreciate that there is no inherent contradiction or necessary tension in the compossibility of negative and positive conceptions of liberty (and *a posteriori* negative and positive State obligations), it is important to understand and distinguish between the different roles played by the State in the system of freedom of expression (see further the detailed discussion of these roles at the end of this section, *infra*).

³⁶ Isaiah Berlin, “Two Concepts of Liberty”, in *Liberty* (Ed. Henry Hardy) (Oxford University Press), p. 171.

³⁷ (emphasis per original) *Ibid.*, p. 174.

³⁸ See, for example: Geoffrey R. Stone, “Democracy and Distrust”, 64 *Colorado Law Review* 1171 (1993).

³⁹ Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 724. See also Salman Rushdie’s comment: “You think you can give away one per cent of your freedom and you’ve still got 99 per cent, but actually, once you give away the first one per cent it’s very remarkable how fast the other 99 per cent goes”, Salman Rushdie, ‘Secrecy and Censorship’, in E. Hazelcorn & P. Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Ireland, Brandon Book Publishers Ltd., 1993), pp. 26-38, at 29.

Turning then to the complementarity between both conceptions of liberty (or sets of State obligations): it can be justified by substantive and instrumental arguments. As to the former: when exclusion and discrimination are institutionally and societally entrenched, negative liberty may be inadequate to render certain rights – notably freedom of expression – meaningful for the victims of such exclusion and discrimination. Positive, equalising measures are then called for in order to realise such rights. As to the latter: positive rights – such as effective participation; equality of access to institutionalised forms of communication, etc. – are often, as Berlin himself assures us, a means for protecting the negatively conceived liberty of individuals (and groups).⁴⁰

The recognition of certain positive State duties in certain concatenations of circumstances should not be construed as implying that States are somehow obliged to remove all impediments – including all kinds of social and economic disadvantage - to the maximal realisation of rights. Such an ambitious claim – for the doctrine of positive State obligations to be a panacea for all the ills of society – could never be sustained (see further, s. 5.2.3(ii), *infra*). As Berlin points out, for one’s liberty to be breached, some kind of agency – either governmental or third-party – must be involved; “Mere incapacity to attain a goal” is not sufficient.⁴¹ He illustrates the point colourfully with the quip: “It is not lack of freedom not to fly like an eagle or swim like a whale”.⁴² Attention must rather focus on specific circumstances which impede sections of the population from exercising their right to freedom of expression and which clearly do fall within the zone of legitimate State responsibility (or “interference”, to continue to apply Berlin’s terminology). As Eric Barendt has argued, the suggestion that “government should ensure that all individuals and groups are in a position to communicate their views muddles freedom, or liberty, of speech with the conditions for its exercise”.⁴³ This is a difficult point and it will be revisited in greater detail in the following sub-section.

5.1.3 Qualifying State obligations

For reasons of conceptual convenience, the duties of States which correlate to human rights are frequently styled as those which are “positive” or “affirmative” on the one hand and those which are “negative” or “restrictive” on the other hand. Technically speaking, though, such qualifiers more accurately describe the kind of action required of States in order to fulfil their duties in respect of human rights.⁴⁴ The distinction between positive and negative State obligations has considerable appeal as an organising principle and this is reflected in the structure of subsequent chapters of this thesis. In order to structure the forthcoming discussion of various State obligations, the distinction provides a convenient (if somewhat rough) way of separating two broad categories of obligations. Chapter 6 focuses on negative State obligations whereas Chapters 7 and 8 focus on positive State obligations. Within each chapter, greater specificity emerges, both in terms of the obligations identified and the rigour with which they are analysed.

⁴⁰ Isaiah Berlin, “Two Concepts of Liberty”, *op. cit.*, at p. 211.

⁴¹ *Ibid.*, p. 169.

⁴² *Ibid.*

⁴³ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 104.

⁴⁴ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, New Jersey, Princeton University Press, 1980), p. 52; see also p. 53.

One of the main conceptual limitations of the distinction is that it suggests a (complete) separation of negative and positive State obligations. This is why it will be relied on here for the purpose of imposing structural order on the discussion and not as the guiding analytical principle. In reality, although negative and positive State obligations are often readily distinguishable, it can also be difficult to pinpoint where one category ends and the other begins. Intersection and overlap between the two are not uncommon. By way of illustration: the negative State obligation to protect persons belonging to minorities from “hate speech” can logically flow into the positive State obligation to facilitate access for such persons to the media. This logical flow is explored in considerable detail in Chapter 6, but it can be summarised here by saying that an effective and comprehensive approach to combating “hate speech” would ordinarily involve preventive measures, including pro-active policies to secure minority involvement in media activities. In the same vein, the negative obligation to counter hate speech and severe forms of negative (ethnic) stereotyping by the media is logically and seamlessly connected to the positive obligation to promote tolerance and intercultural understanding. Viewed as such, it seems more accurate to conceptualise negative and positive State obligations as being situated on a continuum or a sliding scale, rather than as being mutually exclusive.

The conceptual limitation described in the previous paragraph is by no means fatal to the utility of the distinction between negative and positive State obligations for broad categorising purposes. The complete separation of the two categories is not explicit, after all: it is merely one possible reading of the inter-categorical relationship. Nevertheless, greater analytical refinement is required beyond the purposes of broad categorisation. To that end, a more sophisticated analytical model (“a Three-Partite Spectrum of Obligations”⁴⁵), typically associated with Henry Shue and Asbjorn Eide, as adapted by Rolf Künnemann, allows for greater evaluative probing.

Künnemann grounds his model in the conceptualisation of human rights as each right being “linked to an existential status (of human beings) and to State obligations”.⁴⁶ “Roughly speaking”, he writes, “an existential status tells us how human beings are entitled to live in relation to the State under these human rights, and obligations tell us the rules which States subscribe to under this right to satisfy the existential status for their citizens (and others)”.⁴⁷ The different obligations relating to a human right tend to become “increasingly explicit in the process of implementation of the right”.⁴⁸ However, States are also subject to a prior, or “generic”, obligation, *viz.* the obligation to ensure the full implementation of the right. Three “categorical obligations” flow from the generic obligation, namely to respect, to protect, and to fulfil the existential status.⁴⁹ He elucidates the nature of these obligations as follows:

The obligation to respect obliges the State to avoid depriving a human being of this existential status in situations where that status has been attained. The obligation to protect obliges the State to prevent third parties (e.g., other individuals) from depriving a human being of this status in situations where the status has been attained. The obligation to fulfill obliges a State to secure the existential status for human beings in situations where that status has not been attained (i.e., in situations of deprivation).⁵⁰

⁴⁵ Rolf Künnemann, “A Coherent Approach to Human Rights”, 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342, at p. 327.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at p. 328.

⁵⁰ *Ibid.* See also the discussion in s. 5.2.2, *supra*.

There is one further level to Künnemann's model of State obligations:

In the process of implementation, each of these three obligations gives rise to a category of more specific obligations respecting, protecting, or fulfilling the related status: respect-bound obligations, protection-bound obligations, and fulfillment-bound obligations. The analysis of the specific obligations in these three categories reveals something like a characteristic spectrum of obligations under a given human right.⁵¹

The usefulness of this model is perhaps best gauged by considering the extent to which it facilitates evaluative specificity. In other words, its value is that it enables specific obligations to be identified and those obligations can then serve as markers in monitoring and adjudicative processes. In Künnemann's own words:

Determining whether a State acts consistently with its generic obligation is much more difficult than determining whether a specific obligation of conduct – i.e., a rule stipulating or prohibiting a well-defined State measure – is fulfilled or disregarded. The process of implementing a human right consists largely of deriving concrete obligations of conduct from the generic obligation.⁵²

Künnemann's point is borne out by the identification and elucidation of States' obligations under the ICESCR in the following section.

5.1.3(i) International human rights treaty law⁵³

All international human rights treaties share the primary objective of ensuring that the rights enshrined therein are rendered effective for everyone. However, the formulae and approaches relied upon for the realisation of that objective tend to vary per treaty. Each human rights treaty has its own standard of metricity, but conversion is possible between the different metric systems because of the broad congruence of their underlying objectives, *viz.* the effective universal realisation of human rights for everyone. Conversion is also facilitated by the interdependent and inter-related character of human rights, meaning that a general presumption of consistency applies across specific treaties and their specialised focuses. In the following paragraphs, a sample of international treaties (i.e., ICCPR, ICESCR and ECHR) will be surveyed to illustrate the different but comparable approaches to ensure that human rights are effective in practice.

ICCPR

Article 2(1), ICCPR reads:

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.
3. Each State Party to the present Covenant undertakes:

⁵¹ *Ibid.*

⁵² *Ibid.*, at p. 341.

⁵³ The author is grateful to Yvonne Donders and Wilfred Steenbruggen for their helpful reading suggestions for this section.

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Under Article 2(1) of the ICCPR, States Parties must “respect” and “ensure” to all individuals subject to its jurisdiction the rights recognised in the Covenant in a non-discriminatory manner. The obligation undertaken by States Parties is therefore twofold. First, “to respect” all of the rights recognised in the ICCPR, States must not violate them. Second, “to ensure” those rights is a more far-reaching undertaking and, according to one leading commentator, it “implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights”.⁵⁴ The reading of affirmative State obligations into Article 2, ICCPR, is borne out by subsequent paragraphs of the Article and the interpretive clarifications offered, *inter alia*, by the UN Human Rights Committee’s General Comment No. 31 – “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”.

Article 2(2) requires States “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”. This requirement is “unqualified and of immediate effect”.⁵⁵ In addition, pursuant to Article 2(3), States “must ensure that individuals also have accessible and effective remedies to vindicate those rights”.⁵⁶ Importantly for persons belonging to minorities, the envisaged remedies “should be appropriately adapted so as to take account of the special vulnerability of certain categories of person [...]”.⁵⁷

ICESCR

As regards the ICESCR, Article 2(1) reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Here the textual emphases are on the progressive achievement of the full realisation of the rights recognised in the Covenant.⁵⁸

⁵⁴ Thomas Buergenthal, “To Respect and Ensure: State Obligations and Permissible Derogations”, in Louis Henkin, Ed., *The International Bill of Rights* (1981), pp. 72-91, at 77. Buergenthal also notes that such affirmative obligations could include “providing some access to places and media for public assembly or expression” – *ibid.*

⁵⁵ General Comment No. 31 [80] – “The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, 29 March 2004, para. 14.

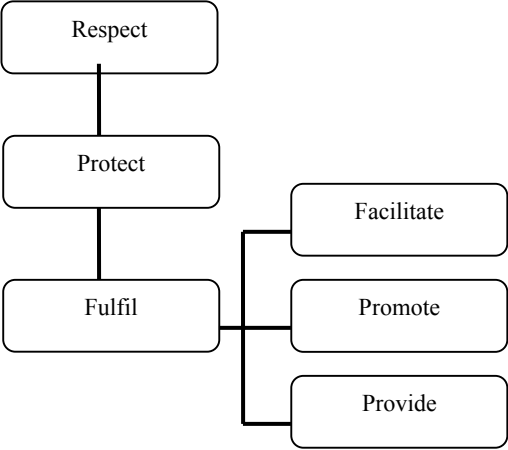
⁵⁶ General Comment No. 31, para. 15.

⁵⁷ *Ibid.*

⁵⁸ General Comment No. 3, para. 11.

In recent General Comments adopted by the CESCR, a conceptually clear approach to the States obligations generated by human rights has been developed and consolidated. The approach recognises that every human right “imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil”, with the latter branching into obligations to facilitate and to provide.⁵⁹ This approach was first formulated by the CESCR in its General Comment 12 and has been employed in each of the Committee’s General Comments since then. However, in subsequent GCs, it has undergone certain variations or refinements. In GCs 12 and 13, for instance, the obligation to fulfil comprises the obligations to facilitate and to provide.⁶⁰ In GC 14, the additional obligation to promote is introduced⁶¹ and in each of the subsequent GCs (i.e., nos. 15-18), the obligation to fulfil is described as incorporating all three obligations, although the order in which they are listed varies.⁶²

Different levels of State obligations to fully realise human rights for everyone



It should be noted that the nature of the various State duties is not always described in identical terms across General Comments to the ICESCR and this is true, *a fortiori*, of its treatment in other relevant international human rights treaties (see *supra*). Sometimes the language used evolves to become more efficient or more expansive. The resultant improvements gradually become consolidated through repetition and this, in turn, leads to greater textual consistency across General Comments. On the other hand, sometimes slight variations in relevant formulae persist - for whatever reason. The following exploration of the nature of each level of State duties will commence with an examination of the essence of the duty before proceeding to tease out specific aspects of the generic duty that become apparent in respect of particular rights.

Obligation to respect

⁵⁹ For a summary of this approach, see Asbjorn Eide, “Economic, Social and Cultural Rights as Human Rights”, in Asbjorn Eide *et al.*, Eds., *Economic, Social and Cultural Rights* (2nd Edit.) (The Netherlands, Kluwer Law International, 2001), pp. 9-28, at 23-25.

⁶⁰ General Comment No. 12, para. 15; General Comment No. 13, para. 46.

⁶¹ General Comment No. 14, para. 33.

⁶² The order in which they are listed is as follows: General Comment No. 14: to facilitate, provide and promote (para. 33); General Comment No. 15: to facilitate, promote and provide (para. 25); General Comment No. 16: to provide, promote and facilitate (para. 17); General Comments Nos. 17 and 18: to provide, facilitate and promote (paras. 34 and 22, respectively).

The duty to *respect* human rights is considered to be a duty of abstention, restraint or non-interference. In essence, “The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right [...]”.⁶³ It entails specific duties in respect of particular rights. Among those duties is the obligation to refrain from denying or limiting equal access for all persons, including minorities to [adequate food and water, “preventive, curative and palliative health services”, decent work, etc.]. Notwithstanding the reference to all persons, minorities are sometimes singled out for special mention (eg. in respect of health⁶⁴ and work⁶⁵), which reflects an awareness of their situational specificities (eg. disadvantage, discrimination, marginalisation). More oblique references to minorities are also relevant, eg. the requirement that States refrain from “arbitrarily interfering with customary or traditional arrangements for water allocation”.⁶⁶ Useful extrapolations could also be derived from the requirement that States’ laws, policies and public programmes be vetted for gender-sensitivity.⁶⁷ There are also recurrent references to States’ duty not to discriminate.

The examination of States’ obligations at three distinct levels allows for a sharper determination of the scope of States’ obligations in relation to specific rights. As the foregoing analysis has shown, the duty to *respect* human rights prevents States from interfering directly or indirectly with the enjoyment of rights. When applied to specific rights, this generic duty accordingly branches out into a number of specific duties. Some of those specific duties could be applied *mutatis mutandis* to the right to freedom of expression (in each of its component parts). The foregoing discussion has attempted to mark out the transferability of some of the specific State duties identified in respect of specific rights guaranteed by the ICESCR to the right to freedom of expression. The following table seeks to present the suggested transfer process in tabular form.

Type of State obligation	Specific implications: ICESCR	Specific implications: freedom of expression/media
Respect	Non-discrimination	Non-discrimination in freedom to seek, receive and impart information and ideas
	Recognition of situational specificities of minorities	Recognition of specific communicative needs and interests of minorities arising from situational specificities
	Equal access to services and resources necessary for effective exercise of right	Equal access to media and other communicative fora

⁶³ GC 14, para. 33; GC 15, para. 21; GC 17, para. 28; GC 18, para. 22.

⁶⁴ GC 14, para. 34.

⁶⁵ GC 18, para. 23.

⁶⁶ GC 15, para. 21.

⁶⁷ GC 16, para. 18.

	Disaggregated approach to services	Functionality of different fora in terms of seeking, imparting and receiving information and ideas
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Obligation to protect

The duty to *protect* human rights requires States Parties “to take measures that prevent third parties from interfering with the enjoyment of [a right]”.⁶⁸ While the term, “third parties”, should be understood broadly, one General Comment states that it includes “individuals, groups, corporations and other entities as well as agents acting under their authority”.⁶⁹ The acknowledgement of the situational specificities of minorities by States authorities is also a necessary precondition for honouring their obligation to protect human rights: GC 17 identifies as one of the elements of the duty to protect the rights enshrined in Article 15(1)(c), ICESCR, “an obligation to protect the moral and material interests of authors belonging to [ethnic, religious or linguistic] minorities through special measures to preserve the distinctive character of minority cultures”.⁷⁰ It could be noted in passing that this particular obligation could also conceivably entail an obligation to fulfil (see further, *infra*).

This recognition of the need to “preserve the distinctive character of minority cultures” does not, however, imply unconditional acceptance or accommodation of specific cultural practices. In the context of the right to health, States are obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning.⁷¹ They are also required to prevent third parties from “coercing women to undergo traditional practices, e.g. female genital mutilation” (*ibid.*). In a similar vein, as part of their duty to protect the right to equality (between men and women), States are required “to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women”.⁷²

In order to effectively protect certain rights, States are under a duty to uphold equal access to, say water, and must therefore adopt “the necessary and effective legislative and other measures” to prevent third parties from denying equal access to others.⁷³ This becomes particularly important when (to stick with the same example) water services have been privatised. Here, States are obliged to prevent private operators or controllers from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.⁷⁴ States’ obligations to uphold equal access extend to the underlying or ancillary determinants of those rights, eg. structures, services or resources which are indispensable for the effective exercise or enjoyment of the rights in question. Thus, in respect of the right to health, States are obliged to “adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties”.⁷⁵ States must ensure that the privatisation of the health sector does not jeopardise the “availability, accessibility,

⁶⁸ GC 13, para. 47; GC 14, para. 33; GC 15, para. 23; GC 17, para. 28; GC 18, para. 22.

⁶⁹ GC 15, para. 23.

⁷⁰ Para. 33; see also para. 32 which deals with indigenous peoples.

⁷¹ GC 14, para. 35.

⁷² GC 16, para. 19. Again, a case could be made for (also) regarding this obligation as an obligation to fulfil.

⁷³ GC 15, para. 23.

⁷⁴ GC 15, para. 24.

⁷⁵ GC 14, para. 35.

acceptability and quality of health facilities, goods and services”.⁷⁶ This particular obligation has been crafted in a way that incorporates indicators for the effectiveness of its implementation. It enumerates specific qualitative criteria for the evaluation of health facilities, goods and services. By distinguishing between facilities, goods and services, it implicitly recognises their differentiated functionalities in respect of the full realisation of the right to health. States are also obliged to “ensure that third parties do not limit people’s access to health-related information and services”.⁷⁷

Finally, the duty to protect a specific right may also include a requirement to establish “an effective regulatory system” incorporating various process values (eg. independent monitoring, genuine public participation) and powers of sanction. One example would be privately-controlled water services;⁷⁸ another would be cases where public services are partially or fully privatised (GC 16, para. 20, which refers to the requirement for States “to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights”).

The following table seeks to present the specific obligations that have been identified under the generic State obligation to protect human rights in the context of the ICESCR (i.e., the treaty-context in which the typology has been most extensively used to date) and their possible analogous application to the right to freedom of expression:

Type of State obligation	Specific implications: ICESCR	Specific implications: freedom of expression/media
Protect	Ensure equal access to health care and health-related services provided by third parties	Ensure equal access to media services provided by third parties
	Ensure privatisation of health sector does not threaten availability, accessibility, acceptability and quality of health facilities, goods and services	Ensure privatization of media does not threaten availability, accessibility, acceptability and quality of media goods and services
	Prevent harmful social or traditional practices and coercion into same	Prevent abusive speech or incitement to hatred
	Ensure third parties do not limit others’ access to health-related information and services	Ensure third parties do not limit others’ access to media content or services; media transparency and accountability

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ GC 15, para. 24.

	Effective regulatory system based on procedural values for preventing access abuses	Effective regulatory system based on procedural values for preventing access abuses
	Elimination of prejudices, customary and other practices perpetuating inferiority and stereotypes	Elimination of prejudices, customary and other practices perpetuating inferiority and stereotypes
	Establishment of public institutions, agencies and programmes to protect against discrimination	Establishment of public institutions, agencies and programmes to protect against discrimination
	(Partly) privatised public services: monitoring and regulation of conduct to ensure not violate equality	(Partly) privatised public services: monitoring and regulation of conduct to ensure not violate equality
	Special measures to preserve the distinctive character of minority cultures	Special measures to preserve the distinctive character of minority cultures

Obligation to fulfil

In short and general terms, “the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of” a right.⁷⁹ Before the tripartite typology of States’ obligations (to respect, protect and fulfil) was formally applied to the ICESCR for the first time in GC 12, the ramifications of the obligation to fulfil had not been translated into structurally separate components. In GC 12, the CESCR, while respecting the three principal levels of obligation, introduced the intermediate-level obligation “to facilitate”.⁸⁰

As already noted, *supra*, under its current state of development, the obligation to fulfil a right is generally taken to comprise obligations to facilitate, promote and provide (as set out succinctly in GC 15, para. 25). The choice of order in which the obligations are listed and considered here is explained by the fact that it follows the evident gradation in levels of State intervention that each obligation entails.

Fulfil (facilitate)

Generally speaking, the obligation to fulfil (facilitate) requires States “to take positive measures that enable and assist individuals and communities to enjoy” a right.⁸¹ The first GC to use the tripartite typology, GC No. 12, states that “The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people’s access to and

⁷⁹ GC 14, para. 33.

⁸⁰ GC 12, fn. 1.

⁸¹ (GC 13, para. 47). GC 14, para. 37; GC 18, para. 27; the wording used in GC 15, para. 25 and GC 17, para. 34, is also very similar.

utilization of resources and means to ensure their livelihood, including food security” (para. 15)). Extrapolating from this obligation in respect of food, an equivalent obligation in respect of the right to freedom of expression could entail securing access to and the ability to use expressive resources (i.e., expressive fora such as the media) and information security (which could include the exchange of information in responsible and reliable ways).

Fulfil (promote)

The engagement of GCs 14-18 with the obligation to fulfil (promote) reveals two main lines of approach: (i) the requirement to take measures centring on the public dissemination of information, awareness-raising, education and training,⁸² and (ii) participation in public affairs and significant, relevant decision-making processes; consultation.⁸³ Useful analogies for the right to freedom of expression of persons belonging to minorities can be drawn from the (non-exhaustive) list of detailed obligations set out in GC 14 (para. 27):

- (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information;
- (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups;
- (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services;
- (iv) supporting people in making informed choices about their health.

First, the role of the State as a speaker is implicated: it must disseminate information of importance for public health, including information about the availability of health services and harmful traditional practices. Relatedly, it must ensure that the public can receive sufficient, relevant and reliable information in order to make informed choices. Second, it must ensure that the (public) services provided for members of vulnerable or marginalised groups are culturally appropriate and otherwise correspond to their specific needs. Again, these obligations are also directly applicable to the right to freedom of expression. This is demonstrated in various contexts, but perhaps most convincingly in respect of the monitoring of the FCNM (see s. 6.5.1 and s. 8.3.2, *infra*).

Fulfil (provide)

The obligation to fulfil (provide) is the most far-reaching and interventionist of State obligations to fulfil human rights. As such, it could be regarded as the Cape of Good Hope of human rights.⁸⁴ As stated in GC 13: “As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal”.⁸⁵ Formulated thus, this obligation is potentially very far-reaching. However, GC 13 also seeks to limit its scope by insisting that “the extent of this obligation is always subject to the text of the Covenant”.⁸⁶ This is the only instance in the GCs surveyed where the limitations of the

⁸² GC 14, para. 37, GC 15, para. 25, GC 16, para. 21, GC 18, para. 28.

⁸³ GC 17, para. 34; see also GC 16, para. 21.

⁸⁴ The Cape of Good Hope was formerly known as the Cape of Storms, and viewed with trepidation because of uncertainty about what lay beyond that point. It was renamed in order to encourage further maritime exploration, and ultimately, progress.

⁸⁵ GC 13, para. 47; see also: GC 12, para. 15, GC 14, para. 37, GC 15, para. 25, GC 17, para. 34, GC 18, para. 26.

⁸⁶ GC 13, para. 47.

obligation are spelt out. As a result, it is difficult to ascertain whether the failure to repeat the limitation in GCs adopted since GC No. 13 is due to concern on the part of the CESCR that it might diminish the potential of the obligation to fulfil (provide) by inviting overly cautious or restrictive interpretations of the same. (At least) two GCs offer additional detail concerning the specific obligations entailed by the obligation to fulfil (provide). GC 17 refers to ensuring the ability of persons to seek and obtain effective redress in cases of violation of their [moral and material] interests [resulting from their scientific, literary or artistic productions].⁸⁷ GC 18, for its part, points out the need for legal recognition of a right [to work]; the adoption of various policies and plans for its realisation in practice, as well as appropriate resource-allocation strategies.⁸⁸ Mechanisms for assuring redress for violations of intellectual property interests and equitable resource-allocation structures and processes could both be very important for the fulfilment/provision of the right to freedom of expression (of persons belonging to minorities). Thus, here, too, bases for extrapolation can readily be identified.

To summarise and further contextualise the foregoing analysis of States' obligations under the ICESCR: the application of this tripartite typology of States' obligations to the ICESCR has greatly enhanced the interpretive clarity surrounding the rights enshrined in the Covenant. Whereas it is typically associated with the ICESCR, it is increasingly being applied in the context of other international human rights treaties, eg. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁹ and ICERD.⁹⁰ References to the typology in the General Comments or Recommendations adopted in respect of the aforementioned treaties occasionally affirm that it is applicable to all human rights, including civil and political rights. This view is supported by a growing body of academic writing⁹¹ and standard-setting initiatives outside of IGO structures.⁹² This trend reinforces the view that it is no idle exercise to extrapolate from the application of the typology to specific rights guaranteed under the ICESCR. Nevertheless, the typology has yet to be formally endorsed by the Human Rights Committee in any of its General Comments relating to the ICCPR.

European Convention on Human Rights

When general concepts are given more specific applications, a number of distributaries flow from the general premises. This rule of thumb also applies to the general theory of positive State obligations and its specific applications. The flow from general to specific can usefully be examined through the approach to relevant issues adopted by the European Court of Human Rights. Clearly, one of the foundational premises for the Court's general approach to positive State obligations⁹³ is its concern that the purpose of the ECHR is to "guarantee not

⁸⁷ GC 17, para. 34.

⁸⁸ GC 18, para. 26.

⁸⁹ See, for example, Committee on the Elimination of Discrimination against Women, General Recommendations Nos. 24 (focusing on Article 12, CEDAW (Women and health)) (paras. 14-17) and 25(dealing with Article 4(1): temporary special measures) (para. 4).

⁹⁰ See, for example, Scott Leckie, "Violations of Economic, Social and Cultural Rights", SIM Special 20, *op. cit.*, pp. [check against printed version, up to fn. 35].

⁹² See, for example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Human Rights Quarterly, Vol. 20, No. 1 (1998), Netherlands Quarterly of Human Rights, Vol. 15, No. 2 (1997), SIM Special No. 20 (Netherlands Institute of Human Rights, Utrecht, 1998), Guideline 6 – Obligations to Respect, Protect and Fulfil. See also: Victor Dankwa, Cees Flinterman and Scott Leckie, "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", SIM Special 20, *op. cit.*, pp. 19-21.

⁹³ Another central premise is the "living instrument" doctrine generally followed by the Court (see further, s. 4.2.2(i), *infra*). This premise (also known as the "dynamic and evolutive" approach) is sometimes invoked in tandem with the "practical and effective rights" premise (eg. in *Stafford v. the UK*, para. 68 and *Christine*

rights that are theoretical or illusory but rights that are practical and effective”.⁹⁴ Based on an analysis of relevant jurisprudence of the European Court of Human Rights, Alastair Mowbray has concluded that “various forms of positive obligations have been imposed upon different governmental bodies in order to secure a realistic guarantee of Convention rights and freedoms”.⁹⁵ What exactly a “realistic guarantee” entails is best determined on a case-by-case basis, although certain trends can tentatively be identified per Convention article.

In its *Airey* judgment, the Court stated that “although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.⁹⁶ In *X. & Y. v. The Netherlands*, it supplemented that statement by admitting that such “obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.⁹⁷ This is an important extension of the principle as articulated in anterior case-law; it confirms a degree of horizontal applicability of relevant rights.

The Court has deliberately adopted similar reasoning regarding the right to freedom of assembly; it held that “genuine, effective freedom of peaceful assembly” cannot:

be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be [...]⁹⁸

The pattern of recognising that positive State duties are sometimes necessary in order to render rights effective can also be detected in respect of Article 10. Such positive State duties apply to procedural and substantive matters alike. In David-versus-Goliath-type situations, where negligibly-funded informational campaigns aiming to influence debate on matters of public interest are pitted against the muscular financial might of multinational corporations, fairness requires that some approximate equality of arms be strived for. In the Court’s own words:

If, however, a State decides to provide such a remedy [against defamation] to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for.⁹⁹

Although the Court does not go to the trouble of spelling out the (self-evident?) implications of its pronouncement – it seems logical that it would be for the State to guarantee the requisite measure of procedural fairness and equality of arms. No other actor is appropriately placed or vested with the necessary authority to do so.

Goodwin v. the UK, para. 74). If the ECHR is interpreted in a dynamic manner, there is always a possibility of expanding the scope of positive State obligations.

⁹⁴ *Airey v. Ireland*, para. 24. See also, *mutatis mutandis*, the judgment of 23 July 1968 in the “Belgian Linguistic” case, Series A no. 6, p. 31, paras. 3 in fine and 4; the above-mentioned Golder judgment, p. 18, para. 35 in fine; the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

⁹⁵ Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79, at 78.

⁹⁶ *Airey v. Ireland*, *op. cit.*, para. 32. See also: (see the above-mentioned *Marckx* judgment, p. 15, para. 31).

⁹⁷ Judgment of the European Court of Human Rights (Chamber) of 26 March 1985, para. 23.

⁹⁸ *Plattform “Ärzte für das Leben”*, Series A, no. 139 (1988), para. 32.

⁹⁹ *Steel & Morris v. UK*, *op. cit.*, para. 95.

As regards more substantive concerns, the Court has accepted in principle that positive measures may be required of States in order to give effect to the right to freedom of expression (as with Articles 8 and 11, including the protection of the right in the sphere of relations between individuals¹⁰⁰), but it has yet to meaningfully explore the practical workings of the principle. For instance, in *Özgür Gündem v. Turkey*, taking as its starting point, “the key importance of freedom of expression as one of the preconditions for a functioning democracy”, the Court recognised that:

Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention.¹⁰¹

This recognition amounts to an important statement of principle, even if the Court does immediately go on to concede:

The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities [...].¹⁰²

Differentiated roles and duties of States regarding expression

It should be obvious by now that as well as placing States under a general duty of non-interference, the right to freedom of expression also gives rise to positive obligations for States. It requires them to stimulate freedom of expression and information by assuring broader societal circumstances that are conducive to freedom of expression and pluralism generally.¹⁰³ Eric Barendt takes the view that as freedom of expression is “primarily a negative liberty”, there are persuasive arguments against “the recognition of general positive free speech rights”.¹⁰⁴ Thus, he cautions against the acceptance of “broad propositions of principle about positive free speech rights” out of fear for the “range of possible implications” that could flow from such propositions.¹⁰⁵ Nevertheless, he does concede that “in some contexts, there is a convincing case for upholding narrowly defined positive free speech rights”.¹⁰⁶ It is submitted here that positive State obligations in respect of the right to freedom of expression can be slotted into two main categories: (i) pluralism, and (ii) non-discrimination, equality and access rights. These categories will be the focus of Chapters 7 and 8, *infra*.

¹⁰⁰ See, among other authorities, *Fuentes Bobo v. Spain*, Judgment of the European Court of Human Rights of 29 February 2000, para. 38.

¹⁰¹ *Özgür Gündem v. Turkey*, Judgment of the European Court of Human Rights (Fourth Section) of 16 March 2000, para. 43.

¹⁰² *Ibid.*

¹⁰³ See, for example, Dirk Voorhoof, “Guaranteeing the freedom and independence of the media”, in *Media and democracy* (Strasbourg, Council of Europe Publishing, 1997?), pp. 35-57, at pp. 42-43.

¹⁰⁴ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 105.

¹⁰⁵ *Ibid.*, p. 103.

¹⁰⁶ *Ibid.*, p. 105.

As mentioned earlier in this section, the State can and does assume different roles in relation to the protection and furtherance of free expression. An exploration of those roles usefully elucidates the extent of concomitant State responsibilities. Zechariah Chafee, Jr. has characterised the relationship between the State and expression as being threefold: “(1) the use of governmental power to limit or to suppress discussion, (2) affirmative governmental action to encourage better and more extensive communication, and (3) government as a party to communication.”¹⁰⁷ State responsibilities vary in accordance with the role being performed. Arguably, so too does the level of scrutiny to which State measures are subjected.¹⁰⁸

(1) Limitation or suppression of discussion

It is in respect of this particular role that the State should pursue a presumptively – or generally – abstentionist line. The central reason for this is distrust of governmental intentions and actions. This sense of distrust has nourished US First Amendment doctrine more than it has European standards concerning freedom of expression, and is well captured in the following citation: “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion”.¹⁰⁹

This is an iron-plated argument from classical liberalism that regards the importance of negative liberty or non-interference by the State as fundamental. However, as will be demonstrated in the next Chapter, this presumption of non-interference is rebuttable, and there are clearly situations in which State intervention is not only desirable, but also necessary, in order to limit or suppress certain types of particularly harmful expression.

(2) Facilitation or encouragement of expression

The goal of facilitation and creation of expressive opportunities can be achieved in a variety of ways. For instance, the State could play the role of arbiter, ensuring, to take the famous Meiklejohnian example,¹¹⁰ that all parties in a town-hall meeting are given adequate opportunity to express themselves. Central to the moderating task is the conviction that the purpose of freedom of expression is not to ensure “unregulated talkativeness”.¹¹¹ Rather, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹¹² In its capacity as arbiter of the fairness of public debate, the creation and upholding of certain rights of access to the media could be seen as modern-day policy objectives for the State. Alternatively, the pursuit of this objective could also be more far-reaching, if conceived

¹⁰⁷ Cited in The Commission on Freedom of the Press, *A Free and Responsible Press* (Uni. of Chicago Press, Chicago, 1945?), p. 136 (summary of Zechariah Chafee, Jr., *Government and Mass Communications*). See also: Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 4; Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995) (generally).

¹⁰⁸ Owen Fiss, for example, enquires as to “whether the allocative state should be subjected to the same strict scrutiny as the regulatory one when it comes to speech”: Owen M. Fiss, *The Irony of Free Speech* (Cambridge & London, Harvard University Press, 1996), p. 29.

¹⁰⁹ Robert Jackson, J., in *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943). Cited in Samuel Walker, *Hate Speech: The History of an American Controversy* (USA, University of Nebraska Press, 1994), p. 2 and p. 166.

¹¹⁰ See generally, Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948), and esp. p. 25.

¹¹¹ *Ibid.*, p. 25.

¹¹² *Ibid.*, p. 25.

of as the promotion of media- and information-related pluralism. Such a conceptualisation would point towards a more allocative or distributory role for the State.

An allocative role for the State as regards expression is by no means uncontested, however. Some commentators express uneasiness about subsidising speech, whether artistic, educational or other. Their unease stems from a typical and deep-seated liberalist suspicion of governmental intervention: “The official patron easily turns into the authoritative regulator. Further, the view that government is needed, by subsidy and regulation, to establish or enable the expression of the disadvantaged or the unequal, signifies a disturbing reliance on government. Rights undergo a self-inconsistent transformation when they are conceptualized as what government policy must positively provide or promote.”¹¹³

(3) Participation in communicative process

Government speech or government-sponsored speech could serve the purpose of countering harmful speech from third-party quarters, or it could serve the purpose of advancing perspectives that are either neglected or discriminated against. In these senses, it could the government’s role as a speaker could be viewed as closely related to its other two roles in relation to speech. But government speech, *qua* speech, could have – and often does have – the additional characteristic of providing information on matters of importance to society. Needless to say, in no circumstances should messages concerning matters of importance to governmental parties be twisted into or disguised as matters of importance to society.

5.2 - New trends in the development of the nexus under international law

5.2.1 – Filling the interstices of international law

The foregoing sections have demonstrated that the international protection accorded to minorities’ freedom of expression is – overall - quite erratic. That is why, as noted in the introduction to this thesis, it is extremely important to identify and group the disparate provisions in international instruments dealing with the topic. It is only through the documentation and analysis of the numerous relevant provisions that key features of the overall picture can be extracted. In light of these considerations, it is useful to consider Karol Jakubowicz’s proposed “full matrix of the rights of national minorities in the media field” (reproduced in its original tabular form here):¹¹⁴

Negative goals	Positive goals	
I. “Ban, combat”	II. “Assist”	III. “Empower”
State action to prohibit, disavow, marginalise, counteract all forms of discrimination and inequality	State action to develop public policy and regulation and provide assistance and funds to guarantee the right of minorities to media in	State not to hinder, or take action to ensure minority access to, and participation in, the media at the level of: 1. Programming

¹¹³ George Kateb, “The Freedom of Worthless and Harmful Speech”, in Bernard Yack, Ed., *Liberalism without Illusions* (Chicago, University of Chicago Press, 1996), pp. 220-240 at 238.

¹¹⁴ Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)” in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities*, pp. 113-138, at p. 118.

	<p>their own languages, to access to media from kin and/or neighbouring countries and to a proper representation of their identity, culture, history and interests in media content, as well as action to promote inter-cultural and inter-ethnic dialogue and understanding</p>	<ol style="list-style-type: none"> 2. Work-force 3. Editorial control and management 4. Ownership of media 5. Regulation and oversight 6. Legislation, public policy
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The usefulness of this proposed matrix derives from a number of its features. First, it identifies a wide range of specific State obligations, as developed by, or inferred from, a number of international instruments.¹¹⁵ Second, it points to the purposes of those State obligations and how they benefit persons belonging to minorities. Although the usefulness of the matrix as a possible analytical framework is readily acknowledged here, it will not be adopted as the model for the remainder of this thesis. It is referred to because, notwithstanding differences of terminology, it is similar to the “respect, protect, fulfil” approach to freedom of expression for persons belonging to minorities developed *supra*. Both involve the break-down of relevant State obligations and their categorisation in purposive terms, thereby elucidating the substantive specificities of the right and how to determine whether the right is being effectively realised in practice.

It has already been shown that the relationship between the right to freedom of expression and minority rights in international treaties of a generalist nature has not been particularly fecund. There is perhaps a certain inevitability about this: by their very nature, generalist human rights treaties can hardly be expected to provide detailed or sophisticated protection for specific niche rights or for interfaces between specific rights. Rather, such detailed or elaborate provisions could be more logically included in specialised treaties, where the narrow thematic focus would be more conducive to the exploration and elaboration of details, nuances and technicalities. Notwithstanding the role that could be played by specialised treaties in this respect, some commentators remain reluctant to accept that international law could have the capacity to negotiate the specific exigencies of discrete minority rights at all. The various arguments and general reasoning that coalesce into this reluctance merit careful scrutiny.

The essence of the case rejecting - or at least stringently querying – the appropriateness of international law as a vehicle for the protection and promotion of minority rights is captured in the following quotation:

But it is doubtful that international law will ever be able to do more than specify the most minimal of standards. The members of various linguistic groups have quite different needs, desires, and capacities, depending on their size, territorial concentration, and historic roots. A set of guidelines that is satisfactory to a small, dispersed immigrant group will not satisfy a large, concentrated historic minority. [...] Any attempt to define a set of rights that applies to all linguistic groups, no matter how small and dispersed, is likely to end up focusing on relatively modest claims. [...] Both

¹¹⁵ *Ibid.*, at 118-119. Note that subsequent sections of this thesis examine an extensive range of State obligations in detailed fashion.

majority and minority groups want much more than is, or could reasonably be, guaranteed in international law.¹¹⁶

The foregoing quotation from Will Kymlicka and Alan Patten refers specifically to the rights and needs of members of linguistic groups, but one can easily extrapolate from the specificity of their chosen example and apply the concerns they outline to a broader range of discrete minority rights and needs. The central thrust of their case is twofold: international law is ill-equipped to deal with the issues at hand because of minimalistic tendencies in its scope and content (this will be considered in detail in the next section, *infra*) and it is insufficiently attentive or responsive to *couleur nationale* or, better, *locale*.

The importance of local-level action, engagement, politics, etc., cannot be gainsaid. The proximity of law to its subjects generally favours heightened sensitivity to specificity. However, these truisms do not detract from the importance of underlying principles and paradigms, the articulation of which often takes place at another level. *Couleur locale* should inform the implementation of general principles in such a way as to maximise their efficiency in practice. The potential for synergic interaction is considerable. When Michael Ignatieff attributes the success of human rights in modern times (at least partly) to their ability to go global by going local,¹¹⁷ this kind of synergy certainly deserves some of the accolades.

Nevertheless, even laws that are finely tuned to the specificities of local needs and circumstances can be found to be deficient. Legal provisions are but one instrument of social policy; others play different but no less valid - and even vital - roles in achieving social objectives. The dynamic interplay between legal and non-legal regulatory measures and other societal forces will be considered in detail in Chapter 9, *infra*.

International law is subject to a number of inherent limitations. For analytical purposes, it is desirable to identify and group the most salient of these limitations. One possible way of doing so would be to focus on: (i) the modest scope and content of international treaties - individually and collectively; (ii) the under-utilisation of existing international law instruments (i.e., inadequate implementation, monitoring and enforcement), and (iii) overstretch in standard-setting, i.e., the reliance on international law - especially human rights instruments - in attempts to realise objectives for which they were not designed. At first glance, the distinction between (i) and (iii) may appear to be artificial, but in actual fact, that is not the case. The modest scope and content of treaties concerns arguments of legal formalism, whereas the focus on the overstretch of human rights instruments is more concerned with deviations from legal formalism and, indeed, a somewhat cavalier regard for its importance.

5.2.2 Modesty of scope and content of treaty law

It is perhaps easy to be sceptical or cynical about what international treaties can or seek to achieve, particularly given the *Realpolitik* of their drafting processes. More often than not, State representatives come to the drafting table with the narrow intention of preventing agreement on any measures that would curtail the action of their home States when action is

¹¹⁶ Alan Patten & Will Kymlicka, "Introduction - Language Rights and Political Theory: Context, Issues, and Approaches" in Will Kymlicka & Alan Patten, Eds., *Language Rights and Political Theory* (New York, Oxford University Press, 2003), pp. 1-51, at pp. 34-5.

¹¹⁷ Michael Ignatieff, Michael Ignatieff *et al.*, *Human Rights as Politics and Idolatry* (Princeton Uni. Press, Princeton, 2001), p. 7. This point is picked up on later in the same volume by K. Anthony Appiah, *ibid.*, p. 106.

needed to defend their States' "essential interests", or on measures that would adversely affect their home States' non-essential interests.¹¹⁸ Drafting exercises are inevitably also infused with altruistic intentions and a resolve to advance shared interests, but it is doubtful that such commonality of principle and purpose between States representatives would always take precedence over more viscerally-felt, parochial anxieties. Given this *Realpolitik*, the sardonic quip by Philip Allott, "A treaty is a disagreement reduced to writing",¹¹⁹ does not seem misplaced.

The modest scope of international treaties can also be explained in less sceptical and less cynical ways. The tendency towards minimalism in international human rights treaties is at least in part due to the fact that "problems of agreement, interpretation, and enforcement inhere even in the most minimalist formulations of human rights".¹²⁰ Kwame Anthony Appiah has described the basic, familiar dilemma as follows: "A conception of rights that's highly determinate in its application may not be thin enough to win widespread agreement; a conception of rights that's thin enough to win widespread agreement risks indeterminacy or impotence."¹²¹ One can safely assume a general wariness on the part of States when it comes to taking on extra commitments that are legally binding and enforceable.

The tailoring of a treaty's objectives to realistic prospects of their achievability also seems central here. On such reasoning, the more ambitious, complicated or contentious the content of a draft convention is, the more difficult it will prove to broker agreement for it amongst a wide range of States.¹²² The detailed treatment of highly specific issues is often among the primary casualties of such a tendency towards minimalism. Even if these initial obstacles are cleared, potential interpretative and enforcement difficulties remain to be faced.

This modesty of ambition in positive international law can readily be detected in the main human rights instruments under discussion here. The Universal Declaration of Human Rights – admittedly a Declaration, but nevertheless one that lays very strong claims to being part of customary international law – consciously styles itself as nothing more than "a common standard of achievement for all peoples and all nations". This implies that there are higher standards than the common one. Similarly, as noted *supra*, the drafters of the ECHR saw it as a general declaration of rights for immediate application: they kept open the possibility of building protection for other rights (most notably, minority rights) at an ulterior date.

When the content of rights – as formulated in the provisions of a treaty – is indeed minimalistic, or even merely not inclusive enough or robust enough, the interpretive techniques employed can either compound or reduce a treaty's textual shortcomings. Articles

¹¹⁸ This point is a paraphrase of a point made by Martti Koskenniemi in the specific context of the adoption by the UN General Assembly of a definition of "aggression": Martti Koskenniemi, "The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law", 65 *The Modern Law Review* (No. 2, March 2002), pp. 159-175, at 168. I also attempt to extend the application of Koskenniemi's observation to the drafting of international treaties generally.

¹¹⁹ Philip Allott, "The Concept of International Law", *EJIL* 10 (1999), pp. 31–50, at 43.

¹²⁰ Amy Gutmann, "Introduction", in Michael Ignatieff *et al.*, *Human Rights as Politics and Idolatry* (Princeton Uni. Press, Princeton, 2001), pp. vii-xxviii, at p. xii.

¹²¹ Kwame Anthony Appiah, *The Ethics of Identity* (Princeton and Oxford, Princeton University Press, 2005), pp. 263-264.

¹²² See, in this connection, the described difficulties in the unsuccessful efforts to draft an international Convention on freedom of religion (Chapter 1, p. 93); the "tortuous" negotiations leading to the adoption of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Chapter 1, p. 98), or indeed, in a European context, the Council of Europe Committee of Ministers' Declaration on freedom of political debate in the media.

31 and 32 of the Vienna Convention on the Law of Treaties are crucially important in this connection. They read:

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

Thus, the core text of a treaty, along with its preambular affirmations and annexes are of clear contextual importance for its interpretation (Article 31.2). So too are any agreements or (multilaterally accepted) unilateral instruments adopted in connection with the conclusion of the treaty (Article 31.2(a) and (b)). Other, extra-contextual, considerations of relevance are: any subsequent agreement between parties concerning interpretation or application (Article 31.3(a)) and any subsequent practice in application which points towards interpretative consequences (Article 31.3(b)). The broader matrix of international law is alluded to in Article 31.3(c). This is an important allusion in respect of human rights provisions in international law. It recognises the existence of an anterior body of inter-State commitments; a recognition which is often undergirded by explicit treaty stipulations that existing State obligations relating to human rights shall not be diminished in any way by obligations imposed by new treaties. In this connection, efforts to crystallise and distil “relevant rules of international law applicable in the relations between the parties” can therefore help to clarify important extraneous considerations for the interpretation of individual treaties.¹²³ According to Article 32, the *travaux* of a treaty and the circumstances of its conclusion are to be regarded as supplementary means of interpretation that can be relied upon in situations of ambiguity, etc., in order to determine the correct meaning of certain treaty provisions.

Whenever the text of a treaty reveals ambiguities, inconsistencies or absurdities, it must then turn unto itself in order to unlock its own inner, deeper, concealed meaning. A literalist

¹²³ See, for example, the Guidelines on the use of Minority Languages in the Broadcast Media (2003), *infra*.

approach may not always suffice and guidance may have to be sought from the (drafting) history (as provided for by Article 32) or the *telos* of the treaty. However, to rely solely on the historical interpretation of a treaty can also prove of limited utility, especially when such an interpretative approach places inordinate emphasis on the need to decipher the “original intent” of its drafters (which may be obscure or incoherent). Paraphrasing two well-known maxims in US Constitutional interpretation, reliance on history should be limited to “broad purposes, not specific practices” because a treaty “is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers”.¹²⁴

These two maxims point inexorably towards a teleological approach to treaty-interpretation, not least because its responsive character can render the treaty more enduring and “future-proof” than alternative interpretive techniques. Such an approach provides continuous, evolutive compensation for any lack of prescience on part of the original negotiating parties/drafters. By interpreting the original vision or intent in light of modern-day societal standards, it drags the original vision out of potential desuetude and helps to reduce uncertainty about original intent. Socio-political changes can dramatically alter the broader context in which law is applied; hence another reason to favour an interpretive technique that is reflective of such changes. As regards the media, the speed of technological change also pleads for interpretive flexibility if treaty formulations are to maintain a relevant grip on their subject matter (see further, ss. 8.1.3 and 8.1.4, *infra*). This logic has prompted specific calls for the adoption of a new General Comment on Article 19, ICCPR, to reflect how new technological capabilities and uses have re-shaped contemporary communicative realities.¹²⁵ The foregoing assertion of the general suitability of teleological interpretation for international treaties is admittedly partisan, but a thorough – and academically satisfactory – exploration of the competing merits of leading techniques of treaty/constitutional interpretation is beyond the scope of the present analysis.¹²⁶ One main justification for the preferential treatment of teleological interpretation in the present discussion is that it is the favoured interpretive technique of a number of international human rights adjudicative bodies.

For instance, Harris, O’Boyle and Warbrick have noted that the Strasbourg adjudicative authorities have only made “occasional use” of the *travaux préparatoires* for interpretive purposes. “This”, they explain, “is partly because the *travaux* are not often helpful and partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses where relevant upon current European standards rather than the particular intentions of the drafting states.”¹²⁷ Although allowing that differences of nuance are reflected by each, the notions of teleological, purposive and responsive interpretation can be described as roughly equivalent.

Although the European Court of Human Rights “generally eschews abstract theorising”,¹²⁸ it has characterised its interpretive technique in terms of the “living instrument” doctrine.¹²⁹

¹²⁴ Brennan, J., in *Marsh v. Chambers*, 463 US 783 (1983), at 816.

¹²⁵ See, for example, Jamie F. Metzl, “Information Technology and Human Rights”, 18 *Human Rights Quarterly* (No. 4, 1996), 705-746, at 742-743.

¹²⁶ One major critique of teleological interpretation is that it opens the door for judicial activism, a practice which in turn is susceptible to the politicisation of treaty/constitutional interpretation. For an overview of the contested nature of constitutional interpretation and the competing merits of various interpretive techniques, see: Post, Bork, etc.

¹²⁷ [footnotes omitted] D.J. Harris, M. O’Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London, Dublin, Edinburgh, Butterworths, 1995), p. 17.

¹²⁸ Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79, at 61.

Since the initial enunciation of the doctrine in *Tyrer v. UK*, the Court has consistently held that the ECHR is a “living instrument” which “must be interpreted in the light of present-day conditions”.¹³⁰ In its present state of development, the doctrine applies to both the substance and the enforcement processes¹³¹ of the Convention, and even to institutional bodies which did not exist and were not envisaged at the time of its drafting.¹³² This “dynamic and evolutive”¹³³ interpretive approach constitutes an important safeguard against the risk that the Convention would ever become – to import a phrase from US First Amendment doctrine – “static and lifeless”.¹³⁴

By its adherence to this particular interpretive technique, the Court has put in place the procedural wherewithal for emphasising in its judgments what has been termed “the dialectical relationship of the law to its ambient culture”.¹³⁵ Or “cultures”, to be more accurate, given the extant cultural heterogeneity throughout the 47 Member States of the Council of Europe. This allows for adaptive doctrinal development; an ability to respond (as deemed appropriate) to developing legal standards in Member States, particularly in instances of emergent consensual, cross-national trends.¹³⁶ This interpretive approach is subject to certain limitations,¹³⁷ however, the most important of which is that “any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection”.¹³⁸ In practice, judicial activism can also be checked by a certain caution/conservatism in its application.¹³⁹

5.2.3 Under-utilisation of treaty law

The problem of inadequate enforcement of existing international human rights instruments frequently draws the critical ire of commentators, and rightly so.¹⁴⁰ The substantive merit of a

¹²⁹ For an overview of the historical development of the “living instrument” doctrine (including recent developments) by the European Court of Human Rights, see: Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5:1 (2005), 57-79.

¹³⁰ *Tyrer v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 April 1978, Series A, no. 26, para. 31; *Matthews v. the United Kingdom*, Judgment of the European Court of Human Rights of 18 February 1999, para. 39.

¹³¹ *Loizidou v. Turkey*, Judgment of the European Court of Human Rights (preliminary objections) of 23 March 1995, Series A, no. 310, para. 71.

¹³² *Matthews v. the United Kingdom*, *op. cit.*, para. 39.

¹³³ *Stafford v. the United Kingdom*, Judgment of the European Court of Human Rights of 28 May 2002, para. 68; *Christine Goodwin v. the United Kingdom*, Judgment of the European Court of Human Rights of 11 July 2002, para. 74. Mowbray has pointed out that the Court has recently been making references to the “living instrument” doctrine and the “dynamic and evolutive” interpretive approach pretty much interchangeably: *op. cit.*, p. 64.

¹³⁴ Brennan, J., dissenting, in *Marsh v. Chambers*, 463 US 783, at 817.

¹³⁵ Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995), p. 17. It should be noted, though, that Post uses the term “responsive interpretation”.

¹³⁶ *Stafford v. the United Kingdom*, *op. cit.*, para. 68.

¹³⁷ See further, Mowbray, *op. cit.*, p. 67.

¹³⁸ *Pretty v. the United Kingdom*, Judgment of the European Court of Human Rights of 29 April 2002, para. 54.

¹³⁹ See, by way of example: *Sîrbu and others v. Moldova*, Judgment of the European Court of Human Rights (Fourth Section) of 15 June 2004. For analysis of this spurned opportunity to reflect the growth of freedom of information legislation at national level in the Court’s jurisprudence, see: 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* (Strasbourg, European Audiovisual Observatory, 2004), pp. 1-30, at p. 8.

¹⁴⁰ Philip Alston, “Conjuring up New Human Rights: A Proposal for Quality Control”, 78 *American Journal of International Law* 607-621 (1984); Gudmundur Alfredsson, “Concluding Remarks: More Law and Less

treaty can be seriously undermined by its procedural shortcomings, both on paper and in practice. Conor Gearty is vehemently critical of the “combination of rhetorical confidence and feeble implementation [which] means that we can all live in a culture apparently unparalleled in its commitment to human rights and equality, without having to make – or be forced to make – any of the sacrifices that would and should be required of us to make such a set of allegiance matter to anybody other than ourselves.”¹⁴¹ This gives rise to a phenomenon infecting human rights which he terms “Standards That Are Merely Mirages”.¹⁴²

The ultimate goal of international treaties is to ensure the faithful enshrinement and effective implementation of their principles and provisions in national law.¹⁴³ Adjudication and monitoring typically play complementary roles in ensuring the enforcement of international law at the national level. Adjudication is generally a more heavy-hitting measure of enforcement than monitoring, and can constitute the culmination of a monitoring exercise. In another sense, though, adjudication can be a form of monitoring, for example the work of the European Court of Human Rights has been described as “‘monitoring’ *par excellence*”.¹⁴⁴ In this sense, “*excellence*” is not an evaluative term of the quality of the Court’s work, but an indication of its juridical – and therefore legally binding – character.

In recent years, monitoring has had its name dragged around in the proverbial mud. The often ineffectual outcomes of the monitoring of humanitarian crises and conflict situations and the inability of monitoring mechanisms to avert or prevent the escalation of such crises and conflicts have contributed to a general undermining of faith in the usefulness of the entire monitoring enterprise. The practice tends to be inextricably associated with the ills it is supposed to observe. The point can be made wryly by quoting one proposed definition of “monitor”: “A verb meaning, To ignore, to do nothing about, to treat with apathy, as in ‘We are monitoring the situation on a 24-hour basis’”.¹⁴⁵ Such general cynicism should not,

Politics”, in Gudmundur Alfredsson *et al.*, Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 913-926.

¹⁴¹ Conor Gearty, “Is the idea of human rights now doing more harm than good?”, Paper delivered at the London School of Economics, 12 October 2004 (on file with author), p. 6 of transcript. See also: Conor Gearty, “Reflections on Civil Liberties in an Age of Counterterrorism”, 41 *Osgoode Hall L.J.* 185 (Summer/Fall, 2003); David Kennedy, “The International Human Rights Movement: Part of the Problem?”, 15 *Harvard Human Rights Journal* (Spring 2002), 101(?); Tom Campbell, Keith Ewing & Adam Tomkins, Eds., *Sceptical Essays on Human Rights* (Oxford University Press, 2001).

¹⁴² Actually, the metaphor he spins presents human rights “as a computer programme designed to do good”, which is being threatened by three viruses, including the acronymic STAMM (i.e., “Standards That Are Merely Mirages”) virus: Conor Gearty, “Is the idea of human rights now doing more harm than good?”, *op. cit.*, p. 5 of transcript.

¹⁴³ See further: Andrew Drzemczewski, “The European Human Rights Convention: Protocol No. 11 – Entry into Force and First Year of Application”, 21 *Human Rights Law Journal* (No. 1-3, 2000), pp. 1-17, at 10. For an overview of the incorporation of the ECHR into the national legal systems of Council of Europe Member States, see: Robert Blackburn & Jörg Polakiewicz, Eds., *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (England, Oxford University Press, 2001); for a more historical perspective, see: Andrew Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (United Kingdom, Clarendon Press, 1985).

¹⁴⁴ Committee of Wise Persons, Final Report to the Committee of Ministers, Doc. No. CM(98)178, 20 October 1998, para. 69. The firm, original context of this phrase was the sentence: “*In addition to the “monitoring” par excellence undertaken in the proceedings before the European Court of Human Rights, an important task of the Council of Europe is to ensure that every member state respects the values and the important system of norms and standards developed by the Organisation over the years and embodied in some 170 conventions and a great number of recommendations. [...]*” (italics per original).

¹⁴⁵ Provided by Miles Kingston, *The Independent*, London, 17 February 1998. Cited in Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: A Useful ‘Human Rights’ Mechanism?”, in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at 88.

however, be allowed to detract from the merits of specific monitoring exercises. For Philip Alston and J.H.H. Weiler, monitoring is “an indispensable element in any human rights strategy”.¹⁴⁶ They explain:

Systematic, reliable, and focused information is the starting point for a clear understanding of the nature, extent, and location of the problems which exist and for the identification of possible solutions. It is also a necessary element in any strategy to garner the support of civil society and the community at large for measures to promote and protect the human rights of vulnerable groups.¹⁴⁷

The mechanisms instituted by the European Charter for Regional or Minority Languages and the FCNM, for instance, represent good examples of the primarily preventive character of monitoring mechanisms within the Council of Europe, according to Andrew Drzemczewski.¹⁴⁸ A detailed evaluation of the effectiveness of these two monitoring mechanisms in respect of both conventions’ provisions on freedom of expression and the media, will now be provided.

5.3 – Emergence of differentiated protection for minorities’ right to freedom of expression

ECHR protection of the right to freedom of expression is guaranteed in the broader context of a particularly strong conception of democracy; one in which the principles of pluralism, tolerance and broadmindedness reign supreme.¹⁴⁹ It correctly perceives the right to freedom of expression, information and opinion as empowering and facilitative. Conceptually, it styles freedom of information as the “touchstone” of all other human rights;¹⁵⁰ a constitutive right which is instrumental in securing the realisation of other rights. This is a conception of democracy in which Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a dominant role:

Article 10 - Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹⁴⁶ Philip Alston & J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (New York, Oxford University Press, 1999), pp. 3-66, at p. 55.

¹⁴⁷ *Ibid.*

¹⁴⁸ Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (no. 43, 2000), pp. 385-428, at 401.

¹⁴⁹ *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

¹⁵⁰ United Nations General Assembly Resolution 59(1), 14 December 1946.

Of course, this reference to Article 10 includes not only the letters set in stone, but the vast and vigorous case-law that has been developed by the European Court of Human Rights on freedom of expression and information. This has been described as “one of the great glories of the European Court”.¹⁵¹ Whether one agrees fully with this description or not, there can be no denying that it does contain a substantial truth. Many important battles in the war of principles have been won, such as: the public’s interest in receiving information via responsible investigative media; in robust political debate, and in the free exchange of information or ideas “that offend, shock or disturb the State or any sector of the population”.¹⁵² It is likely that the next battles to be fought will be somewhat localised. This is not so much a reference to geographical localisation (although it remains a truism that more work on freedom of expression has to be done in some countries than in others); rather it refers to a kind of thematic localisation. Building on some of the advances already registered in the Article 10 case-law, issues such as technology, access and language are likely to feature more prominently on the Court’s agenda in the future. Just as they are likely to feature increasingly in the context of minority rights and therefore on the agenda of the Advisory Committee as well.

5.3.1 Framework Convention for the Protection of National Minorities

The linkage between Article 10, ECHR and Article 9, FCNM, is very explicit. The latter was cast in the mould of the former, and the resultant textual similarities are acknowledged in the Explanatory Report to the Framework Convention.¹⁵³

Article 9

1 The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

2 Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

3 The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

However, Article 9 is not simply a carbon copy of the European prototype for freedom of expression. In some respects, it builds on the original model and introduces greater specificity as regards dimensions to the right to freedom of expression that could be of particular

¹⁵¹ Gerard Hogan, “The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland”, 4 *The Bar Review* pp. 205-211 (No. 4, 1999), at p. 206.

¹⁵² *Handyside, op. cit.*

¹⁵³ See the Explanatory Report to the Framework Convention for the Protection of National Minorities, in particular, paras. 56 & 58.

importance for persons belonging to national minorities.¹⁵⁴ Article 9(4) foregrounds, in an explicit manner, issues that are clearly of relevance to freedom of expression and to national minorities, but which have hitherto been subsumed in more general aspects of the Article 10 jurisprudence of the European Court.¹⁵⁵ The goals of striving towards tolerance and cultural pluralism – outcrops of the Article 10 jurisprudence of the European Court – are clearly remindful of Article 6, FCNM,¹⁵⁶ which reads:

1 The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

2 The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

The main media-related provisions of the FCNM are summarised here in tabular form:

Provision	Summary details
Article 6.1	Encouragement of spirit of tolerance and intercultural dialogue; effective measures to promote mutual respect and understanding and cooperation among all persons, in particular ... in the media
Article 9.1	Linguistic freedom and non-discriminatory access to media
Article 9.2	Licensing of radio, television or cinema must be non-discriminatory and based on objective criteria
Article 9.3	Freedom to create and use print media without hindrance; possibility to create and use own broadcast media outlets
Article 9.4	States must adopt adequate measures to facilitate minorities' access to media and to promote tolerance and permit cultural pluralism

It is interesting to note that during the drafting of the FCNM, the CAHMIN was “informed by the representative of the Steering Committee on the Mass Media (CDMM)¹⁵⁷ that the latter committee had initiated discussions on the revision of Article 10 ECHR, with a view to adding journalistic and editorial freedom, access by various groups in society to the media, and copyright.”¹⁵⁸ This was a reference to discussions based on a study commissioned by the CDMM as part of its contribution to the implementation of a Council of Europe project on “Human Rights and Genuine Democracy”. The Study was entitled “Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights” and it was written by Dirk Voorhoof.¹⁵⁹ The Study concluded as follows:

Analysis of the case law on Art. 10 makes clear that Art. 10 E.C.H.R. is not a static rule but a living instrument of human rights' protection. The indefiniteness and open character of the formulation and construction of the Article leads to an ever developing, dynamic and expanding influence of it. The future impact of Art. 10 on information law and media policy in Europe will,

¹⁵⁴ See, for example, *ibid.*, paras. 56 & 59.

¹⁵⁵ See, in particular, *ibid.*, para. 62.

¹⁵⁶ For commentary, see: Geoff Gilbert, “Article 6”, in 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), pp. 177-191.

¹⁵⁷ Author's footnote: The CDMM's representative was Frédéric Riehl (Office Fédéral de la Communication, Switzerland) – Steering Committee on the Mass Media (CDMM), Report on 35th Meeting, 9-12 November 1993, Doc. No. CDMM (93) 41 Addendum, Agenda Item 11, para. LXVII.

¹⁵⁸ CAHMIN (94) 5, 1 February 1994, 1st meeting 25 January – 28 January 1994, Meeting Report: para. 36.

¹⁵⁹ October 1993, Doc. No. CDMM (93) 36.

to a considerable extent, depend on the manner in which the European Commission and the European Court leave a narrow or a wide margin of appreciation to the contracting States with regard to the justification of the “pressing social need” and of the manner in which they take account of the various factors and dimensions involved in the freedom of expression and information.¹⁶⁰

Ultimately, the Bureau of the Council of Europe’s Steering Committee on Human Rights (CDDH-BU), citing the first two sentences of the above excerpt from the Study, endorsed Voorhoof’s conclusions and stated that it “therefore did not consider it appropriate, at this juncture, to redraft Article 10 of the ECHR”.¹⁶¹ Had the CDDH-BU not followed Voorhoof’s conclusions, it is a matter of speculation how far-reaching the proposed express provision for group access to the media might have been. Nevertheless, the very fact that the question was formally discussed at all could be taken as corroborating the observations *supra* that a paradigmatic development in thinking is beginning to emerge as regards freedom of expression. Qualitative considerations and the right to active participation in the media are likely to come increasingly to the fore.

Monitoring

(i) *General*

At the time of its inception, 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.¹⁶² 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.

(ii) *Advisory Committee*

Thematic approach

When drafting the FCNM, the CAHMIN “considered that programme-type provisions should be included in the framework Convention establishing certain objectives without going into technical details”.¹⁶³ The final text of Article 9, FCNM, shows that this decision was indeed adhered to. This decision shifted the responsibility for examining the compatibility of “technical details” with the standards set out in Article 9 to the Advisory Committee. This shift in responsibility has at least two logical corollaries. First, it points up the need for the Advisory Committee to develop or at least have access to a high level of expertise concerning the nature of technical details, if it is to evaluate their impact in an effective manner. Second, both of these points underscore the need for the Advisory Committee to be able to maximise the potential knowledge and experience provided by external sources of information.

¹⁶⁰ *Ibid.*, p. 65.

¹⁶¹ Steering Committee on the Mass Media (CDMM), Secretariat Memorandum prepared by the Directorate of Human Rights, 11 May 1994, Doc. No. CDMM (94) 31. This document contains an excerpt from the Report of the 42nd Meeting of the Bureau of the CDDH-BU, including its Opinion on the Voorhoof Report.

¹⁶² 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).

¹⁶³ CAHMIN (94) 5, 1 February 1994, 1st meeting 25 January – 28 January 1994, Meeting Report, p. 8, para. 37, ECMI docs. Art. 9.1.

The Advisory Committee's Opinions are structured in such a way that consideration of Article 9 takes place under: 'Specific comments in respect of Articles 1-19'; 'Main findings and comments of the Advisory Committee',¹⁶⁴ and occasionally 'Concluding remarks' as well.

The treatment given to Article 9 as part of the article-by-article approach tends to be detailed and discursive and to offer a wealth of information about the prevailing situations in whatever country is under scrutiny. This information is wide-ranging in character: covering general context, legislation and its implementation and a miscellany of practical considerations. Or, to use the terminology of the Outline for the State reports: narrative, legal, state infrastructure, policy, factual.¹⁶⁵ As such, it reflects the numerous criteria, discussed *supra*, which affect the access of persons belonging to national minorities to the media, including in their own languages. The comprehensive treatment of country-specific situations in the Advisory Committee's Opinions is their great strength. Ironically, however, the specificity of the analysis can also be a limiting factor, at least to the extent that the scrutiny provided is *prima facie* deprived of a more general character.

However, one can still find a number of interpretative diamonds in the rough. With a little bit of cutting and polishing, excerpts from Advisory Committee Opinions such as those quoted *supra*,¹⁶⁶ could be of considerably greater worth, in a wider context than that of the individual circumstances under scrutiny. What is required for each substantive issue addressed is the elaboration of a strong formula with maximum reach and for it to be consistently applied across different country situations. Such an approach would have the merit of enhancing predictability and elevating country-specific analysis to a higher, more general plane on which it would achieve greater impact. Of course, the obvious subtext here is that the quest for consistency, predictability and generality should not be allowed to ride roughshod over the subtleties and sensitivities of specific country-situations. Like in the jurisprudence of Article 10, ECHR, the challenge here is to strike a careful balance between lofty ideals and the hard political and social realities of individual cases. If met squarely, this challenge could lead to immensely instructive and immensely rewarding results, not least for the future monitoring of the FCNM. It should not be shirked.

The evolution of standards from a somewhat lapidary text is crucial and this is another example of parallelism between Article 10, ECHR, and Article 9, FCNM. The focus, in the course of Chapters 6-8, on how the text of Article 9 of the Framework Convention has evolved in the Opinions of the Advisory Committee is therefore appropriate, given its contribution to our understanding of the full ambit of Article 9. This is particularly true in the continued absence of any other mechanisms for offering authoritative interpretations of the text of the Framework Convention, eg. direct justiciability before the European Court of Human Rights; the possibility of having recourse to the Court for advisory/interpretative opinions, or any kind of mechanism akin to the United Nations Human Rights Committee's capacity to issue General Comments on individual articles of the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁷ etc.

¹⁶⁴ In earlier Advisory Committee Opinions, the corresponding section was entitled 'Proposal for Conclusions and Recommendations by the Committee of Ministers'.

¹⁶⁵ Outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities, Appendix 3 (item 4.1), Committee of Ministers Resolution (97) 10, *op. cit.*

¹⁶⁶ The purpose of the quoted passages is merely illustrative; it does not in any way seek to give an exhaustive enumeration of points made by the Advisory Committee that could be easily applied beyond the immediate country-situation for which they were originally devised.

¹⁶⁷ See further, Article 40(4) of the ICCPR.

As a tailpiece to this sub-section, the importance of the precise usage of terminology ought to be reiterated. The Rapporteur for this session has already stressed the distinction between passive and active access to the media: two very different notions covered by the nebulous term “access”.¹⁶⁸ Sensitivity to conceptual and linguistic precision will also be determinative in the ongoing exercise of “filling in the frame” of Article 9, FCNM.

Intertextual references

Occasional references are made in the Opinions of the Advisory Committee to the Committee of Ministers Recommendation (97) 21 on the media and the promotion of a culture of tolerance.¹⁶⁹ It comes as a surprise that this is the only Committee of Ministers Recommendation dealing explicitly with the media to be referred to in an Advisory Committee Opinion’s consideration of Article 9, FCNM. It is submitted here that more frequent references in Advisory Committee Opinions to Committee of Ministers Recommendations on other topics could prove extremely useful: Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting; Recommendation No. R (99) 1 on measures to promote media pluralism, for example. Or, more ambitiously, this “import trade” would not even have to be limited to Committee of Ministers Recommendations.

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 commitments for the protection of national minorities.¹⁷⁰ 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.

Thus, insofar as the practice of explicitly referring to international standards is concerned, pertinence should be the guiding principle, thereby inviting the invocation (where appropriate) of other types of “soft law”, for example, the Council of Europe Committee of Ministers Declaration on the Freedom of Expression and Information of 1982; the Oslo Recommendations Regarding the Linguistic Rights of Persons belonging to National Minorities or the international Guidelines on the Use of Minority Languages in the Broadcast Media.¹⁷¹ This could be a useful way of signposting exemplary or exhortatory standards elaborated in other fora, without having to incorporate large chunks of text from the same standards. In other words, this would involve an exercise of enrichment by reference or intertextuality. It has the further advantage of referring to standards already enjoying the endorsement of other international bodies and the authority that accrues from such endorsement.

¹⁶⁸ Karol Jakubowicz, *Persons belonging to National Minorities and the Media* (Workshop 2), Filling the Frame, Strasbourg 30-31 October 2003, pp. 17-18.

¹⁶⁹ For example, in the Opinions on Cyprus, Hungary, Norway and Romania.

¹⁷⁰ Explanatory Report to the Framework Convention, *op. cit.*, para. 23.

¹⁷¹ These Guidelines were elaborated by a group of international experts under the auspices of the OSCE High Commissioner on National Minorities and were first floated in public at a conference in Baden-bei-Wien, Austria, on 25 October 2003.

The merits of referring to the aforementioned Guidelines on the Use of Minority Languages in the Broadcast Media deserve particular attention here because their subject matter comprises a range of issues that are instrumental in protecting and promoting the interests of persons belonging to national minorities as regards their access to the media (especially in their own languages) (see further, ss. 5.4.1 and 8.3.1, *infra*). The Guidelines would be eminently suited to achieving synchronicity with the FCNM – at least in terms of their programmatic character. The greater specificity of the Guidelines could help to fill the gaps in the more general wording of Article 9, FCNM; gaps which are inevitably present as a result of the treaty’s broader, more sweeping thematic preoccupations. The complementarity quotient here is high.

Scope for use of more pro-active language

The ‘Main findings and comments of the Advisory Committee’ section of Advisory Committee Opinions also gives treatment to Article 9, FCNM. These findings sift through the extensive information provided in the article-by-article approach and this exercise facilitates the task of prioritising areas for further attention. The *forte* of each finding is that it does not limit itself to merely pointing out a situation or practice that is unsatisfactory. The Advisory Committee goes the extra mile on this: each finding is quickly followed by a suggested line of action for redressing the situation or practice in question. While this forward-looking approach is very laudable, again, with a little extra journeying, it could perhaps gain further in effectiveness. In a similar vein, the suggestions advanced for following up on the Advisory Committee’s findings tend to rely on calls to “examine”, give “particular attention to”, “identify”, “take the necessary measures”, “place emphasis”, “try to meet expectations”, etc.

An Irish proverb says that if you light the wick, you might as well burn the whole candle. By applying the proverb to this context, then, might it not be constructive to go further than identifying areas meriting attention or exploration or examination and to actually suggest possible ways in which such attention could be administered; such exploration or examination carried out? Of course, it would be imperative that such suggestions not be perceived by State representatives as being imposed as some kind of disguised *diktat*. Rather, the presentation of useful reference points (eg. identified best State practices) or palettes of options would be a preferred approach. Given the political acumen that has been displayed in the past by the Advisory Committee, confidence in its ability to rise to this challenge of persuasion would not be misplaced. Meetings with State representatives within the context of the monitoring process would afford the Advisory Committee ideal opportunities for prising open the very centre of pressing questions and situations (including those relating to access to the media) and for assuming a pro-active role in the open and constructive discussion of possible measures to be taken.

(iii) Committee of Ministers

As far as the monitoring of the FCNM is concerned, ultimate control and responsibility rests with the Committee of Ministers.¹⁷² This fact alone, is not unproblematic in many respects. Most fundamentally, the process is essentially about States monitoring their own activities and this inevitably gives rise to *prima facie* concerns for the independence and objectivity of

¹⁷² See Articles 24-26, FCNM.

the exercise.¹⁷³ The summary and often bland content of Committee of Ministers' country-specific Recommendations concerning the application of the FCNM (see further, *infra*), furthermore does little to dispel such concerns.

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 serious 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".¹⁷⁴

Of the country-specific resolutions adopted by the Committee of Ministers in respect of its first monitoring cycle, 13 did not make specific reference to persons belonging to national minorities and the media.¹⁷⁵ However, of the country-specific Resolutions in which the media are mentioned, the relevant treatment of issues is rarely more than cursory. While it could be argued that the brevity of these Resolutions is par for the course because the Advisory Committee Opinions provide superior breadth and depth of analysis, it is nevertheless to be regretted that this opportunity for a more detailed approach to media-related (and other) issues has not been routinely seized by the Committee of Ministers.

Greater specificity is particularly required in the first part (conclusions) of the Committee of Ministers' country-specific Resolutions. While the recommendation in the second part of such Resolutions that the State Party take appropriate account of the various comments in the relevant Advisory Committee Opinion is laudable, there remains a danger – absent maximum specificity or maximum levels of detail – of individual concerns being inadvertently smothered in this blanket, catch-all approach. Finally, it cannot be gainsaid that the Committee of Ministers ought to bring increased political pressure to bear in relevant quarters in order to ensure a significant strengthening of the Advisory Committee's financial and human resources.

To conclude this analysis of the monitoring of the FCNM, it must be reiterated that there is clearly a need to derive general principles from specific country situations in a more systematic way. The germ of such principles is already contained in the Advisory Committee's Opinions and if the relevant statements were to be elevated to a higher plane of general application and to constitute a more distinct corpus, they would then offer invaluable interpretative clarity for (Article 9 of) the FCNM. The challenge here would be to marry the goals of showing particular deference to *couleur locale*, while at the same time striving for formulae that would tend towards universal relevance or application.

¹⁷³ This scepticism has been conveyed by Andrew Drzemczewski in the context of other, general monitoring work by the Committee of Ministers, when he posed the question: "Is consensus-based confidential monitoring – in which the State being monitored is itself involved in the decision-making process and in which issues are not put to the vote – not intrinsically 'defective' *ab initio*?" - Andrew Drzemczewski, "Monitoring by the Committee of Ministers of the Council of Europe: A Useful 'Human Rights' Mechanism?", in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at p. 88.

¹⁷⁴ Committee of Ministers Resolution (97) 10, *op. cit.*, para. 36.

¹⁷⁵ Check latest data. In order to avoid drawing disingenuous conclusions from statistics, it should be pointed out that the Resolutions in question on occasion give very summary treatment to the countries under scrutiny (particularly in the case of small countries, for which there may not even be any thematic treatment at all).

Similarly, there is a need for terminological precision, the clarification of concepts and more attention to explaining new or unfamiliar technological features. It is also necessary to undergird the findings of the Advisory Committee by making increased references to relevant international standards (including so-called “soft law”). A pro-active role for the Advisory Committee in making suggestions to States Parties on how to address issues of concern would also be useful.

References to media-related issues in Committee of Ministers country-specific Resolutions have, to date, been scant and when such references have been made, they have generally been found wanting in detail. A heightened role for the Advisory Committee in the monitoring process (with the backing of sufficient human and financial resources) could go some way towards offsetting the effect of this perceived shortcoming of Committee of Ministers Resolutions.

5.3.2 European Charter for Regional or Minority Languages

The European Charter for Regional or Minority Languages also brings together certain key aspects of the right to freedom of expression and minority rights.¹⁷⁶ However, before examining relevant focuses, it is useful to recall the rather unique character of the Charter. Its “chief distinguishing feature is its purpose: the protection it seeks to give a European cultural asset, namely the linguistic diversity represented by regional and minority languages”.¹⁷⁷ As such, it subjects contracting States to various legal obligations, but it does not set out to create rights for either individuals or groups. The extent to which rights for individuals or groups flow from, or are affirmed by, State obligations can therefore be regarded as incidental to the central purpose of the Charter. Article 11 is the Charter’s principal article concerning the right to freedom of expression; it reads as follows:

Article 11 – Media

- 1 The Parties undertake, for the users of the regional or minority languages within the territories in which those languages are spoken, according to the situation of each language, to the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field, and respecting the principle of the independence and autonomy of the media:
 - a to the extent that radio and television carry out a public service mission:
 - i to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or minority languages; or
 - iii to make adequate provision so that broadcasters offer programmes in the regional or minority languages;
 - b
 - i to encourage and/or facilitate the creation of at least one radio station in the regional or minority languages; or

¹⁷⁶ For a general commentary on the Charter, see: Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A critical commentary* (Strasbourg, Council of Europe Publishing, 2005). For commentary specifically on Article 11, see *ibid.*, pp. 200-214.

¹⁷⁷ *Ibid.*, p. 27.

- ii to encourage and/or facilitate the broadcasting of radio programmes in the regional or minority languages on a regular basis;
 - c
 - i to encourage and/or facilitate the creation of at least one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the broadcasting of television programmes in the regional or minority languages on a regular basis;
 - d to encourage and/or facilitate the production and distribution of audio and audiovisual works in the regional or minority languages;
 - e
 - i to encourage and/or facilitate the creation and/or maintenance of at least one newspaper in the regional or minority languages; or
 - ii to encourage and/or facilitate the publication of newspaper articles in the regional or minority languages on a regular basis;
 - f
 - i to cover the additional costs of those media which use regional or minority languages, wherever the law provides for financial assistance in general for the media; or
 - ii to apply existing measures for financial assistance also to audiovisual productions in the regional or minority languages;
 - g to support the training of journalists and other staff for media using regional or minority languages.
- 2 The Parties undertake to guarantee freedom of direct reception of radio and television broadcasts from neighbouring countries in a language used in identical or similar form to a regional or minority language, and not to oppose the retransmission of radio and television broadcasts from neighbouring countries in such a language. They further undertake to ensure that no restrictions will be placed on the freedom of expression and free circulation of information in the written press in a language used in identical or similar form to a regional or minority language. The exercise of the above-mentioned freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
 - 3 The Parties undertake to ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media.

Article 11 is a derivative formulation of Article 10, ECHR; the debt of the former to the latter is acknowledged in the Explanatory Report to the Charter (para. 112). Indeed, Article 11(2) of the Charter incorporates Article 10(2), ECHR, almost verbatim. Like other substantive Articles of the Charter, it is governed by Article 2, which sets out the requirements for undertakings entered into by States Parties:

1. Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1.
2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.

No explanation is given either in the Charter proper or in the Explanatory Report thereto¹⁷⁸ as to why three paragraphs or sub-paragraphs must be chosen from Articles 8 (Education) and 12 (Cultural activities and facilities) and only one from Articles 9 (Judicial authorities), 10 (Administrative authorities and public services), 11 (Media) and 13 (Economic and social life). Even though the stipulated requirements are “minimum” and States are free to take on additional commitments *vis-à-vis* the media, the impression given by Article 2(2) is that the media belong to the poor(er) relations in the family of State obligations under the Charter. This impression is all the more puzzling when one considers the importance of the other, similarly designated “poor relations” (i.e., judicial and administrative authorities, public services, economic and social life). However, it must be added that any implicit belittlement of the role or importance of the media is offset by the Expert Committee’s repeated insistence in its country-specific Reports that the media have a determinative influence on the future of regional and minority languages.

Monitoring

(i) *General*

A purely textual analysis of the Charter prompts a number of sceptical remarks concerning the impact it is likely to have in raising the level of protection and promotion of minority languages in Contracting States. First, the confidence exuded by the preambular affirmations of the Charter do not carry through to its substantive provisions. There is a clear scale of onerousness present in the range of commitments offered within Articles 8-13 of the Charter. As long as States comply with the requirements set out in Article 2(2), they are free to choose the level of onerousness of the commitments they enter into. This panders – perhaps inordinately – to the discretion and therefore good faith of States. This temerity of approach may very well have been designed to encourage wider ratification of the Charter by States, but due to its apparent potential for low-level commitments, there is no guarantee that it will lead to the achievement of meaningful results at the national and sub-national levels.¹⁷⁹

It has been posited that the “*table d’hôte*” character of Charter’s commitments offers a measure of flexibility to States Parties, without which there would be considerably greater reluctance to ratify the Charter. Dónall Ó Riagáin, for instance, has argued that “A less flexible formula would not work because of the greatly differing language situations obtaining in Europe”.¹⁸⁰ The Charter’s modest ambition could be summed up in the working principle that half a loaf is better than no bread; or, to emphasise the meagreness of expectations it generates, the equivalent proverb in Dutch: half an egg is better than an empty shell! Nevertheless, the wisdom of this logic has yet to be borne out in practice: the Charter’s rate of uptake by States has been generally disappointing,¹⁸¹ with only 23 ratifications to date (1 May 2008).

¹⁷⁸ See, in particular, paras. 41-47 of the Explanatory Report.

¹⁷⁹ See further, Robert Dunbar, “Minority Language Rights in International Law”, 50 ICLQ (2001) 90-120, at 113.

¹⁸⁰ Dónall Ó Riagáin, “The Charter: An Overview”, in François Grin, *Language policy evaluation and the European Charter for Regional or Minority Languages* (Palgrave Macmillan, 2003) pp. 55-68, at 64.

¹⁸¹ See, for example, relevant remarks in the three Biennial reports by the Secretary General [of the Council of Europe] to the Parliamentary Assembly on the application of the European Charter for Regional or Minority Languages (3 September 2005 – Doc. 10659; 11 September 2002 – Doc. 9540; 18 October 2000 – Doc. 8879).

(ii) *Expert Committee*

Thematic approach

The Expert Committee investigates whether the State is upholding its obligations by comparing the factual information at its disposal to the particular commitments entered into. The Reports home in on specific commitments undertaken by States: they do not adopt a simple article-by-article approach. This means that the Expert Committee does not necessarily examine the same commitments in respect of every State Party. Nevertheless, its pronouncements on substantive matters are frequently of wider interest/relevance than merely to the particular State to which they are addressed. This is more obviously and more frequently true of the Expert Committee's evaluations than those of the Advisory Committee to the FCNM. Despite the fact that the Expert Committee does not always consider the same commitments in respect of each State, its occasional references to findings in respect of other States does make for greater overall consistency in the evaluative work of the Committee.

On paper, the asserted realism of the Charter could seem more like resigned defeatism, but in practice, the Expert Committee has been striving to achieve maximum returns on what is *prima facie* a restrictively-designed text. This is illustrated by how the specificity of commitments entered into by States has bred specificity of analysis by the Expert Committee. Those trends towards specificity created a need for the Expert Committee to develop expertise on various aspects of the media (especially broadcasting), such as its sociological dimension and the impact of technological developments. By and large, the Committee has risen to that challenge and delivered in kind. As a result, the use of technical terminology is noticeably cleaner and clearer than, for example, by the AC FCNM (but it should also be acknowledged that the text of Article 9 cannot boast exemplary clarity of formulation to start with). The Committee's comments have also borne out an awareness of the need for conceptual and linguistic precision.

Intertextual references

At least as regards Article 11, the Expert Committee has not tended to refer to other Council of Europe standard-setting texts, never mind other international instruments. The Preamble to the Charter considers "that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied" in the ICCPR and "according to the spirit" of the ECHR, and it also has "regard to" relevant CSCE work (in particular the Helsinki Final Act of 1975 and the Copenhagen Meeting of 1990). However these are courtesy nods; acknowledgements of the existence of other standards developed in other international fora. They do not – on any reading – amount to the sourcing of inspiration for the Charter. This is a significant difference from the Preamble to the FCNM. Perhaps, then, given that there is no *ab initio* grounding of the Charter in anterior international law, it should come as no surprise that the Expert Committee would rarely (if ever) refer to prevailing international legal (and non-legal) standards that are extraneous to the Charter itself.

This may be partly to do with the nature of the Charter and the lack of provision for cross-fertilisation by other international law texts. The absence of such a provision should not necessarily preclude the Expert Committee from tactically or systematically invoking relevant references; indeed its purposive approach to its evaluative task suggests that it would not be

adverse to doing so in the future. For the moment, though, its failure to enrich its own work by such invocations must be regarded as a missed opportunity, because, as was argued in connection with the AC to the FCNM, *supra*, it could be advantageous to regularly make such cross-linkage.

However, the Expert Committee does, on occasion, refer to the approach of the AC FCNM on matters of overlapping interest. Such cross-references are only made very sporadically and even then as parenthetical remarks seeking to confirm or re-affirm stand-points already taken by the Expert Committee on particular issues. This tactic shows welcome awareness of the activities of a sibling Council of Europe body and is important for fostering certain thematic consistency across Council of Europe approaches. At the same time, though, the tactic also boasts a certain, calculated temerity: a more assertive policy of cross-referencing could risk leading to the entanglement of nets.

Scope for use of more pro-active language

A general perusal of Expert Committee country-specific Reports suggests that the Committee is also less likely to fudge its words than the AC. When it feels that commitments are not being properly honoured, it is quick to say so and indeed, to offer suggestions on how States Parties might consider ameliorating the situation. There are at least two plausible explanations for this:

(a) The specificity of commitments narrows down the scope of enquiry and the evaluation of detailed factual information means that it generally is possible to ascertain whether States are genuinely upholding their undertakings. The Expert Committee is sensitive to dichotomies between the meeting of obligations in formal and in real terms, and its comments frequently reflect this. It also frequently finds that certain obligations are only being partially fulfilled and indicates how outstanding issues should/might be addressed. Where it is not in a position to draw relevant conclusions (eg. due to a lack of information, or ambiguous information or conflicting information), it tends to state as much and request that the subsequent State Report provide the necessary clarification.

(b) The Expert Committee appears to be considerably freer than its FCNM counterpart in its ability to gather information other than that provided through official State channels. This refers not only to the erstwhile convoluted restrictions of mandate under which the AC had to operate, but also – to an extent – the cautious mindset engendered by such a mindset.

(iii) Committee of Ministers

As with the FCNM, CM Recommendations on the application of the Charter in specific countries tend to be rather terse and do little to elucidate the content of the State obligations under scrutiny. This, as also stated in the context of the FCNM, is more of an observation than a criticism, as these Recommendations – by nature – are not intended as explanatory texts. Rather, one would expect the Reports of the Expert Committee, on which the CM Recommendations are based, to fulfil such an explanatory role. As with the FCNM, the CM relies very heavily on the detail and quality of the Expert Committee's Reports.

Moreover, CM Recommendations do not always refer to the media in any case. Four of the 13 Recommendations addressed to States Parties on the basis of their First Periodical Reports

contained no specific media-related recommendations.¹⁸² As regards the seven Recommendations adopted to date on the basis of States' Second Periodical Reports, two contained no specific media-related recommendations.¹⁸³ Such reductionism is disappointing, as a failure to mention issues relating to the media certainly does not mean that they are not pressing, nor is it necessarily in keeping with the findings of the Expert Committee.

(iv) Secretary General

A useful and rather unique innovation in the Charter monitoring mechanism is the requirement that the Secretary General of the Council of Europe “shall make a two-yearly detailed report to the Parliamentary Assembly on the application of the Charter”.¹⁸⁴ The usefulness of this provision is that it keeps the parliamentary organ of the Council of Europe directly informed of how the Charter is faring (note the stipulation that the report should be “detailed”), thereby facilitating discussion by the parliamentarians.

5.4 Conceptual over-stretch and non-treaty-based standard-setting

Sections 5.2.2 and 5.2.3 have dredged up the main observations concerning the limitations of generalist international law in terms of scope, content and enforcement. It is, of course, important not to understate the role that generalist international law does play in safeguarding the rights of persons belonging to minorities: piecemeal provisions and interventions can certainly make an impact.¹⁸⁵ Section 5.3, then, in turn, examined the role played by specialist international treaties in plugging the gaps in international law. In addition, it is also useful to reflect on the possible gap-filling or standard-setting role for instruments that are independent of treaty law.

Drawing on Sections 5.3 and 5.3 generally, it can be argued forcefully that stronger enforcement mechanisms and practices would stimulate improved implementation and reduce the need for supplementary and complementary treaties. Without wishing to detract from the undoubted merits of this argument, a rejoinder thereto might point out that the elaboration of other, non-treaty, supplementary and complementary instruments (whether legal, quasi-legal or political in character – and leaving aside for the moment any consideration of the extent of their binding effects) could prove useful to the extent that they would pursue specific strategic goals. Basic to such an approach is a faith placed in the ability of a rising normative tide to lift all boats. In other words, to strive for the realisation of specific aims by simultaneously employing diverse strategies, enhances the probability of those aims being attained. Different strategies lend themselves better to different circumstances and are ultimately capable of registering different gains.

But we need to proceed cautiously in our development of this line of thinking: standards that are inadequately anchored in human rights law can lead to rights inflation and devaluation. At the theoretical level, as posited by Frederick Schauer: “when a list of rights becomes coextensive with the list of wants, or even with the list of fundamental needs, we lose any

¹⁸² Hungary, Norway, Slovenia and Switzerland.

¹⁸³ The Netherlands and Norway.

¹⁸⁴ Article 16(5) of the Charter.

¹⁸⁵ See, generally, the discussions of various international instruments that are not specifically devoted to the protection of minority rights in: Council of Europe, *Mechanisms for the implementation of minority rights* (Strasbourg, Council of Europe Publishing, 2004).

strong sense of having a right”.¹⁸⁶ This is also one of Ronald Dworkin’s themes of predilection. He distinguishes between the infringement and inflation of a (moral) right by government, stating that the former involves the definition of a right “more narrowly than justice requires”, whereas in the latter case, a right is defined “more broadly than justice requires”.¹⁸⁷ He regards the infringement of a right as being more serious than its inflation, because infringement constitutes a wrong to an individual, and *a fortiori*, the special character of rights means that they should only be curtailed by other rights or “when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based”.¹⁸⁸ The adverse consequence of the inflation of a right is, to paraphrase Dworkin’s own words, that society is thereby cheated of some general benefit.¹⁸⁹

More concretely, though, Amy Gutmann has cautioned that:

A human rights regime still needs to avoid overextending itself beyond what are reasonable aspirations. But it also needs to avoid a minimalism so sparing that its enforcement would leave the most vulnerable people without what is (minimally) necessary to protect their ability to live a minimally decent life by any reasonable standards.¹⁹⁰

It is not obvious how these apparently antipodal objectives can be bridged in practice. A first step, however, might be to recognise that generally speaking, human rights instruments tend to vacillate between concrete, minimalist treaty law and more aspirational, exhortatory soft law (although treaties can and do have the latter characteristics as well). Both can be normative in character, of course, but they rest on very different kinds of legitimacy and their respective legal statuses should therefore not be confused.

“Soft law” is the catch-all rubric under which various kinds of standard-setting measures not directly related to treaty law are sometimes lumped together.¹⁹¹ The use of scare quotes when denoting “soft law” is deliberate and is an indication of the contested nature of the term.¹⁹² Many commentators are rightly critical of the term, firstly because its amorphous nature renders it pretty useless for the purposes of categorisation or meaningful analysis. A second and related criticism is that it masks a huge variety in the nature of the instruments and in the impact of those instruments on the development of international law. However, one should not throw the baby out with the bathwater. Rather, one should turn these criticisms to constructive ends. The relevance and importance of soft law can only be fully appreciated by exploring the full range of instruments that are included in its ambit. These instruments vary not only in character, as already mentioned, but also in terms of their legal status/significance.

The importance of their status can be determined by such factors as their purported objectives (interpretation or synthesis of existing standards; indicating emergent State practice in a

¹⁸⁶ Frederick Schauer, *Free Speech: A Philosophical Enquiry*, *op. cit.*, p. 56.

¹⁸⁷ P. 197.

¹⁸⁸ P. 200.

¹⁸⁹ P. 197.

¹⁹⁰ Xii.

¹⁹¹ See further: C.M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, 38 ICLQ (1989) pp. 850-866; Hartmut Hillgenberg, “A Fresh Look at Soft Law”, 10 EJIL (No. 3, 1999), pp. 499-515.

¹⁹² See, in this connection: Jan Klabbers, “The Redundancy of Soft Law”, 65 *Nordic Journal of International Law* (1996), pp. 167-182; Jan Klabbers, “The Undesirability of Soft Law”, 67 *Nordic Journal of International Law* (1998), pp. 381-391.

particular area of law; facilitation of bench-marking practices; setting of new standards;¹⁹³ application of existing standards to new points of focus, etc.); the nature and standing of the issuing body; procedures by which they are adopted; enforcement and monitoring mechanisms provided for; subsequent uptake (i.e., adoption and implementation) by States and/or other addressees as well as any relevant third parties.

Thus, the usefulness of soft-law documents as standard-setting documents, is best considered in non-legal terms. To consider them as primarily political is by no means to deprive them of legitimacy or impact. The lessons of standard-setting in the area of minority rights bear ample testimony to the normative potential and usefulness of overtly political approaches.¹⁹⁴ This is, however, subject to the proviso (discussed *supra*) that attempts should not be made to stretch the scope of human rights beyond its elastic limit, or to put it – literally - in Machiavellian terms, to avoid the “error” of men “of not knowing when to limit their hopes”.¹⁹⁵

While it is generally regarded as a fruitful and instructive exercise to compare inter-institutional approaches to identified topics, it can be equally fruitful and instructive to examine various intra-institutional approaches. This is especially true of the Council of Europe, given the multiplicity of different sources of standard-setting texts on issues affecting the freedom of expression rights of minorities, both directly and indirectly. The various approaches tend to admit different side-constraints on the right to freedom of expression, reflecting the inherent biases of their particularised mandates. Furthermore, the various approaches rely on different mechanisms of enforcement and monitoring (if any). Their norm-making importance is determined largely by a combination of their substantive provisions and procedural mechanisms. When evaluating the effectiveness of the impact of various bodies, awareness must be shown of constitutive and procedural variations between them. Subsequent chapters will draw on texts and initiatives by a number of Council of Europe bodies: the Committee of Ministers, Parliamentary Assembly, European Commission against Racism and Intolerance, Venice Commission, and others, as appropriate.

The Committee of Ministers, the executive organ of the Council of Europe, has contributed in no small measure to the organisation’s efforts to promote the diversification of opinion in the media,¹⁹⁶ with resultant benefits for minorities. It has, for instance, adopted a number of Recommendations and Declarations touching on relevant issues.¹⁹⁷ Such statements do not, however, legally bind Member States,¹⁹⁸ and as such, we can class them too under the broad rubric of “soft law”. Recommendations deal with matters for which the CM has agreed “a common policy”.¹⁹⁹ While these commitments may not be legally enforceable, they are

¹⁹³ This is possible function of soft law is controversial and the (generally) non-legal status of soft-law instruments should be stressed in no uncertain terms here.

¹⁹⁴ See further, Chapter 1, *supra*, including the upgrading of OSCE standards into legal norms at national and international levels.

¹⁹⁵ Cited in Daniel Bell, *The End of Ideology*, p. 393.

¹⁹⁶ The efforts of the Parliamentary Assembly of the Council should also be praised at this juncture, even though constraints of space prevent an in-depth analysis of the same.

¹⁹⁷ For a comprehensive overview of these and other international instruments, see Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)”, in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 113-138.

¹⁹⁸ Article 15(b), Statute of the Council of Europe.

¹⁹⁹ Pursuant to Article 20 of the Statute, the adoption of a Recommendation by the CM requires: “a unanimous vote of all representatives present” and “a majority of those entitled to vote”. However, in order to make their

politically authoritative and their implementation at the national level is monitored at the international level.²⁰⁰ The CM may ask States authorities “to inform it of the action taken by them” regarding Recommendations and it has formally emphasised the need for intergovernmental committees (steering committees and committees of experts) to improve their monitoring of the implementation of Recommendations and Resolutions.²⁰¹ One of the terms of reference for the Steering Committee on the Mass Media (CDMM) is to “monitor the implementation by member States of the non-binding instruments prepared under its authority”.²⁰² This certainly includes thematically relevant Recommendations and Declarations adopted by the Committee of Ministers.

In the context of the monitoring activities of the Council of Europe, Andrew Drzemczewski has stressed that: “There is a certain urgency to circumvent a potential turf-war that could undermine not only the work of both organs [i.e., the CM and the PACE] (and others) but also the credibility of the Organisation itself”.²⁰³ He has also called for “more in-house synergy” on the basis of very practical concerns, viz. the “real dangers of unnecessary duplication of work and unnecessary diversification of energies”.²⁰⁴ These cautionary words of advice are just as relevant to the duplicity of substantive, normative approaches to given issues as they are to the monitoring and miscellaneous follow-up processes. Efforts should be made to enhance consistency across the different approaches and to eliminate inter-sibling spats and rivalries. A centralised, uniform approach is not necessary, feasible or even desirable. Distinctive mandates preclude the possibility of uniformity, but they also furnish different angles of approach.

Despite the wary tone of the foregoing paragraphs, soft law can play a useful, but limited, role in relation to the development of international human rights law. For instance, it can have an interpretative function by fleshing out the details of hard-law provisions (which traditionally tend towards terseness) or it can be an indicator of emergent State practice in a particular area.

5.4.1 Guidelines on the use of Minority Languages in the Broadcast Media²⁰⁵

voting procedure more flexible, the Ministers’ Deputies reached a gentleman’s agreement at their 519bis meeting (November 1994) not to apply the unanimity rule to Recommendations.

²⁰⁰ Council of Europe Monitoring Processes: An Overview, Monitor/Inf (2004) 2, Document prepared by the Monitoring Department Directorate of Strategic Planning, Council of Europe, 5 April 2004 (replaces Monitor/Inf (2000) 1); Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (No. 43, 2000), pp. 385-428; Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: a useful ‘human rights’ mechanism?”, 2 *Baltic Yearbook of International Law* (2002), pp. 83-103; Andrew Drzemczewski, “Monitoring by the Council of Europe”, in Gudmundur Alfredsson *et al.*, Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 525-532.

²⁰¹ 405th Meeting of the Ministers’ Deputies, 1987. See also: Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (no. 43, 2000), pp. 385-428, at p. 397.

²⁰² At the time of writing, the revised terms of reference for the renamed Steering Committee on the Media and New Communication Services was not publicly available.

²⁰³ Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: A Useful ‘Human Rights’ Mechanism?”, in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at p. 88.

²⁰⁴ [footnote omitted] *Ibid.*, p. 102.

²⁰⁵ This section is an abridged version of a text which first appeared in Tarlach McGonagle, “OSCE High Commissioner on National Minorities: International Guidelines on Use of Minority Languages in Broadcast Media”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2004-1: 3.

A concrete example of the usefulness of a non-binding text on the rights and issues currently under discussion is provided by a set of international Guidelines on the Use of Minority Languages in the Broadcast Media launched in 2003.²⁰⁶ Elaborated by a group of experts under the auspices of the OSCE HCNM, the Guidelines draw inspiration from and seek to crystallise existing international legal and political standards dealing with the topic. Their usefulness derives from their elucidation of existing international standards and their suitability for benchmarking exercises by a variety of parties (including States authorities, IGOs and NGOs).

The Guidelines follow earlier standard-setting initiatives taken by the OSCE HCNM concerning specific aspects of minority rights. The initiatives in question led to the elaboration of The Hague Recommendations on the Education Rights of National Minorities (October 1996); the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February 1998), and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999).²⁰⁷ However, the character of the Guidelines on the Use of Minority Languages in the Broadcast Media is more programmatic than those of its forerunners, which explains why they are styled as Guidelines rather than Recommendations.

The first section of the Guidelines presents their underlying general principles: freedom of expression; cultural and linguistic diversity; protection of identity, and equality and non-discrimination.

The second section, entitled ‘Policy’, sets out that States should develop policy to address the use of minority languages in the broadcast media. The elaboration and application of such State policy should include the “effective participation” of persons belonging to national minorities. It ought to be supportive of public service broadcasting to the extent that such broadcasting caters, *inter alia*, for the linguistic needs of national minorities. State policy in this area should also “facilitate the establishment and maintenance by persons belonging to national minorities of broadcast media in their own language” (para. 8), and independent regulatory bodies should have responsibility for its implementation.

Regulation (including licensing) “must be prescribed by law, based on objective and non-discriminatory criteria and shall not aim to restrict or have the effect of restricting broadcasting in minority languages” (para. 9). States may not prohibit the use of any language in the broadcast media and any measures promoting one or more language(s) should not have restrictive repercussions for the use of other languages, or otherwise adversely affect the rights of persons belonging to national minorities. Furthermore, again drawing on the language of Article 10, ECHR, regulation must pursue a legitimate aim and be proportionate to that aim. The proportionality of regulation should be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available

²⁰⁶ For detailed commentary, see: Tarlach McGonagle, “Regulating minority-language use in broadcasting: international law and the Dutch national experience”, 16 *Mediaforum* (No. 5, May 2004), pp. 155-160; Tarlach McGonagle & Andrei Richter, “Regulation of Minority-Language Broadcasting”, *IRIS plus* (Supplement to *IRIS - Legal Observations of the European Audiovisual Observatory*), 2004-2; George Jones (Series Editor), Sally Holt & John Packer (Guest Editors), *Mercator Media Forum 8* (Cardiff, University of Wales Press, 2005); John Packer & Sally Holt, “The use of minority languages in the broadcast media: Introducing new guidelines”, *Helsinki Monitor* (2004, No. 2), pp. 103-126.

²⁰⁷ All available at: <http://www.osce.org/hcnm/documents/recommendations/>.

broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

The Guidelines stipulate that onerous translation requirements should not be imposed on minority-language broadcasting and that transfrontier broadcasting must not be restricted (on the basis of language). Moreover, the availability of foreign broadcasting in a minority language does not obviate the need for States to facilitate the domestic production of programmes in that language, “nor does it justify a reduction of the broadcast time in that language” (para. 13).

The fourth section of the Guidelines countenances a number of facilitative measures aimed at stimulating broadcasting in minority languages, both qualitatively and quantitatively. These include States providing access to broadcasting technology and infrastructure; creating financial assistance schemes; pursuing advantageous fiscal policies and maintaining particular licensing and administrative regimes; all with a view to achieving “effective equality” for broadcasters operating (to varying degrees) in minority languages. As elsewhere in the Guidelines, providing incentives for minority language broadcasting and teasing out various possibilities for its realisation, are approached distinctly from public service and private broadcasting perspectives. The importance of capacity-building (eg. technical support for the distribution of productions in minority languages; education and training of personnel for minority-language broadcasting) is also emphasised.

To conclude, the Guidelines can be described as representing a synthesis of existing relevant international legal and political standards. As such, their content should be familiar because they merely reflect a body of diverse commitments already undertaken by most European States in their miscellaneous international treaty obligations. The novelty of the Guidelines is that, for the first time, those diverse commitments are brought together in a document of exemplary clarity and coherence. The Explanatory Note to the Guidelines enhances the clarity offered by the Guidelines, by sourcing each element in precise, pre-existent international standards. Another strength of the Guidelines is their comprehensive nature. As described in the Explanatory Note, the Guidelines draw not only on international treaty law, but also on relevant jurisprudence elaborated pursuant to the same. They also draw on an array of relevant international texts which are not legally binding on States, but which are nevertheless of considerable normative and political importance.

A crucial process that fed into the elaboration of the Guidelines was the compilation of the study, *Minority-Language Related Broadcasting and Legislation in the OSCE*.²⁰⁸ It is a comprehensive survey of the regulation of minority-language use in the broadcasting sectors of each of the (then) 55 Participating States of the OSCE. The study provides keen insights into best relevant practices in operation at the national and sub-national levels across the sweep of OSCE Participating States. It is important to mention the study in order to demonstrate that vast first-hand research (comprising data and contextual analysis) also informs the Guidelines, thereby enhancing its credibility at the coal-face of human rights protection.

²⁰⁸ Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-Language Related Broadcasting and Legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities, carried out by the Programme in Comparative Media Law and Policy (PCMLP), Oxford University and the Institute for Information Law (IViR) of the University of Amsterdam, April 2003 (published: September 2003), available at: <http://www.ivir.nl/staff/mcgonagle.html>.

The Guidelines do not present a fixed blue-print for adoption in each and every European State. Rather, they offer a palette of options and examples which could usefully be adapted to meet the legal and cultural priorities and sensitivities of individual situations in individual States. The margin of appreciation for States is wide. As such, the drafting of the Guidelines was infused with the hope that they could constitute a proverbial rising tide which would lift at least some boats. Another intended purpose of the Guidelines is to map and clarify existing relevant legal and political standards at the international level.

While it can be difficult to assess the precise impact of non-binding texts such as these Guidelines, it is useful to document instances of their invocation or application. The OSCE HCNM has relied on the Guidelines in the course of his work²⁰⁹ and the Parliamentary Assembly of the Council of Europe has also formally addressed the objective of furthering take-up of the Guidelines in its Recommendation 1773 (2006) entitled “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” (see also, s. 1.3.2(i), *supra*).²¹⁰ The Recommendation stresses the complementarity between CoE and OSCE instruments aiming to “guarantee that minorities can use their own languages and that these languages are broadcast by the media”. The operative part of the text recommends, *inter alia*, that the CoE’s Committee of Ministers:

- invite States “to ensure that people belonging to national minorities or using regional or minority languages have a balanced access to public broadcast media and an effective right to establish and use private broadcast media”, in accordance with Article 11, ECRML [entitled “Media”] and Article 9, FCNM [dealing with freedom of expression and access to the media], as elucidated by the work of both treaties’ competent monitoring bodies; relevant PACE Recommendations and Resolutions, and the Guidelines on the use of Minority Languages in the Broadcast Media, and
- “regularly” take the 2003 Guidelines “into account” in the monitoring of the implementation of the ECRML and FCNM.

These recommendations are important because they recognise the obvious overlap between the Guidelines, Article 11, ECRML, and Article 9, FCNM. The explicit encouragement of cross-referencing these texts in relevant treaty-monitoring and other fora should greatly enhance the consistency with which relevant standards are interpreted and applied (see further, s. 5.3.2(i), s-s. “Intertextual references”, *supra*, and s. 8.3, *infra*). Various cooperative and coordinating strategies and initiatives could be taken between relevant IGOs and between relevant bodies within relevant IGOs in order to generate further synergies in the promotion and application of the Guidelines. A number of possible measures are set out in PACE Recommendation 1773 (2006) and elsewhere.²¹¹

²⁰⁹ Eg. Georgia.

²¹⁰ 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, Recommendation 1773 (2006), Parliamentary Assembly of the Council of Europe, 17 November 2006. For an overview of the content of the Recommendation, see: Tarlach McGonagle, “Parliamentary Assembly: Recommendation on Minority Languages and Broadcasting and Inter-Institutional Cooperation”, *IRIS* 2007-2: 3.

²¹¹ Suggested strategies are set out more fully in Tarlach McGonagle, ‘Guidelines on the use of Minority Languages in the Broadcast Media: overview and prospects for further implementation’, Hearing on the use of minority languages in the broadcast media, Parliamentary Assembly of the Council of Europe - Sub-Committee on Rights of Minorities, Committee on Legal Affairs and Human Rights, Eerste Kamer der Staten-Generaal, The Hague, 28 April 2006 (unpublished text, on file with author).

Conclusions

Provisions in international law dealing pointedly with the right to freedom of expression of persons belonging to minorities are few and far between. This is particularly true of human rights treaties that are generalist in their thematic orientation, but also of treaties with a specialised focus. The effectiveness of relevant provisions, such as they are, is largely determined by the strength of their formulation, the clarity and detail of (official) interpretive texts and the rigour with which they are implemented, either by adjudicative or monitoring mechanisms and processes. In each of these respects, leading international instruments are to be found wanting.

Owing to the manifold sensibilities involved, formulations of minority rights in international treaties are rarely robust: the language in which they are formulated is usually heavily compromised by the deferential accommodation of relevant political and cultural sensitivities of States parties to the drafting processes. The same political sensitivities have also tended to limit the justiciability of minority rights under international treaties. In the same vein, the limiting effects of political sensitivities explain why, in specialised treaties such as the FCNM and the ECRML, the guarantees of freedom of expression extend only slightly beyond those explicitly provided for in generalist treaties.

The foregoing observations suggest that explicit provisions in international human rights treaties purporting to guarantee the right to freedom of expression for persons belonging to minorities are limited in terms of both scope and impact. Nevertheless, the generic obligation on States to ensure that all rights are secured for everyone also includes the right to freedom of expression for persons belonging to minorities. The latter obligation must therefore reinforce express provisions (however weakly worded) guaranteeing the right to freedom of expression for persons belonging to minorities to the extent necessary to render the exercise of the right effective in practice. This argument can be advanced by unparcelling the generic State duty to ensure the realisation of human rights into a tripartite typology of State duties to respect, protect and fulfil human rights, as originally developed in academic theory and subsequently applied under various international treaties. This typology allows for the introduction of greater nuance into the range of State obligations to ensure human rights than is possible under the traditional dichotomy between negative and positive State obligations. It also facilitates a more discerning approach to the right to freedom of expression for persons belonging to minorities by recognising that different expressive needs of minorities give rise to different types of duties for States, which in turn call for different levels of State action. The generic duty to ensure the realisation of the right in practice will only be discharged in a given situation when the requisite action has been taken.

By extrapolation from the CESCR's application of the tripartite typology of State duties to economic, social and cultural rights, this Chapter identifies a number of programmatic measures that could/should readily be adopted by States authorities in order to guarantee the effective exercise of the right to freedom of expression by persons belonging to minorities. The adoption of these measures is a duty for States that is inescapably implied by their generic duty to secure human rights for everyone. The fact that they are not always enumerated in international treaties does not mean that they are not applicable or necessarily of diminished relevance.

Generalist human rights treaties are also usefully supplemented by thematically-specific treaties, especially at the regional level. The true strength of guarantees for freedom of expression contained in treaties such as the FCNM and ECRML lies not in their actual wording (which, as noted above, are usually only minimal advances on the wording in generalist treaties), but in how they are interpreted by the treaties' designated monitoring bodies. The guarantees impose programmatic obligations on States, but the content of those obligations can be difficult to determine in the abstract. In practice, their real content must be elucidated through their operationalisation, i.e., their application to, or review in light of, concrete situations. This exercise ultimately helps to ascertain the precise nature and extent of State obligations to render the right to freedom of expression of persons belonging to minorities effective. What emerges from the monitoring exercise is a range of duties largely congruent with range of duties to respect, protect and fulfil the right to freedom of expression of persons belonging to minorities. These duties will be discussed in more detail in Chapters 6, 7 and 8.

Although already evident to varying degrees, the systematic inclusion of the following considerations in the monitoring of the FCNM and ECRML, would greatly enhance the theoretical coherence and depth of the monitoring processes:

- recognition of particular minorities and assessment of their particular needs, based on salient group characteristics and situational specificities (Chapter 1)
- comprehensive pluralistic tolerance as an operative public value (Chapter 2)
- interplay between freedom of expression, minority rights and other human rights (Chapter 3)
- enabling environment, societal considerations, media functionality, etc. (Chapter 4)

Standard-setting work extraneous to treaty and enforcement mechanisms should also be mindful of the foregoing.

Finally, to build on the conclusions to Chapter 4: it is imperative that the adjustment of relevant theories to reflect new communicative realities also informs the interpretive and monitoring processes of international instruments containing provisions dealing with freedom of expression. The ability of authoritative adjudicatory and monitoring bodies to meet this challenge is crucial for ensuring the “organic vitality” of relevant instruments. It is also crucial for ensuring that the right to freedom of expression is effective in practice – not only for persons belonging to minorities, but for everyone. It is therefore strongly recommended that the UN Human Rights Committee prioritise the drafting of a new General Comment on Article 19, ICCPR, which would reflect new realities affecting the exercise of the right to freedom of expression. It is also strongly recommended that the monitoring bodies of the FCNM and ECRML systematically factor considerations of media functionality and the impact of new technologies into their monitoring work. The same is true of the Committee of Ministers of the CoE, and other non-treaty-based standard-setting bodies, such as ECRI. The role that could be played by the European Court of Human Rights in this connection is discussed in detail in Chapter 8.