Synergies in Minority Protection

European and International Law Perspectives

EDITED BY
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SYNERGIES IN MINORITY PROTECTION

There has recently been a remarkable growth in standard-setting with respect to the protection of minorities in international and European law. Layered on top of existing human rights standards relevant to minorities, these developments have resulted in a complex and multi-faceted regime, but one which still does not amount to an integrated and coherent system of minority protection.

In addition to providing an up-to-date account of the relevant standards and their development in practice, this collection breaks new ground by seeking to identify the extent to which some integration and coherence (synergy) is emerging as a result of the work of treaty-monitoring bodies and other international institutions. Leading experts on the main instruments and institutions assess matters such as the application of similar principles, the emergence of common themes, explicit cross-referencing between treaty bodies and international institutions, and the development of similar working methods.

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European and International Law Perspectives

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK
Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521864831

First published in print format 2009

ISBN-13 978-0-511-50819-6 eBook (NetLibrary)

ISBN-13 978-0-521-86483-1 hardback

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FOREWORD

During the last fifteen to twenty years, several new instruments and monitoring and dialogue institutions and procedures have been added to the international minority protection regime. It now amounts to more than fifty instruments and some dozen monitoring and dialogue institutions with minority-specific provisions. In addition, members of minorities are entitled to the equal enjoyment of all human rights and equal access to all implementation and monitoring procedures designed for human rights in general. Indeed, there has been a steady increase in the application of general human rights instruments for the protection of members of minority groups, and an increasing sensitivity to the needs of such persons. Hence, the reference to a minority protection regime rather than merely minority rights is most appropriate.

The expansion of the minority protection regime has occurred relatively quickly, but it has been uneven and unorganised, with a variety of motivations behind the steps taken and with the involvement of several international organisations. Imposing minority rights on third states is distinctly easier than committing to them internally. Double standards appear in the foreign policies of states and these may also impact on international responses. Much of the recent attention has been security-oriented, with a focus on the prevention of violent conflict in the short term, but the interest of states in minority rights tends to drop as soon as the threat of serious violence recedes, even when discriminatory patterns and practices persist.

With this multitude of instruments and monitoring and dialogue procedures, it is not always clear what mandates are most likely to produce human rights and/or minority rights results beneficial to minorities. In this book about minority protection, the editors have designed and produced a thematic volume in which several authors focus on the collaboration and useful overlaps between all these instruments

and procedures. The editors have called attention to different types of possible synergies and devote special attention to three of them: express cross-referencing, substantive convergences, and the emergence of similar working methods. Differences in standards and their application have also been explored. And one should not forget the element of competition that certainly plays a role in the interaction, or lack of the same, between the various international institutions.

The editors and authors also correctly identify and deal with some of the issues that are likely to characterise the debate and action on minority protection in the years to come. When do immigrant communities emerge as new minorities which merit protection as such? How can the situation of the Roma be improved? What is the interplay between individual and group rights and will the latter receive the emphasis they deserve? How can the mainstreaming of minority rights, for example, in the international development and financial sectors, enhance the synergies under examination in the book? What role can interagency consultations accomplish?

The book is a welcome addition to the human rights and minority rights literature. It contains not only valuable academic presentations but also offers, if sometimes only implicitly, useful guidelines for future work in this field.

GUDMUNDUR ALFREDSSON
Chairman/Rapporteur of the UN Working Group
on Minorities at its twelfth and final session in 2006

ABBREVIATIONS

ACFC	Advisory Committee on the Framework Convention
ACHPR	African Commission on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
ARF	ASEAN Regional Forum
Article 27	Article 27 of the International Covenant on Civil and Political Rights
ASEAN	Association of Southeast Asian Nations
CADE	Convention Against Discrimination in Education
CCR	Committee on Conventions and Recommendations
CEIWGM	Central European Initiative Working Group on Minorities
CERD/C	Committee on the Elimination of Racial Discrimination
CESR	Centre for Economic and Social Rights
CHR	Commission on Human Rights
COE	Council of Europe
CRC	Convention on the Rights of the Child
CSCE	Conference on Security and Co-operation in Europe
CT	Constitutional Treaty
Declaration	Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
DH-MIN	Committee of Experts on Issues Relating to the Protection of National Minorities
DRC	Democratic Republic of Congo
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice

ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FCNM	Framework Convention for the Protection of Minorities
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Hague Recs.	Hague Recommendations on the Education Rights of Ethnic Minorities
HCHR	High Commissioner for Human Rights
HCNM	Office of High Commissioner on National Minorities
HRC	United Nations Human Rights Committee
HRCl	United Nations Human Rights Council
HRCm	United Nations Human Rights Commission
HREOC	Human Rights and Equal Opportunity Commission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
Languages Charter	European Charter for Regional or Minority Languages
LN	League of Nations
Lund Recs.	Lund Recommendations on the Effective Participation of National Minorities in Public Life
MDGs	Millenium Development Goals
MoU	Memorandum of Understanding
NGOs	Non-Governmental Organisations
OAS	Organisation of American States
OAU	Organisation of African States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference

OSCE	Organization for Security and Co-operation in Europe
OSCE HCNM	OSCE High Commissioner on National Minorities
Oslo Recs.	Oslo Recommendations on the Linguistic Rights of National Minorities
PCIJ	Permanent Court of International Justice
PIF	Pacific Islands Forum
SERAC	Organisation for Social and Economic Rights
UDCD	Universal Declaration on Cultural Diversity
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCHR	United Nations Commission on Human Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Scientific and Cultural Organisation
UNHCHR	United Nations High Commissioner on Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNIEMI	United Nations Independent Expert on Minority Issues
US	United States
WGIP	Working Group on Indigenous People
WGM	United Nations Working Group on Minorities
WHO	World Health Organisation
WW1	First World War
WW2	Second World War

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Introduction

KRISTIN HENRARD AND ROBERT DUNBAR

Introduction

'Synergy' is a word which conveys a range of meanings, and the particular ways in which it is understood for the purposes of this collection will be explored in this introduction. In our view, the notion of 'synergy' is particularly relevant to the protection of minorities in international law, owing to the diversity of relevant instruments and international institutions, and we shall therefore precede our discussion of the notion of 'synergy' with a broad summary of the most important developments in relation to minority protection, both at a global and at a regional level. We shall conclude with a consideration of the limits of the synergies explored in this collection, and with a speculation, informed by the contributions to this collection, on the future prospects for synergies in minority protection.

1 Broad developments in relation to minority protection at global and regional level

The broad history of the development of protection for minorities in international law is generally well known. So, too, are the limitations of the various mechanisms for minority protection which have existed at each stage in this development. Prior to the First World War, such protection as existed in international law was generally *ad hoc*, based primarily on bilateral treaties in response to particular conflicts or potential conflicts involving kin-groups or co-religionists. It was also usually limited in scope, and included only limitations on discrimination, a right to respect for freedom of religion, and, in some cases, a limited right to freedom of expression – or at least a freedom to use a minority language without restriction in private life. Finally, such protection generally had only rudimentary and largely ineffective mechanisms for monitoring and

enforcing compliance.[1] After the First World War, there was a broader recognition of the role that ethnic and religious tensions played in the outbreak of the war. Also, in spite of the post-war effort – which resulted from this recognition – to redraw the political map of central and eastern Europe to coincide more effectively with ethnic and religious realities, there was also a realisation that the continued and unavoidable presence of minorities in several of the newly-created, recreated or reconfigured states raised the potential for further instability. As a result, a more ambitious, multilateral system of minority protection was created under the auspices of the League of Nations. The regime for the protection of minorities which was established under the League of Nations witnessed important developments in the articulation of standards of minority protection: in addition to the inclusion of individual general human rights of particular importance to members of minorities, such as the right to life, liberty and freedom of religion, and a richer understanding of non-discrimination and equality rights, the various instruments which formed part of the system also included important guarantees relating to the use of minority languages in the education system and before the courts, for example. The League of Nations regime also created mechanisms for supervision by the Council of the League of Nations and by the Permanent Court of International Justice, although these proved to be of only limited effectiveness. However, the regime was still limited in scope – it applied only in respect of a limited number of states in eastern and central Europe, Turkey and Iraq, and only in respect of certain groups – and this may have limited its effectiveness by compromising its legitimacy. The regime did not survive the cataclysms of the Second World War.[2]

In the aftermath of the Second World War, there was a reluctance to recreate a League-style regime of minority protection, in part due to the chequered track-record of that earlier regime and to the exploitation of minority issues by Nazi Germany which justified its expansionism under

[1] See, e.g., Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), ch. 2, pp. 25–37; Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, (New York: United Nations, 1991), 'Introduction', pp. 1–4; and Eduardo Ruiz Vieytez, *The History of Legal Protection of Minorities in Europe (XVIIth–XXth Centuries)* (Derby: University of Derby, 1999), chs. I and II, pp. 11–26, among others.

[2] Again, see, e.g., Thornberry, *International Law and the Rights of Minorities*, chs. 3 and 4, pp. 38–54; Capotorti, *Rights of Persons*, ch. 2, pp. 16–26; and Ruiz Vieytez, *Legal Protection of Minorities in Europe*, ch. III, pp. 26–34.

the veil of 'protecting' kin-groups in other states. Instead, the articulation of universal human rights, supplemented by particular prohibitions on genocide and racial discrimination, was thought to be the best means to guarantee peace and stability and the protection of all human beings, including members of minorities. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') of 1948, evaluated in this collection by William Schabas, and the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, discussed here by Ivan Garvalov, have obvious, and special relevance for members of minorities, since members of minorities tend to be targets of the sorts of acts these instruments seek to prevent. Similarly, major international human rights instruments such as the Council of Europe's European Convention on Human Rights ('ECHR') of 1950, considered in this collection by Kristin Henrard, and the United Nations 1966 International Covenant on Civil and Political Rights ('ICCPR'), discussed by Martin Scheinin, and International Covenant on Economic, Social and Cultural Rights ('ICESCR'), treated here by María Amor Martín Estébanez, contain a number of provisions which have particular importance for minorities, but which are not specifically directed at minorities.

The genocidal atrocities committed in Rwanda and the inter-communal tensions and violence in many other states, such as Sri Lanka, have shown that the question of minority protection is not simply a European one, and this is particularly evident in the contributions of Tim Murithi, who explores relevant developments under the African Charter on Human and Peoples' Rights ('African Charter'), Erik Friberg, who analyses developments in the Asia-Pacific region, and Li-Ann Thio, who examines the work of the United Nations Working Group on Minorities of the Sub-commission on the Promotion and Protection of Human Rights.[3] While the

[3] It should be noted that at the fifth session of the new United Nations Human Rights Council, the Council decided to replace the Sub-Commission on the Promotion and Protection of Human Rights with a new Human Rights Council Advisory Committee, having a reduced mandate. The Council decided at its sixth session (10–28 September and 10–14 December 2007) to establish a forum on minority issues which will effectively replace the Working Group on Minorities and which will provide a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities, which shall provide thematic contributions and expertise to the work of the independent expert on minority issues. See Human Rights Council, Report of the Human Rights Council on its Sixth Session, A/HRC/6/22, 14 April 2008, pp. 34–37.

Working Group on Minorities will, as of September 2007, effectively be replaced by a new Forum on minority issues, created by the Human Rights Council, the experience of the Working Group, as described by Thio, is very important and can, it is hoped, be carried forward in the Forum. While the African Charter is of a slightly later date (1986), the peoples' rights clearly have potential in terms of minority protection, which has been confirmed by the practice of the African Commission on Human and Peoples' Rights.

In spite of the general reluctance to address the question of minorities which prevailed during this period, as Thio points out in her contribution to this book, the United Nations Human Rights Commission did, from a fairly early point in its history, pay attention to minority issues. As Fons Coomans notes in his chapter, UNESCO also addressed minorities issues in the context of its work. Furthermore, both the ICCPR and the United Nations Convention on the Rights of the Child ('CRC') of 1989, discussed here by Jaap Doek, contain a provision which is specifically directed at minorities. Friberg, however, highlights the particular and continuing inability in the Asian region to arrive at regional standards, not only in respect of the protection of minorities but in terms of human rights more generally, due in part to the strong reluctance of the relevant states to submit to a multinational monitoring system. So, while the question of minority protection might be a global one, it is definitely not approached in the same way or to the same extent in different regions. Nevertheless, it remains important and appropriate to attempt to identify synergies, wherever possible.

Another feature of the post-Second World War instruments was the development of methods of treaty monitoring and implementation. In addition to the creation of state reporting mechanisms, quasi-judicial mechanisms emerged, which allowed for both inter-state and individual complaints to be adjudicated by treaty bodies.[4] Indeed, there has been growing recognition of the importance of supervisory mechanisms for the full and effective protection and enjoyment of human rights, and the question of the powers and working practices of supervisory mechanisms in ensuring the effective protection of rights is itself a theme which emerges across the contributions to this volume.

In spite of the relevance of these various post-war instruments to persons belonging to minorities, the outbreak of ethnic and religious violence

[4] See, e.g., Capotorti, *Rights of Persons*, ch. 2, pp. 26–41; and Ruiz Vieytez, *Legal Protection of Minorities in Europe*, ch. IV, pp. 34–46.

following the collapse of Communism and the break-up of multi-ethnic states such as the former Republic of Yugoslavia and the former Soviet Union arguably revealed the inadequacy of the post-war approach in dealing with minorities issues, and the 1990s therefore witnessed a new period of standard-setting and institutional development relative to the protection of minorities. Of particular relevance here is the work of the Conference on Security and Co-operation in Europe ('CSCE', now the Organization for Security and Co-operation in Europe, the 'OSCE'), which is explored in this volume by Arie Bloed and Rianne Letschert. The establishment of the Office of the High Commissioner on National Minorities ('HCNM') as an instrument of conflict prevention should be highlighted, as well as the development of important, though non-legally binding, instruments such as the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. While the establishment of the HCNM acknowledged the importance of a conflict prevention strand in a comprehensive approach to minority protection, it should be noted that, under the auspices of the HCNM, several sets of thematic recommendations were formulated by experts, all of which concern topics of special relevance for minorities and which have provided further guidance to states on the content of existing minority protection norms.

The Council of Europe ('COE') has also played a crucial role in the emergence of a stronger edifice of minority protection, notably through the creation of the first (and still the only) international treaty specifically and exclusively directed at minorities, the 1995 Framework Convention for the Protection of National Minorities ('FCNM'), explored in this collection by Asbjørn Eide. As Bruno de Witte and Enikő Horváth note, the enlargement of the European Union ('EU') to include parts of central and eastern Europe, in which ethnic and religious tensions have been serious, has also caused the EU to address the issue of minority protection. However, no minority-specific standards, let alone an explicit internal minority policy, have yet been developed by the EU, although there are undoubtedly possibilities, based on existing competences, to address, at least indirectly, minority concerns. While de Witte and Horváth remain sceptical about the extent to which this is possible, one could argue that a certain level of 'mainstreaming' of minority issues in the EU could be achieved, if the political will existed.

The establishment in 1995 of the UN Working Group on Minorities has added yet another strategy to enhance minority protection, as is

underscored by Thio, namely one of providing a discussion forum in which problems concerning minorities could be addressed in the presence of government representatives.[5]

It is important to recognise, however, that the renewed interest in minority protection was not solely inspired by the re-emergence of ethnic and religious violence in the former Communist bloc. From at least the 1980s, concerns have grown about the impact of globalisation on cultural and, in particular, linguistic diversity. The realisation that many linguistic minorities were in danger of disappearing has also led to standard-setting of relevance to many minorities, such as the COE's European Charter for Regional or Minority Languages (the 'Languages Charter') of 1992, explored in Robert Dunbar's contribution, and in the context of UNESCO, discussed here by Fons Coomans.

These contemporary developments, layered as they are on top of the important human rights standards which emerged after the Second World War, have resulted in a complex and multi-faceted regime, but one which must be said to fall short of an integrated and coherent 'system' of minority protection in international law. Owing to the work of the COE and the OSCE, in particular, standard-setting is more advanced in Europe, but even in the European context, the legal blanket can be likened to a patchwork quilt, comprising a great variety of component parts, but not always producing a harmonious whole. This variety extends from the nature of the legal commitments themselves – legally binding treaty obligations to soft law – to the precision of those standards – from detailed rights to vague objectives – to the type of monitoring mechanisms – from quasi-judicial to advisory. Ian Brownlie has warned of the dangers posed by the 'fragmentation of law' in the discussion of peoples' rights and in standard-setting as well,[6] and the kaleidoscopic nature of contemporary standards of minority protection may give rise to similar concerns, such as jurisdictional overlap, inconsistencies between standards themselves and inconsistencies in the supervision of standards resulting from differing approaches of different treaty bodies and different international institutions. In this collection, however, while not disregarding the possibility of the emergence of such dangers, we have asked contributors to identify

[5] As noted earlier, the working group has been replaced by a Forum on minority issues.

[6] Ian Brownlie, 'Rights of Peoples in International Law', in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon, 1998), pp. 15–16.

and assess the emergence of synergies of various kinds within this complex set of rules and institutions.

It should be highlighted that there has certainly been an increasing attention to, and mainstreaming of, minorities issues at the UN, especially in the last few years. In line with the developing practice of the relevant UN treaty bodies, the Commission on Human Rights has encouraged these bodies to take the situation of minorities into account in their monitoring activities.[7] Similarly, the Commission requested the High Commissioner on Human Rights to continue its efforts to improve coordination and cooperation among UN agencies and programmes concerning minority protection.[8] The High Commissioner effectively organised an interagency meeting in late February 2004 with a view to encouraging closer cooperation with other parts of the UN system and to better integrating minority issues in the work of these activities and programmes. However, the follow-up interagency meeting to examine ways of integrating minority issues and rights into UN programmes has not yet taken place.[9]

Arguably, this identified need to increase mainstreaming of minority issues in the UN has led to the establishment of the Independent Expert on Minority Issues (UNIEMI), who is specifically mandated to 'cooperate closely, while avoiding duplication, with existing relevant UN bodies, mandates, mechanisms as well as regional organizations', while 'taking into account the views of non-governmental organisations on matters pertaining to his or her mandate'.[10] The reference to cooperation with regional organisations – concern with regional developments is also visible in the activities of UN Working Group on Minorities[11] – is important, as it is bound to enhance possible synergies not only within the UN system but also between the UN and the respective regional systems. In the latter respect, reference can be made to the first meeting between UNIEMI and the HCNM in The Hague on 8 and 9 March 2007, during which a possible cross-fertilisation in working methods and approaches was investigated.

[7] UN Commission on Human Rights, Specific Groups and Individuals, E/CN.4/2005/L.62, para. 10.
[8] *Ibid.*, para 11.
[9] Report of the High Commissioner on the rights of persons belonging to national or ethnic, religious and linguistic minorities, E/CN.4/200/81, paras. 40–41.
[10] Commission on Human Rights, Resolution 2005/79.
[11] See, *inter alia*, Report of the High Commissioner, para. 43; Sub-Commission on the Protection and Promotion of Human Rights, A/HRC/Sub.1/58/L.2, para. 5.

Despite the potential pivotal importance of the UNIEMI, no separate chapter on this special procedure is included in this volume, because of the fact that it is still too early to deduce much from the actual practice of this new body, which has been in place for less than two years. Nevertheless, the current UNIEMI, Gay McDougall, has provided a succinct but useful introduction to its work, which follows Li-Ann Thio's contribution. It also seems appropriate to make some reference to the UNIEMI here. It should in any event be highlighted that the UNIEMI participated as an observer in the activities of the UN Working Group on Minorities, which in turn provided conceptual support to the Expert.[12] Obviously, the mandates of these two UN mechanisms were greatly complementary and both provided ample avenues for the development of synergies, and this is why we have chosen to add McDougall's comments after Thio's contribution. As noted, the Working Group will effectively be replaced by a Forum on minority issues, but it is hoped that the work of the Forum will be greatly influenced by that of the Working Group, and the Forum is to support the UNIEMI who, in turn, shall guide the work of the Forum and prepare its annual meetings.

While UNIEMI has no monitoring function, and therefore has no mandate to consider individual complaints, it works closely not only with the UN Working Group (fostering dialogue between governments and minority groups),[13] but also with the UN treaty bodies, and especially CERD/C, in relation to reporting guidelines for states and initiatives in the field of genocide prevention.[14] The UNIEMI is also clearly set to play an important role in regard to conflict prevention and effective early warning,[15] and to enhance mainstreaming of minority protection in all UN activities.

2 Synergies

The notion of 'synergies' in minority protection was first explored by one of the editors in an article which appeared in 2005.[16] There are several

[12] Report of the Independent Expert on Minority Issues, E/CN.4/2006/74, para. 15.
[13] *Ibid.*, para. 49. [14] *Ibid.*, para. 50. [15] *Ibid.*, para. 71.
[16] Kristin Henrard, 'Ever-increasing synergy towards a stronger level of minority protection between minority-specific and non-minority-specific instruments', 3 *European Yearbook of Minority Issues 2003/4* 15–41.

different types of possible synergies, of which the following three are of particular relevance:

1. express cross-referencing;
2. substantive convergences; and
3. emergence of similar working methods.

2.1 Express cross-referencing

By express cross-referencing, we mean the explicit and specific referencing of the standards of one or more instruments or the output of one or more monitoring bodies or organisations in the standard-setting of another organisation or the work of another monitoring body. Examples of this include the recognition in the preamble to the Framework Convention of the work of other bodies and of other instruments, and in particular that of the OSCE and its Copenhagen Document, or the explicit referencing of a range of instruments in the development of the various recommendations of the OSCE HCNM. Another interesting example of this is the references to the FCNM in the interpretation of the European Court of Human Rights of ECHR standards in some situations involving members of minorities. It is also common knowledge that the EU, and more particularly the Commission in its accession monitoring, refers to minority rights standards developed in the OSCE and the Council of Europe.[17] Though such references are still relatively rare, they are significant developments.

A large body of information is contained in the monitoring output of treaty bodies and other relevant international organisations, and another aspect of the sort of synergy described here is the use of such material by other treaty bodies or organisations. It has been noted, for example, that in its consideration of a state report under the FCNM, the Advisory Committee, the treaty monitoring body under the FCNM, considers reports of other monitoring bodies such as the UN Human Rights

[17] See, *inter alia*, Gabriel von Toggenburg, 'A remaining share or a new part? The Union's role vis-à-vis minorities after the Enlargement Decade', *EUI Working Papers* 2006/15, 22–5, who also identifies institutional cooperation between the HCNM and the European Commission and potential for enhanced institutional cooperation with the Council of Europe. See, also, Rainer Hofmann and Erik Friberg, 'The enlarged EU and the Council of Europe: transfer of standards and the quest for future cooperation in minority protection', in Gabriel von Toggenburg (ed.), *Minority Protection and the Enlarged EU: The Way Forward* (Budapest: LGI Books, 2004), pp. 125–47.

Committee, the Committee under the ICERD, ECRI, the Committee of Experts under the European Charter, and of international organisations such as the OSCE, as well as reports from international non-governmental organisations ('NGOs') such as Minority Rights Group, the International Helsinki Federation, and other organisations representing national minorities in a state.[18] Many of the contributors to this volume highlight a number of examples of such synergies.

2.2 Substantive convergences

Another synergy which is less explicit but which undoubtedly underlies such synergies is the emergence in the work of monitoring bodies and international organisations of common understandings of particular issues, common approaches towards how particular themes are addressed, similarities in how particular issues are resolved, and similarities in the recognition of particular themes and in how such themes are dealt with, all of which might be described as substantive synergies. Examples of such synergies have been commented upon by a number of contributors to this collection. While they are not altogether obvious or striking at first sight, and by no means present or equally strong in all the respective mechanisms and instruments explored in this collection, when considering the collection as a whole, they come into sharper focus.

One example is the close cross-fertilisation that appears to be taking place in the approaches of certain treaty monitoring bodies and international organisations, particularly those dealing with minority-specific standards or instruments. While this is, to a certain extent, to be expected, it is still noteworthy, given that there are still differences between these standards and instruments. For example, the OSCE HCNM has remarked that the various recommendations and guidelines on minority issues that have been produced under the auspices of his office 'have already been largely integrated with the Opinions of the Advisory Committee of the [FCNM]'.[19] Another very important development is what could be

[18] See Rainer Hofmann, 'Introduction', in Marc Weller (ed.), *The Rights of Minorities in Europe: A Commentary on the Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), pp. 8–9.

[19] See Rolf Ekéus, 'The role of the Framework Convention in promoting stability and democratic security in Europe', in *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe, 2004), p. 27.

described as the cross-fertilisation of ideas and approaches which is occurring between the work of monitoring bodies and organisations dealing with non-minority-specific instruments and standards and those dealing with minority-specific instruments and standards. This development is perhaps somewhat less expected, and therefore more striking.

First, it has, for example, been noted that international human rights bodies have been developing what has been described as 'ethnicity-sensitisation': a greater attention and sensitivity to the minority dimension when interpreting non-minority-specific rights.[20] This is visible not only in relation to civil and political rights, but also in relation to economic, social and cultural rights. In the jurisprudence of the European Court of Human Rights, reference can, *inter alia*, be made to the recognition of the right to a traditional way of life in terms of Article 8 ECHR, dealt with in Henrard's contribution, while the Human Rights Committee has, *inter alia*, sanctioned limitations on the use of a certain language in the public domain on the basis of freedom of expression and/or the prohibition of discrimination, discussed further by Scheinin. Martín Estébanez demonstrates in her contribution that the supervisory practice of the Committee on Economic, Social and Cultural Rights has also recognised cultural components to the right to housing and has adopted strong positions in terms of mother tongue education (provision for which is not explicitly recognised in the Convention itself).

Secondly, there has been a movement from the rights of individuals towards a recognition of the collective element in human rights, and this enhanced appreciation of the group dimension 'creates practical possibilities for the expansion of normative frameworks and the elaboration of monitoring mechanisms to address minority questions'.[21] Indeed, this collective or group dimension is of special importance to minorities, particularly in the context of the determination of instances of indirect discrimination, the application of affirmative action policies and in articulating a right to a particular way of life.

Another example of common understandings of and approaches to particular issues relates to the question of what constitutes a 'minority'.

[20] See also the recently added pamphlet to the UN Guide for Minorities concerning 'Minorities and the UN: Human Rights Treaty Bodies and Individual Complaints Mechanisms', E/CN.4/Sub.2/AC.5/2006/4, June 2006.

[21] 'Introduction', in Patrick Thornberry and María Amor Martín Estébanez (eds.), *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004), p. 10.

The absence of any treaty-based definition of what constitutes a minority has been widely acknowledged, and is noted in many of the contributions to this volume. In spite of this, there is at least some evidence of the emergence of a broad recognition by both treaty monitoring bodies and international organisations that there are both subjective and objective aspects to this question, and of some agreement on at least some of the specific factors that should be considered.

The phenomenon of modern mass immigration has resulted in much more heterogeneous societies throughout both the developed and developing world. Even without the events of 9/11, the bombings in Madrid in 2004 and in London in 2005, and the explosion of rioting in 2005 in many French suburbs, the successful integration of so-called 'new minorities' in effective multicultural societies has become a major challenge of the early twenty-first century. On the evidence of a number of contributions to this book, there seems to be an emerging consensus that such 'new minorities' should be considered to be 'minorities' for the purposes of minority protection. Indeed, the focus seems to be moving beyond this question of whether such groups constitute minorities to that of the particular modalities by which they should be protected, based on their needs and priorities. Thus, in a number of chapters, we see the particular relevance to such 'new' minorities of principles of non-discrimination and effective equality in access to employment and services. It is notable that, as Dunbar points out in his contribution, even under the Languages Charter, which explicitly excludes the application of the treaty provisions to the languages of migrants, there is at least some evidence of an engagement with the question of 'new' minorities, evident in the recognition that, with the passage of time, languages of migrants could benefit from the protection of the Languages Charter. Despite the absence of a coherent internal minority policy in the EU, it is obvious that the EU adopts a broad concept of minorities in relation to its external activities and its accession monitoring, in the sense that it explicitly includes migrants in its assessments.

Another area in which there are clear synergies is with respect to the principle of non-discrimination and equality rights, where we see that it is now becoming generally accepted that full and effective equality may require special and differential treatment, and special measures of support to certain groups. This is a theme which is, as is noted in many contributions to this volume, central to the philosophy of minority-specific instruments.

An important development, however, is the explicit articulation of this understanding in non-minority-specific instruments, and this is evident in some of the recent case law of the ICCPR, as highlighted by Scheinin, and is strongly present in the supervisory practice of ICERD, as discussed by Garvalov. While the ECHR recognises the duty to differentiate between substantively different situations as a matter of principle, this has, so far at least, not resulted in the recognition of the duty to adopt minority-specific standards. As Scheinin and Garvalov have noted, if interpretative approaches would become more bold in this respect, this could entail even more dramatic developments under major international human rights instruments, leading to ever closer effective synergies between minority-specific and non-minority-specific instruments.

Another issue that needs to be highlighted is the emerging understanding, common to most of the instruments explored in this collection, that the appropriate general policy orientation of states in respect of their minorities should be one of 'integration without forced assimilation', and, with this, a more detailed common understanding of what the effective 'integration' of minorities actually means in terms of more specific state measures. As some contributors have highlighted, policies aimed at integrating minority populations should ensure equal access to state services and full participation in the social, economic and political life of the state. However, a few contributors have also highlighted that integration policies can also entail *de facto* pressure on minority populations to assimilate, a consideration that is particularly relevant in respect of ethnic, cultural and linguistic minorities. While Article 27 of the ICCPR is widely understood to enshrine a prohibition on forced assimilation and the right to an identity, a regime of minority protection does not guarantee that members of minorities will not choose the path of assimilation. There is, though, an increasing recognition of the positive value attached to societal diversity, another theme which emerges in several of the chapters, and that integration should therefore not come at the expense of cultural, ethnic and linguistic diversity. Some ambiguity exists, however, as to how this general approach translates into more specific standards.

One significant theme which emerges in a number of the contributions is the recognition by treaty bodies and international institutions of the special needs of particular minorities. The increasing attention devoted to Roma issues is one obvious example – indeed, it is also evident within the EU's accession monitoring, as well as under the various instruments and

within the various institutions discussed in this volume. However, indigenous peoples have also received particular attention under a number of instruments, and rather strongly in terms of the CRC, as is underscored by Doek, as well as in the work of a range of institutions. The recognition of the needs of particular groups has also led to the development of some common principles and approaches, which is also evident in a number of the contributions.

Finally, consideration of the contributions to this collection as a whole highlights the emergence of synergies with respect to particular issues, such as minority language education, minority language public services, minority governance issues, including self-governance, autonomy, political participation and political representation, and with respect to economic issues, particularly the question of control of resources and community economic development. Indeed, the increasing relevance of rights such as the right to development in a minorities context, a theme which is evident in the contributions of Thio and Friberg, is itself indicative of emerging synergies and the dynamic nature of the field of minority protection as a whole. This concern had already manifested itself in the views of the Human Rights Committee, which have established that minorities' right to the enjoyment of their own culture under Article 27 of the ICCPR includes the practice of traditional economic activities, a development discussed by Scheinin. More broadly, and not necessarily identity-related, is the stronger presence of economic dimensions of minority issues in the practice under the FCNM, particularly in relation to Article 15, and by the UN Working Group on Minorities, both of which are explored in the relevant chapters.

2.3 Emergence of similar working methods

A final type of synergy is what may be described as synergies in working methods, which would include similarities in the way in which treaty monitoring bodies and international organisations involved in minority issues carry out their monitoring activities. To a certain extent, of course, the work of treaty monitoring bodies, in particular, is dictated by the terms of the treaty itself. As has already been noted, while many of the non-minorities-specific instruments – in particular, the major international human rights instruments such as the ECHR and the ICCPR, as well as the ICERD and the African Charter on Human and Peoples'

Rights – create the possibility of complaints or communications by individuals or other states with respect to the implementation of treaty standards, thereby ensuring that the treaty monitoring body has a quasi-judicial role, minority-specific instruments such as the FCNM and the Languages Charter provide for no similar procedures.

Instead, minority-specific instruments tend to rely on state reporting mechanisms, of a sort that are also provided for in many non-minority-specific instruments, like the CRC, the ICCPR and the ICESCR, and ICERD. The effectiveness of such state reporting mechanisms in the implementation of international human rights standards has sometimes been questioned, especially where the final responsibility lies with a political body, by which we mean a body comprised of states and their representatives, such as the Committee of Ministers of the COE (not independent experts as in the case of the human rights treaty bodies). As Eide and Dunbar discuss in their respective contributions, the supervisory practice has shown that the political bodies tend to follow the opinions of the independent expert bodies set up to assist them, the Advisory Committee (FCNM) and the Committee of Experts (Languages Charter).

It should be acknowledged that under some non-minority-specific conventions, only judicial enforcement is possible (for example, the Genocide Convention), and that under the UNESCO Convention Against Discrimination in Education, a rather peculiar form of monitoring exists, which is done by state representatives and which is limited to general overall assessments of the practice of the contracting states. Such differences obviously reduce the potential of procedural synergies pertaining to these instruments. Monitoring within the EU – that is in relation to the practice of the member states – also generally offers limited scope for the development of procedural synergies. While the Network of Independent Experts provided a systematic overview of the human rights performance of both the European Union and its member states, and even gave close attention to minority protection issues in a special thematic report in 2005, it has since been abolished. The Fundamental Rights Agency, which is briefly mentioned by de Witte and Horváth, was established on 15 February 2007, but its mandate explicitly excludes monitoring, and it focuses on collecting data and providing advice.

Despite the differentiations in terms of the type of monitoring mechanisms used, a few procedural synergies can be identified. It has to be

acknowledged, however, that the level of synergy is markedly lower than in the case of the more substantive synergies.

A first aspect pertains to the use of country visits to the state being monitored, allowing for meetings with government officials, NGOs and others interested in the implementation of the treaty obligations. In addition to deepening the understanding of the monitoring body of the situation in the state, these visits have allowed for an ongoing tripartite dialogue between the monitoring body, the state and its minorities, and this itself has in many ways improved the effectiveness of treaty implementation. This practice has developed and is now an established feature of monitoring under the FCNM and the Languages Charter. Country visits are, however, hardly present in the practice of the UN treaty bodies and the UN Working Group, where this is confined, due to resource constraints, in combination with the global coverage of the instruments concerned, to a few *ad hoc* initiatives. The same is true for the regional human rights treaty bodies. Similarly, only under the minority-specific instruments has a pronounced follow-up mechanism been developed. As Bloed and Letschert note, in-state dialogue and fact-finding is an important part of the work of the OSCE HCNM, and has had similar benefits. It is worth noting that the possibility of such visits will form part of the tools available to the UNIEMI, established under the Commission on Human Rights.[22] Indeed, her coordinating role might further enhance the synergies that are hinted at here.

Another procedural synergy is the great expansion in the sources of information and data which are considered by treaty monitoring bodies and international organisations in carrying out their work. The use by such bodies of the output of other monitoring bodies and international organisations has already been referred to. As both Eide and Dunbar discuss, the treaty monitoring bodies under the FCNM and the Languages Charter, for example, make use of a considerable range of material provided by NGOs and organisations representing or active in minority communities. As Thio illustrates, the extensive use of such material by the UN Working Group on Minorities is a particular feature of that body, while NGO shadow reports are valued greatly by all the UN treaty bodies as an important additional source of information for the monitoring of periodic state reporting. A similar heavy reliance on such material is a feature of the OSCE HCNM and the African Commission on Human

[22] See www.ochchr.org/english/issues/minorities/expert/index.htm.

and Peoples' Rights. Once again, such material greatly enhances the understanding of the treaty body or international organisation of the actual situation of minorities in particular states, and this undoubtedly increases the quality and dependability of the output of such bodies and organisations.

One issue arising from this procedural synergy is itself 'procedural': the extent to which such material is shared between treaty bodies. It is not clear, for example, whether the various treaty bodies and international organisations have access to the same material, or whether they interact with and draw on the views and information of all relevant NGOs. In a private study by one of the editors for the COE, for example, it emerged that many NGOs which made extensive submissions to the Committee of Experts under the Languages Charter did not do so to the Advisory Committee under the FCNM, and vice versa, even though many provisions of both treaties dealt with matters of obvious importance to the NGOs and the communities they served or represented, such as minority language education, broadcasting, public services and so forth. It should be noted that this had implications for the 'on-the-spot' visits of the two monitoring bodies; if an NGO had not made any written submission, it was less likely that the monitoring body would meet with representatives of the NGO during the visit. While this did not contribute to any obvious contradictions in the work of the monitoring bodies – which may have been problematic, to the extent that the provisions of the two treaties were of similar effect – it may have resulted in differences in emphasis, in terms of recommendations and implementation.

This example illustrates how some of the emerging procedural synergies may need to be matched by more explicit and thorough 'methodological' synergies, whereby the cross-referencing, already identified, is extended and enhanced, perhaps by more formal information-sharing between treaty bodies and international organisations, which could include, for example, the construction of contact lists and other similar data information bases. While this raises questions of confidentiality – NGOs and others may be less willing to submit information if they are not sure how such information will be used – and also of appropriate uses of information – evidence submitted in respect of one instrument may not be appropriate for use in respect of different standards, or in respect of different monitoring methodologies – enhancing methodological synergies in this way should, in our view, nonetheless be explored.

3 By way of conclusion: limits of and future prospects for synergies in minority protection

This leads us to our final comments, which are in respect of the limits of, and future prospects for, synergies in minority protection. The most obvious barrier to further synergies in minority protection is the diversity of existing standards, and the unlikelihood of further integrative standard-setting, especially at the global level, but also at the regional level outside of Europe. This is most evident in the contribution of Friberg, in which the emergence of some synergies in terms of emerging issues in minority protection in the Asia-Pacific region can be seen, but where the resolution of such issues is hamstrung by a lack of hard- or even soft-law obligations at the regional level. The same theme is evident in the contribution of Murithi in respect of Africa, where existing hard-law commitments are non-minority specific.

A second limitation is the sheer diversity of minority situations, and the complexity of the juridical, constitutional, political, social, sociolinguistic, demographic and economic circumstances of the states in which they live. Even within a European context, the great variety of minority situations has had an impact on the degree of specificity that is possible in the relevant legal standards – one size certainly does not fit all. The fact that many of the minority-specific standards which do exist have been developed in a European context may itself represent a further barrier to enhanced synergies at a global level. To what extent, for example, is the content of minority standards developed in a European context shaped by certain assumptions about the role of the state, the services it provides, the nature of public administration, and the degree of social integration and cohesion which generally exists? If such assumptions are embedded in some minority standards, and if such conditions do not adhere in other regions – or even within parts of a wider Europe – how should standards be modulated to reflect this reality?

As to future prospects, taking into account the limitations identified above, there are several potentialities hinted at throughout the contributions, but much will depend on the ever-developing interpretative practice of supervisory bodies, in combination with the political will of states actually to follow these synergetic interpretations. The recent Memorandum of Understanding between the EU and the Council of Europe is, however, particularly notable, as the two organisations

emphasise the importance of focusing on synergies and of avoiding duplication, and pay special attention to cooperation concerning the protection of persons belonging to national minorities, and to the fight against discrimination, racism, xenophobia and intolerance.[23]

The preceding discussion has already hinted at (and the following chapters will reveal) the uneven extent to which certain synergies are emerging, and especially at the non-European regional level, it is hard to predict how the currently rather rudimentary standards for minority protection will develop. A substantive understanding of equality is growing, the themes of minority language rights, including educational rights, and participation rights are rather strong, and economic development issues are getting increasing attention. However, the degree to which new minorities can benefit from measures of minority protection remains somewhat controversial; while there is, as noted, an emerging consensus that such minorities should qualify for minority protection, the extent to which they should be treated in a similar way to those minorities that are more long-established in the territory of the state is still being teased out. The extra attention given to particular minorities, like Roma and indigenous peoples, is expected to grow, and could potentially further diversify, to the benefit of other particular minorities. Similarly, the central theme of 'integration without forced assimilation' will probably be further developed and its implications will also be teased out. Also, at the procedural level, the synergies hinted at above have the potential to consolidate and strengthen. However, it is not likely that the practice of country visits and follow-up procedures will be taken up by the UN treaty bodies in the near future. Then again, much will depend on the current revision of the treaty body system. The ongoing practice, experiences and *de facto* mandate developments of UNIEMI, including the incorporation of a regional dimension in its work, obviously carry the promise of stronger synergies at both global and regional level. However, we will have to see to what extent this promise actually materialises. Similarly, in Europe, the approach the EU will be developing in relation to internal minority protection remains unpredictable, while in Africa, eyes are focused on the African Court and how its jurisprudence will develop.

[23] Memorandum of Understanding between the Council of Europe and the European Union, CM (2007)74, 10 May 2007, paras. 9–12, 21.

PART A

Minorities-specific instruments, provisions and institutions

2

The United Nations International Covenant on Civil and Political Rights: Article 27 and other provisions

MARTIN SCHEININ

Introduction

The International Covenant on Civil and Political Rights ('ICCPR') is the only human rights treaty that has universal coverage both geographically and in respect of its personal scope, and that includes a specific provision on the rights of minorities, or to be more exact, on the rights of *members* of minorities. Here the Covenant differs also from the Universal Declaration of Human Rights, which does not include a clause on minorities. This can be explained by its emphasis on the universality of human rights but also with reference to the partly negative experiences of the minority protection arrangements under the League of Nations.

The closest counterpart to the minority rights clause in Article 27 of the ICCPR in other human rights treaties is Article 30 in the Convention on the Rights of the Child,[1] which closely follows the wording of the ICCPR provision but which focuses upon children. While Article 27 ICCPR does not explicitly address the situation of indigenous peoples, the text of Article 30 CRC does. It should also be acknowledged that Article 27 has served as a source of inspiration for the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.[2]

Textually, ICCPR Article 27 is a rather modest provision in that it primarily addresses the negative obligation of states not to *deny* members

[1] See also the contribution by Doek (Chapter 10 below).
[2] General Assembly resolution 47/135, annex, 47 UN GAOR Supp. (No. 49) at 210, UN Doc. A/47/49 (1993).

of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language:

> Article 27
>
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

However, the supervisory practice of the Human Rights Committee ('HRC') and the interpretations and clarifications it has adduced in relation to Article 27 ICCPR should be taken into account when assessing Article 27. The HRC is an independent expert body established pursuant to Article 28 of the ICCPR for the purpose of monitoring state compliance with the treaty.[3] The two main monitoring functions are a mandatory reporting procedure[4] and an optional procedure for individual complaints.[5] As of April 2006, 156 states are subject to the periodic reporting procedure[6] and 105 states to the international right of individual complaint.[7] Although there are no treaty provisions on the legal effect of findings by the HRC under the reporting procedure or in the consideration of individual complaints, such findings represent authoritative interpretations, as the HRC is the only international body established to monitor compliance with the ICCPR.

The HRC may consolidate its lines of interpretation in respect of a specific provision or a cross-cutting issue by adopting a General Comment.[8]

In the subsequent paragraphs, the following issues will be addressed, as they are important in determining the actual reach and impact of Article

[3] The leading scholarly work on the ICCPR and the HRC is Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd edn (Strasbourg: N.P. Engel, 2005). See also Sarah Joseph, *International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004) and Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee*, 2nd edn (Turku: Åbo Akademi University, 2007).

[4] Article 40 ICCPR.

[5] See (first) Optional Protocol to the ICCPR. Potentially, the ICCPR is monitored also through an inter-state complaint procedure, based on Articles 41–42 of the ICCPR. So far, this procedure has never been resorted to.

[6] See www.ohchr.org/english/countries/ratification/4.htm.

[7] See www.ohchr.org/english/countries/ratification/5.htm.

[8] See Article 40(4) of the ICCPR.

27 ICCPR, and furthermore relate to themes that are also emerging in terms of other human rights texts of special relevance for minorities: the concept of minority (and belonging to a minority); the recognition of positive state obligations in relation to minorities; the growing recognition of the group dimension of minority protection; the extent to which indigenous peoples can benefit from the protection of Article 27; the right of self-determination and minority rights; synergies with general human rights; and procedural issues.

1 The minority concept

Article 27 of the ICCPR represents a broad understanding of minorities and minority rights, when compared to some other instruments that use the notion of 'national minorities' and are interpreted by some states and some commentators as limiting themselves to protecting well-established groups that have a long history in the country concerned and whose members must be citizens of the state. The ICCPR is framed in terms of 'ethnic, religious or linguistic minorities'. The ICCPR does not contain a definition of this expression, but in its General Comment 23 the HRC articulated its understanding of the coverage of the term 'minority', primarily in paras. 5.1 and 5.2, which deserve to be quoted in their entirety in order to dismiss certain misunderstandings of the HRC's position:

> 5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.
>
> 5.2. Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term 'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community

> with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

In the last sentence of the above quotation, the HRC rejected a 'recognition regime' where each state party could decide what groups within its territory are entitled to minority protection under Article 27. Being a minority is a matter of empirical facts, and ultimately to be determined by the HRC through its functions of international monitoring of state compliance with the ICCPR. As is visible in the quotation, the HRC explicitly dismissed a citizenship requirement in the application of Article 27. Hence, the General Comment supports a broad understanding of the notion of a minority, to the point where the HRC considers that migrant workers and even visitors may be entitled to protection under Article 27. However, contrary to what some ironic commentators have suggested, the HRC did not say that visitors as a group would be a minority in the sense of Article 27. Rather, and as a close reading of the quotation shows, a state must not deny a migrant worker or a visitor membership in an existing minority merely on the basis of the temporary nature of his or her stay.

Two cases decided under the Optional Protocol illustrate the HRC's approach to the notion of a minority. In 1993, the Committee adopted its views in the joined cases of *John Ballantyne and Elizabeth Davidson*, and *Gordon McIntyre v Canada*.[9] These complaints were initiated by English-speaking inhabitants of the French-speaking province of Quebec. They sought to challenge provincial legislation that prevented them from using English in the public advertising of their businesses. The complainants invoked the non-discrimination provisions in Articles 2 and 26 of the ICCPR, the minority rights clause of Article 27 and the provision

[9] *John Ballantyne and Elizabeth Davidson v Canada*, Communication No. 359/1989, and *Gordon McIntyre v Canada*, Communication No. 385/1989, Views of 31 March 1993.

on freedom of expression in Article 19. Although the HRC declared the communications admissible in all respects, it dismissed the Article 27 claim on grounds that could have been applied at the admissibility stage:

> 11.2 As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the 'State' or to 'States' in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

This finding, based on a textual reading of Article 27, was not unanimous. Eight members appended dissenting or concurring individual opinions, most of them expressing diverging or at least more elaborate arguments as to the notion of minority in Article 27. Nevertheless, since the case of *Ballantyne et al.*, it is clear that persons invoking Article 27 need to formulate their claim so that they demonstrate that they are members of a minority in respect of the state party to the ICCPR as a whole; Article 27 would not be applicable to 'regional' minorities/minorities defined at regional level if the members of such a group in all relevant respects belong to the majority population of the country.

The second case that illustrates the HRC's approach to the notion of a minority is *J. G. A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia.*[10] Building upon the HRC's earlier jurisprudence related to indigenous groups (see below), the complainants argued that through various measures interfering with cattle raising by the Rehoboth community, Namibia had 'denied' the right of the authors to enjoy their own culture. The HRC avoided taking a position as to whether the Rehoboth constituted a minority under Article 27 of the ICCPR. Instead, the HRC expressed the view that the cattle-raising practices of the Rehoboth were not distinctive enough to give rise to a distinct 'culture' in the meaning of Article 27. The HRC referred to its earlier case law,

[10] *J. G. A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*, Communication No. 760/1997, Views of 25 July 2000.

according to which the right of members of a minority to enjoy their culture under Article 27 includes the protection of a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, 'especially in the case of indigenous peoples'. The HRC, however, held that in the present case, it was unable to find that the authors could rely on Article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion was based on the HRC's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dated back some 125 years, it was not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although in the HRC's view the Rehoboth community had distinctive properties as to the historical forms of self-government, the authors had failed to demonstrate how these factors would be based on their way of raising cattle. The HRC concluded unanimously that there had been no violation of Article 27.[11] In short, the HRC expressed the position that, while the Rehoboth community may for purposes of Article 27 constitute a minority in Namibia, it had not been substantiated that their cattle-raising would have given rise to a distinctive culture, enjoying Article 27 protection along the lines explicated by the HRC in earlier cases brought by indigenous groups.

The cases of *Ballantyne et al.* and *Diergaardt* demonstrate the position of the HRC that whether a group constitutes a 'minority' in the sense of Article 27 is to be addressed in relation to the state that ratified the ICCPR and that the practical consequences of Article 27 will depend on a contextual assessment of the particular characteristics and the situation of the group. When a group is considered a minority in terms of Article 27, the article does not require an identical level of protection for every group's economic activities, as such activities may or may not be sufficiently related to the distinct minority 'culture'.

2 Membership in a group

According to the HRC, the individual's right to belong to a minority represents a combination of subjective and objective elements.

[11] *Ibid.*, para. 10.6 of the Views.

The HRC was confronted with the issue in the case of *Sandra Lovelace v Canada*,[12] where the HRC found a violation of Article 27 due to the permanent exclusion of the female author from her aboriginal community. Under the relevant domestic legislation, aboriginal women such as she who had married a non-aboriginal were no longer entitled by right to reside on reserve lands belonging to the aboriginal group. This loss of status was permanent, so that, even upon her divorce, Lovelace had no right to reside on the reserve.

In its conclusions, the HRC emphasised that Sandra Lovelace not only identified herself (subjectively) as a Maliseet Indian but also was ethnically (objectively) a Maliseet Indian. She had been absent from her home reserve for only a few years during the existence of her marriage and was, in the opinion of the HRC, entitled to be regarded as 'belonging' to this minority and to claim the benefits of Article 27 of the ICCPR.[13] According to the HRC, it was natural that after her marriage to a non-Indian had broken up, Ms Lovelace wanted to return to the environment in which she was born, particularly as, after the dissolution of her marriage, her main cultural attachment was once again to the Maliseet Band. In the view of the HRC, to deny Sandra Lovelace the right to reside on the reserve was neither reasonable, nor necessary to preserve the identity of the tribe. The HRC concluded that to prevent the recognition of Ms Lovelace as belonging to the band was an unjustifiable denial of her rights under Article 27 of the ICCPR, read in the context of the other provisions referred to in the communication.[14]

Another case related to the same dimension of Article 27 is *Ivan Kitok v Sweden*.[15] Although Mr Kitok had, because of his absence from his local community, lost full membership in the Sami village and consequently full reindeer herding rights, he was not prevented from moving back to the community and from participating in the reindeer herding activities which are constitutive of the Sami culture. In the circumstances, the HRC considered that there was no violation of Article 27. However, the HRC expressed its concern over the operation of Swedish legislation, emphasising the need (also) to apply objective criteria in the determination of

[12] *Sandra Lovelace v Canada*, Communication No. 24/1977, Views of 30 July 1981.
[13] *Ibid*., para. 14 of the Views. [14] *Ibid*., para. 17 of the Views.
[15] *Ivan Kitok v Sweden*, Communication No. 197/1985, Views of 27 July 1988.

whether an individual who wishes to identify himself with the group is recognised as a member.[16]

3 Positive state obligations and the group dimension of the minority phenomenon

Notwithstanding its negative formulation, positive obligations have been derived from Article 27 by both the HRC and legal commentators. In 1994, the HRC adopted a General Comment, No. 23(50),[17] on Article 27, in which it expressed its interpretation of several dimensions of the provision. In it, the HRC deduces positive state obligations from the negatively worded treaty provision as follows:

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

As is discussed in the other contributions to this book on minority-specific instruments, this acceptance of positive state obligations vis-à-vis minorities as a matter of principle is made explicit in these more recent articulations of minority rights.

It should be underlined that the broad understanding of the notion of minority under the ICCPR does not necessarily mean that every relevant group would need to receive exactly the same level of protection, including through positive state obligations. The scope of positive obligations may be made to depend on matters such as the degree of permanence a group has in a particular country, the size of the group and its degree of territorial concentration. As long as some groups are not denied such measures of protection in a discriminatory manner – in particular, when they are similarly situated in relation to some other group in respect of which positive measures are provided – states may legitimately grade

[16] See para. 9.7 of the Committee's Views.

[17] For a compilation of General Comments and general recommendations by the UN human rights treaty bodies, see HRI/GEN/1/Rev.8/Add.1 (2006).

their positive support to minorities so that groups with a longer tradition enjoy more far-reaching entitlements.

However, applying the same grading on an individual basis to the detriment of newcomers wishing to join a pre-existing minority, would in most cases amount to discrimination. Hence, persons whose presence in the country has not been regularised and who, due to their language, religion or ethnicity, wish to identify themselves with a pre-existing minority group in a country, may very well claim the same protection as other members of the group, for instance, in the education system. However, this does not imply that a totally new linguistic, religious or ethnic group that arrives in the country could immediately claim equal arrangements of positive protection. For example, if a country receives as refugees a group whose language has not previously been spoken in the country, the state may have a duty to adapt its education system so that children belonging to the group have effective access to education, for example through immersion courses in their own language. But only after the group has established its presence and distinctiveness in the country, may it start to make legitimate claims for more far-reaching entitlements in the education system, such as the establishment of minority language schools.

Furthermore, the HRC has, in its reasoning in favour of affirmative measures of protection by states, given the group dimension of minority protection more explicit acknowledgement and support. Already the wording of Article 27 implies that, although protection is afforded to individual members of minorities, the substance of minority rights entails a collective dimension: they are protected as enjoyed 'in community with other members of the group'. This collective dimension comes even more to the forefront in General Comment 23. Indeed, it can be argued that in order for individuals to be able to exercise their right to enjoy their culture and speak their language, this culture and language should be maintained. This, in turn, might require active support by the states concerned. In this respect, the HRC remarks:

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

4 Minorities and indigenous peoples

Although the ICCPR does not include in Article 27 or elsewhere the notion of indigenous peoples, much of the case law and other interpretive material adopted by the HRC under Article 27 has been related to groups that both constitute a minority and identify themselves as indigenous peoples. In particular, the notion of 'culture' in Article 27 has been applied and elaborated by the HRC in respect of claims by indigenous groups.

In its General Comment 23(50) the HRC emphasised the applicability of Article 27 in respect of indigenous peoples.[18] In particular, the notion of 'culture' has been interpreted as affording protection to the nature-based way of life and economy of indigenous peoples. In the terms of para. 7 of the General Comment, the HRC states the following:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

The characterisation of the reference to 'culture' in Article 27 as encompassing the recognition of traditional or otherwise typical economic activities, in particular in regard to indigenous peoples, was developed in the case of *Lubicon Lake Band v Canada*,[19] in which a violation of Article 27 was established because 'historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band'.[20] The factual background of the case related to the exploitation of oil, gas and timber resources in areas traditionally used by the band for hunting and fishing. Over a long period of time, the cumulative effect of these forms of competing use of land and resources had effectively destroyed the resource basis of traditional hunting and fishing for the Lubicon Band.

[18] See, paras. 3.2 and 7 of the General Comment.
[19] *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984, Views of 26 March 1990.
[20] Paragraph 33 of the Committee's Views.

Much of the HRC's subsequent case law under Article 27 has been related to this dimension of Article 27, the link between the notion of 'culture' in the treaty provision and traditional forms of indigenous peoples' economic life. The case *Länsman v Finland No. 1*[21] was related to the harmful effects of a stone quarry in relation to reindeer herding activities of the indigenous Sami. Although no violation of Article 27 was found, the HRC established several general principles for the interpretation of Article 27. It emphasised that Article 27 not only protects traditional means of livelihood but even their adaptation to modern times.[22] As to what kind of interference with a minority culture constitutes 'denial' in the sense of Article 27, the HRC developed the combined test of meaningful consultation (or effective participation) of the group[23] and the sustainability of the indigenous or minority economy.[24]

The HRC's views in the cases of *Länsman v Finland No. 2*,[25] related to governmental logging activities in the reindeer herding lands of the same Sami community, and those in *Apirana Mahuika et al. v New Zealand*[26] built on and developed the same principles. The latter case is especially important for its discussion of the participatory dimension of the test under Article 27 of the ICCPR. The HRC treated the different Maori tribes as constituting one minority in the meaning of Article 27 and held that the complicated and multilayered consultation process entailed sufficient participation for the purposes of Article 27.

The *Länsman* cases highlight a problem related to the burden of proof in cases submitted to the Optional Protocol procedure under Article 27. Although the HRC has emphasised that it does not apply a margin of

[21] *Ilmari Länsman et al. v Finland*, Communication No. 511/1992, Views of 26 October 1994.

[22] Paragraph 9.3 of the Committee's Views: 'The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.'

[23] See para. 9.6 of the Committee's Views.

[24] See para. 9.8 of the Committee's Views: 'With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry.'

[25] *Jouni E. Länsman et al. v Finland*, Communication No. 671/1995, Views of 30 October 1996. See, in particular, paras. 10.4–10.7.

[26] *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, Views of 27 October 2000. See, in particular, paras. 9.4–9.9.

appreciation doctrine, analogous to that developed by the European Court of Human Rights, when addressing whether an interference with the lifestyle of indigenous groups constitutes a 'denial' of the right to culture under Article 27,[27] the HRC nevertheless leaves it primarily to domestic courts to address issues of fact and evidence. Hence, domestic courts will also have an important role in applying the combined test of participation and sustainability when assessing whether a particular interference with lands or resources violates Article 27. If such a discussion appears in the rulings by domestic courts, the HRC will normally defer to their assessment. Therefore, if national courts address the concerns of the indigenous groups under Article 27 or similar provisions of law, the HRC is quite reluctant as an international body to question their assessment – even in cases where the group feels that they were not treated fairly by the national courts. In *Länsman No. 2*, the HRC expressed this problem in the following terms:

> The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.[28]

It is notable that, in spite of these significant developments within the HRC, the *Lubicon Band* case remains the only one in which the HRC has found a violation of Article 27 because competing use of land and resources amounted to an interference with the economy and life of the indigenous community. The case of *Äärelä and Näkkäläjärvi v Finland*[29] can be seen as a response to this problem and as a shift in the litigation strategy of the Finnish Sami. The case was factually very similar to *Länsman No. 2*, relating to government logging in the reindeer herding lands of the herdsmen's cooperative in which the two authors were

[27] *Länsman No. 1*, para. 9.4: 'A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.' This statement was reiterated in para. 9.4 of *Mahuika*.

[28] *Länsman No. 2*, para. 10.5.

[29] *Anni Äärelä and Jouni Näkkäläjärvi v Finland*, Communication No. 779/1997, Views of 24 October 2001.

members. Although the authors based their case before domestic courts on ICCPR Article 27 and comparable provisions of domestic law, they also addressed the Supreme Court of Finland and later the HRC with their misgivings of how they had been treated by the Finnish courts, claiming a violation of the fair trial clause in ICCPR Article 14.

After establishing a violation of Article 14 in two respects, the HRC then stated that it did not have sufficient information in order to be able to draw independent conclusions on the factual importance of the lands in question to reindeer husbandry and the long-term impact of logging on the sustainability of reindeer husbandry, and therefore on the consequences under Article 27 of the ICCPR. Hence, the HRC was 'unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party properly to protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant'.[30] However, when addressing the authors' right to an effective remedy for the violations of the fair trial right they had suffered, the HRC called for a reconsideration of the Article 27 claim on the domestic level:

> [T]he Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims.[31]

While the case law pertaining to the application of Article 27 in respect of indigenous groups so far has concentrated on the notion of 'culture' in the context of that provision, Article 27 also provides potential for the development of indigenous peoples' claims, and by implication of the HRC's jurisprudence, on religion and language. For instance, the case of *Ilmari Länsman et al. v Finland* already included references to the role of the collective forms of reindeer herding as vital to the survival of the Sami language and to the issue of sacred sites as a sensitive issue for indigenous groups,[32] also potentially affecting the permissible scope of interferences in the physical environment.

[30] *Ibid.*, para. 7.6. [31] *Ibid.*, para. 8.2.

[32] For a passing reference to the issue related to religion, see *Länsman No. 1*, para. 2.6. The discussion on the relationship between the collective practice of reindeer herding and the survival of the Sami language appears only in the submissions by the parties and is not reflected in the Committee's Views.

5 The right of self-determination

In addition to the minority rights clause of Article 27, the ICCPR also has a provision on the right of all peoples to self-determination. This provision is identical to Article 1 of the twin Covenant on Economic, Social and Cultural Rights and the relevant paragraphs read:

> Article 1
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The word 'people' is not defined in Article 1 or elsewhere in the ICCPR. Hence, the ICCPR leaves room for different interpretations as to whether the whole population of a state party constitutes 'a people' in the meaning of Article 1, or whether several distinct peoples exist in at least some of the states parties to the ICCPR. The HRC's pronouncements, made in relatively recent concluding observations on state reports by countries with indigenous peoples, starting with Canada in 1999, reflect an understanding that at least certain indigenous groups qualify as 'peoples' under Article 1.[33] Since 1999, such pronouncements have, for example, been made in the consideration of reports by Mexico, Norway, Sweden, Finland, Australia and the US. The HRC has avoided defining the exact

[33] For instance, in its Concluding Observations on Canada, the Committee stated: '8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.' Concluding Observations on Canada (1999), UN Doc. CCPR/C/79/Add.105.

criteria applicable to determine whether an indigenous group is a people under Article 1 of the ICCPR. In particular, the HRC has avoided any pronouncement to the effect that simply any group that identifies itself as a people would automatically be entitled to invoke Article 1 as a matter of right. Rather, its approach has been contextual and responsive: for instance, constitutional, judicial or political recognition within a country of the existence of several distinct peoples within its territory may have paved the way for the HRC's own pronouncement that Article 1 is applicable in respect of an indigenous people.[34] The practice by the HRC in this respect can be summarised as follows: groups identifying themselves as indigenous peoples generally fall under the protection of Article 27 as 'minorities'; in addition, at least some of them constitute 'peoples' for the purposes of Article 1 and are therefore beneficiaries of the right of self-determination. Hence, the ICCPR does *not* give support to a position according to which indigenous peoples are a specific category between minorities and groups, not entitled to the right of self-determination.

The paragraphs of common Article 1 in the ICCPR and the International Covenant on Economic, Social and Cultural Rights relate to the various dimensions of self-determination. Paragraph 1 proclaims the right of self-determination and its main dimensions: all peoples' right 'to freely determine their political status' (*political dimension*) and to pursue their 'economic, social and cultural development' (*resource dimension*). The political dimension, in turn, includes an external aspect of sovereignty and an internal aspect of governance which in turn can be linked to Article 25, which requires *democratic* governance. Hence, there is also a strong participatory dimension in Article 1. This link between Articles 1 and 25 has on occasion been emphasised by the HRC in its concluding observations on reports by states.[35] As to the scope of the political dimension of self-determination, it is important to note that, under public international law, a people's right to self-determination does not automatically entail a

[34] The opinion of the Supreme Court of Canada in the *Quebec Secession* case, as well as constitutional recognition of the Sami as a people in Norway and Finland have served this function.

[35] For example: '20. The Committee notes with concern that the Congolese people have been unable, owing to the postponement of general elections, to exercise their right to self-determination in accordance with article 1 of the Covenant and that Congolese citizens have been deprived of the opportunity to take part in the conduct of public affairs in accordance with article 25 of the Covenant.' Concluding Observations on the Republic of the Congo (2000), UN Doc. CCPR/C/ 79/Add.118.

right of unilateral secession (statehood) for every group that qualifies as a distinct people. The right of secession, as the ultimate form of exercising the right of self-determination, is recognised only under specific conditions. This position was also adopted by the Supreme Court of Canada in the *Quebec Secession Case*, when it concluded:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[36]

There may be differing opinions among scholars of public international law as to the specific circumstances in which a people not only possesses the general right of self-determination but also the more specific right to establish its own state.[37] Ultimately, the question may boil down to a factual one, concerning recognition by other states and other actors representing the international community, such as the General Assembly of the United Nations, deciding *ex post facto* on the membership of a newly independent state. Be that as it may, the opinion of the Supreme Court of Canada is representative of a widely held position, according to which there may be more than one 'people' within the borders of a state and that only in exceptional situations do those peoples enjoy the right of unilateral secession. In most cases, they are expected to exercise their right of self-determination without calling to question existing state borders. In the context of this article, the opinion of the Supreme Court of Canada is worth mentioning, as it served as a source of inspiration in 1999 when the HRC, then considering a report by Canada, explicitly took the position that indigenous peoples may be subjects of the right of self-determination.

Paragraph 2 of ICCPR Article 1 elaborates further the resource dimension of self-determination through proclaiming the right of all peoples to dispose of their natural wealth and resources. This clause, and especially its last sentence, which provides that a people may not be

[36] *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 128.
[37] See James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Clarendon Press, 2006).

deprived of its own means of subsistence, has been relied upon by many groups that proclaim themselves as distinctive indigenous peoples in countries where other ethnic groups, typically of European descent, are in a dominant position.

The approach of the HRC to the right to self-determination under the Optional Protocol has undergone a transformation. While the position of the HRC in its early case law was that, as the Optional Protocol procedure can only be initiated by *individuals* who claim to be victims of a violation of the ICCPR,[38] the truly collective right of self-determination (ICCPR Article 1) cannot be made subject to a communication under the Optional Protocol. The case of *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, decided in 1990, reflects this approach.[39] However, as is evident from other parts of the HRC's views, the provisions of Article 1, or at least the values reflected in that provision, are of relevance in the HRC's analysis of alleged violations of other articles of the ICCPR.[40] The HRC pointed out that, although the communication was initially couched in terms of alleged breaches of the provisions of Article 1, many of the same claims gave rise to issues under Article 27.

In some other cases, the HRC's opinion that Article 1 was not subject to the Optional Protocol procedure was expressed in more straightforward terms. These cases include *A.D. v Canada* and *Ivan Kitok v Sweden*.[41] However, in more recent cases, the HRC has returned to the approach reflected in *Ominayak*, now however also explicitly recognising that although Article 1 cannot itself be the basis for a claim by an individual, the right of self-determination may affect the interpretation of other provisions of the ICCPR, including the right of members of a minority to enjoy their own culture (Article 27). This is illustrated, for example, by the HRC's views in the case of *Mahuika et al. v New Zealand*, decided in 2000.[42]

Further light on the issue of interdependence between the right of self-determination and other provisions of the ICCPR is shed by the case of

[38] See Article 1 of the Optional Protocol to the ICCPR.

[39] *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication 167/1984, Views of 26 March 1990, para. 13.3.

[40] *Ibid.*, paras. 32.1 and 32.2.

[41] *A.D. v Canada*, Communication No. 78/1980, Decision of 20 July 1984, *Ivan Kitok v Sweden*, Communication No. 197/1985, Views of 27 July 1988.

[42] *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, Views of 27 October 2000, para. 9.2.

Gillot et al. v France, decided in 2002.[43] The complaint was related to restrictions on the right to participate in referendums in New Caledonia, allegedly in violation of Article 25 of the Covenant (right of public participation). Interpreting Article 25 in the light of Article 1, the HRC considered that, in the context of referendums arranged in a process of decolonisation and self-determination, it was legitimate to limit participation to persons with sufficiently close ties with the territory whose future was being decided. As the residence requirements for participation in the referendums in question were neither disproportionate nor discriminatory, the HRC concluded that there was no violation of Article 25.

The novelty in the interpretive effect of Article 1 in *Gillot* was that the complaint was not brought by the indigenous or minority group but by certain citizens of the state party who considered their rights violated by their exclusion from the self-determination process. Hence, the right of self-determination was invoked by the state party[44] and then applied by the HRC as justification for an exclusion of newcomers from referendums. The key passages in the HRC's disposition of the case read:

> 13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.
>
> . . .
>
> 13.16 The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons

[43] *Marie-Hélène Gillot et al. v France*, Communication No. 932/2000, Views of 15 July 2002.

[44] See, in particular, paras. 8.3, 8.9 and 8.31 of the Committee's Views that paraphrase the submissions by France before the Committee and make express reference to self-determination.

'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory.

The *Gillot* case is a logical continuation of the HRC's approach built through the reporting procedure under Article 40 of the ICCPR and the recognition of the interpretive effect of Article 1 in earlier cases under the Optional Protocol. Many of the indigenous peoples of the world qualify as 'peoples' for the purposes of ICCPR Article 1 and are, therefore, entitled to the right of self-determination. However, the HRC's practice so far has not resulted in defined criteria for when an indigenous group may claim peoplehood under ICCPR Article 1. Rather, the HRC's pronouncements in the matter have thus far been responsive and contextual. As is reflected in the practice of the HRC, the resource dimension of self-determination is of particular relevance for indigenous peoples' claims under the right of self-determination. This does not mean that they could not have also other valid claims under ICCPR Article 1.

6 Synergies with other general human rights

As to synergies between Article 27 and other provisions of the ICCPR, reference needs to be made to the case of *Hopu and Bessert v France*.[45] Although the case related to issues that normally would have been considered under Article 27 – the construction of a hotel complex at a fishing lagoon and on the burial grounds of an indigenous Polynesian community in Tahiti – the HRC was capable of addressing at least a part of the claims under the provisions on the right to privacy and family life (Articles 17 and 23) when the application of Article 27 was blocked by a reservation by France.

In order to grasp the HRC's understanding of the relationship between minority rights and universally applicable human rights, it is also important to note that the HRC did establish in *Ballantyne et al.* a violation of the ICCPR, namely of Article 19 on freedom of expression. The right to use, publicly and privately (but not necessarily in communication with public authorities) the language of one's own choice was understood as a dimension of freedom of expression, applicable irrespective of whether a person belongs to a minority or, as in this case, the English-speaking majority of Canada.[46]

[45] *Francis Hopu and Tepoaitu Bessert v France*, Communication No. 549/1993, Views of 29 July 1997.

[46] *Ballantyne et al. v Canada*, para. 11.4: 'A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.'

Similarly, in *Diergaardt*, the majority of the HRC held that there had been a violation of the general non-discrimination clause in Article 26 due to the singling out of the Afrikaans language by prohibiting public authorities from responding in Afrikaans to Afrikaans-language communication, even when they were personally able and willing to do so.[47] Together with the case of *Ballantyne et al.*, the case demonstrates how linguistic rights are not merely protected under Article 27 but may also fall under other provisions of the ICCPR of special relevance for minorities.

Another case in which the Committee has found a violation of Article 26 that relates to minority rights is *Waldman v Canada*, in which a Jewish parent complained of not getting the same economic support from public funds for the religious upbringing of his children that was available for the Catholic minority in the same province.[48]

The HRC's views illustrate that the substance of minority rights may be addressed under generally applicable provisions on universal human rights. Hence, treaties that do not have specific provisions on minority rights may also provide potential for minority rights claims, so far as the monitoring body under the instrument in question is prepared to give a minority-sensitive reading to the provisions.

7 Procedural issues

Although it has been clarified by the HRC that many indigenous peoples qualify as beneficiaries of the right of self-determination under ICCPR Article 1, there still exists some confusion on the matter, due to the fact that Article 1 is *procedurally* in a different position than other human rights affirmed in the ICCPR. While Article 1 is covered by the mandatory reporting obligation of all states parties under Article 40, as well as under the (so far never utilised) inter-state complaint procedure under Article 41, the Optional Protocol to the ICCPR, allowing for individual complaints only, excludes cases directly under Article 1 of the Covenant. This is due to the narrow formulation of the so-called victim requirement in Article 1 of the Optional Protocol. According to that provision, the

[47] See para. 10.10 of the Views. This finding is in line with the Committee's Views in *Ballantyne et al.*, where the Committee excluded communication with public authorities in a language of one's own choice from the scope of Article 19 rights. Nevertheless, in *Diergaardt*, three dissenting members also found a violation of Article 19 on account of the same facts.

[48] *Ariel Hollis Waldman v Canada*, Communication No. 694/1996, Views of 3 November 1999.

Committee may consider 'communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'. While the right of self-determination (ICCPR Article 1) falls under the notion of 'any of the rights set forth in the Covenant', it is, as already noted in the preceding discussion, a truly collective right proclaimed to 'all peoples', and individuals cannot, in the interpretation of the HRC, claim to be individually affected as victims of a violation of that right.[49]

As stated in the introductory section of this chapter, the main monitoring functions of the HRC relate to periodic reports by states parties and to complaints by individuals. The ICCPR does not contain an inquiry procedure, and the practical modalities of the HRC's work do not facilitate country visits. In legal terms there is nothing that would prevent the HRC from including country visits in its work, at least when undertaken for the purpose of exercising a function that is provided by the ICCPR, such as the consideration of a periodic state party report, and with the assent of the state itself. On an *ad hoc* basis, a very small number of country visits by HRC members have been undertaken for following up on individual communications, or by invitation.

As to sources of information, the Optional Protocol includes an explicit clause according to which the HRC 'shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned'.[50] In the practice of the HRC, this clause has been interpreted to mean that any interested third party must make its submissions through one of the actual parties to the case, instead of directly approaching the HRC as *amicus curiae*.[51]

In Article 40 of the ICCPR, there are no restrictions as to the sources of information the HRC relies upon when dealing with state party reports. Hence, in assessing the state party report and preparing for its oral consideration, the HRC makes use of the findings by other UN human rights treaty bodies in respect of the same country, of reports by Special Rapporteurs and other mechanisms of the Human Rights Council, of

[49] See, e.g., *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984, Views of 26 March 1990, para. 13.3.

[50] Article 5(1), of the Optional Protocol.

[51] This position is not made explicit in the Rules of Procedure adopted by the Human Rights Committee.

reports and submissions by UN specialised agencies and also of cases or other materials emanating under regional human rights treaties. There are also several points of entry for national or international NGOs that wish to provide written or oral information. After a state party report has been submitted and then issued as a UN document, NGOs are encouraged to submit so-called shadow reports or other commentaries which will assist the HRC in drawing up a list of issues for the oral consideration of a report. The first day of an HRC session includes an agenda item for oral statements by NGOs in respect of state party reports. Furthermore, during the session where a state party report is scheduled for oral consideration, NGOs often arrange informal lunch-hour briefings for HRC members. Finally, after the HRC has adopted its concluding observations on a state party report, NGOs may continue their interaction with the HRC by sending follow-up submissions. All these opportunities are available also to NGOs representing minorities or indigenous groups or otherwise defending their rights.

8 References to other standards or procedures

Among human rights monitoring bodies, the HRC is in practice quite restrictive in making visible its use of human rights standards other than the ICCPR itself, or of the practice of other human rights bodies, including regional human rights courts. The main exception to this rule is the fairly frequent explicit use of the UN Standard Minimum Rules for the Treatment of Prisoners[52] in the interpretation of Article 10 of the ICCPR, a provision that provides the right to humane conditions of detention.[53]

In cases where one or both of the parties have in their submissions made reference to materials emanating from the supervision of other international treaties, the HRC often includes such references in the narrative part of its own views.[54] However, the dispositive part, in which

[52] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[53] See, e.g., para. 9.3 in *Albert Womah Mukong v Cameroon*, Communication No. 458/1991, Views of 21 July 1994.

[54] See, e.g., the case of *Tai Wairiki Rameka et al. v New Zealand*, Communication No. 1090/2002, Views of 6 November 2003. Both the complainants and the state party made reference to several judgments by the European Court of Human Rights.

the HRC interprets the ICCPR and pronounces on possible violations, usually does not include such references.

The same restrictive approach is visible also in the concluding observations adopted by the HRC in the consideration of reports by states. The main rule is that no reference is made to normative standards other than the ICCPR, or to case law or other interpretive practice under such standards.

9 Conclusion

Among legally binding international treaties, Article 27 of the ICCPR provides a promising example of the emergence and evolution of patterns of interpretation in respect of the scope and content of minority rights. Although the provision is formulated negatively ('shall not be denied') and as protecting the individual rights of members of minorities, the HRC, as the authoritative monitoring body, has managed to develop patterns of interpretation that pertain also to positive state obligations and the collective dimensions of minority rights. However, at least so far, the HRC's case law remains modest in respect of the linguistic and religious dimensions of minority rights, whereas the right of minorities to enjoy their own culture has received more attention, in particular through case law and other pronouncements concerning indigenous peoples.

As to synergies between substantive human rights, the practice of the HRC demonstrates a high degree of interdependence between the clause on minority rights (Article 27), the provision on rights of participation (Article 25) and the right of peoples to self-determination (Article 1). The HRC's case law also provides guidance into the relationship between minority rights and freedom of expression (Article 19), the right to privacy and family life (Article 17) and non-discrimination (Article 26).

The HRC's approach to synergies between different international instruments and mechanisms in the field of minority rights is less transparent. While the HRC makes use of wide sources of information in the consideration of state party reports and of all material submitted by the parties to an individual complaint, it is quite restrictive in making any reference to any other normative standards than the ICCPR in its concluding observations on state party reports or in the dispositive part of its Final Views under the Optional Protocol.

3

The United Nations Working Group on Minorities

LI-ANN THIO*

Introduction

Created in 1995[1] under the auspices of the Sub-Commission on the Promotion and Protection of Human Rights ('Sub-Commission'), the Working Group on Minorities ('WGM') has the unique global mandate of promoting and protecting the rights of minorities. Its primary normative framework is the non-binding Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ('Declaration'),[2] adopted by the General Assembly in 1992.[3] While designed to facilitate a 'more comprehensive handling'[4] of the Sub-Commission's mandate in protecting minorities, the WGM appreciates that progressive interpretations of non-discrimination clauses or minority-sensitive readings of human rights provide significant minority protection.[5]

As part of the broader UN human rights system, the WGM is cognisant of how the work of other human rights bodies, like the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)[6] Committee, buttresses minority protection. It has urged states

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1 Commission on Human Rights (CHR) Res. 1995/24 of 3 March 1995.

2 G.A. Res. 135, A/47/678 (1992). The Declaration was sponsored by 37 states from the West (US/Europe), Africa, Asia and Latin America: A/C3/47/L 66 (1 Dec 1992), and has been incorporated into bilateral treaties: K. Gal, 'The role of bilateral treaties in the protection of national minorities in Central and Eastern Europe' E/CN.4/Sub.2/AC.5/1998/CRP.2.

3 G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948). 4 E/CN.4/Sub.2/1994/36, para. 39.

5 G. Gilbert, 'The burgeoning minority rights jurisprudence of the European Court of Human Rights' (2002) 24 *Human Rights Quarterly* 736.

6 660 UNTS 195.

to make the Article 14 ICERD declaration, allowing individuals and groups to raise communications with the ICERD Committee.[7] The Article 27 International Covenant on Civil and Political Rights ('ICCPR')[8] jurisprudence is particularly relevant, as are socio-economic rights like the right to culture in the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[9] The WGM has urged governments to ratify these and other human rights treaties[10] and recommended that the High Commissioner of Human Rights' ('HCHR') office continues to train minority representatives in how to utilise general human rights procedures;[11] international financial institutions are encouraged to supply training on minority issues in relation to Millennium Development Goals ('MDGs')[12] related programmes.

The UN initiatives in adopting the Declaration and creating the WGM, spurred by the resurgent ethno-nationalism of the 1990s,[13] meant that minorities concerns[14] were no longer submerged within the individualist, egalitarian human rights system, as experience displaced the post-1945 orthodoxy that minorities would assimilate into national communities and individual rights would adequately secure their interests. International policy-makers accepted special measures[15] of 'more or less permanent duration',[16] together with minority-specific norms, and monitoring processes were needed for protecting minority identity and autonomy and stabilising plural societies.

The WGM's limited, threefold[17] mandate to review the promotion of the Declaration and its practical realisation, and to recommend practical

[7] E/CN.4/Sub.2/1999/21, para. 86. [8] 999 UNTS 171. [9] 993 UNTS 3.
[10] E/CN.4/Sub.2/2005/27, Recommendation 16(a). [11] *Ibid.*, Recommendation 17.
[12] *Ibid.*, para. 23(a).
[13] L. Thio, 'Resurgent nationalism and the minorities problem: the United Nations and post Cold War developments' (2000) 4 *Singapore Journal of International and Comparative Law* 300.
[14] L. Thio, 'The end of the ''Remarkable Experiment'': approaches towards minority protection in the aftermath of World War Two' and 'The submergence and gradual re-emergence of minorities issues within the UN Human Rights Regime: 1945–1989', in L. Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Leiden and Boston: Brill, 2005), pp. 99–117, 118–60.
[15] E/CN.4/Sub.2/2001/22, para. 18.
[16] WGM Commentary to the UN Minorities Declaration, E/CN.4/Sub.2/AC.5/2005/2, 21 ('Commentary'), para. 55.
[17] High Commissioner of Human Rights ('HCHR'), World Conference against Racism website, Launch of the United Nations Guide for Minorities: www.unhchr.ch/html/racism/01-minoritiesguide.html.

solutions to minority problems,[18] determines the potential for developing normative and institutional synergies with other human or minority rights bodies. Its global coverage over an estimated 10–20 per cent of the world's populations[19] has resulted in the WGM adopting a looser working definition of 'minorities' and treating a broader range of issues as minority-related, than certain regional bodies. The WGM lacks the quasi-judicial functions invested in treaty-based supervisory organs; it has no formal, systematic monitoring process and is neither an adversarial complaints chamber[20] empowered to receive and investigate complaints, nor an early-warning[21] conflict prevention mechanism. It cannot accede to requests to intercede with political leaders, for example, to repeal Myanmar's Citizenship Law depriving 1 million Rohingya of their nationality,[22] or to intervene in minority-related disputes in the way the Organization for Security and Co-Operation in Europe's ('OSCE') High Commissioner on National Minorities ('HCNM') can.[23] The WGM modestly provides 'a space' for minority participants to present 'grievances and claims',[24] in the form of informational presentations, to which governments may reply.[25] Although not a 'mechanism for processing complaints',[26] the WGM's first chairman thought it could undertake detailed examinations of situations brought to its attention and propose solutions, even if it could not adopt conclusions in specific cases or institute follow-up measures. Government observers consider that the WGM would become politicised by handling allegations,[27] and encroach upon the Commission on Human Rights ('CHR') and Sub-Commission's mandates.[28]

While the WGM's dialogical function could complement other treaty-based reporting and complaints procedures,[29] the search for implementation synergies between distinct forms of supervision is incoherent.

[18] CHR Res. 1995/24.
[19] UN Guide for Minorities ('Guide'): www.ohchr.org/english/issues/minorities/guide.htm.
[20] WGM Report, 1st Sess., E/CN.4/Sub.2/1996/2, para. 95.
[21] HCHR Report, E/CN.4/2004.75, para. 27.
[22] WGM Report, 11th Sess., E/CN.4/Sub.2/2005/27, para. 35.
[23] Guide, Pamphlet 9; NGOs suggested conferring an enlarged mediatory role on the WGM: E/CN.4/Sub.2/1996/2, para. 33.
[24] E/CN.4/Sub.2/2005/27, para. 72.
[25] WGM Report, 6th Sess., E/CN.4/Sub.2/2000/27, para. 37. [26] *Ibid.*
[27] E/CN.4/Sub.2/2001/22, para. 124.
[28] Bangladesh, China and Iran, E/CN.4/Sub.2/1996/2, para. 31.
[29] E/CN.4/Sub.2/1996/2, para. 22.

Synergistic convergences are most apt to reside in the WGM's think-tank role, in terms of the sources consulted in addressing definitional questions and norm-setting, through informational exchanges and developing research trajectories for identified priority issues. Elucidating Declaration provisions and developing policy options for handling majority–minority relations is fuelled by informational inputs derived from WGM dialogue sessions and expert working papers.

This chapter examines the lines of synergy the WGM has established with international and regional general and minority-specific human rights bodies, in relation to definitional questions and developing substantive norms. It considers how the standards, argumentative patterns, insights and working practices of other supervisory bodies have influenced or been influenced by the WGM. Notably, as it is a think-tank with a liberal access policy, disparate perspectives are expressed during WGM sessions, some of which may be isolated observations rather than consensus pronouncements. Hence, the best gauge of emerging common views concerning mainstream minority protection matters may be found in the chief outputs of the WGM. The first of these is its Commentary on the Declaration ('Commentary'). Originally a working paper[30] authored by WGM Chair Asbjørn Eide, the Commentary was subsequently discussed and revised, with a final version adopted in 2005 as a collective WGM document. While not a binding document reflecting state views, or a quasi-judicial pronouncement, it is 'indicative' of the WGM's understanding of the Declaration in the light of received comments from governments, NGOs and minority representatives.[31] The second is the UN Guide for Minorities ('Guide')[32] which contains core documents like the Declaration, Commentary and, currently, fourteen pamphlets.[33] This is designed to inform minorities about international and regional procedures relevant to protecting minority rights. While pamphlets 1–4 detail both treaty-based and UN Charter based bodies,[34] pamphlets 5–14 deal with the relevance to minority rights of the work of both

[30] Commentary, para. 21. [31] E/CN.4/Sub.2/1999/21, para. 23.

[32] www.ohchr.org/english/issues/minorities/guide.htm.

[33] Additional pamphlets for inclusion in future versions of the Guide relate to 'Minorities and national institutions for the promotion and protection of human rights', E/CN.4/Sub.2/AC.5/2005/3 and 'Minorities and the UN: Human Rights Treaty Bodies and Individual Complaints Mechanisms', E/CN.4/Sub.2/AC.5/2006/4.

[34] Guide, Pamphlets 1–4.

international (e.g. ILO, UNESCO, High Commissioner for Refugees ('HCR'), OECD's Development Assistance Committee) and regional intergovernmental organisations (e.g. Organisation of American States ('OAS'), African Human and Peoples' Rights Commission ('AHPRC'), Council of Europe ('COE'), European Union ('EU')) in terms of substantive norms and process. While noting that minorities are entitled to all general human rights, the Guide identifies the rights of 'greatest interest' to minorities, referencing the Declaration. The WGM aims to supplement the Commentary with more detailed regional guidelines, currently the subject of expert working papers.[35] In 2004, the WGM declared its intention to elaborate general comments on particular themes such as rights relating to education and land deprivation.[36]

Part 1 of this chapter examines the WGM's normative and institutional framework as a specialised UN minority protection mechanism. Parts 2 and 3 address whether there has been synergy between the WGM and other human rights bodies in relation to definitional issues and substantive understandings of minority rights respectively. Part 4 evaluates how the WGM has cultivated its global mandate and situated itself in relation to international organs with region-specific mandates. Part 5 offers conclusions.

1 UN human rights regime and the WGM

1.1 The UN and the problem of minorities

The minorities problem has human rights and security dimensions, with minority protection providing a 'constructive alternative'[37] to secessionist threats. The Secretary-General noted that the Declaration, together with the 'increasingly effective' UN human rights machinery, would 'enhance'[38] minorities' situations and state stability. As 'genocide's most frequent targets'[39], the imperative of protective measures for minorities who suffer disproportionately during civil conflicts[40] is underscored.

[35] Tom Hadden, 'Towards a Set of Regional Guidelines or Codes of Practice on the Implementation of the Declaration', E/CN.4/Sub.2/AC.5/2003/WP.1 ('Regional Guidelines').
[36] E/CN.4/Sub.2/2004/29, VII. Decisions and Recommendations, 2(*b*).
[37] Secretary-General's Report, E/CN.4/1993/85.
[38] Agenda for Peace, A.47/277-S/24111, para. 18.
[39] HCHR Report, E/CN.4/2004.75, para. 25.
[40] High Commissioner for Refugees, E/CN.4/Sub.2/2001/22, para. 31.

1.2 The WGM and the intra-state framework of the 1992 Minorities Declaration

The WGM considers 'other relevant international instruments'[41] whose standards directly or indirectly relate to minority protection, such as OSCE standards,[42] the COE's Framework Convention on National Minorities ('FCNM'),[43] European Charter for Regional or Minority Languages ('Languages Charter')[44] and the Inter-American and African human rights systems jurisprudence.

Consonant with European standards,[45] Declaration rights operate within the general human rights framework, as Article 8(2) provides; pursuant to the objective of stabilising states,[46] Article 8(4) precludes activities contrary to the territorial integrity and political independence of states. While most European instruments have clauses expressly prohibiting forced assimilation,[47] this is implicit in Article 3(2),[48] which prohibits disadvantaging a minority member for exercising or not exercising Declaration rights, to guard against state imposition of ethnic identity.[49] Integration and a 'necessary pluralism'[50] are considered integral to structuring state–minority relations.

1.3 Institutional framework and WGM modus operandi

The Declaration affirmed that the UN role in protecting minorities 'should increase',[51] while viewing minority protection primarily as a domestic responsibility, supplemented by the work of international agencies and inter-state cooperation.[52]

In 1994, it was observed that creating a WGM, to run parallel to the Working Group on Indigenous People ('WGIP'), would meet the need to 'complement' the work of the ICERD Committee with 'comparable monitoring'[53] of minority rights. The WGM serves as a think-tank and

[41] E/CN.4/Sub.2/1996/2, para. 13.
[42] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ('Copenhagen Document') 11 HRLJ [1990] 232; Geneva Concluding Documents HRLJ 12 [1991] 332; G. Pentassuglia, 'The EU and the protection of minorities: the case of Eastern Europe' (2001) 12 *European Journal of International Law* 3.
[43] ETS No. 157. [44] ETS No. 148. [45] Art. 21 FCNM. [46] Declaration preamble.
[47] E.g. Art. 3(1) FCNM; Copenhagen Document, para. 32. [48] Commentary, para. 21.
[49] Commentary, para. 54. [50] Commentary, para. 13. [51] CHR Res. 1993/42.
[52] Arts. 5, 7, 9, Declaration. [53] E/CN.4/Sub.2/1994/36, para. 39.

fount of specialist knowledge whose chief approaches towards researching minority issues consist of working papers, discussions, holding seminars, issuing interpretative comments and *ad hoc* state visits. It provides an institutional setting where minorities' issues and developments are thematically discussed and constructive solutions explored. To facilitate comparative jurisprudence, states are encouraged to submit reports on domestic practices measured against Declaration standards.[54] The WGM compiles best practices[55] and draws on the expertise of WGM members, scholars and NGOs who have, since 1995, authored some fifty thematic or group-specific papers.

The Sub-Commission selects five of its independent experts, each representing one of the five geographic regions the UN uses in apportioning seats, to compose the WGM whose initial three-year mandate[56] was made permanent in 1998.[57] It met annually for five working days, conducting public and private meetings, although Commission on Human Rights ('CHR') resolution 2005/79 has successfully sought to reduce the meeting time to three working days – the twelfth WGM session was held over four consecutive mornings.[58]

1.3.1 Broad-based consultation at dialogue sessions

The WGM is the only dedicated UN forum where government and non-government bodies can raise minorities concerns. In promoting dialogue, it shares the commitment of other regional bodies to consult broadly across the board with government representatives and civil society actors, which provides a richer informational pool and solidifies rights of minority participation. Since its inception, the access to WGM sessions has been liberally accorded to states, minority representatives, NGOs without ECOSOC consultative status[59] and scholars.[60] This parallels the concern of the FCNM Advisory Committee and the Committee of Experts of the European Charter for Regional or Minority Languages to gain further information, particularly from non-government and independent sources, in reviewing reports and during

[54] WGM Report, 4th Sess., E/CN.4/Sub.2/1997/18, para. 36.
[55] E/CN.4/Sub 2/AC 5/1998/ WP.2. [56] CHR Res. 1995/24; ECOSOC Res. 1995/31.
[57] WGM Report, 5th Sess., E/CN.4/Sub.2/1999/21, para. 1.
[58] www.ohchr.org/english/issues/minorities/group/main.htm.
[59] E/CN.4/Sub.2/1996/2, para. 15. [60] *Ibid.*, paras. 15, 19.

state visits.[61] The Inter-American Commission on Human Rights also consults broadly during investigatory visits,[62] as does the UN Independent Expert on Minority Issues.[63] Following the WGIP model, the WGM endorsed establishing a voluntary fund to enable minority representatives to attend its meetings[64] and has developed innovative relationships with NGOs to overcome resource constraints; for example, the Minority Rights Group International ('MRGI') holds workshops prior to WGM sessions to train minority representatives to participate effectively in the meetings.[65]

1.3.2 Participation of other human rights bodies

Article 9 exhorts UN bodies to help realise Declaration principles within their fields of competence; human rights treaty-monitoring bodies associated with the ICCPR[66] and the Convention on the Rights of the Child ('CRC')[67] are urged to 'give attention' to minorities situations in considering state reports, with particular emphasis on applying a gender perspective to the rights of minority children.[68] After the WGM's invitation,[69] the ICERD Committee[70] included requests for information concerning minority-related treaty rights in their reporting guidelines.[71] The CHR,[72] various human rights special rapporteurs,[73] and UNESCO[74] have referred to the Declaration, which has influenced how NGO representatives formulate

[61] E.g. Opinion on Albania's Initial State Report (12 September 2002); Second Opinion on Slovak Republic, ACFC/OP/II(2005)004, (26 May 2005), para. 7; Advisory Committee, First Activity Report covering the period from 1 June 1998 to 31 May 1999, ACFC/INF(1999)001 para. 18; Fourth Activity Report covering the period from 1 June 2002 to 31 May 2004, ACFC/INF(2004)001, para. 17.

[62] Pamphlet 5, Guide. [63] CHR Res. 2005/29, para. 6(e).

[64] GA Res. A/RES/54/162 (2000), para. 13; ECOSOC Decision 2004/278.

[65] Secretary-General's Report, A/51/536 (1996) paras. 141–5. [66] 999 UNTS 171.

[67] UN Doc. A/44/49 (1989). [68] CHR Res. 2005/79, paras. 2, 4.

[69] E/CN.4/Sub.2/2001/22, para. 158, clause 9. [70] CERD/C/70/Rev. 3.

[71] WGM Report, 2nd Sess., E/CN.4/Sub.2/1996/28, para. 112, mentioning Art. 27 ICCPR, Arts. 11, 12, 13 and 15 ICESCR, Arts. 12, 29, 30 CRC and, in relation to female minorities, the Convention for the Elimination of All Forms of Discrimination, UN Doc. A/34/46.

[72] The CHR said all Declaration rights were violated in the 1994 Rwandan genocide: E/CN.4/S-3/4, A/49/415, p. 24.

[73] E.g. the Special Rapporteur on human rights situation in former Zaire referred to violations of Arts. 2(2), 2(3), 4 and 5, Declaration: E/CN.4/1997/6, para. 35.

[74] Recommendations from a 1993 UNESCO Seminar dealing with minorities and democracy in post-totalitarian states in the former USSR territory were based on the Declaration: E/CN.4/Sub.2/1993/4, para. 6.

claims.[75] These attempts to mainstream minority concerns within general UN human rights bodies are reciprocated by the WGM's reference to the work of the 1966 Covenants, CRC and ICERD[76] oversight committees, whose representatives have participated in WGM sessions.[77] International Labour Organization ('ILO') representatives have indicated the relevance of ILO standards to minority issues[78] and groups attending WGM sessions like UNESCO have even received requests for financial assistance to protect endangered minority languages.[79]

Representatives from regional bodies like the FCNM Secretariat and the HCNM have shared their experiences regarding European standards,[80] advocating a 'three-way dialogue' between the COE, UN and minorities.[81] This creates an environment conducive to facilitating synergies in developing normative standards. From members of the Central European Initiative Working Group on Minorities ('CEIWGM'), the WGM received detailed information on domestic measures, for example Romanian measures to encourage Roma participation in decision-making.[82] There are obvious synergies, as a CEIWGM co-chairperson stated that the draft Commentary helped clarify minority protection concepts.[83] Other IGOs attending WGM meetings include the League of Arab States and Council of the Baltic Sea States.[84] By invitation, the ACHPR provided more information about its Working Group on Indigenous Peoples/Communities.[85]

The WGM seeks to learn from the practices of other bodies in implementing non-binding political instruments such as the CEI Instrument for the Protection of Minority Rights,[86] which grounds intergovernment cooperation. At its meetings, members inform the CEIWGM about measures taken to implement a discussed article, after which a comparative situations document, based on written submissions, is published.[87] From

[75] An NGO alleged Article 2 Declaration was violated where the villages and properties of Negro-African Minorities were destroyed and confiscated: Secretary-General's Report, A/49/415 (1994), para. 140.
[76] E/CN.4/Sub.2/1996/2, para. 75. [77] E/CN.4/Sub.2/1996/28, paras. 71–92.
[78] *Ibid.*, para. 94. [79] E/CN.4/Sub.2/2005/27, para. 29.
[80] E/CN.4/Sub.2/1996/28, paras. 66–70. [81] E/CN.4/Sub.2/2001/22, para. 86.
[82] E/CN.4/Sub.2/2000/27, para. 65–7. [83] *Ibid.*, para. 65. [84] Commentary, paras. 78–9.
[85] WGM Report, 9th Sess., E/CN.4/Sub.2/2003/19, para. 13; Report of the ACHPR Working Group of Experts on Indigenous Populations/Communities, E/CN.4/Sub.2/AC.5/2005/WP.3 ('African Commission Report').
[86] *Ibid.*, paras. 63–4. [87] *Ibid.*, para. 64.

these institutional exchanges, the WGM learns about the priorities of other organisations, such as devoting one of twenty-seven articles in the CEI Instrument to Roma[88] and the OSCE and COE focus on Roma, paralleling the WGM's evolution into the chief UN forum for discussing Roma issues.[89] The exchange of experiences provides models for promotional methods, such as modelling a planned global minorities' database[90] after the Centre for Documentation and Information on Minorities in Europe's web compilation of central and eastern European national laws.[91]

1.3.3 Utility and limits of the dialogue process

Dialogue sessions are integral to the WGM's 'greatest achievement'[92] in identifying major group-specific or thematic issues requiring Declaration-based constructive solutions, highlighting and sustaining interest in, for example, the Roma.[93] Participation in WGM sessions can garner international attention towards domestically obscure causes; in 1999,[94] after NGOs drew attention to the problems of Afro-American people in the Americas stemming from 400 years of plantation slavery, the WGM commissioned working papers and held regional seminars in Honduras[95] and Montreal,[96] established a special forum to study the effects of the trans-Atlantic slave trade and reparations[97] and recommended redressal measures.[98] The WGM prefers to take a back-seat role with respect to certain problems, such as those involving 'kin' states, where other regional organisations are available. Romania voiced concerned about the extra-territorial impact of Hungary's 2001 Law on Hungarians Living in Neighbouring Countries,[99] purporting to grant socio-economic benefits, not merely cultural rights, to Hungarians abroad. While mentioning that Hungary had undertaken[100] to modify the law, and that the Venice Commission and HCNM had expressed concern, the Romanian observer called for more detailed guidelines on kin state policies towards kin minorities abroad,[101] to pre-empt bilateral tensions. The WGM chairman agreed that such guidelines were necessary and 'should start in Europe', given the existing infrastructure; and suggested that the HCNM spearhead

[88] E/CN.4/Sub.2/2000/27, para. 63.
[89] *Ibid.*, para. 61.
[90] E/CN.4/Sub.2/2001/22, para. 21.
[91] *Ibid.*, para. 24.
[92] Eide, Reflections (2003).
[93] E/CN.4/Sub.2/1999/21, para. 85.
[94] *Ibid.*, para. 59.
[95] E/CN.4/Sub.2/AC.5/2002/5.
[96] E/CN.4/Sub.2/AC.5/2002/WP.2.
[97] E/CN.4/Sub.2/1999/21, para. 60.
[98] E/CN.4/Sub.2/2002/19, para. 12.
[99] E/CN.4/Sub.2/AC.5/2002/WP.5.
[100] E/CN.4/Sub.2/AC.5/2002/WP.4
[101] E/CN.4/Sub.2/2002/19, paras. 40–5.

drafting guidelines,[102] committing itself to 'follow the issue closely'.[103] Notably, kin-host state issues arise outside Europe, as where Korea expressed concern for Korean minorities in Japan who, as non-citizens, lacked welfare coverage.[104] Bilateral treaties like those between the Russian Federation and Baltic states are suggested methods for protecting the rights of Russian minorities 'abroad'.[105] In WGM discussions, the HCNM representative agreed that OSCE stability pact-related bilateral treaties were good techniques to protect territorial integrity, promote economic relations, and entrench national minorities' standards[106] consonant with international norms.

While government representatives attending dialogue sessions occasionally give brief, good-faith replies, this format precludes detailed investigation; for example, the Indian observer baldly refuted allegations that assimilationist policies affected religious minorities.[107] Furthermore, reiterated allegations of maltreatment towards, for example, Egypt's Christian Coptic minority, elicit standard responses that Copts were not minorities but part of the Egyptian nation.[108] States can refute false assertions and issue rebuttals by referring to the positive opinions of other minority bodies, as when the Montenegro observer read out the FCNM's Advisory Committee opinions on Serbia and Montenegro[109] regarding a draft law allegedly restricting the future recognition of minorities. The Greek observer refuted concerns about the system of appointed, not elected muftis bearing judicial functions in Thrace, as the European Court of Human Rights had not contested this.[110] Regional standards are thus regularly invoked before the WGM as legitimating factors.

Constructive dialogue is hampered by poor attendance rates of state observers, peaking at seventy in 1995 and dwindling to about forty or fifty per session. The perception that the WGM is primarily 'an important forum for dialogue with NGOs' is reflected in the CHR's urging that it focus on 'interactive dialogue' with NGOs during its amended three-day annual session.[111] While the WGM provides some unsystematic

[102] *Ibid.*, paras. 43, 45. [103] *Ibid.*, para. 45. [104] E/CN.4/Sub.2/1996/2, para. 48.
[105] E/CN.4/Sub.2/1996/28, paras. 59–61; Commentary, para. 77 notes that minority provisions in such treaties should accord with international and regional standards and contain dispute settlement provisions.
[106] *Ibid.*, para. 62. [107] E/CN.4/Sub.2/2000/27, para. 43.
[108] E/CN.4/Sub.2/2005/27, para. 38. [109] E/CN.4/Sub.2/2004/29, paras. 27, 37.
[110] E/CN.4/Sub.2/2005/27, para. 40 [111] CHR Res. 2005/79, para. 9.

monitoring by highlighting certain situations, this is diffused and not comprehensive, as states like France do not recognise the existence of minorities on their territory.

1.3.4 Establishing the parameters and nature of discourse

The WGM requires that information be presented objectively, not in 'an accusatory manner';[112] in conciliatory fashion, states are urged to consider legitimate minority aspirations within the state framework, while minorities are encouraged to respect others' rights.[113] This reflects the WGM's limited institutional mandate and realistic apprehension of its role within an international organisation beholden to states. The WGM shares the reticence of OSCE bodies in discussing minority rights as collective rights.[114]

1.3.5 Visits

Unlike the practice of bodies like the FCNM Advisory Committee[115] which visits states as part of the process of evaluating state reports, WGM visits are *ad hoc*, contingent on funding and government invitation.[116] By contrast, the HCNM may visit OSCE states at will, pursuant to its conflict prevention mandate.

The WGM has visited Mauritius (2001)[117] and Finland (2004),[118] prompting Egypt to caution that 'country visits should not become monitoring activities'.[119] Visits are meant to further general research into particular situations, to 'draw lessons'[120] from good practices, allowing WGM members to appreciate 'grassroots' social realities. The Finnish government considered the visit 'part of its constructive dialogue with international mechanisms'.[121]

WGM members consult widely during these visits, meeting both government and non-government bodies, such as minority representatives, NGOs, journalists and political party leaders, and thus facilitating rounded perspectives. WGM reports on these visits highlight problem

[112] E/CN.4/Sub.2/1996/2, para. 34. [113] E/CN.4/Sub.2/1994SRS11, para. 29.
[114] Guide, Pamphlet 9, p. 4.
[115] FCNM Advisory Committee, Second Activity Report covering the period from 1 June 1999 to 31 October 2000, para. 9.
[116] E/CN.4/Sub.2/1997/18, para. 108(b). [117] E/CN.4/Sub.2/AC.5/2002/2.
[118] E/CN.4/Sub.2/2003/19, para. 86. [119] E/CN.4/Sub.2/2002/19, para. 70.
[120] *Ibid.*, para. 2. [121] E/CN.4/Sub.2/2004/29, para. 57.

areas and make recommendations, such as warning the future local government of Mauritius' Rodrigues Island in implementing autonomy plans to 'exercise caution in promoting tourism' and other development projects to preserve the island's ecosystem and cultural identity.[122] The WGM hears first-hand the dissatisfaction of groups like the Sami, with land rights issues,[123] whose request that Finland ratify the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries had not come to fruition, despite the government's appointment of two rapporteurs. The WGM recommended ratifying the Convention without delay.[124]

2 Synergies regarding questions of definition?

2.1 The declaration and 'national minorities'

The WGM, to avoid the 'risks arising from a rigid legal definition',[125] adopts a pragmatic approach towards definitional issues. This is sound, as attempts by UN bodies to produce an authoritative formulation since 1947 have failed, as did efforts in relation to the FCNM. States remain divided over needing a 'universally acceptable definition' and considering such efforts 'extremely time consuming' and 'counter-productive'.[126]

Consonant with the approach of the Human Rights Committee ('HRC') to Article 27 ICCPR,[127] the WGM considers that the existence of a minority[128] is not subject to unilateral state recognition, but is a question of fact, to be determined by reference to objective and subjective elements, such as groups possessing distinct cultural traits, being economically and politically non-dominant, as well as self-identification. Thus, the WGM listens to groups claiming to be minorities but lacking official recognition,[129] such as Greece's 'Macedonian minority'.[130]

The Declaration refers to 'national minorities' but does not define the term; there is no clear consensus as to whether 'national' connotes citizenship or a broader concept of ethnicity; its inclusion in the title sparked

[122] E/CN.4/Sub.2/AC.5/2002/2, paras. 50–1.
[123] WGM Report, Visit to Finland, E/CN.4/Sub.2/2004/29/Add.1, para. 37.
[124] *Ibid.*, para. 45. [125] E/CN.4/Sub.2/1996/28, para. 102.
[126] E/CN.4/Sub.2/1996/2, paras. 76–7. [127] HRC, General Comment 23 (1994).
[128] E/CN.4/Sub.2/1997/18, para. 46. [129] E/CN.4/Sub.2/2001/22, para. 144.
[130] E/CN.4/Sub.2/2004/29, paras. 33, 38.

praise from some states as a progressive, realistic inclusion, and disquiet from others.[131] In seeking elucidation from other bodies, the WGM discovered in the ICERD context that 'ethnic' and 'national' origin in Article 1 were not formally interpreted, but in practice 'ethnic' referred to a person's origin while 'national' connoted birthplace,[132] although other jurisdictions have construed 'ethnic' in a broader cultural sense.[133]

The Commentary notes the Declaration has a 'much wider scope'[134] and is not confined to the understandings of certain European instruments that 'national' refers only to state citizens, a point of 'some controversy'.[135] It is at least as broad as Article 27 ICCPR, which relates to ethnic, religious or cultural minorities.[136] Further, reading Article 27 with Article 2 ICCPR, states are obliged to protect everyone within the territory, including non-citizens.[137] The Commentary states there is no need to define 'national minority' as hardly any non-national minority groups are not also an ethnic, religious or linguistic minority.[138]

Thus, 'national minorities' in the Declaration does not mean nationality. This approach has attracted dissent,[139] and some consider it 'easier to grant additional rights' to minorities who are citizens.[140] Nevertheless, a greater flexibility is evident in the practice of European bodies like the FCNM Advisory Committee, which 'increasingly urges States not to limit their minority protection systems to nationals',[141] even where states define 'national minorities' in declarations or declare that their countries have no minorities entitled to FCNM protection.[142] For example, Albania was asked to reconsider its non-recognition of Egyptians as national minorities.[143] WGM members, in surveying European practice, have noted that although Article 14 ECHR does not define 'national minorities', this

[131] E/CN.4/Sub.2/2000/27, para. 24. [132] E/CN.4/Sub.2/1996/28, para. 8.

[133] *Mandla v Dowell Lee* [1983] 2 AC 548 (HL), construing 'ethnic' under Race Relations Act 1976, s. 3.

[134] Commentary, para. 9. [135] Commentary, paras. 6–8.

[136] In explaining why the Declaration does not define 'minorities', the CHR working group considered the beneficiary class would be clarified by the qualifying adjectives when concretely applied: E/CN.4/1991/53, para. 9

[137] Commentary, para. 9 [138] Commentary, para. 8.

[139] Egypt, WGM, 5th Sess., E/CN.4/Sub.2/1999/21, para. 28. [140] Austria, *ibid.*, para. 37.

[141] K. Henrard, 'Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union' (2005) 7 *KHRP Legal Review* 98.

[142] Guide, Pamphlet 8.

[143] Opinion on Albania's Initial State Report, 12 September 2002 at www.mfa.gov.al/english/pdf_files/opinioni_anglisht.pdf.

has in practice included non-traditional groups like the Roma,[144] who have neither a 'kin state' nor historical attachment to land.

2.2 Contentious issues and flexible approaches in identifying minority groups

The contentious nature of definitional questions is evident in the response to Chernichenko's proffered working definition. 'Minority' was defined as 'a group of persons in principle permanently resident in the territory of a state', 'constituting less than half of its population', bearing distinct 'national or ethnic, religious and linguistic ... characteristics', displaying 'a will to preserve the existence and identity of the group'.[145] The definition expressly excluded indigenous populations and 'peoples' entitled to the right to self-determination. Together with the proposed criterion of permanent residency, which excluded vulnerable groups like migrant workers, this definition was therefore controversial. Furthermore, it posed difficulties where the Declaration is viewed from a 'universal perspective',[146] as the criterion of numerical inferiority[147] appears Euro-centric in not accurately capturing minority situations in many African[148] and Asia-Pacific states,[149] where a large number of groups coexist in a heterogeneous society, without an outright majority, as in the case of Nigeria's 250–600 minority communities.[150]

The WGM has in practice grappled with groups not traditionally considered minorities, such as 'new minorities', which lack an historical attachment to the land and have a 'kin' state they were separated from through frontier revisions resulting from European peace treaties or colonialism.[151] After its first visit to Finland, the WGM highlighted the vulnerabilities of the Russian-speaking 'Ingrians'[152] of Finnish origin and the 4,000-strong Somali community[153] to media stereotyping and public sector discrimination.

[144] E/CN.4/Sub.2/2000/27, para. 69. [145] E/CN.4/Sub.2/AC.5/1997/WP.1.
[146] E/CN.4/Sub.2/1997/18, para. 29.
[147] E/CN.4/Sub.2/1993/34, referred to by El Salvador and Nigeria; E/CN.4/Sub.2/1996/2, para. 79.
[148] Commentary, para. 12. [149] E/CN.4/Sub.2/1997/18, para. 43.
[150] Regional Guidelines (2003), para. 9. [151] E/CN.4/Sub.2/1999/21, para. 19.
[152] *Ibid.*, para. 30. [153] *Ibid.*, para. 17.

States differ on whether to include groups like migrant workers[154] and indigenous peoples[155] within the 'minorities' category. While the WGM previously suggested that the concerns of certain groups like refugees, asylum-seekers, migrant workers, aliens and children were better examined by other organisations applying a human rights framework,[156] such as the CRC Committee handling 'stateless' Haitian children,[157] it has not been dogmatic about this. An increasingly flexible, open-ended approach towards the definitional issue is evident, consonant with the observation that while minorities after the First World War were primarily defined by substantive criteria like language and religion, subjective self-identification was the chief factor in an age of 'ethno-genesis'.[158] The WGM does not insist, as some Europeans states do, upon citizenship as a prerequisite to recognising minority status. The Commentary considers that citizenship should not be a 'distinguishing criterion' presumptively excluding a group from the Declaration's ambit, as other relevant factors distinguish 'between the rights that can be demanded by different minorities'.[159] In 2005, the WGM recommended that governments protect the rights of all minority persons within their territory 'irrespective of citizenship'.[160]

The WGM appreciates that minority groups are not homogenous with uniform needs, recognising new candidates as minorities, like the Americas' Afro-descendants, given their non-dominant status and poverty.[161] Several points are noteworthy. First is the WGM's willingness to consider the situation of groups not typically considered minorities. Over state objections that the WGM should not handle refugee-related issues, such as the Uzbeks of Kyrgyzstan,[162] where the HCR is involved, the WGM considered the problems of stateless minorities and related refugee situations, as minorities such as the 20,000 Bhutanese living outside camps in Nepal and India[163] are susceptible to forced displacement.[164] The Guide expressly recognises the link between minorities and refugees, given minority vulnerability during inter-ethnic conflict.[165] Clearly,

[154] Cuba, Nicaragua and Nigeria, E/CN.4/Sub.2/1996/2, para. 77.
[155] While Nigeria supported this, the Swiss and Austrian observers wanted to maintain a distinction between these groups: *ibid.*, para. 78.
[156] E/CN.4/Sub.2/1996/2, para. 36. [157] E/CN.4/Sub.2/2001/22, para. 116.
[158] E/CN.4/Sub.2/2000/27, para. 31. [159] Commentary, para. 10.
[160] E/CN.4/Sub.2/2005/27, para. 16(d).
[161] All for Reparations and Emancipation, E/CN.4/Sub.2/2002/19, para. 35.
[162] E/CN.4/Sub.2/2005/27, para. 43. [163] E/CN.4/Sub.2/1997/18, para. 96.
[164] E/CN.4/Sub.2/1996/2, para. 53. [165] Guide, Pamphlet 12.

groups like the Roma, a regular WGM agenda item, are accepted as minorities.[166] The ICERD committee and HRC[167] have addressed Roma issues in reviewing reports,[168] with the former adopting a General Recommendation concerning discrimination against Roma.[169] Working papers on Roma in the Americas[170] have been discussed before the Sub-Commission[171] and WGM. The WGM's prioritisation of the needs of vulnerable groups like the Roma[172] is shared by European bodies like the OSCE, EU and FCNM Advisory Committee,[173] demonstrating a synergy in terms of focus and institutional cooperation. The WGM in 2001 urged the OSCE and COE to intensify efforts to prevent discrimination against Roma persons and to ensure that they enjoyed language and educational rights.[174] In 2004, it recommended holding a joint seminar with the COE on Roma and inviting Roma representatives from non-European countries.

Secondly, the issue of whether a distinction should be drawn between 'new' or immigrant minorities and 'old' or historical, settled minorities[175] has received less attention in the European context, where the former are generally excluded from protection under the FCNM and Languages Charter.[176] In contrast, the Commentary declares the 'best approach'[177] is to jettison this dichotomous thinking in favour of a more contextually differentiated rights approach, where the strength of rights depends on the type of minority involved. While the Declaration does not expressly endorse this approach, its Commentary acknowledges that the needs of the different categories of minorities can be considered.[178] For example,

[166] E/CN.4/Sub.2/2000/27, para. 61. [167] Albania, CCPR/C/SR.2230 (25 Oct 2004).
[168] CERD/C/304/Add.85 (Romania, 12 April 2001).
[169] ICERD Committee, General Recommendation 27, UN Doc. A/55/18, annex V at 154 (2000).
[170] E/CN.4/Sub.2/AC.5/2003/WP.17.
[171] S. Y. Yeung, 'The human rights problems and protections of the Roma', E/CN.4/Sub.2/2000/28.
[172] K. Henrard, 'The building blocks for an emerging regime for the protection of a controversial case of cultural diversity: the Roma' (2004) 10 *International Journal on Minority and Group Rights* 183.
[173] K. Henrard, 'An ever increasing synergy towards a stronger level of minority protection between minority specific and non specific instruments' (2003/4) 3 *European Yearbook on National Minorities* 104; e.g. *Report on the Situation of Roma and Sinti in the OSCE Area* (10 March 2000); 1999 EU Guiding Principles for Improving the Situation of Roma.
[174] E/CN.4/Sub.2/2001/22, Recommendation 6.
[175] E/CN.4/Sub.2/1996/2 1st Sess. (1995), para. 81.
[176] Regional Guidelines 2003, para. 32. [177] Commentary, para. 11.
[178] Commentary, para. 7.

the Commentary's approach towards linguistic rights appears consonant with European regional standards which are 'developed at greater length' in the Languages Charter[179] and the 1996 Hague Recommendations on the Education Rights of Ethnic Minorities ('Hague Recommendations').[180] It identifies various factors influencing why maximal state resources are warranted to preserve linguistic identity, particularly in relation to territorial languages traditionally spoken and broadly utilised in a region.[181] Where a linguistic group is dispersed or is a new minority, there is a greater need to learn the language of the surrounding environment or country more fully at an earlier stage.[182] It noted that the Languages Charter did not cover migrant languages, but that migrants could set up private schools. Further, while religious minorities may only enjoy special rights relating to religious profession, at the apex of the scale, national minorities would have the strongest rights oriented towards culture, and the preservation and development of a 'national identity'.[183]

The Commentary suggests that minorities established for a 'long time' in the territory may have 'stronger rights' than the recently arrived and that the territorially compact, as opposed to dispersed, may 'be entitled to some kind of autonomy'.[184] The presumption is that 'old' minorities (indigenous peoples, national minorities) had stronger entitlements than 'new'[185] minorities (refugees, recent immigrants, migrant workers),[186] although the latter, not being a universally accepted term, are often excluded from minority protection.[187] A descriptive rather than definitive approach towards identifying minorities was supported, as the concept was evolving.[188]

2.3 Groups: peoples, indigenous groups and minorities

There is an overlap between the rights of groups like indigenous peoples and minorities, a distinction the UN respected in establishing separate working groups to promote the different categories of rights. To clarify their agenda[189] and maintain a distinct mandate[190] between the WGM and WGIP, Erica-Irene Daes, WGIP Chair, advised group

[179] ETS No. 148. [180] Commentary, para. 62. [181] Commentary, para. 61.
[182] Commentary, para. 63. [183] Commentary, para. 6. [184] Commentary, para. 10.
[185] Commentary, para. 11. [186] Bengoa, E/CN.4/Sub.2/2000/27, para. 32.
[187] E/CN.4/Sub.2/2003/19, para. 42. [188] E/CN.4/Sub.2/2000/27, para. 34.
[189] E/CN.4/Sub.2/1994/SR.8, para. 13. [190] E/CN.4/Sub.2/1993/34, para. 39.

representatives that the WGIP only dealt with subjects related to indigenous peoples and they should attend the WGM if their concerns related to minorities.[191]

The inclusive practice of the HRC regarding Article 27 ICCPR and of the FCNM Advisory Committee[192] in allowing indigenous peoples to invoke minority protection provisions if they wished, without detracting from their indigenous status (which is associated with more extensive group rights) was endorsed by the WGM Chair, in rejecting a working definition[193] which excluded indigenous peoples from the category of minorities.[194] During the 2004 WGM session, there was general agreement that indigenous peoples and minorities faced 'common concerns' such as gaining recognition, protection against forced assimilation and control over decisions affecting them.[195] The Commentary explicitly states that, while a distinction is drawn between minorities and indigenous peoples within the UN and OAS, since the Declaration does not 'properly address' the 'particular concerns' of indigenous groups, their individual members were 'fully entitled' to claim minority rights, as was done repeatedly under Article 27 ICCPR,[196] as this is one of the few available relevant legal norms.[197] The HRC expansively construed the economic dimension of 'culture' in respect of claims brought by individual members on behalf of themselves or the entire group,[198] to include natural resource management, even if state interests trump minority concerns.[199]

Eide and Daes authored a paper in 2000 which adopted a purposive, needs-based approach to distinguish minorities from indigenous peoples,[200] based on realistic aspirations to preserve group identity. This facilitates 'focus on the appropriate rights required for different kinds of groups'.[201] While minority rights are individual, indigenous groups are distinguished

[191] UNPO Report on the fifteenth session of the Working Group on Indigenous Populations, 31 July 1997 at www.unpo.org/article.php?id=209.
[192] Opinion on Norway, 12 September 2002, ACFC/INF/OP/I(2003)003, para. 19.
[193] E/CN.4/Sub.2/AC.5/1996/WP.1. [194] E/CN.4/Sub.2/1997/18, para. 102.
[195] E/CN.4/Sub.2/2004/29, para. 55. [196] Commentary, paras. 16–17.
[197] E/CN.4/Sub.2/1996/28, para. 102. [198] Commentary, para. 18.
[199] E.g. *Jonassen v Norway*, Communication No. 942/2000.
[200] Eide and Daes, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples', E/CN.4/Sub.2/2000/10.
[201] E/CN.4/Sub.2/1996/2, para. 88.

by their 'primarily collective'[202] right to internal self-determination[203] at international law, encompassing self-government and control over traditional lands,[204] transcending the Declaration's scope.[205] Article 23 of the Draft Declaration on Indigenous Rights[206] represents the 'highest possible level of minority rights', including 'education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions'.[207]

The WGM has demonstrated sensitivity to regional situations by holding regional seminars in Asia, consulting experts about minority situations[208] and considering a report by the ACHPR Working Group of Experts on Indigenous Populations/Communities.[209] While the African Charter on Human and Peoples Rights has no minority rights, the ACHPR has been flexible in handling peoples' rights complaints, suggesting some recognition of ethnic group rights, fortified by its establishment of a Working Group on Indigenous Populations to study the concepts of minorities and indigenous groups. The Report considered that the term 'indigenous peoples' more accurately captured 'the real situation' of African groups' concerns.[210] Reference was made to Eide and Daes' paper, in which aboriginality, territoriality and collective identity chiefly described indigenous groups, distinguishing the use of 'indigenous', which was a 'sensitive issue', since 'all Africans are indigenous to Africa'; 'indigenous' was not necessarily allied to the prior habitation of an area, given migratory patterns,[211] but was deployed as the 'modern analytical form of the concept' to draw attention to discrimination suffered by groups like the Masai and Tuareg, who sought both protection against discrimination and recognition as a people, cultural protection and land rights. Given the nature of such claims, many groups, ranging from hunter-gatherers and pastoralists to small-scale farmers, 'feel that the indigenous human rights regime' is a 'more relevant platform' than the

[202] Eide, WGM Report, 6th Sess., E/CN.4/Sub.2/2000/27, para. 29.
[203] Eide and Daes, paras. 43, 49. [204] E/CN.4/Sub.2/2001/22 para. 67.
[205] Commentary, para. 16. [206] E/CN.4/Sub 2/1994/2/Add.1.
[207] E/CN.4/Sub 2/1990/46, paras. 22–23.
[208] S. Slimane, 'Peoples, rights in Africa', E/CN.4/Sub.2/AC.5/2001/WP.2.
[209] E/CN.4/Sub.2/AC.5/2005/WP.3. [210] African Commission Report, 62–3.
[211] Association of World Citizens, WGM Report, 6th Sess., E/CN.4/Sub.2/2000/27, para. 58.

minority rights arena[212] for addressing their political subordination and economic underdevelopment.[213] The African Working Group has settled for 'a socio-psychological description' of indigenous people, following the UN self-definition approach.[214]

Drawing from regional practices, the Guide notes in relation to peoples' rights in Articles 19–22 of the African Charter that 'peoples' were undefined and could not be automatically equated with 'minorities'.[215] However, the Commentary recognises that it remains possible for persons belonging to national/ethnic groups to legitimately make claims, in different contexts, to both peoples' and minority rights.[216]

3 Synergies in standard-setting

Aside from training manuals and pocket translations,[217] the WGM has promoted understanding of Declaration standards through its Commentary. There is now an abundance of country-based studies[218] and reports from regional conferences and seminars[219] which contextualise minorities' situations, informing the development of regional guidelines to supplement the Commentary by offering more detailed, practical implementation measures, informed by factors like each community's size, distribution and length of settlement.[220] A working paper amplified the 'continuum of possible measures' between separationist and integrationist models[221] available to states in implementing territorial or functional autonomy.

Priority matters such as development-related[222] issues like land tenure and security, internal displacement, refugees[223] and the concerns of hunters, nomads and pastoralists, etc. receive primary attention in

[212] African Commission Report, 64. [213] *Ibid.*, 57. [214] *Ibid.*, 5. [215] Guide, Pamphlet 6.
[216] Commentary, para. 15. [217] E/CN.4/Sub.2/1999/21, paras. 74–8.
[218] E.g. V. Pholsena, 'Inclusion of minorities in public life in Laos, Thailand and Vietnam', E/CN.4/Sub.2/AC.5/2003/WP.11.
[219] Report from the Conference on the Rights of Minorities of African Descent in the Americas, E/CN.4/Sub.2/AC.5/2002/WP.3; 'Multiculturalism in Africa', co-proposed by the WGIP and WGM: E/CN.4/Sub.2/AC.5/2000/WP.3 (focus on effective participation and development issues); Cultural Diversity and Development in South-East Asia, E/CN.4/Sub.2/AC.5/2003/WP.14.
[220] Regional Guidelines (2003), para. 38. [221] *Ibid.*, para. 4.
[222] The WGM decided to focus on various themes including minorities and development: E/CN.4/Sub.2/2004/29, Recommendation 2(a).
[223] E/CN.4/Sub.2/2004/29, paras. 6–22; E/CN.4/Sub.2/2005/27, 13–36.

dialogue sessions and are the impetus for exploratory working papers relating to the Roma,[224] Afro-descendants in South America,[225] and regional issues in Asia, Europe and Africa.[226]

3.1 Developing minority declaration standards

Despite being the UN's most comprehensive minority rights document, building upon the International Bill of Human Rights,[227] the Declaration is 'minimalist',[228] supplementing existing universal human rights;[229] like most European instruments, it is oriented towards individual rather than collective rights, which indigenous peoples[230] may claim, while recognising the communal dimension of group existence.[231]

Unlike the negative formulation of Article 27 ICCPR, which 'inspired' but did not restrict the Declaration,[232] Article 2(1) positively declares a minority's right to enjoy their culture, religion and language without discrimination,[233] while Article 1(1) requires states to 'encourage conditions' for promoting minority identities, including marshalling state resources[234] to promote substantive equality through 'appropriate measures'[235] in education, broadcasting, participatory and language rights. Article 2(1) obliges states to ensure that private actors do not impair minority rights,[236] as where multinational fishing corporations threaten the livelihood of Asian and African minority small-scale fisher people.[237]

When allegations of Declaration violations are made at WGM sessions, or linkages are drawn between it and other human rights standards or the work of bodies like the ICERD Committee,[238] this hints at possible clarifications of what Declaration standards entail. However, the WGM does not conclusively pronounce on such allegations, such as breaching

[224] J. Bernal, 'The Rom in the Americas', E/CN.4/Sub.2/AC.5/2003/WP.17.
[225] A. Chala, 'People of African Descent in South America', E/CN.4/Sub.2/AC.5/2003/WP.18.
[226] E/CN.4/Sub.2/2004/29, paras. 23–33. [227] Commentary, para. 4.
[228] States may have practices exceeding these minimal standards, such as the Austrian constitutional advisory ethnic councils: E/CN.4/Sub.2/1996/2, para. 40.
[229] Commentary, para. 81. [230] Commentary, para. 15. [231] Art. 1(1), Declaration.
[232] Declaration preamble, confirmed in E/CN.4/Sub.2/AC5/2000/WP 1, II.
[233] Art. 2(1), Declaration; Commentary, para. 33. [234] Art. 4(2), Commentary, para. 56.
[235] Art. 4(3), Declaration. [236] E/CN.4/Sub.2/2001/22, para. 18.
[237] World Forum of Fisher Peoples, WGM Report, 8th Sess., E/CN.4/Sub.2/2002/19, para. 19.
[238] E/CN.4/Sub.2/2000/27, paras. 96–9.

Article 4(5) by denying the Ijaw in Nigeria access to clean waters and roads,[239] making it difficult to locate consensus on the issue. However, by identifying developments as positive ones, like the Slovak-Hungary treaty relating to minority culture,[240] the WGM develops benchmarks for assessing whether Declaration provisions are successfully realised.

3.2 Engaging with regional minority regimes and standard-setting synergies

The WGM seeks to learn from the experiences of other relevant bodies. For example, the HCNM office director provided information on various policy guidelines authored by experts, in accordance with international and regional standards,[241] at the HCNM's request: these included the Lund Recommendations on the Effective Participation of National Minorities in Public Life, the Oslo Recommendations on the Linguistic Rights of National Minorities minority languages and the Hague Recommendations. The 'Warsaw Guidelines'[242] provided information on enhancing minority representation. Regarding minority rights to participate in law enforcement decisions, a working paper referenced the 2006 Recommendations for Policing in Multi-Ethnic Societies developed by the HCNM.[243] The WGM considered the Oslo Recommendations 'useful points of reference' for linguistic minority issues.[244]

Clearly, substantive two-directional synergies between the WGM and other regional bodies exist, such as the ACHPR, whose Vice President stated at a WGM session that the WGM and WGIP could provide guidance on 'difficult and sensitive' minorities' issues, bearing in mind the constitutional discourse focused on constituting multi-ethnic political institutions[245] to protect the 'unitary' state against 'ethnic divisions'.[246] The ACHPR, in its resolution adopting the Report of its Working Group on Indigenous Populations/Communities,[247] recognised the relevance of

[239] E/CN.4/2000/27, para. 48. [240] E/CN.4/Sub.2/2001/22, para. 52.
[241] John Packer, WGM Report, 7th Sess., E/CN.4/Sub.2/2001/22, para. 84. [242] *Ibid.*, para. 85.
[243] T. Hadden, 'Integration with diversity in security, policing and criminal justice', E/CN.4/Sub.2/AC.5/2006/WP.1.
[244] E/ CN.4/Sub.2/1999/21, para. 80.
[245] Rezag-Bara, WGM Report, 7th Sess., E/CN.4/Sub.2/2001/22 , para. 80.
[246] African Commission Report, 68. [247] E/CN.4/Sub.2/AC.5/2005/WP.3, Annex I.

standards in the Declaration, ILO Convention No. 169, the ICCPR and the CRC in addressing African group problems.

Even where European standards are not applicable, these are commonly invoked in discussing the substance of minority provisions. For example, the Commentary refers to both non-minority-specific UN human rights and European standards to fortify its views. The Article 1 right to identity indicated 'a clear trend' towards protecting cultural diversity, evident in other UN treaties and regional instruments like the FCNM and OSCE standards embodied in the Copenhagen Conference on the Human Dimension (1990) and 1991 Geneva Experts Meeting on National Minorities ('Geneva Meeting').[248] The Commentary linked Article 1 to the state obligation to enact legislative measures to prevent ethnic hatred, consonant with obligations under Article 4 ICERD and Article 20 ICCPR.[249] In relation to classic minority rights relating to language and education, there are normative synergies. In 1997, the Hague Recommendations[250] were presented as a working paper[251] and commented upon, after which the WGM decided to transmit them to governments, IGOs and NGOs for further comment. These comments, together with an analytical review of the Recommendations, were to be incorporated into another working paper, designed to promote their universal applicability.[252]

3.3 Exploring minority standards

More exacting minority standards are identified during discussions; for example, the Declaration rights to education are not as extensive as European provisions like Article 13 FCNM, recognising the right of minorities to manage their private educational institutions.[253] Exploratory working papers offer progressive interpretations of Declaration standards and expand on the substantive content of rights such as cultural rights,[254] deepening knowledge of minority situations. Two noteworthy

[248] E/CN.4/Sub.2/AC.2005/2. [249] E/CN.4/Sub.2/AC.2005/2, para. 32.
[250] E/CN.4/Sub.2/AC.5/1997.WP.3. [251] E/CN.4/Sub.2/1997/18, 3rd Sess., para. 51.
[252] E/CN.4/Sub.2/1997/18, 3rd Sess., para. 111.
[253] G. Siemienski, 'Education rights of minorities: the Hague Recommendations', E/CN.4/Sub 2/AC 5/1997/WP.3, paras. 8–10.
[254] Schulte-Tenckhoff, 'Right of persons belonging to minorities to enjoy their own culture', E/CN.4/Sub.2/AC.5/1997/WP.5.

topics relate to the political and economic dimensions of minority group identity and existence.

3.3.1 Effective participation in the governance of states

3.3.1.1 National decision-making Article 2(2) and (3) of the Declaration recognise the rights of minority persons to participate effectively in the political and socio-economic dimensions of public life and national/regional decision-making. Effective participation has emerged as a priority focus in the WGM and other regional bodies,[255] and is designed to sustain 'an integrated but pluralist society'.[256]

The Declaration right is sparsely detailed; to identify its minimal content,[257] the Commentary draws on the interpretative understandings of other bodies, including the Lund Recommendations,[258] which distinguish between participation in national decision-making and forms of autonomy or self-government. Following Article 1 ICERD, the Commentary states that 'public life' must be broadly understood to encompass not only religious, economic and social life but the political dimension, involving electoral rights and holding public office. In discussing 'participation', the Commentary states that this relates to national and regional/local decisions having a 'particular impact' on minorities.[259] The Commentary referenced existing European standards like Article 15 FCNM and the modalities elaborated at the 1991 Geneva Meeting,[260] including advisory and decision-making bodies, assemblies for national minority affairs, decentralisation, territorial autonomy and non-spatial forms of administrative autonomy.[261] Thus, the Commentary took note of high watermark regional standards. Sustained interest in this topic is evident in the extensive canvassing of issues of autonomy and integration in working papers, particularly during the seventh WGM session,[262] and regional thematic seminars as a way of formulating concrete proposals.[263]

[255] A. Verstichel, 'Recent developments in the UN HRC's approach to minorities, with a focus on effective participation' (2005) 12 *International Journal on Minority and Group Rights* 25.
[256] Commentary, para. 35. [257] Commentary, paras. 42–50.
[258] Commentary, para. 41; E/CN.4/Sub.2/AC.5/2001/WP.7; E/ CN.4/Sub.2/1999/21, paras. 81–8.
[259] Commentary, para. 38. [260] Commentary, para. 39. [261] Commentary, para. 39.
[262] No fewer than twelve working papers related to this topic: E/CN.4/Sub.2/2001/22.
[263] E/CN.4/Sub.2/1999/21, para. 30.

Working papers[264] have also indicated when the right is thwarted in specific contexts, for example, the non-representation of Iraq's Assyrian minority.[265] The WGM adopts an hortatory approach in compiling a best practices list, for example, vindicating Article 2(2) through the high percentage of national minorities in the Macedonian army.[266]

3.3.1.2 Self-determination and autonomy Argumentation patterns reveal some synergy of thinking between the WGM and other minority bodies regarding the scope of the right of self-determination, associated with state dismemberment fears.[267] There is no Declaration provision on self-determination[268] or autonomy, as a proposed clause allowing minorities to manage their internal affairs was rejected.[269] Indeed, the Commentary confirms that the Declaration does not provide group rights to 'external' self-determination,[270] in the form of statehood claims, discussion of which strays beyond the WGM's competence, given its agnosticism towards the scope of this international right. An indigenous group representative considered that the right, with its 'increasingly indigenous content',[271] was more appropriately considered before the CHR and Working Group on the draft declaration.[272]

However, the WGM and other regional bodies like the ACHPR[273] accept that minority protection[274] could be implemented through 'internal' self-determination which was broadly 'the right of a people to be self-governing through a democratic process'.[275] This could be effectuated by 'autonomy' or enhanced participation in governance,[276] although discussions of these schemes raise state fears of subversion of state integrity,[277] or concerns it may be invoked to support separatist claims, as

[264] F. de Varennes, 'Towards effective political participation and representation of minorities', E/CN.4/Sub.2/AC.5/1998/WP.4.
[265] E/CN.4/Sub.2/1997/18, para. 61. [266] CERD/C/270/Add.2.
[267] Eide, WGM, 5th Sess., E/CN.4/Sub.2/1999/21, para. 20.
[268] Commentary, paras. 15, 19. [269] E/CN.4/1992/48, para. 27. [270] Commentary, para. 19.
[271] T. Potier, 'Autonomy in the 21st Century: through theoretical binoculars', E/CN.4/AC.5/2001/CRP.1.
[272] E/CN.4/Sub.2/2004/29, para. 43.
[273] *Katanagese Peoples' Congress v Zaire*, Case No. 75/92, Eighth Annual Activity Report (1994–5) (ACHPR/RPT/8th).
[274] E/CN.4/Sub.2/2004/29, para. 43. [275] E/CN.4/Sub.2/2001/22, para. 78.
[276] E/CN.4/Sub.2/1999/21, paras. 18, 20.
[277] Russia has rejected awarding territorial autonomy to national minorities for fear of sparking secessionist movements: V. Kartashkin, 'Study on the use of autonomy approaches in the

the Chinese observer noted regarding Xinjiang and Eastern Turkestan;[278] thus discussions on autonomy rights are often accompanied by admonitions against making 'unrealistic proposals',[279] given the political sensitivities involved.

The WGM considers that for some minorities, resort to autonomous arrangements relating to religious, linguistic or cultural matters may best secure their effective participation and protection of group identity,[280] especially in central and eastern Europe, where multiple ethno-communities co-exist. However, the consensus is that autonomy is not a legal right[281] but a 'good practice' which should operate in tandem with 'positive measures of integration'.[282] The WGM endorses the African perspective that accommodative solutions should be multi-ethnic in orientation, based on shared identities in promoting democracy over ethnocracy.[283] This is closely allied to the concept of autonomy, which may be territorial or cultural, as a means of accommodating diversity and multiple identities. Working papers have explored this, not only generally,[284] but also through detailed country studies relating to the Aaland Islands, Northern Ireland and Sri Lanka.[285] The working papers on autonomy emphasise that no precise model exists, as what is required is shaped by historical, geographical, cultural and economic factors.[286]

In exploring the content of participation and autonomy, there is some synergy where European standards are consulted: the Commentary refers to the Lund Recommendations' discussion on devolution principles.[287]

Russian federation', E/CN.4/Sub.2/AC.5/2001/WP.3, para. 88, favouring a national cultural autonomy model: WGM Report, 7th Sess., E/CN.4/Sub.2/2001/22, para. 88.

278 E/CN.4/Sub.2/2003/19, para. 69.

279 Kartashkin, E/CN.4/Sub.2/AC.5/2001/WP.J, para. 72.

280 E/CN.4/Sub.2/2000/27, para. 72.

281 Commentary, para. 19; E/CN.4/Sub.2/2005/27, para. 51; M. Weller, 'Towards a general comment on self-determination and autonomy', E/CN.4/Sub.2/AC.5/2005/WP.5.

282 Commentary, para. 20. 283 Rezag-Bara, *ibid.*, para. 77.

284 J. Bengoa, 'Minorities and self-determination', E/CN.4/Sub.2/AC.5/2004/1/Add.1; G. Gilbert, 'Autonomy and Minority Groups: A legal right in international law?' E/CN.4/Sub.2/AC.5/2001/CRP.5; A. Eide, 'Cultural Autonomy and Territorial Democracy', E/CN.4/Sub.2/AC.5/2001.WP.4.

285 E/CN.4/Sub.2/2000/27, paras. 91–94; T. Hadden and J. Wickramaratne, E/CN.4/Sub.2/AC.5/2000/CRP.4.

286 WGM Report, 6th Sess., E/CN.4/Sub.2/2000/27, paras. 72–3.

287 HCNM GAL/4/99, 30 June 1999, referred to in the Commentary, E/CN.4/Sub.2/AC.5/2000/WP.1; T. Hadden and C. O. Maolain, Appendix: 'Integrative approaches to the accommodation of minorities', E/CN.4/AC.5/2001/CRP.9; E/CN.4/Sub.2/2001/22, para. 66.

The WGM readily borrows from the work of other regional bodies, exploring such issues as the principle of subsidiarity,[288] and considering the findings of the European Centre for Minorities Issues' sponsored 1999 Flensburg Seminar.[289] The idea of an incipient collective right to political inclusion has been explored through global and regional studies of integrative and autonomist models,[290] but without conclusive pronouncement on its status.

3.3.1.3 Socio-economic rights/development The WGM has linked the security and economic aspects of minorities issues, noting that intolerant racism fuels the economic exclusion of minorities;[291] thus, non-compliance with Declaration provisions, which contain no reference to land or natural resources, can provoke ethnic conflict.[292] Following a 1999 proposal,[293] the WGM has consciously related developmental concerns to minorities issues.

Article 4(5) addresses the economic marginalisation of minorities, including issues relating to powerful sectors of society appropriating land and resources. States are to consider 'appropriate measures' to ensure the full participation of minority persons in their country's 'economic progress and development'. Genuine consultation is necessary to satisfy the Article 5(1) requirement that national policy-making duly regards the 'legitimate interests' of minorities, including non-economic factors like health and housing policies. Further, states must not labour under a 'misguided requirement' that minorities be treated as 'museum pieces' and kept at traditional development levels.[294] Article 5(2) stipulates that inter-state programmes should consider minority interests, while Article 9 urges UN organs and international financial institutions to implement Declaration rights. Minorities were identified as vulnerable

[288] E/CN.4/Sub.2/2000/27, para. 76.
[289] European Centre for Minority Issues, 'Towards effective participation of Minorities', E/CN.4/Sub.2/AC.5/1999/WP.4.
[290] E/CN.4/Sub.2/2000/27, para. 15.
[291] NGOs asked the WGM to incorporate the websites of European organisations into the UN Guide for Minorities (the European Commission on Racism and Intolerance (ECRI) and the European Monitoring Centre on Racism and Xenophobia). International Seminar on Co-operation for the Better Protection of the Rights of Minorities, Durban, South Africa, Sept 2001, E/CN.4/2002/92, para. 71 ('Durban Seminar').
[292] F. de Varennes, E/CN.4/Sub.2/AC.5/2000/CRP.3. [293] E/CN.4/Sub.2/1999/21, para. 64.
[294] Commentary, para. 71.

groups especially susceptible to violations of socio-economic rights, such as the ICESCR right to health.[295]

This topic has received concerted attention from the WGM; the spartan Declaration state directives relevant to economic development have been expanded through the Commentary, expert papers and WGM discussion. Its Commentary notes that reference to minority group 'existence' in Article 1 transcends mere physical survival, extending to cultural heritage and safeguarding economic and land resources upon which minority group livelihood depends.[296] That minorities globally are among the 'poorest of the poor'[297] galvanises efforts to mainstream minority rights to serve the anti-poverty MDGs' objectives, to which end the WGM requests that states provide minority-sensitive[298] information relevant to implementing MDGs.[299] It requested in 2001 that the MRGI prepare a paper on national development policies and minorities[300] and has considered other MRGI working papers on how to incorporate minority perspectives into MDGs programmes. Regarding the work of international development agencies,[301] the WGM recommended that institutions like the United Nations Development Programme ('UNDP') and World Bank conduct feasibility studies[302] which consider the 'social and environmental costs' of development programmes on affected minorities, including resettlement and compensation,[303] to balance preserving traditional culture with implementing poverty reduction strategies.[304] It recommended hiring minority representatives as project consultants,[305] asserting that minority concerns are 'an essential not a peripheral component' of appraising successful development and aid programmes.[306]

Possible breaches of development-related Declaration provisions are raised during WGM sessions; Nigeria allegedly violated Article 4(5) by not guaranteeing the Ogoni people a role in environmental decision-making.

[295] ICESCR Committee, General Comment 14 (2000), E/C.12/2000/4.
[296] Commentary, para. 24.
[297] MRGI, 'The Millennium Development Goals: Helping or harming minorities', E/CN.4/Sub.2/AC.5/2005/WP.4.
[298] E/CN.4/Sub.2/2005/27, para. 55. [299] E/CN.4/Sub.2/2001/22, ch. VI, Recommendation 3.
[300] E/CN.4/Sub.2/2001/22, Recommendation 4(b); 'Minority rights and development: overcoming exclusion, discrimination and poverty', E/CN.4/Sub.2/AC.5/2002/WP.6.
[301] 'An examination of approaches by international development agencies to minority issues in development', E/CN.4/Sub.2/AC.5/2005/WP.8.
[302] Commentary, para. 74. [303] E/CN.4/Sub.2/2003/19, para. 20. [304] *Ibid.*, para. 86 G20.
[305] E/CN.4/Sub.2/2004/29, para. 48.
[306] Durban Seminar, para. 89. This form of 'ethno-development' may clash with mainstream values.

Internal colonialism can be perpetuated, violating the right to development, where minority communities do not enjoy the fruits of development, precipitating proposals that either the government or oil company operators exploiting the Niger delta lands of the Ikwerre community ought to make monthly payments to all families.[307] Indeed, certain development projects may perpetuate underdevelopment and minority poverty.[308] The concerns of Philippines' seafaring Sama Dilaut were not only ignored in development planning which has forced them to live on land,[309] rendering them vulnerable to bonded labour.[310] This helps flesh out how the right to development of minorities may be violated. This increased attention of the right to participate in economic development is also evident in the work of the FCNM Advisory Committee, in noting that Finland ought to intensify its efforts in redressing the shortcomings relating to the effective participation of Roma in socio-economic life and to adopt a gender perspective.[311] OSCE seminars have discussed the economic integration of national minorities, through participatory rights, educational rights,[312] and a background paper considers sustainable development and minorities in OSCE areas.[313] The normative synergy in prioritising this topic is evident in the European Commission's consideration of minority participation in development processes, urging Croatia in its accession application to facilitate refugee return and their socio-economic integration through regional development programmes.[314]

4 Cultivating the WGM'S global mandate by going regional

The WGM is especially responsible for addressing minority issues in regions without specific minority or human rights regimes. It has actively sought to redress the lopsidedness caused by the preponderance of

[307] E/CN.4/Sub.2/2004/29, para. 21. [308] E/CN.4/Sub.2/2002/19, para. 38.
[309] E/CN.4/Sub.2/2004/29, paras. 9, 11. [310] E/CN.4/Sub.2/2005/27, para. 11.
[311] FCNM Advisory Committee Opinion on Finland (22 September 2000), ACFC/INF/OP/I (2001)2, para. 48.
[312] OSCE Media Advisory, 'OSCE Kyiv seminar to focus on integration of national minorities', 8 March 2005, at www.osce.org/item/8966.html.
[313] Third Preparatory Seminar, thirteenth OSCE Economic Forum Integrating Persons belonging to National Minorities: Economic and other perspectives (10–11 March 2005), SEC.GAL/55/05, at www.osce.si/docs/2005-03-11-kijev-ozadje.pdf.
[314] European Commission, Council Decision 'on the principles, priorities and conditions contained in the European Partnership with Croatia', COM(2004) 275.

Euro-centric information received at dialogue sessions and working papers, whose content is determined by the proffered 'expertise and goodwill'[315] of volunteers, concerning bilateral and regional minority protection measures, for example, FCNM standards and the HCNM's confidence-building work.[316] This created the impression that the Declaration targeted European minorities, especially from central and eastern Europe.[317] Notably, a 1999 paper discussing universal and Europe-based regional minority protection systems did not refer to Latin American or African organisations, as the 'relevant regional instruments' lacked 'special provisions for minorities'.[318] This sparked calls to study non-European situations to 'compensate for the overwhelming majority of European examples analysed so far',[319] such as mechanisms to encourage the participation of minorities of Nicaragua's Caribbean coast.[320] Several NGOs urged the WGM to pay attention to the African context;[321] in 2000, the Arusha Seminar on multiculturalism was held,[322] noting the shared features of minority groups outside Europe and the Americas.[323]

In 2001, the WGM chair declared that 'minority issues were not simply a European concern',[324] necessitating a 'global understanding';[325] in 2003, the WGM Chair observed the UN could do 'very little', both normatively and institutionally, in the European context where both monitoring and conflict prevention mechanisms like the FCNM Advisory Committee and HCNM were 'well in place'.[326] Indigenous rights were also attended to by the UN Permanent Forum and Special Rapporteur. Thus, the WGM should focus on encouraging 'more of a regional approach'.[327]

The universalisation of WGM operations is best evidenced in the UN Guide for Minorities, which seeks to help minorities understand how to vindicate their rights through existing general and minority-specific human rights mechanisms. The Guide demonstrates a firm orientation towards 'going regional' by including information about the possible relevance of European, African and Inter-American human rights systems

[315] E/CN.4/Sub.2/2001/22, para. 146. [316] E/CN.4/Sub.2/1996/28, para. 69.
[317] E/CN.4/Sub.2/1998/18, para. 29. [318] E/CN.4/Sub.2/1999/21, para. 45.
[319] E/CN.4/Sub.2/2000/27, para. 76. [320] E/CN.4/Sub.2/1999/21, para. 100.
[321] *Ibid.*, para. 50. [322] E/CN.4/Sub.2/AC.5/2000/WP.3.
[323] E/CN.4/Sub.2/2000/27, para. 56.
[324] During the inter-war era, minorities were considered a European problem: see L. Thio, 'Battling Balkanization: regional approaches towards minority protection beyond Europe' (2002) 43 *Harvard International Law Journal* 409.
[325] E/CN.4/Sub.2/2001/22, para. 128. [326] Eide, Reflections (2003). [327] *Ibid.*

to minority protection. The WGM's trend towards regionalisation is also manifested in its cooperation with the HCHR in staging regional conferences in Asia, the Americas and Africa,[328] inviting government and private sector representatives.[329] Sub-regional meetings such as meetings held in central[330] and south Asia[331] in 2004 enable minority representatives unable to attend Geneva meetings to provide detailed information; these meetings also publicised the three month Fellowship and annual one-week training programme for persons belonging to minorities.

The WGM has benefited from expert papers containing a wealth of country studies and is developing regional guidelines on implementing the Declaration;[332] a working paper outlines the particularities in various regions which require consideration.[333] Concerns included the challenges against national unity and secular constitutions inherited by South Asian states which post-colonial elites 'disfigured',[334] by espousing religious nationalism, for example, Hinduism and Sinhalese Buddhism in India and Sri Lanka respectively.[335] In Africa, particular concerns related to the fear of secessionist forces, reflected in the lack of constitutional recognition of ethno-cultural groups. Within the Arab context, the problem of securing minority political participation was linked to the broader problem of democratising authoritarian state structures.[336] In countries undergoing constitutional transition, nationalist tendencies have marginalised minority languages and cultures, as in the former Soviet satellite state of Georgia.[337] Certain issues have their European counterparts, as in the relationship of minorities to land as an aspect of cultural identity, which the HRC has long recognised with respect to Scandinavian Sami; in Southeast Asian countries like Laos, Vietnam and Thailand, the major problems relate to poverty[338] and land development programmes, which increasingly encroach on traditional lands inhabited by minority hill peoples whose lifestyle and land conservation practices are denigrated as 'backward'.[339] Within African states like Sudan and Kenya, pastoralist

[328] *Ibid.*, paras. 106, 116. [329] E/CN.4/Sub.2/2000/27, para. 116.
[330] E/CN.4/Sub.2/2005/AC.5/2005/5.
[331] E/CN.4/Sub.2/AC.5/2005/4; R. Samaddar, 'Autonomy, Self-Determination and the Requirements for Minimal Justice in South Asia', E/CN.4/Sub.2/AC.5/2001/CRP.2.
[332] HCHR Report, E/CN.4/2004/75, para. 14. [333] Regional Guidelines (2003).
[334] Sri Lanka, E/CN.4/Sub.2/AC.5/2005/4, para. 7. [335] *Ibid.*, paras. 19–21.
[336] *Ibid.*, paras. 8–10. [337] *Ibid.*, paras. 14–15. [338] E/CN.4/Sub.2/2003/19, para. 38.
[339] *Ibid.*, paras. 25–26.

minority groups suffered land displacement to facilitate the exploitation of natural resources or gazetting of lands for conservation purposes.[340] This may spark future exploration of the collective dimension of minority rights.[341]

The WGM has devoted attention to minority topics receiving less international attention. Responding to the Sub-Commission's request, the WGM considered the special case of economically depressed Afro-American minorities in Latin America,[342] their reparations claims for enslavement and need for affirmative action. A working paper observed that this was a 'relatively undeveloped area of work' in the field of minority rights, warranting careful consideration in formulating regional guidelines.[343]

In discussing regional situations beyond Europe, there is a synergy with European practice insofar as normative standards like the FCNM[344] and the work of European bodies like the HCNM and CEIWGM as models for intergovernmental cooperation[345] are referenced. Advanced European standards are regularly referred to, even in contexts beyond their operation. For example, a Statement of Principles on Minority and Group Rights in South Asia,[346] authored by the International Centre for Ethnic Studies, makes liberal reference to the Declaration, Guide, COE and OSCE standards as exemplifying good practice. For example, in relation to linguistic rights and the media, reference is made to Article 10 FCNM and the Oslo Recommendations concerning freedom to use minority languages with administrative authorities. In relation to the right to be instructed in minority languages, reference is made to the Languages Charter, Hague Recommendations, FCNM and Article 4(3) of the Declaration. This Statement is designed to elevate deficiencies in constitutional norms and practice to match international standards in relation to minorities, broadly defined to include refugees and migrant workers, irrespective of citizenship. The importance of constitutional arrangements to handle diversity is reflected in Principle 10, which considers that in South Asia, devolution of power, autonomy and federalism may enhance effective minority participation in decision-making processes. To fortify

[340] E/CN.4/Sub.2/2000/27, para. 59.
[341] *Ibid.*, para. 39.
[342] E/CN.4/Sub.2/1999/21, para. 85.
[343] Regional Guidelines (2003), para. 31.
[344] E/CN.4/Sub.2/2001/22. chap. VI, Recommendations 5, 6.
[345] E/CN.4/Sub.2/2003/19, para. 52.
[346] E/CN.4/Sub.2/AC.5/2003/WP.2.

this principle based on power-sharing, reference is made to Article 14 of the Lund Recommendations and Article 3 of the European Charter of Local Self-Government.[347]

5 Conclusion

In its first decade, the WGM has become the primary forum for canvassing at some depth the special needs of minorities on a global basis; it has become a *de facto*, unsystematic means for developing Declaration norms to influence state conduct. Through dialogue and research, it has developed a broad understanding of 'minority' and disparate minority situations,[348] apprehending how regional particularities shape varied minority problems, such as how the current animosity towards Russian-speakers outside the Russian Federation stems from the USSR's assimilationist approach towards central Asian minorities.[349] This expert knowledge, which accurately identifies relational tensions in minority situations, is central to developing contextualised, constructive proposals to fortify socio-political stability through protecting rights and preventing conflict. The WGM urged the HCHR office to continue organising the Minority Fellowship Programme, which prepares the Minority Profile and Matrix,[350] providing indicators against which minorities can present disaggregated information about their situation, to be evaluated against international standards.[351] The WGM also recommended mainstreaming minority protection in other UN agencies, such as peacekeeping operations, drawing attention to the Roma in Kosovo and ethnic groups in Sudan and Ethiopia.[352]

The lines of synergy the WGM has developed with other related bodies pertain to standard-setting and investigating concrete ways to implement these standards, as it is 'the best mechanism for drawing attention to minority situations', notwithstanding its lack of a 'fully-fledged monitoring function'.[353] Despite the findings of an MRGI survey that minority representatives made domestic progress after advocacy at WGM

[347] ETS 122. [348] E/CN.4/Sub.2/2000/27, para. 57.
[349] E/CN.4/Sub.2/AC.5/2005/5, para. 5. [350] E/CN.4/Sub.2/AC.5/2006/3 (23 June 2006).
[351] Report on the Workshop on Minorities and Conflict Prevention and Resolution (May 2005), E/CN.4/Sub.2/AC.5/2006/2, paras. 32–37.
[352] E/CN.3/Sub.2/2005/27, para. 24. [353] E/CN.4/Sub.2/2003/19, para. 74.

sessions,[354] the WGM's chief contribution lies in its ability to generate further study into normative standards and to identify infrastructural gaps in protection. In investigating protective mechanisms, the WGM has entertained proposals for a minority rights convention, drawing on the experience of European treaties,[355] and drafting an optional protocol to Article 27 ICCPR. It considered that a special representative[356] able to handle and investigate complaints[357] and to respond to urgent minority-related conflicts[358] might fill the gap in providing a more effective monitoring body,[359] particularly referring to the HCNM's engagement[360] in quiet diplomacy to de-escalate tensions, through dialogue and on-site missions.[361] The WGM Chairman, in taking cognisance of the regions best served by existing infrastructure, noted the 'greatest need' lay beyond Europe, since 'the European scene is fairly well covered'.[362] Subsequently, an Independent Expert on Minority Issues was created under CHR resolution 2005/79 for a two-year period to contribute to the 'timely identification' of human rights problems involving minorities and to promote the Declaration through receiving communications peace-building efforts,[363] consultations and attending WGM sessions as observer.[364]

There is evidence of synergy between the WGM and other minority or human rights bodies in the types of argumentation and development of the substantive content of minority standards with other bodies, though this is less so regarding working methods and definitional issues. Being exposed to a broader range of minority situations, the WGM appreciates that the global minority problem is broader than the European national minorities' problem and more complex, given that minorities are not homogenous in nature and the legal category is not clearly defined. In not dogmatically insisting that minorities be numerically inferior or possess historical ties to land, the WGM remains the best positioned, in

[354] E/CN.4/Sub.2/2004/29, para. 63. [355] E/CN.4/Sub.2/1997/18, para. 97.
[356] E/CN.4/Sub.2/2002/19, para. 73, cl. B1. [357] E/CN.4/Sub.2/1999/21, para. 93.
[358] E/CN.4/Sub.2/2003/19, para. 74.
[359] E/CN.4/Sub.2/2002/19, para. 66; E/CN.4/Sub.2/2004/29, para. 66, cl. 13.
[360] *Ibid.*, para. 75.
[361] HCHR Report, E/CN.4/2004.75, para. 32; L. Thio, 'Developing a ''peace and security'' approach towards minorities' issues' (2003) 52 *International Comparative Law Quarterly* 115.
[362] Eide, Reflections (2003); V. Kartashkin, 'Universal and Regional Mechanisms for Minority Protection', E/CN.4/Sub.2/AC.5/1999/WP.6.
[363] HCHR Report, E/CN.4/2005/81.
[364] CHR Res. 2005/79, paras. 6–7, 9; E/CN.4/Sub.2/AC.5/2006/6.

conceptual terms, to address the problems of accommodating and protecting non-dominant and distinct groups within multicultural societies worldwide. Its limited institutional mandate means that effective modalities of implementing minority standards and curbing minorities-related conflicts must be sought elsewhere.

6 Postscript: The United Nations Independent Expert on Minority Issues

GAY MCDOUGALL[365]

The establishment of the UN Special Procedures mandate of the Independent Expert on Minority Issues in 2005 has been a most significant UN development in the field of minority rights. This is particularly significant in view of the creation of a new Forum on minority issues in September 2007. As first holder of the post of Independent Expert, I have taken early steps to firmly establish the mandate amongst my thematic counterparts and to adopt the working methods and tools of my fellow mandate holders, while also developing procedural tools and approaches unique to the mandate. Importantly, the Independent Expert can issue direct communications to states based on information received from a variety of sources, conduct country visits at the invitation of governments, and report on my activities directly to the Human Rights Council.

UN Special Procedures mandate holders are usually individual post holders,[366] unpaid and appointed on the basis of their expertise and experience in a particular field of human rights. While mandate holders are serviced and supported by OHCHR, they do not have dedicated offices of their own, have minimal staff support and are funded from a common special procedures budget. It is therefore important to note that such practical limitations upon mandate holders mean that many consider it essential to establish functional collaborations, seek opportunities for joint initiatives, and to a great extent develop synergies with other bodies,

[365] Human rights lawyer and former director of Washington-based human rights NGO, Global Rights. Appointed as the first holder of the position of Independent Expert on Minority Issues on 29 July 2005, in accordance with the provisions of Commission on Human Rights Resolution 2005/79.

[366] Some mandates, such as the Working Group on Disappearances or the Working Group on Mercenaries, are working groups consisting of five expert members representing different regions.

organisations and institutions working in the same and related fields, as well as taking forward their own thematic and country-specific initiatives.

At the core of the mandate of the Independent Expert is the requirement to promote the implementation of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted without a vote by UN member states in 1992, and offering therefore, theoretically, a universally accepted minority rights standard inspired by ICCPR Article 27. Notably, the requirement to find synergies both within the UN system and beyond is in implied within the mandate of the Independent Expert, in the provision that the mandate should: 'cooperate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates and mechanisms, as well as regional organizations.' Recognising the importance of this 'relationship building' requirement, I have taken early steps to fully benefit from the existing and ongoing work of such bodies and organisations and to forge new and creative collaborations.

6.1 Synergies within OHCHR

The possibilities for collaboration and complimentarity between a new Independent Expert on Minority Issues and the UN Working Group on Minorities were clearly envisaged, and explicitly highlighted within the resolution establishing the Independent Expert's mandate.[367] Despite the lack of formal opportunities, the possibility for synergies was demonstrated during the twelfth session of the Working Group, which the Independent Expert attended in August 2006. While the Working Group offered a unique forum for minorities themselves within the UN system, and the possibility of dialogue between minority representatives and their governments, its limitations included a lack of mandate to take up particular country situations, to engage in communication with governments on specific issues, or to make country-specific recommendations or concluding observations. In contrast, the Independent Expert is equipped through my mandate to undertake such country-specific activities and was felt by many to provide the means by which to remedy some of the

[367] Commission on Human Rights Resolution 2005/79, decided to amend the mandate of the Working Group on Minorities so that it may, *inter alia*, focus its work on 'conceptual support of, and dialogue with the independent expert, who shall participate as an observer'.

limitations of the Working Group. In terms of the development of the thematic and conceptual initiatives of the Working Group, it was also felt that the toolkit provided to the Independent Expert offered an enhanced potential to take forward and promote such work that had too often remained in the form of thematic papers and had largely failed to realise its full practical potential. The twelfth session of the Working Group offered a glimpse of the possibilities in this regard, notably in a proposal for the Working Group and the Independent Expert collectively to take forward work in the area of guidelines for policing in multi-ethnic societies, benefiting also from the work of other international bodies including the guidelines of the OSCE HCNM in this field.

However, this is a potential that was short-lived, due to the review process of the Human Rights Council which, as noted, resulted in the effective replacement of the Working Group on Minorities with the Forum on minorities issues.[368] Nevertheless, I have clearly noted during my interactive dialogues with the Human Rights Council my support for the continuation of a strong forum for minorities within the UN system, which maintains the unique features of the Working Group, particularly in terms of minority participation, but which is provided with higher status within the system (reporting directly to the Human Rights Council rather than the Sub-Commission or its replacement) and which may have a mandate to convene both Geneva and regional meetings. With such a forum now in place, I feel that the potential for synergies between the two minority-dedicated mechanisms of the UN is greatly enhanced.

6.2 Synergies with other mandates

I have begun to forge close collaborations with my fellow mandate holders working on related issues, while remaining careful to demonstrate complementarity and avoid duplication with mandates on indigenous peoples, freedom of religion, contemporary forms of racism, and migrants, amongst others. I noted in my initial report that a minority component was often hidden in the work of many mandates on both civil and political, and economic, social and cultural issues, and that it is important to highlight the fact that it is often persons from minorities who experience violations across the full spectrum of human rights.

[368] See the Introduction to this volume.

Collaborations to date have included joint communications, cooperation in the context of thematic seminars, and consideration of joint country visits. The Independent Expert undertakes a joint visit to the Dominican Republic in October 2007 with the Special Rapporteur on contemporary forms of racism.

I have sought to take forward proactively an early engagement with the UN treaty bodies, and in particular the Committee on the Elimination of Racial Discrimination, perhaps the Committee most consistently considering minority issues in its work. In August 2006, I held a first official dialogue with CERD/C, during which I discussed possibilities for collaboration, including in regard to the Committee's early warning, urgent action and follow-up mechanisms,[369] and with a view to enhancing the Committee's capacity to consider minority issues consistently within its work. A second substantive dialogue took place in March 2007 in order to continue the engagement and at the request of the Committee. In addition to consideration of thematic collaborations, synergies are emerging in regard to consideration of particular country situations. I have benefited from the reports and concluding observations of CERD/C as well as other treaty bodies, and have sought to promote these substantive recommendations during the course of my country visits and in direct communications. Equally, a closer collaboration between the Committee and me will allow ICERD to benefit from my country visit reports in its own consideration of particular countries. The possibilities for effective synergies have resulted in my paying particularly close attention to the schedules and concluding observations of treaty bodies including CERD/C, CESCR, CRC and CEDAW.

6.3 Synergies with the wider UN system

I established in my initial annual report that I shall promote the effective mainstreaming of minority issues across the UN system, recognising that situations involving minorities 'often lie at the nexus of efforts to promote human rights, development and security'. I expressed my desire for the elaboration of a policy on minorities for OHCHR and other UN bodies and the establishment of an interagency dialogue on minority issues, stating that I see a role for the mandate to encourage these dialogues

[369] See Ivan Garvalov's contribution to this volume (Chapter 9).

among representatives of UN agencies, regional bodies, international financial institutions and development agencies. I believe that this was a strong statement of desire to see increased attention to minority rights throughout the UN system, not simply in terms of adding minority issues to the list of priorities already encumbering UN agencies, but to find practical opportunities to work with and assist them.

A useful example of how I believe I have been able to raise the profile of minority issues in the wider UN system is a collaboration with UNDP in pursuing my work in the area of poverty alleviation and realisation of MDGs for minorities. In close cooperation with UNDP, I initiated and co-convened an international consultation, 'UNDP's Engagement with Minorities in Development Processes', held on 18 and 19 October 2006 in New York, with the aim of strengthening consideration of minority issues in the UNDP priority areas relating to poverty/MDGs, democratic governance and crisis prevention and recovery. A key outcome of this meeting has been a commitment to the development of a UNDP Policy/Guidance Note on minorities. I identify this work on developmental issues and processes as also being central to my stated desire to promote inclusion and stability and address structural and developmental inequalities that may lead to tensions and conflict. The possibilities for such strategic collaborations are clear in that they provide much needed policy commitment within key UN agencies to focus more clearly and consistently on the situations of minorities within their areas of mandate responsibility. Success in achieving such policy and related financial commitments within UN agencies such as UNDP offers great potential for new synergies to emerge in more specific areas of interest related to minorities in development processes, for example. In terms of enhancing relationships with UN agencies and promoting consideration of minority issues, a useful OHCHR initiative has been to create an informal interagency working group on minorities including representatives from agencies including UNICEF, UNHCR, ILO and OCHA.

At the regional level, I have consulted with the minority mechanisms of bodies including the Council of Europe, Secretariat of the Framework Convention for the Protection of National Minorities. In March 2007, I held a first face-to-face official dialogue with the outgoing OSCE High Commissioner on National Minorities, Ambassador Rolf Ekéus, during which we were able to share perspectives, compare methodologies and consider possible future joint initiatives between the Independent Expert

and the office of the HCNM. I look forward to continuing the development of synergies between the two institutions with the new HCNM. Creative possibilities for collaboration with European mechanisms are many and might include, for example, possibilities for the Independent Expert to raise attention to the European experience and guidelines and recommendations emanating from the work of European institutions, in the context of my own initiatives in other regions.

While Europe offers a particularly rich vein of minority mechanisms and institutional experience in minority issues from which to benefit, equally I have also begun to seek consultations with other regional intergovernmental institutions. In 2006/7, I held substantive meetings on minority issues with the Organization of American States (OAS), and held initial dialogues with staff of the African Union during my visit to Ethiopia. I have held initial consultations with representatives of the Organization of the Islamic Conference and I hope to engage more fully with the OIC in the course of my future work.

As an example of my regional engagements, in an OAS resolution the OAS General Assembly requested the Inter-American Commission on Human Rights 'to continue intensifying dialogue and cooperation with' the Independent Expert on Minority Issues, including on the Draft Inter-American Convention against racism.[370] In consultations with OAS member states, and supported by OHCHR, I held an international expert consultation in January 2007 aimed at assisting regional and national institutions in regard to standard-setting and effective mechanisms to combat discrimination and protect the rights of minorities, and with a view to contributing substantively to the ongoing OAS process.

6.4 Working with civil society partners

I am also required to take into account the view of non-governmental organisations, and of considerable benefit to me has been the opportunity to meet directly with representatives of minority communities from all regions, notably at the twelfth session of the Working Group on Minorities, in August 2006. During this session, I held a forum for

[370] 'Combating Racism and All Forms of Discrimination and Intolerance and Consideration of the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance', AG/RES.2168 (XXXVI-O/06).

minority representatives to consult directly with me, raise questions, and bring issues to my attention. I have benefited greatly from information provided to me by civil society, academic and research organisations. During official missions to Hungary and Ethiopia, I have equally made it a priority to meet with representatives of minorities in order to solicit their views. In 2007, I took forward work in close collaboration with civil society, minority representatives and academic institutions to highlight the global issue of denial and deprivation of citizenship to minorities as a means of discrimination against them, seeking to consolidate, benefit from and add a UN dimension to, much useful existing work carried out in this field.

4

The OSCE High Commissioner on National Minorities

ARIE BLOED AND RIANNE LETSCHERT

Introduction

Since the beginning of the 1990s, the institution of the OSCE High Commissioner on National Minorities (the 'High Commissioner')[1] has acquired a considerable prestige in the area of conflict prevention. Even though the High Commissioner is primarily, or even exclusively, aiming at the prevention of conflicts relating to national minority issues, it is obvious that a major tool for the High Commissioner to achieve his aims is monitoring and promoting a proper implementation of minority rights. Nevertheless, the security-oriented perspective of the High Commissioner cannot be overlooked, as it implies that he is – according to his mandate at least – only active in minority situations where serious tensions exists. It also implies that, as a conflict prevention instrument, the High Commissioner only considers a limited number of minority problems, whereas other minority problems which 'don't have the potential to develop into a conflict' fall outside the scope of his mandate.

The purpose of this chapter is to consider how far the High Commissioner has contributed over the years to a further strengthening and development of minority rights standards. Did the activities of the High Commissioner indeed lead to the development of new standards, or did they contribute to a further elaboration or clarification of existing standards? In another study, the first author of this chapter has explored the High Commissioner's role in relation to citizenship issues and

[1] Document of the Helsinki Follow-up Meeting, 'The Challenges of Change', 1992. The High Commissioner's mandate is contained in the part entitled 'The Helsinki Decisions'. The High Commissioner started functioning as of 1 January 1993.

concluded that the High Commissioner in the 1990s indeed contributed considerably to developing certain criteria which he used to monitor developments within specific countries.[2] This was an interesting phenomenon, because citizenship issues still largely belong to the domestic jurisdiction of states. The High Commissioner developed his criteria on citizenship issues, in particular, through addressing specific recommendations to the governments of the countries concerned.[3]

A more substantial influence on the elaboration of international standards on the protection of the rights of national minorities can be seen in the various sets of recommendations or guidelines which have been developed since the middle of the 1990s by expert groups which have received the official endorsement of the High Commissioner.

The first author of this chapter – in his capacity as former Director of the Foundation on Inter-Ethnic Relations – was one of the initiators of this ongoing process of developing recommendations on specific groups or categories of minority rights. The process aimed at bringing together outstanding experts on minority rights with the purpose of trying to further clarify or develop the often vaguely worded international norms on minority protection. In principle, such recommendations should be bold, but remain within realistic terms. The very first set of such recommendations is known as the Hague Recommendations Regarding the Education Rights of National Minorities, which were officially approved in October 1996. Since then, four more sets of such recommendations have been developed: the Oslo Recommendations on Linguistic Rights (1998); the Lund Recommendations on Participation Rights (1999); the Guidelines on the Use of Minority Languages in the Broadcast Media (2003): and, in February 2006, Recommendations on Policing in Multi-Ethnic Societies followed. The first three sets of recommendations were endorsed by the first High Commissioner, Max van der Stoel, while the last two have been developed under the patronage of the present High Commissioner, Rolf Ekéus.

[2] A. Bloed, 'Citizenship issues and the OSCE High Commissioner on National Minorities', in S. O'Leary and T. Tiilikainen (eds.), *Citizenship and Nationality Status in the New Europe* (London: Institute for Public Policy Research, 1998), pp. 39–52.

[3] Such country-specific recommendations have been used only by the first High Commissioner. For unknown reasons the second High Commissioner, who took office in July 2001, never made use of this helpful tool.

Quite a few studies have been devoted to the Hague Recommendations and the following sets of recommendations on issues such as linguistic and participation rights of minorities.[4] For this chapter, we will briefly explore how far the first sets of recommendations have indeed contributed to a synergy of international standards developed by other minority rights mechanisms in the respective fields. Since quite a few publications have been devoted to the older sets of recommendations, the chapter will devote some more attention to the most recent recommendations on policing in multi-ethnic societies. Furthermore, the question of whether the High Commissioner should initiate the elaboration of a set of recommendations relating to the issue of new minorities will be analysed. In order better to understand the ways in which the High Commissioner can have an impact upon the process of standard-setting and the interpretation of the standards by the supervisory bodies, it is important first to give a brief overview of the background, mandate and working methods of the High Commissioner.[5]

1 Brief overview of the High Commissioner's mandate and working methods

The instrument of the High Commissioner on National Minorities was established at a time that Europe was witnessing severe intra-state conflicts resulting from minority tensions. The OSCE participating states believed that adopting an instrument specifically devoted to tensions related to national minorities could prevent the outbreak of such conflicts in the future.[6] The High Commissioner was, therefore, established as an instrument of conflict prevention, not as a mechanism to monitor the

[4] A recent example of such a study is the special issue of the *International Journal on Minority and Group Rights*, entitled 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life – Five Years After and More Years Ahead', edited by Krzysztof Drzewicki (2005) 12(2/3) *International Journal on Minority and Group Rights*.

[5] For a thorough overview, see R. M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: Asser Press, 2005), ch. 2.

[6] In the 1992 Helsinki Document, 'The Challenges of Change', the participating states acknowledged that 'economic decline, social tension, aggressive nationalism, intolerance, xenophobia and ethnic conflicts threaten stability in the CSCE area. Gross violations of CSCE commitments in the field of human rights and fundamental freedoms, including those related to national minorities, pose a special threat to the peaceful development of society, in particular in new democracies' (p. 5).

implementation of minority rights provisions within the OSCE participating states.[7]

A remarkable element in his mandate is the fact that the High Commissioner, as an external third party, a non-state entity, can become involved at the earliest possible stage of a potential conflict.[8] Moreover, he can become involved at his own discretion, as even the approval of the OSCE Permanent Council is not needed.[9] He has the right to enter a participating state even without that state's formal consent or the explicit support of other participating states.[10] The High Commissioner is entitled to travel and communicate freely when visiting a country. The far-reaching elements in the High Commissioner's mandate are proof of what might be referred to as the 'legitimate intrusiveness' of the OSCE; a development whereby the OSCE is penetrating more and more into what traditionally was considered to be the internal affairs of participating states.[11] This development is a reflection of the principle that issues concerning national minorities belong to the legitimate concern of all OSCE participating states.[12] It also has to be stressed that this development is based on the full consent of all OSCE participating states, although in the past few years, unfortunately, such consent has not always been present. The Russian Federation, for instance, is increasingly opposing OSCE involvement by invoking the non-intervention principle, in particular, in relation to the Chechen crisis. This is an outright violation of the OSCE commitments, but since the OSCE lacks enforcement mechanisms and is based on the voluntary consent of all participating states, the organisation is hardly able to address effectively this type of violation. In

[7] At the Stockholm meeting of the Council of Ministers for Foreign Affairs (15 December 1992), the former Dutch Foreign Minister, Max van der Stoel, was appointed the first High Commissioner on National Minorities. From 1 July 2001, the post is occupied by the Swedish diplomat Rolf Ekéus. The mandate states that the High Commissioner should be an eminent international person with long-standing experience (Helsinki Decisions, para. II.8).

[8] Helsinki Decisions, para. II.3. The Document of the Helsinki Follow-up Meeting, 'The Challenges of Change', was adopted on 10 July 1992 by the OSCE Summit in Helsinki. It consists of two main parts: 'The Summit Declaration' and 'the Helsinki Decisions'. Unless otherwise indicated, all references to the Helsinki Document are references to the 'Decisions' part.

[9] However, there are some exceptions. For example, the Permanent Council must approve the HCNM's involvement in situations which have already erupted into violence or which the Council is itself addressing.

[10] A state may also request the High Commissioner's involvement: see, e.g., Romania in 1993.

[11] See also Letschert, *The Impact*, p. 48.

[12] See the 1991 OSCE Moscow Document.

practice, therefore, the OSCE commitments relating to the right of participating states to address any issue of concern are seriously undermined. In 1991, during the Meeting of Experts on National Minorities which took place in Geneva, it was acknowledged that there was a continuing need for substantial implementation review and that issues concerning national minorities 'are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state'.[13] This was later reaffirmed and applied to a wider context (encompassing the entire human dimension) in the Moscow Document of 1991. The political affirmation of this statement is an important development, since it recognises the international dimension of human rights questions and opposes the principle of non-intervention in internal affairs.

Although the High Commissioner certainly has some far-reaching powers, in reality he will make use of them only with the voluntary consent of the authorities concerned. Since his mandate is based on voluntary cooperation and since he has no power to take binding decisions, the High Commissioner will in practice make use of his powers only if the authorities and minorities are willing to cooperate with him. Without such cooperation, any involvement by the High Commissioner would be futile from the outset. This implies that, in spite of his far-reaching formal powers, the possibilities for the High Commissioner to become effectively involved in national minority issues fully depend upon the willingness of countries concerned to cooperate. Again, since some of the OSCE participating states started using the non-intervention principle to avoid OSCE involvement in their problems, one might have expected that this also would affect the work of the High Commissioner. So far, though, no such signs can be observed. However, countries 'east of Vienna' have traditionally opposed High Commissioner involvement in their minority problems, not because of the non-intervention principle, but because they are of the opinion that these problems are effectively addressed by their own national legislation and other international organisations (such as the Council of Europe). This has effectively prevented the High Commissioner from dealing with 'hot' political issues, such as the Kurdish problem in Turkey.

The possibility of conducting country visits enhances the ability of international mechanisms to determine whether countries adhere to

[13] Geneva Report, Chapter II.

international norms and enables mechanisms to enter into dialogue with the government and other parties involved. The High Commissioner extensively uses the opportunity of visiting countries which is provided for in his formal mandate.[14] Other minority rights mechanisms have developed a similar practice, even though the right to do so has not always been explicitly included in their mandate. As was hinted at by Li-Ann Thio in Chapter 3, the UN Working Group on Minorities' mandate does not mention the possibility of country visits. Actually, the competence to conduct country visits has never been discussed as such during Working Group sessions. However, in 2001, the government of Mauritius invited the Working Group and the first country visit was made. Until May 2005, only three countries have invited the Working Group and two visits have been made. In the period that the Working Group was the only minority-rights-specific UN mechanism, the added value of country visits was clearly visible. However, the need for a forum such as the Working Group to conduct such visits could be questioned, if the recently established UN Independent Expert on Minority Issues is allowed to visit countries. It is not yet clear, however, whether the Independent Expert will be able to visit countries, because the supporters of the resolution that established the mechanism deliberately did not include a reference to the possibility of country missions, in particular, and, more generally, how to respond to information received.[15] Therefore, it remains to be seen how this mandate will develop. It should also be noted that the original mandate of the Council of Europe ('COE') Advisory Committee ('AC') under the Framework Convention for the Protection of National Minorities ('FCNM') does not mention the possibility of country visits.[16] Nevertheless, the AC has developed the practice of conducting country visits as part of the monitoring and follow-up procedure.[17]

[14] Note, for instance, the intense involvement of the first High Commissioner in Macedonia, which he visited more than fifty times.

[15] See the original proposal in E/CN.4/2005/L.62, 14 April 2005, which was amended by Draft Resolution L.62, submitted by Austria. The renewed Resolution is E/CN.4/2005/L.2005/79. See further on the UN Working Group and the Independent Expert, Letschert, *The Impact*, ch. 3.

[16] See Rules on the Monitoring Arrangements under Article 24 to 26 of the Framework Convention for the Protection of National Minorities, Res. (97)10, adopted on 17 September 1997 and the Rules of Procedures adopted by the AC on 29 October 1998 (and agreed to by the Committee of Ministers).

[17] See also Chapter 5, by Asbjørn Eide, below.

The High Commissioner's mandate mentions that the High Commissioner should act as a third party between the parties directly involved and should discuss underlying minority tensions with the parties.[18] The mandate does not mention what should be done with the results of these discussions. The first High Commissioner came up with a tool to turn these discussions into something more than meetings without obligations. He decided to issue recommendations that he sent to the various governmental representatives and institutions, depending on the issues concerned. Although these recommendations – all to be found at the OSCE website – addressed country-specific issues, their contents went beyond these specific issues.[19] By addressing issues such as the acceptability and proportionality of requirements for acquiring citizenship within a country, the High Commissioner indirectly assisted in clarifying a number of issues or even helped in developing certain principles and standards in areas which, until that time, actually hardly belonged to international law. It may only be regretted that the present High Commissioner has not made use of this authoritative and influential instrument, developed by his predecessor.[20]

The High Commissioner may collect and receive information from *any* source, including media and NGOs, with the exception of 'any person or organization which practices or publicly condones terrorism or violence'.[21] The High Commissioner may also receive specific reports from parties *directly involved* regarding developments involving national minorities. The parties directly involved who may submit reports (and with whom the High Commissioner may enter into contact) include the government, representatives of associations, NGOs, religious and other groups of national minorities directly concerned in the area of tension.[22] The High Commissioner can 'seek to communicate in person during a visit to a participating State' with parties directly concerned. No mention is made of personal contacts outside country visits. In order effectively to exercise the early warning function, reliable and objective information is essential. Where other minority rights mechanisms receive state reports (such as the AC under the FCNM) that provide the mechanisms with all kinds of information (e.g. statistical, legislative, policy and practical

[18] Helsinki Decisions, para. II.3. [19] www.osce.org/hcnm/.
[20] See also Letschert, *The Impact*, pp. 69–73 and p. 93.
[21] Helsinki Decisions, paras. II.23 and 25. [22] Helsinki Decisions, paras. II.26, 26a, 26b.

information), the High Commissioner and his advisers need to collect the information themselves. The High Commissioner's advisers therefore put much time into collecting and analysing information on specific country situations.

On the basis of the analysed information, the High Commissioner decides whether to address a certain situation more thoroughly by seeking contacts with government authorities and/or arranging a country visit. Besides his legal and political advisers, the OSCE long-term missions, situated in several of the countries in which the High Commissioner engages, play an important role in this process, and provide the High Commissioner with general country information but also up-to-date information on the situation in the country. However, it has to be observed that the relations between the High Commissioner and some OSCE long-term missions have not always been ideal.[23]

The High Commissioner has maintained contacts with NGOs, but usually to a limited extent, and most of the time such contacts have been used only to collect information. The OSCE missions normally advise which NGOs the High Commissioner should meet. Usually, they are consulted when the High Commissioner needs background information on certain matters. However, it has also been observed that

> they were an under-utilized resource and there was no systematic networking or information gathering save for the receipt of information via periodicals, the internet or participation in seminars.[24]

A possible explanation for this could be that, in most countries, civil society is just developing and sometimes divided along ethnic lines. Another possible reason is that the expertise available within civil society was simply not well enough known to the High Commissioner and his staff and the visits were often too short to explore this aspect more thoroughly on the ground. Some NGOs sought regular contacts with the High Commissioner (such as Helsinki Committees in some countries) in order to inform him of the factual situation on the ground. The reason for seeking contact with the High Commissioner might also have been to exert influence on the content of the recommendations of the High

[23] See Letschert, *The Impact*, p. 90.

[24] Walter Kemp, *Quiet Diplomacy in Action, The OSCE High Commissioner on National Minorities* (The Hague: Kluwer Law International, 2001), p. 100.

Commissioner which the first High Commissioner usually addressed to the government after his visits.

As to contacts with minority representatives, the first High Commissioner has occasionally been blamed by minorities for not having included them enough during his engagement in a country.[25] He met minority representatives when visiting a country to collect information and to understand their point of view. On several occasions he organised round-tables or seminars to bring both parties together, although this has not become a general practice, and the country-specific recommendations are not submitted to the minority groups. On some occasions, the High Commissioner requested that the government forward the recommendations to minority representatives. This practice, however, has not become general.[26] It has to be understood, though, that the High Commissioner is part of an intergovernmental organisation and that therefore the formal contact points for dealing with specific states is the Foreign Minister. In other words, being part of an intergovernmental body also puts certain restraints on the way in which the High Commissioner functions. The specific nature of the instrument of the High Commissioner calls for a cautious approach towards involving civil society in his activities. Moreover, when drafting his recommendations, the first High Commissioner carefully balanced the wishes and problems as perceived by both the authorities and the minorities and in this drafting process he also never (or hardly ever) consulted further with the Foreign Minister or other governmental representatives. The reasoning for the High Commissioner's approach towards the involvement of civil society may also be understood from the perspective of the impartiality and confidentiality principle.

Nevertheless, it could be argued that, by not sending the recommendations to the minorities in question or the association or NGO representing them, the High Commissioner might have let go of an important implementation tool, since it deprived minorities of the possibility of pressing states in the implementation of the recommendations. On the other hand, it has to be observed that the High Commissioner's

[25] From an interview with the first High Commissioner.

[26] See Kemp, *Quiet Diplomacy*, p. 56, where he refers to a request forwarded to the government of Ukraine to forward the recommendations to the Parliament of the Autonomous Republic of Crimea.

recommendations always became public after they were presented to the Permanent Council of the OSCE, and it is clear from practice that the representatives of all national minorities concerned were fully aware of the contents of these recommendations.

At this stage it is interesting briefly to examine the practice of other minority rights mechanisms in this regard. The role of NGOs and minority representatives has been very important for the work of the AC under the FCNM. Not only did they provide information when the AC requested such information, they also drafted shadow reports, seeking to give a clear and independent picture of the implementation progress of the FCNM. However, the fact that the first phase of the monitoring procedure is confidential (meetings with government representatives are held in private and often take a long time) leads to the situation that minority representatives and NGOs are prevented from engaging in a constructive dialogue in one of the most important phases of the entire monitoring procedure. In addition, several governments are reluctant to allow the AC to make the opinion public before the submission of state comments or before the adoption of the COM resolution. This does not enhance transparency of the monitoring procedure because the confidential stage will last even longer.[27] Note that, following a Committee of Ministers decision, minority representatives are nowadays allowed to attend AC meetings in Strasbourg.[28] The UN Working Group on Minorities provides the best example of a mechanism where NGOs have a chance to participate fully in the mechanism's work.[29]

The High Commissioner's role in clarifying and sometimes even developing international norms might seem at odds with his main task of identifying and seeking early de-escalation of ethnic tensions that might endanger peace, stability or friendly relations among OSCE participating states. This is also reflected in his functions. The High Commissioner is basically charged not with the promotion and protection of the rights of national minorities, but with *early warning* and, if needed, *early action.*[30]

[27] Note that the government of Serbia and Montenegro has been the first and only government which allowed the AC to make the opinion public even before it submitted the state comments to the AC.

[28] Renewal of authorisations granted to the Advisory Committee for the first monitoring cycle adopted by the Committee of Ministers on 8 April 2003 at the 835th Meeting of the Ministers' Deputies.

[29] See further Letschert, *The Impact*, p. 404.

[30] Helsinki Decisions, para. II.3.

Nevertheless, the first High Commissioner developed the practice of frequently referring to minority rights provisions when urging governments to implement minority rights in domestic legislation and related policies. Among these provisions are documents concerning specific minority rights such as the OSCE Copenhagen Document, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the COE FCNM. He also referred to other, more general, international human rights law, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.[31] The High Commissioner thus saw a close interrelation between the implementation of minority rights and the prevention of conflicts. As a matter of fact, this is rather logical, since minority problems quite frequently start with the violation of their rights, which implies that a proper implementation of minority rights is at the same time a highly effective conflict prevention measure.

In line with his emphasis on the implementation of minority rights, he initiated the drafting of thematic recommendations and guidelines in which various existing minority rights (and relevant human rights) are elaborated, and which will be discussed in more depth below. Actually, this method of developing and promoting specific sets of recommendations and guidelines is only one way in which the High Commissioner deals with norms on minority protection. Ratner distinguishes four other approaches, which he calls 'methods for integrating norms into conflict resolution': (1) translation of norms, (2) elevation of norms; (3) mobilisation of support for outcomes consistent with norms; and (4) dissemination of norms.[32] The High Commissioner 'translates' the norms, in the sense that he clarifies the content and meaning for the use of each particular situation. The elevation of norms means that 'the High Commissioner has sought to take norms that do not meet the traditional

[31] See, e.g., his recommendations to the Macedonian government regarding educational rights. In his recommendation of 30 March 1998 to Mr Blagoj Handziski (Minister for Foreign Affairs), he made an explicit reference to international rules relating to the right to establish and maintain private education (Article 13(4) of the International Covenant on Economic, Social and Cultural Rights). He also referred to Article 13 of the COE Framework Convention and Recommendation 1353 of the COE Parliamentary Assembly regarding access of minorities to higher education.

[32] S. R. Ratner, 'Does international law matter in preventing ethnic conflict?' (2000) 32(3) *New York University Journal of International Law and Politics* 591–698, 623.

definition of legally binding . . . and imbues them with a more binding status'.[33] The High Commissioner has frequently underlined the importance of soft-law commitments and tries to persuade states to implement such commitments in domestic law. His references to the thematic recommendations and guidelines in his country recommendations are proof of this. Regarding the mobilisation of support, the High Commissioner puts much effort into convincing his partners (participating states, OSCE institutions and other international organisations) to support him. With this support, he urges states to implement his recommendations. This is of utmost importance, especially during EU accession negotiations. Lastly, relating to the dissemination of norms, the High Commissioner and his Office try to disseminate and explain existing minority rights norms to all parties involved. Ratner's analysis of the High Commissioner as an instrument that integrates norms in its activities is further elaborated by viewing the High Commissioner as a normative intermediary. He is authorised

> by states or international organizations seeking to promote observance of a norm, who involves himself or herself in a particular compliance shortcoming of a state and seeks to induce compliance through a hands-on process of communication and persuasion with relevant decision-makers.[34]

The High Commissioner is not the only minority rights mechanism that tries to further clarify international norms. International minority rights mechanisms' efforts to clarify international rules can best be illustrated by the following example relating to the drafting process of the Croatian Constitutional Law on the Rights of National Minorities. The draft law contained a definition of the term minorities, restricting it to persons having the citizenship of the state (Article 5). The High Commissioner tried to convince the government to amend this provision and to include non-citizens under the definition of minorities.[35] The COE Venice Commission was also involved in the drafting process. The experts from the Venice Commission finally accepted the limitation to citizens, although they did refer to 'recent tendencies of minority protection in international law (Article 27 of the ICCPR and the practice of the

[33] *Ibid.*, 636. [34] *Ibid.*, 668.
[35] See Recommendation of 4 April 2001 to the Minister of Justice of Croatia, Mr Stjepan Ivanišević.

HCNM)', which illustrates a different position.[36] Note that the AC held in its first Opinion on Croatia that 'it would be possible to consider the inclusion of persons belonging to additional groups, including non-citizens as appropriate, in the application of the Framework Convention on an article-by-article basis.'[37] The failure of the Croatian government to amend Article 5 was criticised by the AC in the second Opinion. The AC therefore recommended that the government amend the Constitutional Law regarding the *a priori* exclusion of non-citizens from its scope and 'that the authorities should ensure that in relevant sectoral legislation and practice such a requirement is invoked judiciously and only in cases where it pursues a legitimate aim'.[38]

The High Commissioner has from the beginning sought cooperation with other international organisations working in the same field, and has referred to the reports or opinions issued by other minority rights mechanisms.[39] Cooperation became more intense with the EU in the period that the European Commission was preparing its opinions on the accession of the candidate countries. The High Commissioner has not

[36] See CDL (2001) 20, 5 March 2001, Meeting of the Venice Commission Rapporteurs with the Croatian Working Group Drafting the Constitutional Law on the Rights of National Minorities in Croatia, Zagreb, 4–5 January 2001. See also CDL-AD (2003)9, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia. See also Opinion on the two draft laws amending the law on national minorities in Ukraine, adopted by the Venice Commission at its fifty-eighth Plenary Session, (Venice, 12–13 March 2004): 'The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 § 1 of the Venice Commission's Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe's Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages). However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition. In the Commission's opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens.'

[37] First Opinion on Croatia, adopted on 6 April 2001, published on 6 February 2002, ACFC/INF/OP/I(2001)003, p. 10. See also the first AC Opinions on Estonia, Germany, Serbia and Montenegro.

[38] Second Opinion on Croatia, adopted on 1 October 2004, published on 13 April 2005, ACFC/INF/OP/II(2004)002, para. 30.

[39] Note that the High Commissioner has promoted ratification of the COE FCNM in his contacts with governments.

hesitated to criticise the EU's policy towards minority rights and the double standards towards EU member states and non-member states.[40] Cooperation between the UN and the High Commissioner is based on the fact that the OSCE is a regional arrangement of the UN under Chapter VII of the UN Charter.[41] The High Commissioner takes part in coordination meetings and representatives of the Office often attend UN sessions such as the Working Group on Minorities, where presentations are given on the activities of the High Commissioner.[42]

The second author of this article has argued, based on two case studies in Macedonia and Croatia, that international organisations should become aware that by referring to each other's activities or better, supporting the activities of other bodies in their own reports or recommendations, the influence on the implementation of the recommendations made (by each organisation) will likely increase. An analysis of the successive reports and recommendations issued with regard to Macedonia and Croatia throughout the years by the High Commissioner and the AC, but also by ECRI, the UN Special Rapporteur, the UN Human Rights Committee and the European Commission, determined that these reports only rarely refer to the activities of other bodies engaged in the country and their respective recommendations.[43]

Note, for instance, the opinion of the AC regarding the implementation of the FCNM in Macedonia. The AC is particularly worried about the attitude of the young population, which is evident in the fact that some members of ethnic communities (mainly the Macedonian and Albanian) do not wish to take part in ethnically mixed schools.[44] The High

[40] 'Surely the standards on which the Copenhagen criteria are based should be universally applicable within and throughout the EU, in which case they should be equally – and consistently – applied to all Member States. Otherwise, the relationship between the existing and aspiring EU Member States would be unbalanced in terms of applicable standards. I believe such imbalance would be inconsistent with declared EU values and raise serious doubts about the normative foundations of the EU itself.' Address by Rolf Ekéus, 'From the Copenhagen Criteria to the Copenhagen Summit: the Protection of National Minorities in an Enlarging Europe, Conference on National Minorities in an Enlarged European Union', Copenhagen, 5 November 2002.

[41] As such, OSCE states may jointly decide to refer a dispute to the United Nations Security Council on behalf of the OSCE. See also Chapter 13, by de Witte and Horvath, below.

[42] For more information on cooperation with other UN bodies, see Kemp, *Quiet Diplomacy*, pp. 97ff. See also Chapter 3 by Li-Ann Thio in this volume.

[43] See Letschert, *The Impact*, ch. 8.

[44] AC Opinion on Macedonia, adopted 27 May 2004, published on 2 February 2005, ACFC/INF/OP/I(2005)001 ('Opinion Macedonia') para. 74, p. 19.

Commissioner has repeatedly emphasised that the government should increase its efforts to develop a multicultural educational system.[45] A similar message is expressed by the AC. However, the AC could have expressed its concern more forcefully, referring to the High Commissioner's recommendations and involvement in this matter as a back-up to its own assessment. The same applies to the activities of the High Commissioner with regard to the privately run South East European University in Macedonia, initiated by the first High Commissioner. The AC praised this initiative because of the interaction of students from different ethnic backgrounds and the availability of education in Albanian, Macedonian and English. The AC, however, did not explicitly refer to the activities of the High Commissioner in this regard. Considering that the High Commissioner consistently refers to the need to implement the FCNM (an approach supported by OSCE missions, which informally monitor the implementation of the FCNM and AC Opinions and which give information on and further promote the Convention), the AC should consider following a similar approach. Note, furthermore, that representatives of the High Commissioner's Office were also not consulted in the preparation of the AC Opinion.[46]

Another example, also relating to Macedonia, concerns the AC's reference to a scheme for recruiting persons belonging to minorities to work in the civil service that has been launched with support of the EU. The AC acknowledges the difficulties in this process, especially because the government is confronted with two competing objectives: 'on the one hand, to reduce the size of the civil service and, on the other hand, to promote public sector employment opportunities for persons belonging to minorities, in particular Albanians.'[47] A similar assessment was made by ECRI, stating that:

> there seems to be considerable fear amongst the public, particularly ethnic Macedonians, as to what the impact will be of the policy of equitable representation in conditions of economic difficulties and high unemployment. The need identified by international financial institutions for cutbacks in the number of staff in the civil service seems to have increased anxieties.[48]

[45] See also COE PA Recommendation 1213(i), 2000.
[46] From interviews at the High Commissioner's Office.
[47] Opinion on Macedonia, para. 97, p. 23.
[48] See para. 151 of the Third ECRI Report on Macedonia, adopted on 25 June 2004, published on 15 February 2005.

As was highlighted in the Introduction to this book, from the point of view of elaborating the existing minority rights standards in a consistent way, it is all the more important that the various bodies cooperate and coordinate their efforts. To illustrate, in the AC Opinion on Estonia, the AC expressed serious concern about a certain section in the Estonian Language Act (section 23) because it required public signs and other announcements to be in Estonian. The AC urged the government to revise the Language Act in conformity with the Framework Convention.[49] The government commented on this particular issue as follows:

> It should be stressed that the amendments to the Language Act as well as the implementing decrees thereto were drafted in close co-operation with the Office of the High Commissioner on National Minorities of the OSCE who has publicly stated that the amended text of the Language Act is in conformity with Estonia's international obligations and commitments. Similar statements have been made by the European Union and the Council of Europe.[50]

Regarding the involvement of the High Commissioner in, again, Estonia, it was observed that:

> to be sure, not only in cases when the Mission and the High Commissioner were of [a] different opinion did the effectiveness of the High Commissioner suffer. Similar occasions occurred also with other international organisations, most notably with the CBSS [Council of the Baltic Sea States] Commissioner.[51]

As referred to above, a case study of Croatia has demonstrated the danger of different views between various international bodies. The difference of opinion between the Venice Commission and the High Commissioner regarding the inclusion of a citizenship requirement in the Croatian Constitutional Law was used by the authorities to justify the view

[49] See first AC Opinion on Estonia, 2001, para. 43. See Statement regarding the adoption of amendments to the Law on Language by the Estonian Parliament of the High Commissioner of 15 June 2000, available at the High Commissioner website, where he states that an 'analysis of the amended text of the Law on Language leads me to the conclusion that the text of the Law is largely in conformity with Estonia's international obligations and commitments'.

[50] Comments of the Government of Estonia on the Opinion of the AC, GVT/COM/INF/OP/I (2002)005, para. 43.

[51] See M. Sarv, 'Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia, 1993–2001', *Core Working Paper* No. 6, p. 107, available at www.core-hamburg.de/english/research/hcnm/.

it found most preferable. In addition, it has, to a certain extent, undermined the position of the High Commissioner.[52] The lack of coordination can thus be used by governments to choose the approach of the international organisation which best suits them.

2 Thematic recommendations

2.1 General observations

When the High Commissioner was first established, the approach was merely country-specific. The first High Commissioner visited countries where he believed his involvement could make a difference, and subsequently issued country-specific recommendations. He soon realised, however, that some issues recurred in almost every minority situation in which he was involved. These issues included educational rights, linguistic rights and the right to effective political participation. Since the normative minority rights framework usually contains only vaguely formulated provisions which leave a wide margin of appreciation to states, the High Commissioner decided to initiate the drafting of more thematic recommendations or guidelines which would further elaborate the minority rights standards. He decided to bring together outstanding international experts to draw up general recommendations that would be endorsed by his office and that could serve as guidance for states and minorities. In November 1995, the then still-existing Foundation on Inter-Ethnic Relations, on the request of the High Commissioner, organised an international expert consultation on the subject of education. This led to the finalisation of the Hague Recommendations Regarding the Education Rights of National Minorities. Later, in 1996, two expert consultations took place in the field of linguistic rights. This led to the drawing up of the Oslo Recommendations on the Linguistic Rights of National Minorities. In 1998, a group of eighteen international experts drew up the Lund Recommendations on the Effective Participation of National Minorities

[52] Note Dorodnova with regard to Latvia, who observed that a 'factor that could have potentially threatened the success of the HCNM [in Latvia] was the lack of coordination of the activities, positions and recommendations of various international actors'. J. Dorodnova, 'Challenging Ethnic Democracy: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Latvia, 1993–2001', *CORE Working Paper* No. 10, p. 151, available at www.core-hamburg.de/english/research/hcnm/.

in Public Life.[53] The second High Commissioner has furthermore initiated the drafting of Guidelines on the Use of Minority Languages in the Broadcast Media which were adopted at Baden on 24 and 25 October 2003.[54] Finally, in February 2006, the High Commissioner presented another series of recommendations on Policing within Multi-Ethnic Societies.

The recommendations have been drafted by independent experts at the request of the High Commissioner. In fact, the High Commissioner had a strong influence on the way the recommendations were drafted, taking into account his personal experience with the matters concerned. The recommendations have not been adopted by the OSCE participating states as such, but have received full political support. Formally, the recommendations remain only expert recommendations, although their public endorsement by the High Commissioner greatly added to their authority. Some have therefore noted that these recommendations qualify as 'soft law'. Considering that they were drafted by a group of experts, that they concern a general thematic issue, that they were later used by an independent body such as the HCNM and that they are frequently referred to by other international instruments, they 'come close to the status of politically binding documents, often contributing to or regarded as "soft law" '.[55]

In international law, a distinction is often made between hard and soft law. In general, it can be stated that a formally concluded treaty is considered hard law, resulting in legally binding obligations, whereas soft law consists of instruments that are non-binding in the legal sense, such as resolutions and recommendations, but which are generally considered as reflecting a more or less common opinion within the international

[53] The Lund Recommendations have been further elaborated in the Warsaw Guidelines that were adopted in January 2001 and contain recommendations to assist national minority participation in the electoral process.

[54] The recommendations have been published in English, and a number of other languages including Croatian, Estonian, Hungarian, Latvian, Romanian, Russian, Serbian, Slovak and Ukrainian.

[55] Both the UN Working Group on Minorities and the COE Advisory Committee under the Framework Convention have referred to these guidelines in their reports or opinions. See, e.g., the recent adoption by the AC of the Commentary on Education under the Framework Convention for the Protection of National Minorities, adopted at the twenty-fifth session on 2 March 2006, in which reference is made to the OSCE Hague Recommendations. See also M. van den Bosch and W. J. M. van Genugten, 'International legal protection of migrant workers, national minorities and indigenous people – comparing underlying concepts' (2002) 9 *International Journal on Minority and Group Rights* 195–233, 210.

community and which are drafted in a standard-setting way. Shelton has further categorised non-binding norms into primary soft law and secondary soft law. She considers primary soft law to be 'those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organisation'.[56] She continues that such an instrument 'may declare new norms, often as an intended precursor to adoption of a later treaty, or it may reaffirm or further elaborate norms previously set forth in binding or non-binding texts'.[57] Secondary soft law includes

> the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organisations applying primary norms.[58]

From the point of view of the normative development of international rules, the activities of international mechanisms in the field of standard-setting and clarifying existing standards are therefore of utmost importance.

In addition to drafting recommendations or guidelines on the above-mentioned topics, the High Commissioner has also addressed other topics from a thematic point of view. For instance, the situation of the Roma and Sinti attracted his attention after being confronted with their problems in several countries and after the Senior Council in 1993 specifically requested that the High Commissioner pay attention to the Roma, even though one could argue that, formally, it did not belong to his conflict prevention mandate. In view of the seriousness of the situation of Roma and Sinti, the High Commissioner again paid attention to this issue by publishing a Report on the Situation of Roma and Sinti in the OSCE Area in 2000, in which he provided recommendations on how to deal with their problems. It was obvious, however, that at first the High Commissioner dealt with this issue only because the Senior Council of the OSCE[59] had

[56] D. Shelton, 'Commentary and conclusions', in D. Shelton (ed.), *Commitment and Compliance, The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), p. 449.

[57] *Ibid.*, p. 450. [58] *Ibid.*, p. 451.

[59] The Senior Council at the time was the main decision-making body within the OSCE. This role is now performed by the Permanent Council which in practice has replaced the Senior Council.

specifically requested him to do so. In practice, the High Commissioner is of the opinion that Roma issues do not come within his mandate: although the problems relating to the treatment of Roma and Sinti are definitely amongst the most serious minority problems in the OSCE area, they are not considered a *security* problem. The fact that he picked up the issue again in 1999–2000 was undoubtedly because the seriousness of the problem warranted further attention, but also because the High Commissioner was being increasingly criticised for paying attention only to problems 'east of Vienna'. By addressing the problems of Roma and Sinti, who are also heavily discriminated against in western European countries, the High Commissioner could counter such criticism to some extent.

Following the publication of his report on Roma and Sinti, the High Commissioner organised a seminar on this issue in Bratislava in June 2000. The recommendations following from the report have achieved a high normative value, as evidenced by the fact that they have been used by the EU during accession negotiations with candidate countries.[60] An interesting aspect of the Roma report of the High Commissioner is the fact that he extensively referred to relevant norms and standards of the OSCE and many other international organisations. In this respect, the High Commissioner continued his policy of basing his recommendations as much as possible on existing obligations and commitments of the OSCE participating states. By extensively referring to instruments from other intergovernmental bodies, the High Commissioner also conspicuously contributed to a valuable synergy of norms and standards in the area of the protection of national minorities.

The fact that the High Commissioner initiated the drafting of thematic recommendations and guidelines is an interesting development in comparison with the way other international organisations are functioning. Other organisations either aim at developing new legal standards in the form of covenants, treaties, conventions, etc., or they clarify existing standards through their monitoring procedures. The work of the COE AC under the FCNM is a good example of the last category. The High Commissioner, however, started from recurring themes in his work (such as education, language, citizenship, participation) and aimed at clarifying standards in these areas as a separate task. The fact that the OSCE is a strictly political organisation made it even easier for the High

[60] See EU Guiding Principles for Improving the Situation of the Roma in Candidate Countries.

Commissioner to embark on this road. The COE AC is developing a similar approach by drafting thematic comments on recurring themes which it comes across in its monitoring work. The first theme on which it adopted a general commentary is on education.[61] Whether this will have a similar impact in terms of standard-setting as the work done by the High Commissioner remains to be seen, but the AC approach seems quite logical and viable. The efforts of the two mechanisms to elaborate the normative framework can only be applauded. However, it also has a downside because the risk of diverging comments is present. A suggestion could be to combine the efforts, through which the general comments or guidelines would be supported by both mechanisms, which would also increase the authority of the comments.[62]

An argument against this could be the different functions of the two mechanisms. However, both the AC and the High Commissioner have grown closer together, because of the loosening of the demarcation of the specific tasks of conflict prevention and the protection of minorities. The AC was established as a monitoring mechanism, entrusted with the task of seeing that the FCNM is implemented and complied with. The AC's efforts to promote dialogue between the parties involved might also, however, influence the prevention of conflicts. Conversely, the influence of the High Commissioner on the protection of minorities through his conflict prevention activities must not be underestimated. This was specifically referred to by the second High Commissioner when addressing the Conference on the fifth anniversary of the Framework Convention, stating that the protective role of the Convention also brings about preventive effects. At the same time, the mandate of the High Commissioner, pervaded by the philosophy of conflict prevention, has a strong impact

[61] Commentary on Education under the Framework Convention for the Protection of National Minorities, adopted at the twenty-fifth session on 2 March 2006.

[62] Note that, in May 2004, the Venice Commission organised an informal meeting with representatives of the AC, the High Commissioner and the UN Working Group on Minorities to discuss the issue of citizenship (the Committee of Experts on the European Charter for Regional and Minority Languages, representatives of the PA and the Nationality Unit DGI also participated in this meeting). See also the statement by Ekéus at the conference on the fifth anniversary of the Framework Convention: 'The more these guidelines overlap and are consistent with Opinions of the Advisory Committee and Resolutions of the COM, the greater synergy between the two can be generated.' See *Filling the Frame, Five Years of Monitoring the Framework Convention for the Protection of National Minorities*, Proceedings of the Conference held in Strasbourg, 30–31 October (Strasbourg: Council of Europe Publishing, 2004), p. 27.

upon the protection of minorities.[63] The impact of the AC on the prevention of conflicts has also been acknowledged by the first Chairman of the AC, when he stated that:

> the AC is guided by the understanding that a key feature of the Framework Convention is that it sets objective and legal standards for the protection of national minorities. Indeed, we believe that it is precisely this feature that renders the Framework Convention so important as a contribution for the stability of the continent.[64]

It could therefore be argued that it has become more difficult to draw a clear division between a mechanism primarily focusing on enhancing the protection of minorities and a mechanism focusing on the conflict preventive aspects of minority tensions. The two aims often interrelate: the protection of minorities with a view to enriching cultural diversity in society and securing peace and stability in a state and region.

The most recent standard-setting project initiated by the High Commissioner concerns the issue of policing in multi-ethnic societies. Policing has become an issue on the OSCE agenda only relatively recently. At the last OSCE summit meeting in Istanbul in November 1999, the organisation for the first time in its history adopted decisions which proclaimed the important role of policing in maintaining and restoring peace and stability in the OSCE region. Actually, this was a rather remarkable fact, since any inside expert realises how extremely important the role of police organisations is in maintaining social and legal harmony and order in a country and region. Good, effective and transparent policing is one of the main pillars for any rule of law state and its absence constitutes one of the sources of instability within societies. Widespread corruption, lack of professionalism and abuse of power are diseases which are quite common in several OSCE states and these facts seriously threaten the development of democracy and the rule of law and, thereby, stability within these states. In view of their often vulnerable position, unprofessional and unethical policing would have a particularly negative impact on minorities, also partly because they are often underrepresented in the

[63] Address by Rolf Ekéus, *Filling in the Frame*, p. 27.
[64] Statement by Rainer Hofmann at the 679th Meeting of the Committee of Ministers' Deputies, AC Report, fifth Meeting, p. 7.

police force, while police officers usually lack specific knowledge about the minorities which they have to police.

Other studies have extensively explored the first three sets of Recommendations of the High Commissioner on Education Rights, Linguistic Rights and Participation Rights and have concluded that they have indeed had a substantial impact upon the process of standard-setting, some authors even concluding that these recommendations have become part of soft law.[65] This is partly reflected in the fact that these recommendations have been distributed as official documents by other intergovernmental organisations (in particular the UN and Council of Europe), in the many official references to these recommendations by other intergovernmental bodies (such as the AC of the Framework Convention) and in the official recognition of such recommendations as the basis for official state policies (such as the Baltic countries concerning education rights of national minorities). This implies that the High Commissioner's recommendations had an impact both upon the further development of international standards and on national policies and standards. The impact at the international level mainly relates to the *interpretation* of existing norms, although the bold interpretation of vague existing norms through quite detailed elaborations could sometimes be seen as getting close to the elaboration of new standards.

The present authors consider it unnecessary to repeat the various arguments made by the above-mentioned authors in their scholarly studies, and therefore, as indicated in the Introduction, we will explore whether the new set of Recommendations on Policing in Multi-Ethnic Societies makes another contribution to the further bold interpretation of existing minority rights standards or even to the development of new ones.

[65] See, e.g., J. Packer and G. Siemienski, 'Integration through education: the origin and development of the Hague Recommendations', (1996–7) 4(2) *International Journal on Minority and Group Rights* 187–198; A. Eide, 'The Oslo Recommendations Regarding the Linguistic Rights of National Minorities: an overview' (1999) 6(3) *International Journal on Minority and Group Rights* 319–328; J. Packer and G. Siemienski, 'The origin and development of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities' (1999) 6(3) *International Journal on Minority and Group Rights* 329–350; P. Thornberry and M. Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg: Council of Europe Publishing, 2004), pp. 17–18. Also see: Drzewicki (ed.), (2005) 12(2/3) *International Journal on Minority and Group Rights*, special issue; K. Myntti, *A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life* (Turku/Abo: Abo Academi University, 2001); M. Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005).

2.2 Recommendations on policing in multi-ethnic societies

2.2.1 Are the new recommendations of additional value?

In order to assess whether the new series of recommendations have an impact on the further development of (new) international standards, it is important to raise the question of whether these recommendations – in line with the recommendations from the 1990s – did fill a gap in terms of further elaborating vague international standards. This question is indeed relevant in view of the fact that, in the past several years, various documents have been developed which address the same issues. The best-known document in the area of policing multi-ethnic societies is undoubtedly the so-called Rotterdam Charter: Policing for a Multi-Ethnic Society, which was adopted at an international conference in Rotterdam in May/June 1996. During this conference, police officers, representatives of NGOs and officials from local, national and European authorities discussed and adopted the text of the Rotterdam Charter. The purpose of this Charter is 'to identify the different actions that are needed to implement police services in the European multi-ethnic societies'.[66] The text of the Rotterdam Charter largely covers the same subject matter of the new High Commissioner's recommendations and it is, therefore, somewhat surprising to see that the Rotterdam Charter is only mentioned in a footnote in the explanatory note to the recommendations, particularly given that the main consultant who contributed to the drafting of the Rotterdam Charter was also the consultant hired for drafting the new recommendations.

One may only guess why the expert group, convened by the High Commissioner, apparently decided largely to ignore another highly relevant document, with the result that its own end result is largely a duplication of another document. If the High Commissioner's aim was to strengthen international standards in the area of multi-ethnic policing, he would have achieved that aim much more forcefully by directly referring to other existing documents, also in order to avoid differences in standards. However, it now seems that a desirable synergy has deliberately been avoided. This is regrettable, as by more explicitly taking into account previously adopted documents the expert group and, for that matter, the

[66] From the official website of the Rotterdam Charter: www.rotterdamcharter.nl.

High Commissioner would also have demonstrated that they indeed built upon existing norms and documents in developing the new set of recommendations. Now many readers may get the impression that the recommendations, endorsed by the High Commissioner, present something completely new, which is certainly not the case. A more intensive reference to the Rotterdam Charter and other relevant documents would have shown that the High Commissioner's recommendations are indeed aimed at further developing previous efforts by other organisations and expert groups, based on gained practical experiences about policing in multi-ethnic societies. The authors consider this a missed opportunity to strengthen the existing general standards on policing in multi-ethnic societies, in particular because the need for such standards is highly topical, even for western countries. Recent events in countries such as France and the United Kingdom have demonstrated that clearly. We will address these issues further in section 3 below.

The question about the need for a new document may also be posed in view of the fact that various other texts with a considerable relevance for multi-ethnic policing exist, such as the Council of Europe European Code of Police Ethics (2001), the Budapest Recommendations on Police in Transition (1999),[67] the UN Code of Conduct for Law Enforcement Officials (1979) and other texts.

All in all, the conclusion is that the High Commissioner could have explained more extensively his need for the new set of recommendations in light of the various documents which already exist and how his recommendations relate to these other documents. Since other international documents already contain relevant standards, the High Commissioner should have had good reasons for creating a new document, but these reasons remain largely 'in the air'. Now one could easily get the impression that the new set of recommendations actually are somewhat redundant.

3 Thematic recommendations regarding new minorities?

The instrument of the High Commissioner was originally set up to address the problems of national minorities which emerged in the nineteenth and early twentieth centuries. National minorities were those

[67] To be found at the website of the Hungarian Helsinki Committee: www.helsinki.hu.

groups which the upheavals of European history had created. Based on this conception, a distinction was made between national minorities, also sometimes referred to as 'traditional' or 'historical' minorities, and 'new' minorities, those groups usually referred to as migrant workers and immigrant communities.[68] The first group benefited from the minority rights regime; the second group from international rules relating to migrant workers and immigrant communities.[69] In the last decade, the situation of new minorities has attracted increasing attention from academics, and the question has arisen of whether the minority rights mechanisms established in the 1990s (for example, the High Commissioner, the AC, the UN Working Group on Minorities) should also address issues pertaining to new minorities.[70]

Before addressing this question, it should first be noted that the High Commissioner's mandate does not clarify what constitutes 'national minorities'. In order to circumvent the discussion of which groups would be considered a national minority each time he addressed a certain situation, the first High Commissioner, Max van der Stoel, referred to the OSCE Copenhagen Document, which explicitly states that 'to belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice'.[71] Furthermore, he once stated that:

> I would dare to say that I know a minority when I see one. First of all, a minority is a group with linguistic, ethnic or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group, which usually seeks to maintain its identity but also tries to give stronger expression to that identity.[72]

[68] See also M. van den Bosch and W. J. M. van Genugten, 'International legal protection of migrant workers, national minorities and indigenous people – comparing underlying concepts' (2002) 9 *International Journal on Minority and Group Rights* 195–233.

[69] Such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158, 18 December 1990, entry into force 1 July 2003.

[70] See also J. Packer, 'Confronting the contemporary challenges of Europe's minorities' (2005) 16(3) *Helsinki Monitor* 227–31.

[71] Copenhagen Document 1990, ch. IV, para. 32.

[72] Keynote Address of Max van der Stoel, CSCE High Commissioner on National Minorities at the CSCE Human Dimension Seminar on 'Case Studies on National Minority Issues: Positive Results', Warsaw, 24 May 1993.

Van der Stoel thus captured two essential characteristics of a minority. First, every minority has at least one basic feature related to its own identity that distinguishes it from the majority. Secondly, it wants to preserve such characteristics. Besides clarifying what he understood by the term 'minority', he needed to clarify the term 'national'. Some states explained this term as 'having the nationality or citizenship' of the state, which would suggest that non-citizens would be excluded from the High Commissioner's scrutiny. However, many of the situations in which the High Commissioner has been involved concern issues of citizenship (for example, in Estonia and Latvia) of persons belonging to national minorities who either did not have any citizenship at all or who had the citizenship of another state. It would be unfair for a state to prevent the High Commissioner from taking up such an issue by arguing that the requirement of citizenship had not been fulfilled. The High Commissioner has not taken such a restrictive approach. For example, in Estonia (and Latvia), he has made a number of recommendations mainly concerning the Russian-speaking population that did not have Estonian nationality. It is clear that the authorities of the states concerned did not make any objection against the High Commissioner dealing with these problems because of the 'lack of citizenship' of the persons concerned.

The question of whether issues relating to new minorities should be addressed by the High Commissioner is not easy to answer. For many years, minority tensions in western European countries were not considered to have the potential to develop into intra- or international conflict. This assumption might need reconsideration, based on current developments in several western European countries. Several western societies are faced with less tolerance towards new minorities, which, if not addressed properly, might lead to increasing tensions. The Rotterdam Declaration, which was adopted by the OSCE Parliamentary Assembly in 2003, urged the OSCE participating states to strengthen the High Commissioner's mandate to deal with issues concerning new minorities and to give the Office more resources to cover these new tasks.[73] Following

[73] The Rotterdam Declaration of the OSCE Parliamentary Assembly and Resolutions adopted during the twelfth Annual Session, 5–9 July 2003, ch. III, para. 84, which suggests 'that the mandate and resources of the OSCE High Commissioner on National Minorities be modified and strengthened to deal with the protection of the new minorities in established democracies in the OSCE area, and to help them integrate into the societies of their new homelands while recognizing their right to maintain their cultural heritage.'

this declaration, no concrete steps were taken. Then, on 22 December 2004, the Bulgarian Chairman-in-Office[74] appointed a Personal Representative on Combating Racism, Xenophobia and Discrimination, also focusing on Intolerance and Discrimination against Christians and Members of Other Religions, a Personal Representative on Combating Anti-Semitism, and a Personal Representative on Combating Intolerance and Discrimination against Muslims.[75] These appointments raise the question of whether the High Commissioner would still have a role to play in relation to new minorities, considering that these special representatives are entrusted with the task of addressing issues relating to such minorities. In addition, ECRI has carried out considerable work in this field, as has the European Monitoring Centre on Racism and Xenophobia (which will possibly be incorporated in the future EU Fundamental Rights Agency).

However, in spite of these valuable initiatives and activities with regard to new minorities, it should be acknowledged that the needs of these minorities go beyond measures to combat discrimination, which is the main focus of the above-mentioned institutions and representatives. As was aptly noted by the second High Commissioner:

> there is a great deal in common between new and established minorities both in the problems they face and in the means of resolving them. Both are likely to be concerned about political, economic and social exclusion and about the maintenance of their own culture.[76]

The second High Commissioner at first indicated a willingness to address themes such as racism, anti-Semitism and intolerance with regard to new minorities.[77] However, he later stated that tensions involving new

[74] Within the OSCE, the Chairman-in-Office holds the leadership of the organisation. The chairmanship rotates annually, and the post of the Chairman-in-Office (CiO) is held by the Foreign Minister of a participating state. The CiO is assisted by the previous and succeeding chairmen; the three of them together constitute the Troika. The origin of the institution lies with the Charter of Paris for a New Europe (1990); the Helsinki Document 1992 formally institutionalised this function.

[75] These appointments were extended by the Slovenian CiO in January 2005.

[76] Address by the OSCE High Commissioner on National Minorities, Ambassador Rolf Ekéus, thirteenth meeting of the OSCE Economic Forum, 27 May 2005, p. 3.

[77] Note the following statement of Ekéus regarding the integration of new minorities through their participation in the economic, social, cultural and political life of their countries: 'They cannot be told that they must leave their religion, language or other key elements of their identity at the door.' (Rolf Ekéus, 'Towards a Europe for All', Speech at the Roundtable Conference on New Minorities: Inclusion and Equality', The Hague, 20 October 2003).

minorities only fall within his mandate if they have the potential to develop into conflict.[78] As mentioned above, the main task of the High Commissioner was originally to identify and seek early de-escalation of ethnic tensions that might endanger peace, stability or friendly relations among OSCE participating states. However, as previously indicated, the High Commissioner has been able to expand considerably his mandate with working methods originally not foreseen.[79] The HCNM's opinion that the problems of new minorities do not belong to his mandate has been seriously criticised.[80] Indeed, by missing the chance to link more closely with the Rotterdam Declaration (as was also the case with regard to the recommendations on policing), the High Commissioner has missed a chance to deal with the highly important problem of new minorities in western European countries. Actually, it is quite remarkable that the High Commissioner is against involvement in the problems of new minorities, as the security dimension of new minority problems is obvious. Recent events (2005 and 2006) in France and the United Kingdom strongly indicate the explosive nature of the ongoing and increasing problems of exclusion and discrimination of the new minorities.[81] Therefore, there seems to be a sufficient basis for the High Commissioner to consider such problems to be in his mandate.

Both the OSCE High Commissioner and the COE AC can play a role in this field, starting by adopting a joint general comment or recommendations on the scope of minority protection with regard to new minorities. The AC, following its article-by-article approach, already indicated that some provisions clearly apply to 'old' minorities (such as Article 11(3)), whereas others could be applicable to new minorities (Articles 6, 3, 5, 7 and 8).[82] Considering the great expertise of both the

[78] He stated that 'my mandate is about conflict prevention and I believe that in choosing my priorities I should continue to look to the areas where risks of conflict are greatest' (address by the OSCE High Commissioner on National Minorities, Ambassador Rolf Ekéus, thirteenth Meeting of the OSCE Economic Forum, 27 May 2005, p. 3).

[79] For a thorough overview, see Letschert, *The Impact*, ch. 2.

[80] J. Packer, 'Confronting the contemporary challenges of Europe's minorities' (2005) 3 *Helsinki Monitor* 229–30.

[81] For more information, see the news presented on the website of the Minority Rights Group International: www.minorityrights.org/news_detail.asp?ID=387.

[82] R. Hofman, 'Review of the Monitoring Process of the Council of Europe Framework Convention for the Protection of National Minorities' (2001–2) 1 *European Yearbook of Minority Issues* 435–60, 449.

High Commissioner and the AC in the field of minority protection and their advisory role to governments on different ways of accommodating minorities' needs, thereby not losing sight of the interests of governments, it would be desirable if the two minority rights mechanisms tried to influence governmental policies with regard to new minorities' issues. This would provide the High Commissioner, in particular, with an opportunity to conduct innovative work in terms of standard-setting, and this would also undo the criticised neglect regarding the issue of new minorities. However, since both instruments are functioning on the basis of different mandates, it is clear that the High Commissioner could also consider a more operational involvement in the problems of 'new' minorities, in addition to the development of new standards.

4 Conclusion

The High Commissioner has to be commended for his continued efforts to contribute to a further development of standards in the area of the protection of the rights of persons belonging to national minorities. These efforts have had a very positive impact upon the process of standard-setting in the past, and there is definitely still space for further activities in this area, for example relating to the scope of minority protection for new minorities. The considerable authority of the High Commissioner is an important factor in this context, even though his 'Recommendations' or 'Guidelines' are just recommendations, without any legally or politically binding force. In practice, however, the High Commissioner's authority gives them a more authoritative status than recommendations which might have been issued by groups of experts.

It is also clear that the Hague, Oslo and Lund Recommendations have had a significant influence on the development or further elaboration of standards relating to the protection of national minorities. In fact, these three sets of recommendations had the explicit aim of making a contribution in terms of standard-setting. In the case of the Recommendations on Policing in Multi-Ethnic Societies, however, it has to be observed that their nature is quite different from previous recommendations, in particular the Hague, Oslo and Lund Recommendations. These latter recommendations were clearly filling a gap by further elaborating vague norms on minority rights, whereas the most recent set of recommendations have the character of a set of operational guidelines, without a strong

link to existing norms, standards and principles. The recommendations definitely contain useful practical guidelines, but effectiveness may have been enhanced by embedding them more firmly in the context of existing (legal and political) norms and standards. The extensive Explanatory Note also fails to address the important question of why a new document was warranted, given that some other quite relevant documents on the same subject have already been developed.

The High Commissioner has combined conflict prevention strategies (early warning and early action) with emphasis on implementation of and compliance with human rights, more particularly minority rights. His engagement with minority rights norms is clearly demonstrated through the elaboration of the country-specific recommendations and the encouragement of the drafting of thematic recommendations and guidelines. The country-specific recommendations and the general guidelines have evolved into one of the main tools of the High Commissioner, providing important guidance for governments and other international organisations working in this field. Moreover, this practice has led to the development of new standards and the further elaboration of existing, vaguely formulated norms in the field of minority rights.

This leads to the conclusion that the efforts of the High Commissioner to contribute to the development and further elaboration of standards on the protection of minority rights have been quite successful in the time of the first High Commissioner, but that his successor apparently has opted for a different policy of only developing some technical, operational guidelines in the spheres of broadcasting and policing. By doing so, the High Commissioner has lost a chance to build on the momentum created in the 1990s. The High Commissioner should be encouraged to return to a more ambitious approach instead of just developing interesting operational guidelines.

5

The Council of Europe's Framework Convention for the Protection of National Minorities

ASBJØRN EIDE

Introduction

The Council of Europe's Framework Convention for the Protection of National Minorities ('FCNM') was adopted in 1994 and entered into force in 1998. Article 1 of the FCNM proclaims that: 'The protection of national minorities and of the rights and freedoms of persons belonging to those minorities *forms an integral part of the international protection of human rights*, and as such falls within the scope of international co-operation'.[1] The purpose of this chapter is to show, from the monitoring practice, several implications of that assertion: (1) the interpretation and application of the FCNM draws on the basic principles underlying universal human rights, including that human rights are for everyone and are therefore different from citizens' rights, and that they shall be ensured without discrimination; (2) earlier usages of the concept of minorities, derived from practices before 1945 when human rights were made part of the emerging international law of cooperation, are invalid to the extent that they conflict with contemporary human rights; (3) while the FCNM reaffirms the applicability of standard human rights to persons belonging to minorities, it goes beyond that by providing additional rights for such persons and by imposing obligations on the state to protect the minorities as groups.

The term 'standard human rights' refers to the rights contained in the Universal Declaration of Human Rights and in the global and regional conventions derived from that declaration. Standard human rights are individualistic in nature and are rights of every person; minority rights are by definition rights of persons belonging to minorities, which to some extent require measures to protect the minorities as groups.

[1] Emphasis added.

In the evolution of the international protection of minority rights the FCNM is of particular significance for two reasons: (1) it is the first multilateral convention spelling out in detail minority rights and corresponding state obligations; and (2) it has a monitoring system through which an extensive practice has evolved, making it possible to draw a number of conclusions concerning the meaning and content of minority protection. The monitoring is carried out by an expert body, the Advisory Committee on the Framework Convention ('ACFC') which reports to the Committee of Ministers[2]. The monitoring of the FCNM can be seen as a laboratory for the elaboration of the interaction between minority protection and the evolution of the international system of human rights. On the other hand, since it forms an integral part of the international protection of human rights, there is by necessity an extensive synergy between the international protection under the FCNM and that of other human rights instruments.

While pointing out that the FCNM was the first – and so far the only – multilateral convention spelling out minority rights in some detail, it is important to bear in mind its antecedents such as the minority protection under the League of Nations, but also the profoundly changed context. There is a considerable difference between the conditions which gave rise to the minority protection system after the First World War, and those prevailing when the FCNM was adopted in 1994, and the main difference is exactly what FCNM Article 1 states: that the rights of persons belonging to national minorities form an integral part of the international protection of human rights. In 1919, when the minority protection arrangements under the League of Nations were created, there were neither internationally agreed human rights standards nor any system for their international protection.

The fact that the minority protection contained in the FCNM is an integral part of international protection of human rights affects the understanding of the *concept* of minority (below, section 1) and the question of *effective equality* of persons belonging to minorities (section 2). In these regards, there is a synergy effect in that the monitoring of the FCNM can draw on standard human rights and the work of the other relevant supervision bodies. But FCNM goes beyond the standard rights by requiring states parties to ensure conditions required for minorities to preserve and develop their culture and

[2] The monitoring process is described in section 5 below.

identity (section 3) and conditions for *effective participation* in economic, social and cultural life and in public affairs (section 4); in these regards there can be a synergy effect, in that the other supervision bodies can draw lessons from the monitoring of the FCNM. To what extent this is done in practice will not be examined in this chapter, which will be limited to an examination of where the minority rights rely on standard human rights and where they go beyond. Since states parties to the FCNM are also parties to other human rights conventions and therefore subject to other monitoring or supervisory bodies, a brief presentation will be given of the peculiarities of the monitoring process of the FCNM and ways in which it can draw on the work of other supervisory bodies and on activities of other relevant international agencies (section 5).

The purpose here is not to give a general presentation of the FCNM or the interpretation of its provisions in the light of the monitoring practice. That has been done by others. The most comprehensive work is the *Commentary on the European Framework Convention* (Marc Weller, 2005). Nor is it the purpose here to assess the effectiveness and function of the monitoring process, which has been covered in other important contributions.

1 The concept of 'minority' and the personal scope of application of the FCNM

Lengthy debates have been held on the concept of minority and the criteria, subjective and objective, which should be used to determine which minorities 'exist'. There is not in customary international law a consensual definition of 'minority'. Neither do the relevant conventions, including the FCNM, define the term. There is general agreement that the term 'minority' in international law is limited to persons who belong to a group who share in a common culture, a religion, and/or a language. Whether there are additional limitations depends on the interpretation of the convention as a whole.

1.1 The human rights perspective

Rights of persons belonging to minorities are set out in the UN Covenant on Civil and Political Rights ('CCPR') Article 27. The monitoring committee for that covenant, the Human Rights Committee, has clarified its

understanding of the term 'minority' under that article in its General Comment 23.[3] The Committee points out that CCPR Article 2(1) requires states parties to the Covenant to ensure that the rights protected under the Covenant are available to *all* individuals within its territory. Consequently, they do not need to be citizens of the country.[4] This observation by the Human Rights Committee reflects the general principle that human rights belong to everyone, not only citizens, unless special limitations are contained in the conventions themselves. Here one can observe a synergy to the monitoring of the FCNM: there is nothing in the text of the FCNM which requires that persons belonging to minorities must be citizens.

The Human Rights Committee elaborates on the reasons why the concept of minority under Article 27 is not restricted to citizens by referring to the nature and scope of the rights envisaged under that article: 'Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language.'[5] In other words, the state is duty-bound to respect the exercise of these freedoms.

The same goes for the FCNM: state obligations to respect the use by minorities of their own language or the practice of their religion and beliefs are part of universal human rights and cannot be limited to citizens or traditional minorities. Their freedom to enjoy their own culture is also part of universal human rights and cannot be restricted except for those aspects of their culture that conflict with human rights. Such limitations must be applied to majorities as well as minorities, however; it is not a special aspect of minority issues.

It might be argued that the FCNM contains more burdensome obligations on states than the mere duty to respect the exercise by minorities of their freedoms, and that it is therefore justified to have a more restricted scope of application of the FCNM. Also in this regard it is useful to refer back to the human rights perspective.

[3] See Martin Scheinin's contribution to this book (Chapter 2).

[4] Human Rights Committee: Article 27 of the International Covenant on Civil and Political Rights. General Comment 23 (in Report of the Human Rights Committee, vol. 1 GAOR, 49th Session, Supplement No. 40 (A/49/40) pp. 107–10, www.ohchr.org/english/bodies/hrc/comments.htm.

[5] *Ibid.*, para. 5.2.

The Human Rights Committee has pointed out that the state must also *protect* the enjoyment of these rights against threats from third parties:

> Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself – but also against the acts of other persons within the State party.[6]

This also corresponds to the content and practice of the FCNM. As required under its Article 6, states parties must protect any person – citizen or not – 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 human rights perspective must be taken even one step further. The Human Rights Committee asserts with reference to cultural rights under Article 27 that:

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting or the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[7]

In contrast to the CCPR Article 27, which uses the terms 'ethnic, religious and linguistic minorities', the Framework Convention uses the term 'national minority'. The word 'national' should not, however, justify a limitation of the personal scope of application of the FCNM. The term 'national minority' is a predominantly European term, with roots going back to the age of nationalism starting at the end of the Napoleonic wars and consolidated in the minority arrangements after the First World War (1914–18). The meaning it had then should not unduly colour the understanding of the term today. The situation in 1919 was very different from that of our present time; in particular, there was no general human rights regime in international law.

[6] *Ibid.*, para. 6.1. [7] *Ibid.*, para. 7.

While guidance in the application of the FCNM can be taken from the understanding of CCPR Article 27, the FCNM does impose heavier duties on states and in some regards provides for enhanced rights for persons belonging to some minorities. It is quite understandable and reasonable that, in regard to those enhanced rights, states want to limit the range of beneficiaries. But many of the rights set out in the FCNM do not go beyond those in Article 27 CCPR or those which follow from 'standard' human rights. There is consequently no good reason to limit the application of FCNM as a whole to a restricted number of beneficiaries; restrictions can justifiably be made in regard to the more demanding obligations on states such as those under Articles 10(2) and 14(2). This is also what is envisaged by the Convention itself.

1.2 States parties' approach to the scope of application

In the absence of a definition of 'minority' in the FCNM, state parties make their own decisions, implicitly or explicitly, regarding the scope of application they want to give to the FCNM. In practice, it is done either in connection with ratification[8] or in the reporting process. Declarations made in the context of ratification are sometimes couched in generic terms, listing the criteria for inclusion, whereas others simply list the names of the minorities that will be covered.

Some states use an open and inclusive approach to the scope of application. One example is the United Kingdom. The term 'national minority' is not, in the United Kingdom, a legally defined or used term. The FCNM is applied to racial groups as defined in the Race Relations Act 1976, which defines a racial group as 'a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origins'. This includes ethnic minority communities (or visible minorities) as well as the Scots, Irish and Welsh, who are defined as a racial group by virtue of their national origins. Gypsies (and Travellers in Northern Ireland) are also considered a racial group under the UK Act.

[8] Six states parties (Austria, Estonia, Germany, Poland, the former Yugoslav Republic of Macedonia and Switzerland) have explicitly declared upon ratification that the protection is extended only to citizens. Latvia has a general restriction to citizens only, but extends the coverage to certain groups of non-citizens. See http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=08/02/05&CL=ENG&VL=1.

There is no restriction to citizenship. This flexibility has been strongly welcomed by the ACFC.[9]

Most states use the term 'national minority' in their legislation or practice and restrict the term to 'traditional' groups, which means that they must have existed in the country for a considerable length of time. Many of them do not require, however, that the individual persons belonging to those groups need to be citizens; newcomers can also be covered if they have the same language, practise the same religion or share the same culture as the traditional group in that country. States taking this approach include Norway, Sweden and some other countries.[10] Other states have a double restriction: they include only well-established, traditional groups and exclude from coverage even those persons belonging to such groups that are not citizens of the country.

The restriction to those who hold Estonian citizenship is particularly controversial, because a large number of those who lived there when Estonia regained its independence from the Soviet Union were not given Estonian citizenship. The Soviet citizenship of those persons disappeared. Since they were not given citizenship in their country of residence at the time of its restoration of independence, they became in reality stateless. The majority of the largest linguistic minority in Estonia was therefore excluded from the scope of application of the FCNM, a matter which has raised concern both with the High Commissioner on National Minorities of the OSCE, and with the ACFC, which has called on the Estonian government to reconsider its position.[11]

1.3 The approach of the Advisory Committee

Facing considerable differences among states regarding the scope of their application of the FCNM, the Advisory Committee (ACFC) recognised

[9] First Opinion on the United Kingdom, para. 14.

[10] First Norwegian state report, section 3.1, fourth para. The Swedish state report does not provide information on this question, but in their dialogue with the ACFC, the Swedish authorities have confirmed that the provisions of the FCNM are to be implemented in the same way for all persons belonging to these particular minorities, regardless of whether or not they are Swedish citizens. The ACFC strongly welcomed this inclusive approach. Bearing in mind that a large number of persons concerned are not Swedish citizens, this inclusive approach contributes to the impact of the Framework Convention and helps to avoid any arbitrary or unjustified distinctions within these minorities. See first Opinion on Sweden, para. 16.

[11] First Opinion on Estonia, para. 18.

that in the absence of a definition of 'minorities' in the Convention, governments have a margin of discretion in deciding which minorities they want to protect when ratifying the Convention, but that margin of discretion is not unlimited.

Declarations by states parties at the time of ratification setting out a restrictive application of the Convention could be seen as a reservation, and could as such be held to be subject to the general law of treaties making a reservation invalid when it defeats the object and purpose of the Convention. Since FCNM Article 1 makes it clear that minority protection is part of international human rights law, there is less space for reservations than in regard to other types of treaties. This point is further strengthened by the FCNM Article 19, which says that in the application of the Convention, the parties can only make such limitations, restrictions or derogations which are provided for in international legal instruments, in particular the European Convention on Human Rights and Fundamental Freedoms.

Justifiable distinctions could be made on objective and reasonable grounds. This is also built into the Framework Convention itself. One example is that the right to use the minority language in relations with the administrative authorities cannot be claimed by persons belonging to all national minorities, but only those among them who fulfil the requirements set out under Article 10(2).

The Advisory Committee has therefore decided to combine a rather pragmatic approach to the scope of application with some basic principles. In its assessment of the state party's application of the FCNM Article 3(1) ('Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such'), the ACFC points out that, in the absence of a definition in the Framework Convention, the parties must examine the personal scope of application to be given to the Convention within their country. The position taken by the state party, whether in the declaration accompanying the ratification or explicitly or implicitly in its report on the implementation of the Convention, is therefore deemed by the Committee to be the outcome of that examination. Whereas the Committee notes that parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, the Committee notes, on the other hand, that this appreciation must be exercised in accordance with international law and the fundamental principles set out

in the FCNM Article 3. In particular, the implementation of the FCNM should not be a source of arbitrary or unjustified distinctions. A standard formulation to this effect is generally included in the opinions adopted by the ACFC.[12]

2 Ensuring equality for persons belonging to minorities

Basic to international human rights are the principles of equality and non-discrimination, as set out in UDHR Article 1 ('Everyone is born free in dignity and rights') and Article 2 (non-discrimination in the enjoyment of human rights). The principles have subsequently been elaborated through provisions in numerous human rights instruments seeking to strengthen equality and non-discrimination. As pointed out also by Kristin Henrard,[13] protection of minorities as part of human rights is built on two principles, the prohibition of discrimination and measures to protect and promote their separate identity. While FCNM Article 4 deals with prevention of discrimination and measures to ensure full and effective equality, Article 5.1 sets out the obligations of states to promote conditions for diversity and Article 5(2) requires them to abstain from assimilationist policies without prejudice to their general integration policy.

2.1 Legal measures prohibiting discrimination

Under Article 4(1), states parties undertake to guarantee to all persons belonging to national minorities the right of equality before the law and of equal protection of the law. Any discrimination based on belonging to a national minority shall be prohibited. Exploring whether states have created sufficient guarantees against discrimination, the ACFC

[12] An example of the standard formulation is found in the first opinion on Estonia, para. 15, which reads: 'Whereas the Advisory Committee notes on the one hand that Parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, it notes on the other hand that this must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions'.

[13] Kristin Henrard: *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Dordrecht: Kluwer Law International, 2000), p. 8.

consistently examines in detail the legislative framework on anti-discrimination within the state party and seeks to assess whether it is sufficiently known and made use of. During the first cycle of monitoring,[14] serious weaknesses and lacunae were found in national laws and in the institutions for the implementation of such laws. While newer constitutions often contain general provisions on equality before the law and equal protection of the law, the generality of these provisions and the limited enforcement of constitutional guarantees reduce their significance. General prohibitions against discrimination with penal sanctions have been found to exist in national criminal codes, but specific legislation aimed at preventing and prohibiting discrimination in areas such as employment, provision of services and housing was lacking. It is in these areas that discrimination is most widespread. The Advisory Committee has therefore recommended that the authorities should seek to fill such gaps in the legislation.[15]

While the range of legal measures initially were found to be rather defective, the situation was found, during the second cycle of monitoring to have improved in a number of countries. It can be assumed that the improvements are due in part to international monitoring by the ACFC and other supervisory bodies, though it is difficult to ascertain with any degree of precision what the impact has been.

Many countries have adopted measures to transpose into national law the Council of the European Union Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Not only member states of the European Union, but also candidate countries and several others have sought to give domestic effect to this directive or are in the process of doing so.

2.2 Problems in the equality before the law and equal protection of the law

During the first round of monitoring, the ACFC found in some cases ethnic bias to be prevalent even within the judiciary and the agencies of law enforcement, partly as a result of past violent ethnic conflicts. One

[14] The first cycle started in 1999 and had largely been completed in 2004 except for countries that have recently ratified the ACFC.

[15] E.g., in first Opinion on Albania, para. 25.

such example was that of Croatia, but at the time of monitoring it was on the decline.[16] Monitoring during the second cycle showed that improvements had been made, probably due in part to international monitoring by the ACFC and other international mechanisms such as the OSCE. Ethnic bias directed against Serbs was nevertheless found to persist as late as 2004, but at that stage mainly within the lower levels of the court system. The problem of bias was particularly serious in regard to war crime trials.[17] The authorities were therefore requested to redouble efforts to improve the effectiveness and capacity of the judicial system to protect the rights contained in the Framework Convention.[18]

The Advisory Committee has found widespread discriminatory behaviour by parts of the public towards some of the minorities, in particular towards the Roma, compounded by biases within the law enforcement agencies. The principle of equal protection of the law has often not been respected. Partly to be blamed is the behaviour by the law enforcement agencies, in particular parts of the police, who themselves at times are ethnically biased. Racially motivated crimes directed against the Roma have been left without prosecution, sometimes not even reported to the police. The Roma therefore often have negative attitudes towards the police and local officials.[19] The widespread distrust between the Roma and the police has often been an obstacle to equal protection of the law. Steps have subsequently been taken to overcome these problems, including through plans and schemes to raise awareness of human rights in the training courses for the police.[20] Cases are nevertheless still reported of Roma persons being targets of intolerance, hostility, and sometimes violence, where the threat in some cases has come from the police.[21]

2.3 On availability of remedies

In its monitoring the ACFC gives attention to the availability of remedies, both in the court system and by non-judicial mechanisms such as ombudsman offices or comparable institutions. While the legislation against discrimination has been improving during the monitoring process, the Advisory Committee has been concerned that the implementation of the

[16] First Opinion on Croatia, para. 36. [17] Second Opinion on Croatia, p. 14.
[18] *Ibid.*, para. 191. [19] E.g, first Opinion on Czech Republic, paras. 39 and 40.
[20] Second Opinion on Czech Republic, para. 83. [21] *Ibid.*, para. 86.

legislation has been defective. It has often been difficult to evaluate the situation, however, due to a lack of monitoring by state authorities themselves of the number and content of cases in this area.

The Advisory Committee has noted with satisfaction that many states have established independent institutions with the mandate to receive and examine complaints, including ombudsman institutions or human rights commissions, sometimes also with the power to impose penalties,[22] but has expressed its concern that these institutions have not been given enough support or their decisions have not been followed up as well as they should.

2.4 Citizenship allocation and its impact on inequality

Inequality before the law can manifest itself in many ways, including in the allocation of citizenship, and in the distinctions that are made between the rights of citizens and non-citizens. In countries which emerged or re-emerged as a consequence of the dissolution of federations,[23] the problem of citizenship became a problem for those residents who had been citizens of the larger (now defunct) federation but who did not belong to the 'titular' nationality of the newly independent or restored state. While some restored states such as Lithuania chose the 'zero option' allowing citizenship to be obtained by all lawful residents in Lithuania who formerly had citizenship of the Soviet Union, others (Estonia and Latvia) chose to apply citizenship regulation based on the law that existed before 1940, when the countries were forcibly made part of the Soviet Union. As a consequence, those who, under Soviet law, had settled in these countries after 1940, and their descendants, became stateless, having to go through a naturalisation process where a narrow annual quota made it a very slow process.

Lack of citizenship blocked access and drastically undermined their possibility for effective participation in public life and also had a negative impact on their ability to participate in economic and social life, an issue further discussed in section 4 below.

Since these countries limited the scope of application of the FCNM to persons holding citizenship, large ethnic and linguistic groups were

[22] E.g., in the case of Bulgaria, first Opinion, para. 30.
[23] The Soviet Union, the Yugoslav Federal Socialist Republic, Czechoslovakia.

initially excluded from its coverage. In the case of Estonia, the Advisory Committee expressed its concern both with the restricted coverage given to the FCNM (first Opinion re Estonia, para. 17) and with the slow naturalisation process, and recommended that Estonia should reconsider the scope of application (in effect, dropping or modifying the citizen criterion) and make the naturalisation process more accessible (first Opinion, section V, in respect of Article 3 and Article 4).

Citizenship problems arose also in the successor states of the former Yugoslav Socialist Republic, but more comprehensive naturalisation legislation helped to solve the problem at a relatively early stage.

2.5 Poverty and deprivation of the Roma

The Advisory Committee has found that, in a large number of countries, east and west, there are vast socio-economic differences between many of the Roma and the majority of the population in the fields of education, employment, and housing. In many cases the Roma are segregated, living in camps with unacceptably low conditions of sanitation and shelter, sometimes in 'informal' settlements which are not legally recognised. The situation of the Roma has in some cases been characterised as alarming by the ACFC.[24] The situation of the Roma in Italy has given rise to particular anxiety for the Committee: for years the Roma have been isolated from the rest of the population by being assembled in overcrowded camps where the living conditions and standards of hygiene are very poor. Some huts have neither running water nor electricity; proper drainage is also lacking. Considering the seriousness of the situation, the Advisory Committee has recommended that the Italian government should envisage a comprehensive and coherent strategy at the national level, which should no longer be centred on the model of separation in camps.[25] The situation of the Roma is also addressed by ECRI and by CERD; information derived from their monitoring practice has served as important background material for the ACFC, though rarely explicitly referred to in the opinions adopted. Measures to promote effective equality for the Roma are described below in section 4.

[24] E.g., in the first Opinion on Bosnia and Herzegovina, paras. 46–51.
[25] First Opinion on Italy, para. 25.

2.6 Measures to promote equality do not constitute discrimination

FCNM Article 4.3 provides that measures adopted in accordance with para. 2 shall not be considered to be an act of discrimination. This is in line with a general understanding of international human rights law. Measures adopted to ensure, for a disadvantaged or vulnerable group and its members, full and effective equality with members of the majority are not only legitimate but necessary because they pursue a legitimate purpose, provided they are not disproportionate to the purpose sought and are not causing unacceptably invidious or negative consequences for other persons. Objections have at times been raised in some countries to the adoption of special measures on the ground that these would be discriminatory. The Advisory Committee has therefore on several occasions had to remind states parties that such measures are indeed not only permissible but required under the FCNM.[26]

3 Promoting conditions for minority culture and identity

States parties are, under Article 5(1), required to promote conditions for the development of the culture of the national minority concerned and for the preservation of what is described as the essential elements of their identity, namely their religion, language, traditions and cultural heritage. The specific measures required can largely be gauged from some of the subsequent articles in the Convention, some of which repeat standard human rights but with explicit application to persons belonging to minorities, while others focus more specifically on measures needed to protect the minorities as such.

Standard human rights require that the state respects the freedom of everyone, including persons belonging to minorities, to use their language, practise their religion, and to assemble and organise for the purpose of preserving and developing their culture, and states have also a duty to protect them against third party interference with such freedoms. These standard freedoms are also included in the FCNM: Article 7 on the right of every person belonging to national minorities to freedom of assembly, freedom of association, freedom of expression, and freedom of thought,

[26] E.g., first Opinion on Azerbaijan, para. 28, and second opinion on Slovakia, para. 38, which refers not only to ACFC Article 4.2 and 4.3, but also to 'other international human rights provisions' without specifying which ones.

conscience and religion, Article 8 on the freedom to manifest one's religion or belief and to establish religious institutions, organisations and associations, and Article 9.1 on freedom of expression of every person belonging to minorities, including freedom to hold opinions and to impart and receive information in the minority language without interference by public authorities and regardless of borders set. These standard human rights are applicable to all, and must be ensured for any group of persons whether they are recognised as a national minority or not.

More proactive obligations flow from the second sentence of Article 9(1): states shall ensure that persons belonging to minorities are not discriminated against in their access to media. This is spelled out in greater detail in Article 9(3) and (4). Under Article 9(3), states parties shall not hinder the use by minorities of their own printed media. In regard to radio and television, they shall be granted the possibility of creating and using their own media. Under Article 9(4), states parties shall also facilitate access to the media for persons belonging to minorities. The focus here is their access to radio and television media, whether state owned or licensed by the state. The purpose of such access is to promote tolerance and to permit cultural pluralism.

Of central importance for the preservation and development of the minority culture are the provisions in Article 10, which not only require states to recognise the right of persons belonging to minorities to use their own language freely and without interference, but also, under certain conditions set out in Article 10(2), require states parties 'to endeavour to ensure, as far as possible' the conditions which make it possible for minorities to use their own language in relations with administrative authorities. This applies to areas inhabited by persons belonging to national minorities traditionally or in large numbers, provided such persons request to use their language and where it corresponds to a real need.

Also important for maintenance of their own identity and culture is the right, set out in Article 11, to use their own surname and first name in the minority language, to use their own language in signs, inscriptions and other information of a private nature visible to the public (for example on shops), and in areas traditionally inhabited by a national minority, to display traditional local and place names.

Finally, of paramount importance is Article 14, which makes it a right for every person belonging to national minority to learn her or his

minority language. The state party has also, under certain conditions, a cautiously worded duty to endeavour to ensure, as far as possible, that persons belonging to minorities have the opportunity to be taught their own language or to receive instruction in their own language.

These, then, are the main provisions which supplement and give direction to the general obligation of states under Article 5(1) to create conditions for minorities to develop their culture and preserve the essential aspects of their identity.

In practice, the choices of appropriate measures to achieve those purposes depend greatly on the context and the nature of the problems faced by the minority concerned. In general terms, the Advisory Committee has strongly encouraged state authorities to involve the representatives of minorities in consultation concerning the choice of adequate measures. Through its monitoring work, the Advisory Committee has articulated more clearly the content of the various provisions, thereby reducing the scope of state discretion and, arguably, bringing the provisions of the FCNM closer to other 'rights' provisions.

3.1 On support for minority associations and their cultural activities

Persons belonging to national minorities, like any other group of persons with some common interest, are entitled to form their own associations, and the state is required to respect and protect such associations. The proactive duties flowing from Article 5(1) require more, however. In order to fulfil their obligations under Article 5(1), states parties should provide financial assistance to the cultural activities of the associations of those minorities. One way of creating conditions for the development of the minority cultures is through financial support to cultural events such as historical festivals. Many minorities seek support for cultural centres, museums and libraries. Failure by governments to meet such requests is sometimes criticised by the Advisory Committee.[27] Governments are also encouraged to provide support for print and electronic media of minorities.[28] It may also be necessary to provide some funding for basic running costs of the minority association.

[27] See, e.g., first Opinion on Poland, para. 42.
[28] See e.g., Opinion on Norway, p. 30.

The financial assistance given to the cultural activities of minorities, including their associations, should at least be proportional to the numbers of persons belonging to the minority concerned, seen against the total allocation to cultural activities within the country as a whole. The Advisory Committee has pointed out, however, that it may be necessary to give a relatively higher support to the smallest or weakest groups whose culture is in danger of disappearing altogether.[29] The process by which decisions on the allocation of financial support to the minorities are made should be transparent, and the minorities should be consulted or involved in the decisions.[30]

Minorities are often in need of premises where they can carry out their cultural activities and other measures for the members of their minority. The Advisory Committee has noted with appreciation that some countries have made this available, for example, the establishment of the 'House of Nationalities' in Moldova[31] and the support for Roma centres and participation by Roma performing artists in international events.[32] Associations of national minorities play an important role in the preservation of their cultures, and states parties should therefore facilitate as far as possible their functions and their ability to receive grants from internal and international sources. The Advisory Committee has underlined that the authorities should not create undue obstacles such as difficult registration and tax regulations.[33]

Particular problems are connected with the restoration of cultural heritage and preservation of cemeteries in situations where there has in the past been severe dislocation or outright genocide so that the minority no longer exists in the area. This issue came up in the case of Poland, regarding synagogues or Jewish cemeteries in the aftermath of the Holocaust, and as a consequence of the displacement of the Ukrainian population from south-east Poland during 'operation Wisla' in 1947.[34] This is also connected with the questions of restitution of property for the Ukrainians and Lemks who were victims of nationalisation during Operation Wisla.

Special issues arise in regard to those persons who have become 'minorities' as a result of the break-up of federations into separate states (as in the former federal republics of the Soviet Union or Yugoslavia).

[29] E.g., first Opinion on Austria, para. 26. [30] First Opinion on Austria, para. 81.
[31] First Opinion on Moldova, para. 41. [32] First Opinion on Bulgaria, p. 48.
[33] First Opinion on Azerbaijan, para. 35. [34] First Opinion on Poland, para. 44–5.

During the initial decade after the break-up, such minorities had difficulties in having their cultural activities supported.

3.2 Diversity, separation or integration

Taking into account the dual purpose of minority protection to ensure equality and conditions for diversity, the balancing act between the implementation of Articles 4 and 5 FCNM is particularly important and difficult. While the obligation of the state to promote full and effective equality between persons belonging to minorities and those of the majority corresponds to standard human rights, particularly as set out in the International Convention on Elimination of All Forms of Racial Discrimination ('ICERD'), active measures to promote conditions necessary for persons belonging to minorities to maintain their culture and identity (FCNM Article 5) go beyond the standard human rights requirements. An important guide to the balancing act is set out in Article 5(2): without prejudice to the measures taken in pursuance of their general *integration* policy, the parties shall refrain from polices and practices aimed at *assimilation* of persons belonging to minorities against their will and shall protect them from any action aimed at such assimilation. This raises the question of the difference between assimilation and integration.

Assimilation means making persons with a different culture and tradition shed the essential aspects of that identity and to absorb the culture and tradition of the majority as their new identity. Assimilation policies have been very common in earlier stages of nation building, but the impact of minority protection is that the trend is now moving away from it. An extreme version of enforced assimilation has been the practice of taking away the children of some minorities, such as the Travellers, and bringing them up in the culture of the majority, which was practised in some cases including Switzerland, Norway and others up to a generation ago. The question of compensation for such practices is still pending. It has to some extent also been applied to Roma, and it has been common until a few decades ago in regard to children of indigenous peoples in many parts of the world. Less drastic assimilation can take many forms. One way is only to allow for the use of the official language and to provide no opportunity for the learning or use of the minority language. Another form is 'lifestyle' assimilation, in the form of eliminating the ability to

pursue a particular way of life, with a view to making the persons conform to the dominant way of life in society. The Travellers, who by definition have a kind of nomadic lifestyle, have in some periods been subjected to this by being deprived of the traditional possibilities. The Irish government, in 1993, set up a Task Force on the Traveller communities, which recommended moving from 'absorption of Travellers' (assimilation) to an integrating response. The Advisory Committee has encouraged the Irish government to take the broader perspective of the Travellers into account.[35] The Roma present a somewhat different dilemma. Many of them prefer a settled lifestyle but have difficulties in attaining it because of racism and rejection. In some countries, the Roma/Gypsy identity is surrounded by negative perceptions which lead many persons to hide their identity rather than to declare and maintain it. Successful integration is only possible if the state party manages, as required under FCNM, to generate a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect, understanding and cooperation among all persons living on their territory, including the Roma.

The alternative to assimilation is not segregation, but integration. Segregation would make it difficult to ensure effective equality. The Advisory Committee has strongly criticised segregation of the Roma, both in terms of settlements/housing[36] and segregation of Roma children in schools[37] and has called for stronger measures in favour of integration into society. On the other hand, it has also expressed the fear that some plans for integration may lead to unwanted assimilation.[38] Consequently, there is a need to recognise and apply the difference between assimilation and integration. Probably the best way to express it is that assimilation is a one-way street but integration is a two-way street: a society integrates its minorities if, on the one hand, the minorities recognise a set of common norms applicable to the society as a whole, without which social cohesion cannot be achieved, while, on the other hand, the national society and its majority adapts itself by recognition of its multicultural composition. Integration of a minority which preserves essential aspects of its identity and culture changes the national society as a whole, not only the minority. Social cohesion can be achieved by intercultural education and adaptation, as envisaged in FCNM Article 12.

[35] First Opinion on Ireland, paras. 45–6. [36] First Opinion on Italy, p. 25.
[37] First Opinion on the Czech Republic, para. 61. [38] First Opinion on Slovakia, p. 23.

Neither preservation of language nor practice of religion requires physical separation; it is not even necessary to separate the schools of children of minorities and majorities. Various devices have been found in practice to ensure both the multicultural and intercultural sides of integration.

Greater difficulties appear to arise, however, when the culture of a minority implies a separate way of life, to which the surrounding society has difficulty in adapting. Two quite different versions of this have been encountered: indigenous peoples whose way of life requires communal control over land and resources to maintain their culture; and the itinerant way of life of Travellers and some of the Roma.

These two situations require different responses. Indigenous peoples' movements worldwide are increasingly demanding territorial autonomy, making it possible for them to plan and organise the resources they need for their economic activities. This cannot be a solution for Travellers or itinerant Roma. No good solution has yet been found because the increasing regulation of the market system makes it very difficult to accommodate them. But efforts are under way in some countries to find appropriate forms of accommodation.

The Advisory Committee has generally expressed itself in favour of measures of integration, while emphasising the need to avoid assimilation. In the case of Estonia, it expressed concern that the proclaimed integration policy focused mainly on the promotion of the national (Estonian) language but not on those measures that were more important for the minorities, such as access to employment and generally facilitating participation in economic and social life. Efforts aimed at supporting the culture and identity of persons belonging to minorities is, in the view of the Advisory Committee, essential for an integrated society.[39]

4 Creating conditions for effective participation

States parties are under Article 15 required to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, particularly those that affect them.

[39] First Opinion on Estonia, p. 27.

4.1 On participation in public life[40]

The starting point in standard human rights for such participation is found in the political rights as set out in ICCPR Article 25 and corresponding regional instruments, supported by the rights to freedom of assembly and association, and the prohibitions on discrimination as set out in ICCPR Articles 2 and 26. ICCPR Article 25 is unique, in that the right can be claimed only by citizens; it is essential, therefore that there are no undue restrictions on the allocation of citizenship to persons belonging to minorities. States are free to go beyond the minimum requirement in ICCPR Article 25, and many states do so by allowing non-citizens to participate at the local level. The rights to assembly and association cannot be restricted to citizens, a point which is made in other contributions to this collection.

The first level of protection of the rights of persons belonging to minorities is therefore to ensure that they are not subjected to any kind of discrimination contrary to human rights. But the FCNM takes a substantial step beyond standard human rights by requiring that the participation by the minorities shall be 'effective'. This requires a range of measures to overcome the fact that minorities, by definition, are numerically inferior to the majority and that majority democracy is therefore at risk of continuously outvoting them if the issues related to the minorities are controversial. Under the auspices of the OSCE High Commissioner for National Minorities, the so-called Lund Recommendations (adopted in 1999) provide an overview of possible options to make participation effective for minorities. Special measures can be adopted regarding participation in decision-making at the level of the central government, including special election arrangements, and regarding participation at regional and local levels. While national level participation is often conditional on citizenship, participation through elections at the local level is often permitted also to non-citizens who have been legally resident there for a specified number of years. Effective participation may, under some circumstances, be enhanced also by arrangements for self-governance or strong decentralised governance. The ACFC has observed that decentralised or local forms of government are often an important factor in creating

[40] Marc Weller, *The Rights of Minorities in Europe: Commentary on the European Framework Convention* (Oxford: Oxford University Press, 2005), gives a comprehensive analysis of Article 15 and the practice of the ACFC in that regard.

necessary conditions for effective participation of persons belonging to national minorities in decision-making, particularly where the minorities are concentrated in certain areas.[41] Self-governance can be non-territorial (often referred to as 'cultural' or 'personal' autonomy) or territorial. The ACFC has expressed its appreciation of territorial autonomy arrangements which have strengthened the effective participation of minorities, such as Greenland and the Faroe Islands under Denmark, and the Gagauz autonomy in Moldova.[42] Cultural self-governance can be of particular usefulness with regard to minority language development, and in some contexts also regarding minority education policies. Territorial self-government can, as pointed out in the Lund Recommendations

> help preserve the unity of states while increasing the level of participation and involvement of minorities by giving them a greater role in a level of government that reflects their population concentration. Federations may also accomplish this objective, as may particular autonomy arrangements within unitary States or federations.

As a supplement or alternative, the use of advisory or consultative bodies representing minorities can enhance the effectiveness of their participation. The use of advisory or consultative bodies representing minorities is now quite widespread and strongly encouraged by the Advisory Committee. Governmental authorities are encouraged by the ACFC to consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence. The effective functioning of these bodies will require that they have adequate resources. While some governments make active and constructive use of such bodies, there are in many other situations serious shortcomings both regarding the regularity of meetings, the issues discussed, the follow-up given to the advice or recommendations of these bodies, and the resources allocated for their activity.

Effective participation in public life also requires the presence and recruitment of persons belonging to the minorities in public service institutions at all levels, including in the central and local administration,

[41] First Opinion on Azerbaijan, para. 76.
[42] First Opinion on Denmark, para. 36; first Opinion on Moldova, para. 90.

in the judiciary, and not least in the police.[43] Such participation is essential for several purposes: one is that it enhances equal opportunity for employment in the public sector, but the most important is that it enhances the level of confidence of the minorities towards the public service, including the law enforcement agencies.

4.2 On effective participation in social and economic life

Article 15 must be read in conjunction with Article 4(2), requiring states parties to adopt, where necessary, measures to promote, in all areas of economic, social and cultural life, full and effective equality between persons belonging to a national minority and to those belonging to the majority. Participation in social and economic life requires not only participation in, but also contribution to and the right to benefit from economic and social development in the country concerned. Guidance can be taken here from the provisions set out in the European Social Charter. 'Economic and social life' includes any kind of engagement in gainful occupations, including ownership and disposal of capital assets, entrepreneurial activities, trade and access to work with all that goes with it such as vocational training and trade union possibilities. 'Social life' includes, *inter alia*, access to social security, social and medical assistance, protection of health, the right of mothers and children to social and economic protection, and access to education.

The creation of effective participation in economic and social life requires compliance with the obligations to ensure equality and non-discrimination as set out in Article 4, including the adoption of measures to promote full and effective equality in the social and economic field between persons belonging minorities and those of the majority (see section 2 above) and through ensuring equal access to education at all levels for members of minorities, as required under FCNM Article 12(3). Furthermore, it requires active measures by state authorities under FCNM Article 6 to promote mutual respect, understanding and cooperation between all persons living on their territory, including obligations to

[43] These issues are addressed in several opinions, such as the first Opinion on Serbia and Montenegro, para. 58, which expressed concern about the bias of the police against the Roma, and *Ibid.*, where it was appreciated that Albanians were increasingly included in the police forces in regions with high Albanian settlement.

protect persons who may be subject to threats and discrimination (Article 6(2)). It further requires the state to take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

4.3 Contexts of participation faced by the Advisory Committee

Looking back at the experience of the ACFC during its seven years of existence, it is possible to identify five major issues or contexts with different characteristics and responses.

In some cases, the minority situation is a result of or affected by territorial and/or constitutional change, in the form of emergence of new states as a result of disintegration or dissolution of larger entities (former Yugoslavia, Czechoslovakia, the Soviet Union). Groups that have previously been part of the majority or 'titular nationality' or 'constituent' people, and who have since become minorities in their country of residence, have faced several challenges in maintaining their collective identity and contact with the kin state, and in being treated as equals in the newly independent or reconstituted state. This duality affects their choices in education and language and has considerable impact on their economic activity and access to employment.

Inequality has been found to be widespread and particularly serious in regard to the Roma and similar groups such as the Ashkalis and Egyptians[44] found in Albania and Kosovo, as well as the Travellers found, *inter alia*, in Ireland, Norway and Switzerland. Persons belonging to these groups often face discrimination, and their problems with education, and the living conditions of these groups, including their problems regarding health, housing, barriers to employment and sometimes inability to benefit from social services, have given serious grounds for concern.

The Travellers face difficulties because they generally follow an itinerant lifestyle, as can be inferred from the name of the group. Like many of the Roma, they face difficulties on two grounds: first, because they are

[44] Ashkalis have, for hundreds of years, lived in Kosovo. They consider themselves different from the Roma. Their origin is uncertain. They speak Albanian but may have originated in Egypt, Turkey or India. The 'Egyptians' in Kosovo and Albania may possibly have been Copts living in Egypt before the arrivals of the Arabs.

generally subjected to negative and hostile attitudes by members of the majority, and secondly, because society at large has difficulties in accommodating their itinerant lifestyle. Their children have difficulties in having regular school education because of their lack of a fixed residence, and the adults have difficulties in having an income based on their traditional areas of economic livelihood such as scrap metal, horse trading, market trading, etc.

Discrimination against Roma is common in different parts of Europe but the effects have been aggravated when affected by territorial change: Roma have been targeted and subjected to direct or indirect ethnic cleansing, for example in Kosovo[45] and in the Republic of Serbia.[46]

Encouraged by international attention and monitoring by the ACFC and others, an increasing number of states have developed plans or strategies to improve the situation of the most vulnerable minorities, in particular the Roma and the Travellers. The Advisory Committee has in several of its opinions encouraged the adoption and implementation of such plans, recommending that the state party give sufficient attention to initiatives to promote full and effective equality for the Roma and thereby ensure their better integration in society, granting the necessary resources to achieve this purpose.[47]

Indigenous peoples fall into a special category. Their way of life and their relation to natural resources is often much more different from that of the majority population than is the case with most (other) minorities. Many indigenous peoples are more concerned with local control over natural resources and a degree of autonomy in order to make a living based on their own modes of production, than with seeking equality in the society as a whole. In Norway the special position of the Sami as an indigenous people has been recognised, and their rights are regulated on the basis of Norwegian ratification of the ILO Convention 169, including through the establishment of a Sami parliament, which is being given increasingly broad powers, including a major role in the administration of land and natural resources in the Finnmark, the northernmost county in Norway, where the majority of the Sami live. The Sami parliament has made it clear that it does not want the Sami issues to be dealt with under the FCNM, and this has been accepted by the Norwegian government.

[45] First Opinion on Kosovo, para. 45. [46] First Opinion on Bosnia and Herzegovina, para. 45.
[47] First Opinon on the Czech republic, section V, in respect of Article 4.

Neither Sweden nor Finland nor the Russian Federation has ratified the ILO Convention. The Sami in Sweden and Finland and the indigenous peoples in the Russian federation, including the Sami, are covered by the FCNM. In both Finland and Sweden, a Sami parliament has been established which could possibly evolve into cultural and even territorial autonomy, but at present they have mainly advisory powers only, with less control over land and natural resources than the Sami of Norway. The ACFC has in both cases recommended that more efforts should be made to resolve the disputes over the control of land areas required for the reindeer herding of the Sami population.[48]

The HCNM has noted in the case of the Russian Federation that ensuring full and effective equality has been particularly difficult with respect to persons belonging to many of the numerically small indigenous peoples of the north, who continue to face wide-ranging problems in economic, social, political and cultural life to the extent that the situation is not compatible with Article 4 of the Framework Convention.[49]

New minorities are excluded by many states from protection under the FCNM, but not by all – the United Kingdom has a broad scope of application where they are included. New minorities are understood to be those that have entered the country after it became independent or restored its independence. Many of these 'new' minorities are visible minorities, in the sense of colour or race, coming from Asia, Africa and the Caribbean; others are conspicuous because of their use of a language different from the country they have entered, such as the Turks and Kurds in Germany. The main issue in regard to these minorities is to secure to all residents effective economic and social participation. Unemployment is, in general, much higher among these new minorities than among the majority population, as recognised by the United Kingdom in its first state report.[50] An additional problem is the difficulty of ensuring tolerance and intercultural dialogue with the Islamic population, which now constitutes a significant and growing part of the 'new' minorities in western and northern Europe.

A range of different measures have been taken both by the UK government and by the devolved executives (in Scotland and Wales) to reduce

[48] First Opinion on Sweden, para. 30; first Opinion on Finland, para. 22.
[49] First Opinion on the Russian Federation, paras. 41 and 45.
[50] State report by the United Kingdom, para. 241.

unemployment amongst the ethnic minority population. While appreciating these efforts, the Advisory Committee has called for their continuation and extension in order to ensure the necessary conditions for the effective participation of these persons in economic life affecting them.[51] Measures have also been taken to increase the representation of these new minorities in various kinds of public service such as the police, the fire service and the prison administration, which has found appreciation in the ACFC.[52]

5 Procedural and institutional developments under the FCNM

Among scholars concerned with minority rights there was initially considerable disappointment. The FCNM was felt to be too weak, both in terms of substantive rights and state obligations, and in terms of the monitoring system. Among the strongest critics, Gudmundur Alfredsson wrote that in international forums, European governments would be quick to criticise an approach where a regional organisation in another part of the world

> were to adopt programmatic standards for flexible implementation, with the subjects for protection to be selected by the governments concerned, and the monitoring limited to State reports for examination of experts working under the thumb of government ministers and diplomats.[53]

It will be argued below that the international monitoring of its implementation has turned out to be more effective than expected by the critics. A brief description of the procedure will first be given, followed by an assessment of its effectiveness.[54]

5.1 Outline of the monitoring procedure

Formally, monitoring is the responsibility of the Council of Europe's Committee of Ministers ('COM'). In practice, the substantive work is carried out by a committee of independent experts, the Advisory Committee on the Framework Convention for the Protection of National

[51] First Opinion on United Kingdom, para. 95. [52] *Ibid.*, para. 96.

[53] Gudmundur Alfredsson, 'A frame with an incomplete painting' (2000) 7(4) *International Journal on Minority and Group Rights* 296.

[54] A more detailed analysis of the monitoring process is given by the first president of the ACFC, Rainer Hoffmann (see 'Introduction', in Weller, *Rights of Minorities in Europe*).

Minorities ('ACFC'). Under FCNM Article 24, the Committee of Ministers is required to monitor the implementation of the Convention by the state parties, based on periodic reports which the states parties under Article 25 are obliged to submit on the legislative and other measures taken to give effect to the principles set out in the Convention. States parties may also be requested to provide additional information, which is commonly done. The first report was required to be submitted within one year after the entry into force of the FCNM for the country concerned, to be followed by periodic reports at five-year intervals. The first cycle of the monitoring (dealing with the first report) was generally completed in 2004, and the monitoring is currently into its second cycle, dealing with the second state report.

For the evaluation of the adequacy of the measures taken by states, the FCNM provides for the establishment of an advisory committee to assist the Committee of Ministers. The Advisory Committee has in practice the main role in the monitoring process, ably assisted by a specialised and highly competent sector established for that purpose within the Secretariat of the Council of Europe. It is composed of eighteen independent experts, elected by the COM, based on nominations by states parties.[55] The evaluation by the Committee proceeds as follows.

Prior to the initiation of the first cycle of reporting the Advisory Committee prepared an outline to guide the preparation by state parties of their first reports for the first cycle.[56] A revised outline was prepared for the reporting in the second cycle.[57] Upon receipt of the states report, the Committee appoints a working group of three or four of its members, assisted by the secretariat, to prepare a draft opinion evaluating the implementation by that country. The member elected in respect of that country is excluded from being part of the working group. There is also an informal understanding not to include in the working group members elected on behalf of other countries that may have a particular interest in or concern with the minorities of the reporting country, such as the kin state of large minorities in neighbouring states. This caution is pursued in order to avoid bias in the evaluation of the report.

[55] The procedure for election is set out in COM Res. (97)10, contained in *Framework Convention for the Protection of National Minorities: Collected Texts*, 4th edn (Strasbourg: Council of Europe Publishing, 2008) ('*Collected Texts*'), p. 36.

[56] In *Collected Texts*, p. 47. [57] In *Collected Texts*, p. 62.

The secretariat also collects a substantial amount of additional information concerning the minority situation and their treatment in the country concerned. This includes assessments made by other bodies or agencies of the Council of Europe, the OSCE or the United Nations, including its treaty bodies. Considerable synergy is achieved through the lessons learned and assessments made by other bodies. Information is also received from non-governmental organisations, in the form of comprehensive 'shadow' reports or more particular pieces of special information. Having made an initial examination of the state report and the extensive package of other information, the working group, in collaboration with the secretariat, identifies issues they feel need additional information in order fully to assess the adequacy of the implementation. On that basis, a further set of questions is sent to the government.

The most important part of the procedure, however, is the visit by the Advisory Committee's working group to the country concerned before the draft opinion is prepared. Such visits have been undertaken in nearly all cases. While it can be done only on the basis of an invitation by the state concerned, nearly all states extended such invitations during the first cycle, which came to an end in 2004–5, and they continue to do so during the present second cycle. In a few cases where there is practically no minority situations to examine, the Advisory Committee has decided not to conduct a visit. The similarities with the practice of the OSCE High Commissioner on National Minorities, which arguably inspired this approach, and of the Committee of Experts under the European Charter for Regional or Minority Languages, both discussed in this volume, should be noted.

The visits usually last for one week. During the visit, the Working group members hold extensive meetings with relevant government representatives, with branches of the administration dealing with minorities, such as education, health, language issues, security, the judiciary and the police, and with representatives of the legislative assembly. Where possible, it also meets with representatives of the electronic media (TV and radio) and with the agencies for self regulation of the printed media where these exist. The delegation often also meets with the Ombudsman or the Human Rights Commission.

A crucial part of the visits is to hold meetings with representatives of minorities and non-governmental organisations, held separately from the meetings with the government representatives. Based on the information and concerns presented by the minorities, the delegation is able, towards

the end of its visit, to bring up for discussion issues which in the view of the minorities have not been adequately tackled by the government.

The delegation also meets, where it is useful, with the country offices of international agencies, particularly that of the OSCE, the High Commissioner for Refugees, the field offices of the High Commissioner for Human Rights, and others that may have information to share, in addition to the representative of the Council of Europe in the country.

Following the country visit, the ACFC prepares a detailed, country-specific opinion on each state's performance, adopted by the whole of the Committee. Each country opinion is quite detailed, running into some twenty to thirty pages. The outline of the reports has changed somewhat over its nine years of existence, but the main elements are the following: a detailed review of the implementation, article by article, followed by a list of the main findings and a set of concluding remarks intended to serve as a tool for continuing dialogue between the government and its national minorities, to which the Advisory Committee is also prepared to contribute. Finally, the opinions contain a set of concluding remarks which serve as the basis for the recommendations adopted by the Committee of Ministers addressed to the country in question.

When the opinion has been adopted, it is sent to the government of the state concerned. The government is invited to comment on the opinion, and it generally makes use of that opportunity. The comments are generally constructive. Governments rarely seek to deny the critical points made in the opinion. More commonly, governments use their comment to provide information about further steps taken, achievements made or further plans adopted after the visit of the ACFC.

The comments are presented to the Committee of Ministers together with the opinion. On behalf of the COM, the opinion is examined and a draft resolution is prepared by a group of representatives of the ministers set up to deal with human rights issues ('GR-H'), for subsequent adoption by the COM, which then adopts a set of conclusions and recommendations. In most cases, the content of these conform closely to the conclusions drawn by the ACFC.

It has become a common practice that the government, after the adoption of the resolution by the COM, convenes a national follow-up seminar within their country. Participants in those national seminars are the representatives of the minorities, the NGOs, government representatives, Ombudsmen, and representatives of the legislative assembly.

Representatives of the ACFC are invited to attend these meetings and to present the recommendations of the ACFC and the resolution of the COM. The government, on its side, presents the comments it has submitted to the COM on the opinion.

One probable reason why the governments' state comments sent to the COM are usually cooperative and constructive may be the awareness that the comments will be examined and discussed at the national follow-up seminars where the minorities and representatives of civil society are present. Inaccuracies and efforts at whitewashing in the government comments would run the risk of being exposed at that seminar.

In the second cycle of monitoring, which started in 2004, states are requested to provide information about the measures they have taken to implement the recommendations contained in the opinion of the ACFC.

5.2 Assessment of the procedure

The evolution in practice of the monitoring has made it more inclusive than the treaty bodies of the United Nations. Regarding *sources of information*, there has, since the beginning, developed an almost seamless growing flow of information to the secretariat and the working groups of the ACFC. In addition to the official state report, there are comprehensive shadow reports from minorities or specific pieces of information when new developments take place. There is also an inflow of information from other agencies both within the Council of Europe (the Venice Commission, ECRI) and outside it (in particular the OSCE). In addition, the secretariat keeps itself and the working groups informed about the results of the monitoring of the same country by the treaty bodies of the United Nations, and relevant cases in the European Court of Human Rights. All of this material can be taken into account when the secretariat visits the country and prepares its opinion.

Regarding *transparency and openness*, all the official documents arising from the monitoring are available or become available at the latest when the COM adopts its conclusions and recommendations. The state report is public upon receipt. The conclusions and recommendations by the Committee of Ministers are made public when adopted, and at the same time, if not before, the opinion of the Advisory Committee and the comments by the state are made public. With the consent of the government, the opinion can be made public as soon as the comments have been received. There is a

clear trend towards an early publication, with government consent. The relevant monitoring documentation (state reports, ACFC opinions, government comments and COM conclusions and recommendations) are all available at the website of the Secretariat for the Framework Convention[58] and can therefore be consulted by everyone with access to the Internet, thus also including the minorities in the country concerned.

Inclusiveness and involvement of the minorities is very much facilitated by the visits prior to the preparation of the opinion of the ACFC, and by the national follow-up seminars (this could be termed a participation dimension in relation to the supervision of the FCNM). The delegation of the ACFC is generally given access to the minorities they want to see, as well as to representatives of NGOs. Its meetings with the Ombudsman or Human Rights Commission and with parliamentarians broaden the net of people who become involved in, and aware of, the possible problems concerning minorities. The significance of the visits can hardly be overestimated.

The procedure chosen for the second cycle – to follow up on the recommendations and findings during the first cycle, and to examine possible new situations requiring attention that have arisen since the first opinion was adopted – strengthen the impact of the opinion and make it more authoritative.

The role of the Advisory Committee is not primarily to identify violations, but to pursue a dialogue with the states parties. Neither its opinion, nor the resolutions by the Committee of Ministers are legally binding. The ACFC is not a court. Its persuasive effect depends both on international factors and on relations inside the country concerned. The greater the interest of the country in participating in European regional cooperation, the greater is the effect of its recommendations. The purpose of the ACFC is not primarily to identify violations of the conventions, but to encourage an optimal implementation of the FCNM.

As shown in recent studies,[59] neither the FCNM nor the other international agencies dealing with minority protection have been able to ensure full and adequate treatment of minorities. Serious shortcomings remain. A legacy of discrimination can still be observed arising from the

[58] www.coe.int/T/E/human%5Frights/minorities/.

[59] See Anna Meijknecht, *Minority Protection: Standards and Reality. Implementation of Council of Europe Standards in Slovakia, Romania and Bulgaria* (The Hague: T. M. C. Asser Press, 2004); Rianne Letschert, *The Impact of Minority Rights* (The Hague: T. M. C. Asser Press, 2005).

serious ethnic conflicts of the 1990s. The situation of the Roma and similar groups is particularly serious, in western as well as eastern Europe, and international protection remains weak, in spite of the Holocaust to which these groups were subjected before and during the Second World War.[60] In the west, the situation of the 'new minorities' is volatile and unresolved. Nevertheless, there is in Europe a growing network of agencies dealing with minority protection,[61] which is moving towards an increasingly 'Adequate System of Minority Protection', the title of Kristin Henrard's study.[62]

6 Conclusions and summary

6.1 The concept of 'minorities'

Since there is no definition of 'national minorities' in the FCNM and no generally accepted, detailed definition of 'minorities' in general international law, the states parties have a margin of appreciation in determining to whom the Convention applies. There is considerable variation in the scope given by different governments. The common minimum is that only those groups are included which share a common ethnicity, language or religion which differs from that of the majority. Beyond that minimum, the differences are considerable. While some, such as the United Kingdom, have chosen a very open approach, including 'old' and 'new' minorities and non-citizens as well as citizens, others are quite restrictive and include only those who have lived traditionally in the country for a long time and are citizens. Some even exclude the application of the Convention in regard to persons belonging to the recognised minority but living outside the particular region where they traditionally lived. Some exclude the Roma on the grounds that these have a nomadic lifestyle which makes them move between countries, even when it can be shown that the Roma have had a historical presence in that country for a long time.

[60] See Marcia Rooker, *The International Supervision of Protection of Romany People in Europe* (Nijmegen: Nijmegen University Press, 2002).

[61] Patrick Thornberry and María Amor Martín Estébanez: *Minority Rights in Europe* (Strasbourg: Council of Europe Publishing, 2004) ch. 2.

[62] Kristin Henrard, *Devising an Adequate System of Minority Protection* (The Hague/Boston/London: Martinus Nijhoff, 2000).

In monitoring the implementation, the Committee has shown that it prefers an open and inclusive scope of application, but recognises that in the absence of a definition in the text of the Convention, the states parties have a margin of appreciation in determining which minorities they want to give the full protection of the Framework Convention. Nevertheless, the ACFC has pursued a gentle but consistent push towards a more open and inclusive concept, and has expressed its appreciation to those countries which have used the open approach. For those with a more restrictive approach, the HCNM has encouraged them to reconsider the issue on an article-by-article approach, and on that basis also to include non-citizens in its coverage. The article-by-article approach is based on the insight that the obligations of the state differ under the different articles, and that in relation to the more extensive obligations it can be considered justified to have a more restricted application.

It is clear from the practice of the ACFC that it does not support the use of citizenship as a general criterion of exclusion. It has shown through its practice that, in some circumstances, reliance on citizenship would give unreasonable results. Governments have shown some willingness to meet this objection, not necessarily by changing their formal criteria of inclusion/exclusion but in practice to give resident non-citizens the same minority protection as others.

6.2 Integration versus separation

With regard to *integration and conditions for diversity*, the ACFC has shown a clear preference for integration. It has given considerable attention to whether there is sufficiently developed legislation to prevent and prohibit discrimination, not only in the criminal code but also in regard to key areas such as education, housing, employment and health. Issues of equality before the law and equal protection of the law have been given central importance, and possible biases within the law enforcement agencies have been highlighted. The ACFC seeks to investigate whether persons belonging to minorities are adequately and proportionally represented in public agencies such as the judiciary, the police and generally in the administration at different levels.

On the other hand, the ACFC also investigates the measures taken to ensure conditions for the preservation of group identity and the development of their culture. Detailed examination is carried out

regarding the implementation of the obligations undertaken by states as set out in the subsequent articles of the FCNM: Article 7 on respect for minorities' right to freedom of assembly, association and expression, as well as freedom of thought, conscience and religion; Article 8 on the right to manifest their religion or belief and to establish religious institutions; Article 9 on freedom of expression, including in their own language, and the requirement of measures to ensure that persons belonging to minorities are not discriminated against in their access to media and can run their own media; the right of minorities in Article 10 to use their own language freely and, under certain conditions, to use their own language in relations with administrative authorities. Important for maintenance of their own identity and culture is the right set out in Article 11 to use their own surname and first name in the minority language, to use their own language in signs, inscriptions and other information of a private nature visible to the public (for example on shops), and in areas traditionally inhabited by a national minority, to display traditional local and place names. Much attention is given to the implementation of Article 14, which makes it a right for every person belonging to national minority to learn her or his minority language and under certain conditions to be taught their own language or even to receive instruction in their own language.

In regard to participation as set out in FCNM Article 15, the ACFC has given considerable attention to the implementation by states parties of conditions necessary for the effective participation of minorities in the public life of their society. Somewhat less attention has until now been given to the their participation in economic, social and cultural life, but the awareness of this issue has increased considerably, recognising the need to distinguish between the different contexts in which the problem arises in order to develop concrete and meaningful responses to each type of context.

6.3 The monitoring process

The ACFC has made considerable innovations. It has ensured a broad flow of information, and has developed a far-reaching trilateral dialogue between the governments, their minorities and the Council of Europe through the Advisory Committee. Of particular importance are the country visits and the national follow-up seminars, both of which have

contributed to a very active involvement by minorities, both in the monitoring itself and in the national policies regarding minorities.

6.4 Note on source documentation

This chapter contains numerous references to state reports and to the opinions of the monitoring body. The easiest way to find the sources is through the relevant website, which is at www.coe.int/T/E/Human_Rights/Minorities/.

On that website will be found the list of state reports for the first and second cycles and the list of the country opinions adopted by the ACFC, as well as the resolutions adopted by the Committee of Ministers. Hence, all the reports and opinions referred to in this chapter can be found on that website.

6

The Council of Europe's European Charter for Regional or Minority Languages

ROBERT DUNBAR

Introduction

The European Charter for Regional or Minority Languages[1] (the 'Charter') is a Council of Europe treaty that was opened for signature on 5 November 1992, and which came into force on 1 March 1998.[2] Twenty-three states have ratified the Charter and a further eleven have signed it.

Strictly speaking, the Charter is not a minority-specific instrument at all, and its origins and purpose differ in important respects from the Council of Europe's Framework Convention for the Protection of National Minorities (the 'Framework Convention') and other minority-specific provisions. Strictly speaking, it is not a human rights instrument either; as we shall see, the text of the Charter does not create any individual or collective rights for speakers of regional or minority languages, a point made clear in the Charter's Explanatory Report.[3] Rather, as its title suggests, the Charter focuses on languages themselves, and the consequences of this are important, and will also be considered further, below. However, it is also important to note that the formal position just described tells only part of the story. Languages are spoken by people, and any attempt to protect a language will have implications for those who speak it, a point that is acknowledged in the Explanatory

[1] European Treaty Series No. 148.

[2] Pursuant to Article 19(1), the Charter entered into force on the first day of the month following the expiration of a period of three months after the date on which five member states of the Council of Europe have ratified it. Pursuant to Article 18, it is only open to signature by member states of the Council of Europe.

[3] Paragraph 11. By the same token, Article 6 of the Charter provides that the parties undertake to see to it that the authorities, organisations and persons concerned are informed of the '*rights* and duties established by the Charter'.

Report.[4] As we shall see, the provisions of the Charter are of considerable importance for members of certain minorities, and the implementation of the Charter may in some cases imply the creation of a legislative framework and even of certain rights. Before considering such matters, however, it is important to understand the distinctive objectives of the Charter and the particular context in which is was created in order fully to appreciate its potential impact.

The drafting history and the object and purpose of the Charter are quite distinct from the minorities-specific instruments which have appeared since the early 1990s, and such differences must be borne in mind in understanding both the Charter's operation, and its relationship to such instruments and to those human rights instruments which are of most immediate relevance to minorities. With regard to its drafting history, although the Charter was, like many of the most important contemporary minorities instruments, such as the Framework Convention, concluded in the 1990s, its origins were in the early 1980s rather than the early 1990s and it was not inspired by the re-emergence of ethnic conflicts that accompanied the fall of Communism, but by concerns about the threat to cultural diversity that was posed by the impending loss of linguistic diversity in Europe. In 1981, for example, the Parliamentary Assembly of the Council of Europe adopted Recommendation 928 on the education and cultural problems of minority languages and dialects in Europe,[5] and in that same year, the European Parliament passed a resolution on these questions;[6] both these documents called for specific action to promote the local use of minority languages.[7] Acting on these documents, the Council of Europe's Standing Conference of Local and Regional Authorities of Europe ('CLRAE') decided to begin preparation of an instrument for the protection of regional and minority languages, and immediately undertook a survey of the actual situation of such languages in Europe. After a

[4] Paragraph 11 goes on to provide that: 'the obligations of the parties with regard to the status of [regional or minority] languages and the domestic legislation which will have to be introduced in compliance with the charter will have an obvious effect on the situation of the communities concerned and their individual members.'

[5] European Bureau for Lesser Used Languages, *Vade Mecum: A Guide to International Documents on Lesser-Used Languages of Europe*. (Brussels: EBLUL, 2003), p. 257.

[6] 'Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities', the so-called 'Arfé Resolution' of 16 October 1981: EBLUL, *Vade Mecum*, at p. 7.

[7] Explanatory Report, para. 4.

public hearing in 1984, initial drafting of an instrument was carried out, an exercise in which the Parliamentary Assembly of the Council of Europe participated.[8] Following on from this, in 1988 the Committee of Ministers of the Council of Europe established an *ad hoc* committee of experts on regional or minority languages in Europe ('CAHLR') to begin drafting the Charter, bearing CLRAE's work in mind. Thus, work on the Charter largely predated and was independent of the ethnic violence unleashed by the fall of Communism.[9]

With regard to its object and purpose, the Charter is, as noted above, centrally concerned with the preservation of cultural diversity. The Charter's preamble, for example, recognises that some of 'the historical regional or minority languages of Europe' are in danger of eventual extinction, and that the protection of such languages contributes to the maintenance and development of Europe's cultural wealth and diversity. This theme is also emphasised in the Explanatory Report to the Charter. It notes that many European states have on their territory 'regionally based autochthonous groups', whose language differs from that of the majority of the population.[10] While the demographic situation of these 'regional or minority languages' varies greatly, the Explanatory Report recognises that many of these languages share one important feature: they all suffer from 'a greater or lesser degree of precariousness'.[11] In this context, the 'overriding purpose' of the Charter is to 'protect and promote' these regional or minority languages 'as a threatened aspect of Europe's cultural heritage';[12] indeed, the Explanatory Report characterises this overriding purpose as 'cultural'. In making culture, and cultural diversity, its central focus, the Charter is unique.

This focus has subtle but important consequences for the implementation and monitoring of the Charter. The emphasis that the Charter places on the preservation of threatened languages argues for a teleological approach; state policies taken in response to the Charter should ultimately be determined by reference to their effectiveness in preserving and promoting linguistic diversity. The theme of effectiveness is, indeed, one

[8] Explanatory Report, paras. 5 and 6.

[9] As the Explanatory Report notes, the CLRAE conceived and presented its draft charter 'before the dramatic changes in central and eastern Europe and in light of the needs of countries that were already members of the Council of Europe': para. 12.

[10] Explanatory Report, para. 1. [11] Explanatory Report, para. 2.

[12] Explanatory Report, para. 10.

which emerges in the work of the body which monitors the implementation of the Charter, the Committee of Experts.[13]

At the same time, some of the other instruments discussed in this collection – notably, the Framework Convention – also make reference to the preservation and promotion of cultural diversity as a policy goal. Furthermore, both general human rights and minorities-specific instruments recognise a right to identity, and to the extent that there is an increasing awareness that this right may imply a collective element – a theme evident elsewhere in this volume – the development of a similar teleological approach and a focus on effectiveness in ensuring the protection of identities may be emerging in the work of other monitoring bodies – reference could again be made to the work of the Advisory Committee under the Framework Convention. Thus, even though the origins and purpose of the Charter are unique, considerable scope for synergies may continue to emerge.

1 Scope of application of the Charter

An important consequence of the Charter's focus on languages themselves is that the Charter makes no reference to concepts such as 'minorities' or 'national minorities'. As we shall see, the Charter does contain a number of provisions which impose obligations on states in respect of 'users' of regional or minority languages, but being a 'user' of a language does not require any determination of whether the individual is a member of a particular group. It is, for example, perfectly possible for an individual to be a 'user' of a regional or minority language, and therefore to be entitled to the benefit of a service guaranteed under the Charter, without that individual necessarily being a member of the group – whether a minority, national minority, or otherwise – with which the language is associated. An analogous approach is evident in some of the case law of the European Court of Justice relating to EU mobility rights, in which even though the litigants were not members of the national linguistic minority for whom special language rights were created, they were nonetheless entitled to benefit from the protection of that regime because they spoke and wished to use the protected language.[14] To the extent that contemporary

[13] The Committee of Experts will be considered further, below.

[14] See *Ministère Public v Mutsch* Case 137/84 [1985] ECR 2681, and *Bickel and Franz* Case C-274/96 [1998] ECR 1-7637.

minorities-specific instruments and monitoring bodies tend to recognise the autonomy of the individual to associate him- or herself with a minority, and therefore benefit from the protection of the relevant instrument, the Charter's approach hints at an emerging synergy.

However, the Charter does create different categories of languages, and only users of certain languages – the 'regional or minority languages' – can potentially benefit from the full protection of the Charter. The Charter defines these 'regional or minority languages' as ones that are 'traditionally used' within a given state by nationals of that state, and the users of such languages must form a group that is numerically smaller than the rest of the state's population.[15] Thus, the Charter does not liberate us completely from the task of identifying groups, although the existence of the relevant group is determined by reference to one primary characteristic, the use of a particular language. The definition goes on to specify that 'regional or minority languages' must be different from the official language or languages of the state.[16] It also provides that the concept of 'regional or minority language' does not include dialects of an official language or languages, or 'the languages of migrants'.[17] The monitoring body set up under the Charter, the Committee of Experts, has made clear that the existence of 'regional or minority languages' in a state is to be determined objectively, regardless of the approach taken by the state.[18] The substantive provisions of the Charter are set out in two parts: Part II contains general principles which apply to all regional or minority languages of the state, and Part III contains more detailed provisions on specific topics which apply only to those regional or minority languages which the state designates. The Charter also recognises a second category of languages. These are 'non-territorial languages', which are entitled to

[15] Article 1(a). [16] Article 1(a)(ii). [17] Article 1(a).

[18] In its consideration of Croatia's first periodical report, for example, the Committee of Experts indicated that they had received information that suggested that Slovene and Bosnian should be considered to be regional or minority languages on the basis of their traditional use in Croatia, and that the authorities were encouraged to clarify these issues: Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 2, 20 September 2001, para. 11. In its report on Croatia's second periodical report, the Committee of Experts received some additional information in respect of Slovenian (as it was referred to in that second report), but there was still uncertainty as to whether it was associated with a particular territory, and so the Committee of Experts again asked for further clarification: The Committee of Experts, Application of the Charter in Croatia, Second monitoring cycle, ECRML (2005) 3, 7 September 2005, paras. 48–50.

the protection of Part II of the Charter, but not of the more detailed provisions of Part III. 'Non-territorial languages' are defined as languages used by nationals of the state which differ from the languages used by the rest of the state's population and which, although like regional or minority languages are traditionally used within the territory of the state, unlike regional or minority languages cannot be identified with a particular area of the state.[19] The Explanatory Report offers as examples of 'non-territorial languages' Yiddish and Romany,[20] and justifies the exclusion of these languages from the protection of the more detailed provisions of Part III of the Charter on the basis that those provisions generally aim to protect regional or minority languages on the territory in which they are used, and the absence of such a territorial base makes the satisfaction of such provisions difficult.[21]

There are, however, a number of ambiguities in the definition of 'regional or minority languages', and not all of these have been resolved through the process of treaty monitoring. For example, the definition makes reference to 'languages', 'official languages of the state' and 'dialects' of the official language or languages, but does not provide much guidance on the meaning of these various terms. The reference to 'official languages *of the state*' suggests that languages which have official status at a local or regional level, but not at a national level, will not be 'official languages' for these purposes, and may therefore qualify as 'regional or minority languages'. Thus, languages such as Catalan, Basque and Galician, which are official languages of autonomous communities in Spain, and Welsh, which arguably has such a status in Wales, have nonetheless been treated as 'regional or minority languages' for the purposes of the Charter.[22] It is not clear, though, what level of recognition

[19] Article 1(c). [20] Para. 36. [21] Para. 37.

[22] In its instrument of ratification, Spain indicated that these languages were 'regional or minority languages' for the purposes of the Charter, and in its report on Spain's first periodical report, the treaty monitoring body, the Committee of Experts, clearly implied that they were 'regional or minority languages' by discussing them within the context of Part II of the Charter which, as we shall see, applies to all of a state's regional or minority languages: see Committee of Experts, Application of the Charter in Spain, ECRML (2005) 4, 21 September 2005: paras. 80–97. Similarly, in its instrument of ratification, the United Kingdom indicated that Welsh was a 'regional or minority language' for the purposes of the Charter, and in its report on the United Kingdom's first periodical report, the Committee of Experts also discussed Welsh in the context of Part II, clearly implying its view that Welsh was such a language: Committee of Experts, Application of the Charter in the United Kingdom, ECRML (2004) 1, 24 March 2004, at, e.g., paras. 41–2.

at the national level is necessary for a language to be termed an 'official language'. Many languages benefit from some measure of legislative protection, but does this mean that they are 'official' languages? It has been argued that the concept of an 'official language' must be 'strictly defined', so that languages which have some legal status but which do not have an official function in the workings of public bodies, and which are not used in drawing up public documents or in dealings among public authorities are not 'official' in this sense.[23]

To complicate this issue further, the Charter anticipates that a language which is, in fact, an 'official language' of the state may still benefit from the protection of Part III of the Charter – as we shall see, the part which sets out most of the detailed provisions with regard to state obligations – if the language is 'less widely used on the whole or part' of the territory of the state, and the state chooses to undertake Part III obligations in respect of the language.[24] Swedish, which is spoken by about 5 per cent of the population of Finland, is, with Finnish, recognised as a national language and as a less widely used official language under the Finnish constitution, and, while it is therefore not a 'regional or minority language' under Article 1 of the Charter, it nonetheless benefits from the protection of Part III of the Charter, because Finland specified that it would apply Part III provisions to Swedish in its instrument of ratification.[25]

The exclusion of 'dialects' of official languages from being 'regional or minority languages' invites the question of when a dialect becomes a language, and the Explanatory Report is unapologetic about the fact that the Charter provides no guidance: it notes that the question depends not only on strictly linguistic considerations, but also on 'psycho-sociological and political phenomena' which may provide a different answer in each case. As a result, the question is left to the state authorities to determine, 'in accordance with its own democratic processes'.[26] In spite of the fact that the Charter says nothing about whether dialects of regional or minority languages are covered – the definition excludes only dialects of the official language(s) of the state – the question of whether a particular

[23] Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Strasbourg: Council of Europe, 2005), p. 61.
[24] Article 3(1).
[25] Committee of Experts, Application of the Charter in Finland, ECRML (2001) 3, 20 September 2001, paras. 8–10.
[26] Para. 32.

form of language is a dialect of a regional or minority language or a separate regional or minority language has occasionally arisen. The Explanatory Report, however, seems to suggest that the Charter does not apply to such dialects: para. 32 provides that 'The charter does not concern local variants or different dialects of one and the same language'. In spite of this, the treaty monitoring body, the Committee of Experts, has taken a flexible approach. An example of this is Kven, a language spoken in Norway which bears a close relationship with Finnish, the status of which under the Charter was unclear. The Committee of Experts noted but did not pronounce on this issue,[27] but they did discuss measures taken in respect of Kven in their consideration of Norway's obligations under Part II of the Charter,[28] implying that Kven would be a regional or minority language for the purposes of the Charter. The Committee of Ministers, in its recommendation to Norway following Norway's first periodical report, directed the Norwegian authorities to 'clarify the status of the Kven language with a view to improving the situation of the language in conformity with Part II of the Charter';[29] as the Committee of Ministers asked the authorities to clarify the status of the language with a view to improving its situation under Part II, rather than clarifying whether Kven was subject to Part II at all, they seemed imply that Kven was, indeed, a regional or minority language. A similar issue arose in respect of Sami in Finland. Finland has designated 'the Sami language' as a regional or minority language which will be subject to Part III of the Charter. However, the Committee of Experts found that the Sami language consists of three different variants, North, Skolt and Inari Sami, and has treated them as separate languages for the purposes of Parts II and III of the Charter.[30] This was repeated by the Committee of Experts in their findings on Finland, where they noted that Skolt and Inari Sami, in particular, are in danger of extinction and are in need of immediate and positive supportive action by the

[27] Committee of Experts, Application of the Charter in Norway, ECRML (2001) 6, 22 November 2001, paras. 19, 20.

[28] *Ibid.*, para. 26ff; as we shall see, Part II applies automatically to all of a state's regional or minority languages, regardless of whether the state considers that the language is a regional or minority language within the meaning of Article 1.

[29] *Ibid.*, recommendation 2.

[30] Committee of Experts, Application of the Charter in Finland, ECRML (2001) 3, 20 September 2001, para. 8.

state.[31] In resolving issues relating to dialects, the Committee of Experts seems to place considerable weight on whether there has been serious discussion between the state and the speakers of the particular language/dialect, and on the depth of feeling of speakers of the language/dialect itself.[32] Given, though, that the overriding goal of the Charter is the preservation and promotion of cultural diversity, the relatively permissive approach that the Committee of Experts has taken in respect of the recognition of dialects of regional or minority languages for the purposes of Charter protection seems appropriate.

1.1 Application to so-called 'new minorities'

One of the themes explored elsewhere in this volume is the question of the extent to which mechanisms of minority protection apply in respect of so-called 'new minorities'. While the Charter does not make reference to concepts such as 'minorities' or 'national minorities', from the definition of 'regional or minority languages' it would appear that the Charter does not apply to many languages which are spoken by 'new minorities'. First, the definition of 'regional or minority languages' specifically provides that the 'languages of migrants' are not covered. Secondly, a regional or minority language is one that is spoken by 'nationals of the State'; languages of non-nationals are excluded. Third, a regional or minority language must be 'traditionally used within a given territory' in the state; this implies a connection with a territory within the state that is of some duration.[33] The Explanatory Report provides the following information:

> The purpose of the charter is not to resolve the problems arising out of recent immigration phenomena, resulting in the existence of groups speaking a foreign language in the country of immigration . . . In particular, the charter is not concerned with the phenomenon of non-European

[31] *Ibid.*, Finding C. This approach was picked up on by the Committee of Ministers in their recommendations to Finland where, for example, they recommended that special efforts should be devoted by Finland to pre-school and primary education and to making available the necessary teacher training and teaching materials for Skolt and Inari Sami which seem to be in danger of extinction: Recommendation RecChL(2001)3 on the application of the European Charter for Regional or Minority Languages by Finland, 19 September 2001.

[32] See Woehrling, *The European Charter*, p. 63.

[33] It is difficult to imagine that languages of migrants or of non-nationals could satisfy this condition, and it is therefore unclear why it was considered necessary to specifically exclude the languages of migrants and the languages of non-nationals.

> groups who have immigrated recently into Europe and acquired the nationality of a European state.[34]

It appears, though, that there may be some room for flexibility in the application of the Charter to languages of so-called 'new minorities'. Given that the Charter focuses on languages, rather than the characteristics of the individuals and groups with which they are associated, where newcomers speak a language that is already constituted as a regional or minority language because of its long presence on the territory of the state, there seems little basis for excluding such newcomers from the benefits of the Charter's protection. This was, in fact, the approach taken by the Committee of Experts in respect of Russian-speaking immigrants to Finland. Finland treats Russian speakers differently, depending on whether they are 'Old Russians' – Russian speakers whose ancestors came to Finland prior to Finnish independence – or 'New Russians' – those who arrived since independence and, in particular, since the fall of Communism.[35] The Committee of Experts made clear that they considered the obligations of Finland were to the language – and by implication, to its users – without reference to whether its users were 'new' or 'old' arrivals.[36]

As the case of the so-called 'Old Russians' also illustrates, it may be possible for languages of immigrants to become sufficiently established on the territory of a state that they become, with the passage of time, a 'regional or minority language', on the basis that they are no longer associated solely with 'recent immigration'. The Committee of Experts has not yet had to consider this particular issue, and it is not clear what criteria they would employ in determining when a language of migrants has become sufficiently established to constitute a language 'traditionally used' in the territory of the state.[37] It has been suggested by Council of Europe officials, for example, that a language that has been spoken within

[34] Para. 31.

[35] The Committee of Experts found that there were between 15,000 and 25,000 so-called 'New Russians', outnumbering the 5,000 'Old Russians' by several times: Committee of Experts, Application of the Charter in Finland, ECRML (2001) 3, 20 September 2001, para. 14.

[36] *Ibid.*

[37] See, e.g., Woehrling, *The European Charter*, pp. 58–9; he suggests that where users of such immigrant languages have acquired the nationality of the state and have become fully integrated, and their language has become 'an accepted feature of the state' and 'part of the national culture', the language may qualify, and he notes that in some cases, this process may only take 'a few years'.

a state over a period of perhaps four generations may qualify,[38] although once again, this may not be a view that is followed by the Committee of Experts. It is certainly possible that, as the concept of 'minority' expands in the wider international law of minority protection to include so-called 'new minorities', the Committee of Experts and states themselves may interpret the Charter's requirement of a long-standing territorial connection more liberally. The potential for such a liberal approach may be particularly great in states which are former colonial powers – the United Kingdom and the Netherlands come quickly to mind – and which have had large numbers of immigrants from former colonial territories dating back to the nineteenth century and even earlier, whose languages are still spoken in these states. It is submitted that such a liberal approach is also consistent with the overriding objective of the Charter, the preservation and promotion of cultural diversity in Europe; surely, the languages of so-called 'new minorities' also contribute to Europe's cultural diversity?

It must also be noted in this context that the gap between the Charter and other instruments on this issue may not be as dramatic as the stark language of Article 1 may suggest. Take, for example, the United Kingdom. In its initial periodical report under the Framework Convention, the United Kingdom noted that the concept of 'national minority' did not exist in domestic British law, and that it would apply the Framework Convention based on the concept of 'racial group' used in its domestic anti-discrimination legislation. This concept is a broad one which refers not only to 'race' but to nationality, national origins and ethnicity, and clearly applies to many so-called 'new minorities'. The monitoring body under the Framework Convention, the Advisory Committee, signalled its preference for an expansive interpretation of the term 'national minorities' that would include such 'new minorities' by warmly welcoming the 'inclusive approach' taken by the United Kingdom.[39] In spite of this, when it came to the implementation of those provisions, such as Article 10, paragraph 2 and Article 14, which may require positive measures of support in respect of languages, the UK took a much more limited approach, and concentrated primarily on measures in favour of speakers of those languages such as Welsh, Scottish

[38] Personal communication with Charter Secretariat.

[39] Advisory Committee on the Framework Convention, Opinion on the United Kingdom, adopted 30 November 2001, ACFC/INF/OP /I(2002)06, para. 14.

Gaelic and Irish, which are 'regional or minority languages' within the meaning of the Charter.[40]

1.2 Self-determination

Because the focus of the Charter is on languages, rather than the groups that speak them, neither the Charter nor its monitoring body addresses questions such as the right of speakers of regional or minority languages to self-determination. The Charter does make clear that none of its provisions may be interpreted as implying a right to engage in any activity or perform any action that contravenes the principle of the sovereignty and territorial integrity of states. The Charter also provides, though, that its provisions shall not affect any more favourable provisions concerning the status of regional or minority languages 'or the legal regime *of persons belonging to minorities*' (emphasis added) which are provided for by 'relevant bilateral or multilateral international agreements'. Thus, although the Charter makes no reference to the concept of self-determination, it would not purport to limit a claim to self-determination by speakers of a regional or minority language; such issues are, as noted, simply outside the remit of the Charter. The Explanatory Report makes clear that the Charter is not concerned with 'the problem of nationalities who aspire after independence or alterations to frontiers', but notes that the Charter may be expected to promote the integration of minorities whose distinguishing feature is language by enhancing the possibility of using their language and thereby to reduce any historical resentments that they might harbour.[41] Furthermore, the Charter does give some recognition to the notion that users of regional or minority languages should participate in decisions which affect them,[42] and the Committee of Experts has

[40] *Ibid.*, paras. 70–4, 89–92.

[41] Para. 13. The promotion of tolerance in multilingual societies could be said to be one of the subsidiary goals of the Charter. For example, Article 7(3) requires states to promote mutual understanding between all linguistic groups and the inclusion of respect, understanding and tolerance in relation to regional or minority languages as one of the objectives of education and training and to encourage the mass media to pursue this same objective. As we shall see, Article 7 is in Part II of the Charter, and is therefore an obligation which applies in respect of all of a state's regional or minority languages, as well as its non-territorial languages.

[42] See, e.g., Article 7(4), which requires states to take into consideration the needs and wishes expressed by the groups which use regional or minority languages in determining their policies on such languages.

commented favourably where states have consulted bodies and associations representing speakers of regional or minority languages when adopting legislation to support such languages and has expressed concern where states have failed to consult such groups with respect to ratification of the Charter.[43] Participation rights are a feature of other minorities instruments, as highlighted in this collection, and are also a feature of so-called 'internal' aspects of the right to self-determination, and the willingness of the Committee of Experts to address such issues is in keeping with such developments, and it will be interesting to see how the output of the Committee in this area develops.

2 Structure and content of the Charter

The substantive provisions of the Charter are set out in Parts II and III. Part II contains only one article, Article 7, and it applies in respect of all of the regional or minority languages within the state, and in respect of the state's non-territorial languages. As noted above, these languages are determined objectively, and states are therefore not entitled to choose which languages benefit from the protection of Part II. States which are party to the Charter must base their policies, legislation and practice in respect of all of their regional or minority languages (and to their non-territorial languages) on a number of objectives and principles.[44] These objectives and principles tend to be broad and programmatic. They make reference, for example, to the need for resolute action to promote regional or minority languages in order to safeguard them,[45] to the facilitation and/or encouragement of the use of these languages, in speech and writing, in public and private life,[46] and to the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages.[47] Article 7 also requires that states take measures to encourage participation of groups which use regional or minority languages; in particular, states should take into consideration the needs and wishes expressed by the groups which use such languages and they are encouraged to establish bodies for the purpose of

[43] See, e.g., Report of the Committee of Experts, Application of the Charter in Croatia, ECRML (2001)2, 20 September 2001, para. 43.
[44] Article 7(1). [45] Article 7(1)(c). [46] Article 7(1)(d). [47] Article 7(1)(f).

advising the authorities on matters pertaining to regional or minority languages.[48]

Part II of the Charter contains a non-discrimination provision: states are required to undertake to eliminate any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language that is intended to discourage or endanger its maintenance or development.[49] However, the thrust of both Part II and Part III of the Charter goes well beyond the prohibition of acts of discrimination against regional or minority languages and their users. The Explanatory Report refers to the prohibition of discrimination as 'a minimum guarantee' for the speakers of regional or minority languages.[50] Indeed, the obligation to take special measures of support for regional or minority languages so as to ensure true and effective equality for their speakers is at the very heart of the Charter. The Explanatory Report repeatedly emphasises that, having regard to the present weakness of some of Europe's historical regional or minority languages, the mere prohibition of discrimination against their users is not a sufficient safeguard, and that special measures of support which reflect the interests and wishes of those users are essential to their preservation.[51] Thus, the Charter is suffused with the ethos of substantive equality, a principle which is given explicit recognition in Part II, which provides that the adoption of special measures in favour of regional or minority languages aimed at promoting equality between their users and the rest of the population is not considered to constitute an act of discrimination.[52] The increasing importance of this principle in the field of minority protection is evident in many of the other chapters in this volume, and the Charter has the potential to make a considerable contribution to our evolving understanding of the application of this principle in the context of linguistic minorities.

Part III of the Charter then contains more detailed obligations relating to the use of minority languages. These obligations are set out in seven separate articles, dealing with the use of regional or minority languages in education,[53] by the judicial authorities,[54] by administrative authorities and in public services,[55] in the media,[56] in cultural activities and facilities,[57] in economic and social life,[58] and in respect of transfrontier exchanges.[59]

[48] Article 7(4). [49] Article 7(3). [50] Para. 71. [51] See, e.g., paras. 27 and 61.
[52] Article 7(2). [53] Article 8. [54] Article 9. [55] Article 10. [56] Article 11. [57] Article 12.
[58] Article 13. [59] Article 14.

One characteristic which differentiates the Charter from other minorities instruments or minorities provisions in wider human rights instruments is the level of specificity and detail with respect to minority language services in each of the areas covered by Part III. The article on education, for example, contains provisions relating to pre-school, primary, secondary and post-secondary education, as well as technical and vocational education and adult and continuing education.[60] The article on media contains provisions relating to television and radio broadcasting, newspapers and audio and audiovisual works.[61] The article on judicial authorities contains provisions relating to the criminal courts, civil courts and administrative tribunals.[62]

Another characteristic which differentiates the Charter from other minorities instruments or minorities provisions in wider human rights instruments is that the state has a significant degree of choice as to the obligations to which it is subject under Part III. First, the Part III obligations apply only in respect of those regional or minority languages which the state has specified in its instrument of ratification.[63] Thus, while all regional or minority languages are entitled to the measures of support set out in Part II, not all will benefit from the more detailed provisions of Part III. Secondly, even in respect of those regional or minority languages specified under Part III, the state has a fairly wide range of choices as to which of the Part III obligations it will assume for each language. The various Part III obligations are, as noted, set out in seven articles, and these contain sixty-five paragraphs and subparagraphs.[64] The state must choose a minimum of thirty-five paragraphs and subparagraphs for each regional or minority language it specifies for these purposes.[65] Although the provisions of each article are, as noted, detailed and specific, they offer the state a range of options, ranging from relatively heavy obligations to relatively light ones. In respect of education, for example, the options range from full minority language medium education at the

[60] Article 8(1)(a)–(f). [61] Article 11(1)(a)–(e). [62] Article 9(1)(a)–(c).

[63] Articles 2(2), and 3(1).

[64] Given the nature of some of these provisions, it has been suggested that states may actually choose from sixty-eight options: see Woehrling, *The European Charter*, pp. 73–5.

[65] Article 2(2). The state must choose at least one paragraph or subparagraph from each of the articles in Part III except Article 14, relating to transfrontier exchanges, and it must choose at least three paragraphs or subparagraphs from Article 8, on education, and Article 12, on cultural activities and facilities.

various stages in the education system (e.g. pre-school through to post-secondary) to providing a substantial part of the student's education through the medium of the minority language, at least for the children of those parents who request it. In respect of media, for example, the options range from the creation of one radio station and one television channel in the regional or minority language, to the transmission of programmes in such a language.

States must, however, make choices about the coverage of Part III responsibly, and in a way that is designed to accomplish the Charter's core objective – the protection and promotion of all of the state's regional or minority languages (and non-territorial languages).[66] For example, in deciding not to specify a regional or minority language for the purposes of Part III, the state must have reasons for doing so which are compatible with the spirit, objectives and principles of the Charter.[67] With respect to choosing its Part III obligations, the state must attempt to match the Part III provisions as closely as possible to the particular context of each regional or minority language.[68] The aim is to take account of the wide disparities in the *de facto* situation of each regional or minority language, with certain provisions well adapted to a regional or minority language used by a large number of speakers but not suited to those used by a small number of speakers. Broadly speaking, the larger the number of users of a regional or minority language and the more homogenous the regional population, the 'stronger' the option which should be adopted, and a 'weaker' option should be adopted only when the stronger option cannot reasonably be applied, owing to the relatively weaker position of the language.[69] This sort of 'sliding scale' approach is consonant with, and could be understood as an expression of, the principle of substantive equality which underlies the approach taken in other treaties and by other monitoring bodies considered in this collection.

One feature of the Part III obligations that is similar to provisions in minority-specific instruments which provide for positive measures of support for linguistic minorities is that many of the obligations apply only in respect of limited territories within the state. First, some obligations apply only to those territories within the state in which the regional or

[66] See Explanatory Report, para. 10.
[67] See Explanatory Report, para. 42.
[68] See Explanatory Report, para. 43.
[69] See Explanatory Report, para. 46.

minority language is used or spoken.[70] Such territories are not only those within which a regional or minority language is the dominant one or the one spoken by a majority, but also those areas where the language is spoken to a significant extent, even if only by a minority, and which correspond to the language's historical base.[71] Secondly, a number of obligations in Part III apply only to those territories in which the numbers of users of a regional or minority language are sufficient to justify measures of support.[72] Such territorial restrictions or requirements of demand contingency are not uncommon in instruments which create rights to minority language services or which impose obligations upon states to provide such services; they recognise that such provision can involve additional costs to the state, and that it would be unreasonable to impose such costs in circumstances where the provision of services would, owing to small numbers or small concentrations of speakers, be unduly burdensome. However, such limitations can be subject to abuse by states, which may be tempted to define the territories in which the obligations apply or the levels of demand required in a manner that is too restrictive and which effectively frustrates the provision of such services. Ultimately, it is the treaty monitoring body which bears responsibility for ensuring that states strike the balance in an appropriate manner.

3 Implementation of the Charter

The mechanism by which the implementation of the Charter is monitored is very similar to that which is employed under the Framework Convention; given that both are Council of Europe treaties, this is not surprising. The system of monitoring is set out in Part IV of the Charter, entitled 'Application of the Charter', and it essentially comprises a state reporting system. States which are parties to the Charter must present periodical reports to the Secretary-General of the Council of Europe; although the form of the reports is prescribed by the Committee of Ministers of the Council of Europe (the 'Committee of Ministers'), states must report on their policy pursued in accordance with Part II of the

[70] See, e.g., Article 8(1), on education; Article 10(3), on public services; Article 11(1), on media; Article 12(1), on cultural activities and facilities; and Article 13(2), on economic and social life.

[71] Explanatory Report, paras. 33 and 34.

[72] See, e.g., Article 9(1), on the judicial authorities; Article 10(1), in respect of administrative authorities; and Article 10(2), in respect of local and regional authorities.

Charter and on the specific measures taken in satisfaction of their obligations under Part III.[73] The first periodical report must be presented within one year of the date of entry into force of the Charter for the state, and subsequent reports must be presented every three years thereafter.[74] Thus, the reporting cycle under the Charter is shorter than the five-year cycle which is employed under the Framework Convention.

In the first instance, state reports are examined by a Committee of Experts established under the Charter.[75] The Committee of Experts then prepares a report on the implementation of the Charter by the state, and this report, together with proposals of the Committee of Experts for recommendations to the state being monitored,[76] and the comments by that state, are passed along to the Committee of Ministers.[77] Strictly speaking, the Charter does not require the Committee of Ministers actually to make recommendations to the state party concerned, or to take any action whatsoever; it does require the Secretary-General to make a two-yearly detailed report to the Parliamentary Assembly of the Council of Europe on the application of the Charter.[78] Nonetheless, it is the Committee of Ministers' practice to examine the Committee of Experts' proposals for recommendations, and it has in every case gone on to adopt recommendations directed to the state in question; these recommendations usually reflect a consensus within the Committee of Ministers and are very close to the proposals of the Committee of Experts.[79] While the Charter requires states parties to make their reports public,[80] it provides that the Committee of Ministers may, but are not required to, make public both the Committee of Experts' report and the state party's comments; however, the Committee of Ministers has authorised the publication of all Committee of Experts' reports, states parties' comments thereon, and the Committee of Experts' own recommendations.

In practice, the effectiveness of the monitoring mechanism depends to a substantial degree on the Committee of Experts. The Committee of Experts

[73] Article 15(1). [74] *Ibid.* [75] Article 16(1). [76] Article 16(4). [77] Article 16(3).
[78] Article 16(5).
[79] See Woehrling, *The European Charter*, p. 255. The final recommendations of the Committee of Ministers are published, but the proposals of the Committee of Experts on which they are based are not; the claim Woehrling makes about the general similarity of the Committee of Ministers recommendations to the Committee of Experts proposals is presumably based on personal communications.
[80] Article 15(2).

is composed of one member for each state party to the Charter.[81] The member is appointed from a list of individuals nominated by the state party.[82] Those nominated by the state must be 'of the highest integrity and recognised competence in matters deals with in the Charter';[83] the Explanatory Report notes that by placing emphasis on 'the intrinsically personal trait of the "highest integrity", the charter makes clear that the experts ... should be free to act independently and not be subject to instructions from the governments concerned'.[84] It should be noted that the professional background of the members of the Committee of Experts differs to some degree from that of members of similar treaty-monitoring bodies. While some of the members are lawyers – and particularly academic international lawyers – there have also been experts in linguistics, historians, experts in minority language development, and minority language journalists. This broad composition has brought an awareness of the broader sociolinguistic context in which the Charter operates, and this is reflected in the nature of the Committee of Experts' reports, a point to which further reference is made below. As noted earlier in the discussion of the object and purpose of the Charter, the preoccupation of the Charter with outcomes – the preservation and promotion of regional or minority languages – focuses attention on the sociolinguistic effects of the various measures adopted by states, and the sensitivity to such issues which the composition of the Committee of Experts brings is a significant and unique feature of this treaty.

Given the size of the Committee of Experts, the detailed monitoring work in respect of each state report is done by a team of three members, composed of a rapporteur, appointed by the Committee of Experts, the member from the state which is being monitored, and a third member, and in practice, the Charter Secretariat provides substantial support and guidance to the working group. Once the Committee of Experts' report is drafted, however, it goes before the full membership for comment and approval.

3.1 Working methods

There are several features of the state reporting mechanism created under the Charter that are both innovative and important, and which are shared

[81] Article 17(1). Article 18(1) provides that members of the Committee of Experts are appointed for a period of six years and are eligible for reappointment.
[82] Article 17(1). [83] *Ibid.* [84] Para. 131.

with the Framework Convention. First, upon reviewing the state's report, the Secretariat of the Charter prepares on behalf of the Committee of Experts a questionnaire which is sent to the state authorities and which solicits further information in respect of matters raised in the state report.[85] Secondly, the Charter provides that bodies or associations that are legally established[86] in a state which is party to the Charter may draw the attention of the Committee of Experts to matters relating to the Part III undertakings of that state, and may also submit statements concerning the policy pursued by the state in accordance with Part II of the Charter.[87] The Committee of Experts must take into consideration such information in the preparation of its report on the state.[88] In fact, the Council of Europe in general and the Committee of Experts in particular place great value on the participation of non-governmental organisations ('NGOs').[89] In practice, the Charter Secretariat attempts to obtain from the state party the names and contact details of NGOs that represent users of regional or minority languages, as well as of public and administrative bodies that are likely to be involved in the implementation of Charter commitments. The Charter Secretariat, upon the invitation and with the cooperation of the states parties themselves, regularly conducts workshops for NGOs and public and administrative bodies on the content and implementation of the Charter. Furthermore, the Committee of Experts commissioned and published guidelines for NGO participation in the monitoring process.[90] In addition to information provided by NGOs, the Committee of Experts considers other material which it uses in assessing the information provided by states, such as official documents from the state and 'well-established facts from public sources'.[91]

[85] The Advisory Committee under the Framework Convention employs a similar sort of questionnaire.

[86] It has been argued that this phrase merely means that such bodies be legally constituted: see Woehrling, *The European Charter*, p. 252. The Explanatory Report provides that the purpose of this rule 'is to prevent groups whose headquarters is outside the party concerned by the application of the charter from using the monitoring system set up under it to generate discord among the parties': para. 128.

[87] Article 16(2). [88] Article 16(3).

[89] The same is true of the Advisory Committee under the Framework Convention.

[90] Eduardo J. Ruiz Vieytez, *Working Together: NGOs and Regional or Minority Languages* (Strasbourg: Council of Europe, 2004).

[91] Article 17 of the Rules of Procedure of the Committee of Experts.

A third innovative aspect of the monitoring process, and one that is also employed by the treaty monitoring body under the Framework Convention, is the practice, adopted by the Committee of Experts, of sending a delegation from the Committee to the state being monitored for an 'on-the-spot visit'.[92] The delegation is usually comprised of the rapporteur and usually two other members of the Committee of Experts, including the expert whose origin is the state being monitored, as well as a member or members of the Charter Secretariat. The delegation generally meets with government officials, representatives of public and administrative bodies, including local and regional governments, and of NGOs identified by the Charter Secretariat in its communication with the state authorities, referred to above. The on-the-spot visits usually last two to three days, and while many of the meetings take place in the national capital of the state, the delegation will generally try to set up meetings in those communities in which users of regional or minority languages are concentrated, and will try to visit schools and other similar local institutions. Without question, the information gathered by the Committee of Experts, through the questionnaires, NGO submissions and the on-the-spot visits, has added greatly to their appreciation of the actual situation with respect to the implementation of the Charter, has allowed the Committee of Experts to assess more vigorously and critically the claims made by states, and has thereby enriched greatly the output of the monitoring process.

Indeed, this is reflected in both the size and the thoroughness of the Committee of Experts' reports. In practice, they tend to be much more extensive and detailed than the output of other treaty bodies, including the Advisory Committee under the Framework Convention, although in recent years, the size of the Advisory Committee's output has increased. For example, Committee of Experts' reports in the first monitoring cycle tend to average about sixty pages in length, although reports on states with a complex linguistic and regulatory regime tend to be longer: the first Committee of Experts report on Germany was 118 pages and on Spain 161. The Committee of Experts reports of the first monitoring cycle comprise three chapters: the first chapter contains background information, such as information on the language situation in the state, and a discussion of preliminary matters and of general issues raised by the monitoring process; the second chapter comprises a detailed analysis of

[92] This process is provided for under Article 17, *ibid.*

the implementation by the state of Parts II and III of the Charter; and the third chapter sets out the Committee of Experts' findings. Given the Charter's focus on the preservation and promotion of regional or minority languages, there tends to be a considerable amount of detail in the first chapter on the actual demographic and sociolinguistic position of the regional or minority languages, and the extent and depth of this information tends to be greater than that found in the output of other treaty bodies. This is undoubtedly partly a reflection of the particular skills mix of the members of the Committee of Experts, a point referred to earlier, and partly of the nature of the Charter itself: as one member of the Committee of Experts noted, it was considered especially important to acquire information on the number of speakers and the territory in which those speakers reside.[93] In its consideration of the implementation of Parts II and III, the Committee of Experts provides specific comments on each paragraph and subparagraph of each article, and finds that the provisions have been 'fulfilled', 'generally fulfilled', 'partly fulfilled', 'formally fulfilled' or 'not fulfilled'.[94]

The Committee of Experts reports in the second monitoring cycle are somewhat shorter – generally between about thirty and forty pages, which, incidentally, is similar to the length of the Advisory Committee's output during the second monitoring cycle – but are still significant pieces of work, filled with considerable detail. The reports of the second monitoring cycle tend to follow the structure employed in the first cycle, but the first chapter, which contains background information and a discussion of general issues raised, also provides an update on the situation of the language, including demographic and legal and policy changes that have taken place since the first cycle, and the final chapter, which contains conclusions, includes an assessment of how the state responded to the issues raised in the first Committee of Experts' report. There has been a similar experience under the Framework Convention, and it illustrates another synergy – the tendency for these state reporting monitoring mechanisms to develop more specificity and 'bite' as they develop. Given the relatively short period of time between state reports – as noted, the

[93] Vesna Crnic-Grotic, 'The Committee of Experts for the Charter', in *Implementation of the European Charter for Regional or Minority Languages* (Strasbourg: Council of Europe, 1999), p. 74.

[94] Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004), p. 157.

Charter provides for a three-yearly reporting cycle – the monitoring process has initiated a process that more closely resembles a fairly close and continuing dialogue, involving not only the state and the Committee of Experts, but also sub-state actors such as local and regional governments, and NGOs, and once again, this experience is similar to that under the Framework Convention and other instruments considered in this volume. In both the first and second monitoring cycle, the Committee of Experts have not sought to be overly censorious of states, and has been sensitive to the many real difficulties that states face in implementing the Charter. Rather, they tend to focus on the identification of difficulties and the initiation of a realistic strategy for addressing them which may involve legislative changes as well as other measures. As one member has put it, the Committee of Experts 'will encourage the parties to gradually reach a higher level of commitment in accordance with the charter'.[95] It is, however, too early to make any definitive assessment of the effectiveness of this monitoring process; this will likely only become apparent over several monitoring cycles, as the extent to which states actually respond to previous Committee of Experts' reports and Committee of Ministers' recommendations becomes evident. However, the Committee of Experts' reports and the Committee of Ministers' recommendations have provided important insights into the Charter and its implementation, and should be considered as important sources of guidance with regard to the scope and contents of the Charter.

3.2 Substantive developments arising from the monitoring process

As is apparent from the discussion of its structure and contents, the Charter is a more complex and detailed instrument than virtually all of the instruments discussed in this collection (although, once again, unlike these other instruments, states parties to the Charter have considerable discretion as to which of its detailed provisions actually apply). In spite of its greater specificity, however, it still contains a large number of ambiguous provisions which require clarification. The Committee of Experts has, through its monitoring work, provided a considerable amount of clarification, although many of the Charter's ambiguities have not yet been addressed. Given the complexity of the Charter, it is possible only to give a taste of the many

[95] Crnic-Grotic, 'Committee of Experts', p. 74.

ways in which the Committee of Experts has provided guidance on the meaning of the Charter.

We have already considered how the Committee of Experts has clarified a number of issues relating to the scope of the application of the Charter, such as the question of whether languages which are official languages at a sub-national level can be regional or minority languages (they can) and whether dialects of regional or minority languages can be covered (again, it appears they can), and that the existence of 'regional or minority languages' is to be determined objectively, based on assessment of the facts, not on the views of the state.

The Committee of Experts has clarified a number of other fundamentally important matters. First, they have made clear that the obligations imposed on states under Part II and those undertaken under Part III of the Charter apply regardless of whether users of regional or minority languages who benefit from the protection of these provisions are able to speak the dominant or official language. A good example of this can be found in the Committee of Experts' monitoring of the first periodical report of Hungary. The experts found that minority language communities are generally 'well integrated' in Hungary and that practically all speakers of minority languages live in a situation of diglossia, speaking Hungarian like a mother tongue and using it daily as the main medium of communication.[96] In spite of this, the obligation under the Charter to provide minority language services is in no way diminished. Thus, in consideration of Hungary's obligations under Article 9(1)(a)(ii), which guarantees the accused the right in criminal proceedings to use his or her minority language, the Committee of Experts was critical of Hungary's domestic legislation which, due to its alleged lack of clarity, had been interpreted on occasion in such a way as to deny the right to use a minority language where the accused could also speak Hungarian. The Committee of Experts noted that the Charter provision imposes an unconditional obligation on judicial authorities to allow the accused the right to use the minority language, regardless of competence in Hungarian, and they suggested that the Hungarian authorities should consider amending the domestic legislation to make this clear.[97] This

[96] Committee of Experts, Application of the Charter in Hungary, ECRML (2001) 4, 4 October 2001, para. 12.
[97] *Ibid.*, para. 45.

obligation goes well beyond what is required by the European Convention on Human Rights, for example, and approaches what could be described as a 'language right'.

A very important issue in the application of the Charter is the determination of the territory of the regional or minority language. As noted earlier, a large number of the detailed obligations of Part III apply only in respect of certain territories within the state – some obligations apply only to those territories within the state in which the regional or minority language is used or spoken, and others apply only in those territories in which the numbers of users of a regional or minority language are sufficient to justify measures of support. The Committee of Experts has not developed any set of principles with respect to this matter, and has given states a certain amount of latitude to determine these territories for themselves. However, it has been critical of states which have, in the opinion of the Committee of Experts, sought to determine these territories in a manner that is too restrictive, thereby minimising the potential application of the Charter. The experts have, in particular, been concerned about the use of percentages to determine the application of Part III obligations. In its monitoring of Croatia, for example, the Committee of Experts noted that Croatia had made a declaration in its instrument of ratification that the territories of the regional or minority languages were those in which they had official status. In its monitoring of Croatia's first periodical report, the experts noted that the Croatian Constitution provided that such languages would be official languages only where they were spoken by over 50 per cent of the population of the area; in the monitoring of the second periodical report, it was noted that this threshold had been reduced to 33 per cent, but that there were a number of other considerations which effectively made the determination of the territory of the regional or minority languages difficult. The Committee of Experts noted that these percentages were very high,[98] and stated that the determination of the territory of the regional or minority languages was difficult,[99] and in their findings, noted that this has created obstacles to the promotion of regional or minority

[98] Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 2, 20 September 2001, paras. 19–21.

[99] Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 3, 7 September 2005, paras. 51–62.

languages,[100] and that the territory of such languages must be determinable in a clear and unambiguous manner.[101]

The Committee of Experts has resolved a number of other ambiguities in the Charter, and space permits only a few examples of this. In Part II, Article 7(1)(d) refers to the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in *public* and private life. The Committee of Experts has made clear that the term 'public life' is wide, and could include the use of the language 'in education, justice, administration, economic and social and cultural life, as well as in transfrontier exchanges';[102] this is a very expansive interpretation, and is effectively conterminous with the subject matter of Part III of the Charter. A number of Part III provisions, particularly those relating to education, in Article 8, and administrative authorities and public services, in Article 10, condition the obligation to provide minority language services on sufficiency of demand. With respect to Article 8, the experts have not commented on the general principles which should guide the determination of numerical sufficiency, but they have, however, in determining whether states have satisfied their Article 8 obligations, considered whether national authorities have, in fact, established numerical thresholds, either by law or in practice,[103] thereby implying that such thresholds are desirable, and they have expressed concerns where such thresholds have been set too high. They went on to provide that the rules regarding demand sufficiency should be 'transparent' and that there should be 'a specific structure for organising classes that is likely to provide "sufficient access" to education in the regional or minority language and which facilitates "equal access" to such education'.[104] While stopping short of specifically requiring statutory rules or some numerically determined right to minority language education, the Committee of Experts does seem to be leaning strongly in that direction; in this regard, it should be noted that they have, in the context of state obligations under

[100] Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 2, 20 September 2001, finding C.

[101] Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 3, 7 September 2005, finding B.

[102] See, e.g., Committee of Experts, Application of the Charter in Hungary, para. 24, or Committee of Experts, Application of the Charter in Croatia, para. 34.

[103] See, e.g., Committee of Experts, Application of the Charter in Croatia, paras. 49–51.

[104] *Ibid.*, paras. 53–4.

Article 10(2)(a), encouraged the creation of 'a legal basis for the use of regional or minority languages within regional authorities'.[105] It is becoming increasingly clear in the work of the Committee of Experts that some legislative framework, if not necessarily explicit 'rights', may be necessary to properly implement various provisions in Part III of the Charter – although the Committee may indeed be moving in the direction of explicitly recognising and giving support to the creation of language rights – and similar developments in the monitoring of other treaties considered in this collection – notably the Framework Convention – and in the output of other international bodies is suggestive of yet another emerging synergy in the area of minority protection.

4 Relationship of the Charter with other instruments

A final set of issues concerns the relationship of the Charter with other minorities instruments and general human rights instruments with minorities-specific provisions, and the degree to which the Committee of Experts has, in its monitoring work, explicitly considered such instruments and the work of other treaty bodies and international organisations in clarifying the content of the Charter – some of the implicit synergies having already been identified.

As noted at the outset, the Charter differs from other minorities instruments and human rights instruments with minorities-specific provisions in a number of respects: it makes no reference to the concept of 'minorities' or 'national minorities', it creates no individual or collective rights, and its overriding concern is cultural. Nevertheless, the Charter is not unrelated to these other instruments, a point that is acknowledged in many ways in both the text of the Charter and in its Explanatory Report. First, these linkages are acknowledged in the Charter's preamble. It makes reference to the 'right' to use a regional or minority language in private and public life, a right which it describes as 'inalienable', and which conforms to the principles in major international human rights treaties such as the United Nations International Covenant on Civil and Political Rights ('ICCPR') and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). The preamble to the Charter also makes reference to the work carried out within the CSCE (now the Organisation

[105] *Ibid.*, para. 82.

for Security and Co-operation in Europe, the 'OSCE'), and in particular to its Helsinki Final Act of 1975 and to the document of the Copenhagen Meeting of 1990, which contained a detailed set of provisions on minorities protection, which provisions inspired many of the provisions of the Framework Convention. Secondly, the Charter makes clear that its provisions form part of, and are subject to, a normative hierarchy. The Charter acknowledges that none of its provisions shall be construed as limiting or derogating from any of the rights guaranteed by the ECHR.[106] The Charter provides that its provisions shall not affect any more favourable provisions concerning the status of regional or minority languages, or the legal regime of persons belonging to minorities which may exist in domestic law, or which are provided for in a bilateral or multilateral treaty.[107] The Charter acknowledges that none of its provisions may be interpreted as implying any right to engage in any activity or perform an action which contravenes the purposes of the United Nations Charter or other obligations under international law.[108] Thirdly, some of its provisions draw on those of other instruments. For example, Article 11(2), which relates to the media, guarantees freedom of direct reception of television and radio broadcasts from neighbouring countries, and requires states to ensure that no restrictions will be placed on the freedom of expression and free circulation of information in the written press. The paragraph goes on, however, to make these guarantees subject to certain conditions, and these are essentially the same as those set out in Article 10(2) of the ECHR, which guarantees freedom of expression, a fact which is acknowledged in the Explanatory Report.[109] The Explanatory Report goes on to make reference to another Council of Europe treaty, the European Convention on Transfrontier Television. Where a state is party to that treaty, the conditions set out in Article 11(2) of the Charter will be interpreted by reference thereto.[110] Finally, Article 14, which relates to transfrontier exchanges, requires states to apply existing bilateral and multilateral agreements so as to foster contacts between users of the same regional or minority language in the fields of culture, education, information, vocational training and permanent education.

In spite of these various references in the Charter, the Committee of Experts has explicitly drawn on the provisions of other treaties and the work of other treaty bodies only rarely. This is partly due to the particular

[106] Article 4(1). [107] Article 4(2). [108] Article 5. [109] Para. 112. [110] Para. 112.

nature of the Charter, described above, and to the fact that its provisions – particularly those of Part III – tend to be much more detailed and specific than those of other minorities instruments or minorities-specific provisions of general human rights instruments. Indeed, the Committee of Experts has on occasion pointed this out. In its monitoring of the first periodical report of Croatia, for example, the Committee of Experts noted that the provision guaranteeing the use of regional or minority languages in criminal proceedings, Article 9(1)(a) went further than the ECHR, in that speakers of a regional or minority language may use that language before a court even if they are capable of communicating in the official language. The experts noted that the goal of the Charter was to create or enlarge the space for the use of these languages in the public sphere,[111] a very different consideration from that which underscores the ECHR provision. Furthermore, while, as noted, the Charter recognises that its provisions cannot be applied in a manner inconsistent with the ECHR and other obligations of international law, there are, in fact, few if any provisions of the Charter that would engage in such a way with ECHR and other international legal obligations. The Committee of Experts has consistently found, in its consideration of Article 11(2), that states generally do not impose restrictions on freedom of direct reception of television and radio broadcasts from neighbouring countries, or on the freedom of expression and free circulation of information in the written press, and has therefore not had to make reference to ECHR principles in determining whether such restrictions were justified.

The one instrument to which the Committee of Experts has, on occasion, made reference is the Framework Convention, although the Charter itself does not make specific reference to it. In its monitoring of both the first and second periodical reports of Hungary, for example, the Committee of Experts had cause to refer to the work of the Advisory Committee under the Framework Convention in relation to Hungary's Part II obligations under Article 7(5) to speakers of Romani. In respect of the first periodical report, the Committee of Experts noted the overall phenomenon of deeply rooted social discrimination against people of Roma background, and that this had to be dealt with by the Advisory Committee for the Framework Convention. The Committee of Experts

[111] Committee of Experts, Application of the Charter in Croatia, ECRML (2001) 2, 20 September 2001, para. 62.

noted, though, that such social discrimination is not an issue under Part II of the Charter, which merely aims to protect languages. The Committee of Experts went on make reference to the absence of any efforts to upgrade the standing of the two Roma/Gypsy languages in public life, and encouraged the Hungarian authorities to intensify their efforts in Romani and Beas language planning and their attempts to develop a viable model of bilingual education for children having one of these two languages as a mother tongue. The Committee of Experts noted that the lack of minority language provision – particularly education provision – was in part due to traditional notions of anti-discrimination policy, which viewed assimilation of the Roma as the best method of addressing their marginal status.[112] In its monitoring of the second Hungarian periodical report, the Committee of Experts took care to argue that the provision of Romani- and Beas-medium services, including education, was not inconsistent with the goals of promoting greater integration of Roma into Hungarian society and the elimination of social exclusion directed at the Roma. They took pains to endorse the Advisory Committee's criticism of the policy of enrolling Roma children in schools for the disabled,[113] and its view that the tendency of Roma to integrate through *de facto* assimilation was a consequence of a general negative societal attitude to Roma culture, and did not represent proper integration.[114] In its monitoring of Denmark's first periodical report, the Committee of Experts noted Denmark's position that Romani had not been traditionally spoken in Denmark and was therefore not a 'non-territorial' language. The Committee of Experts also noted, however, that it has been brought to their attention that the Advisory Committee of the Framework Convention referred to the 'historic presence of Roma in Denmark' in its opinion on Denmark, and on the basis of this reference, and representations made by speakers of Roma on the Committee of Experts' on-the-spot visit, it encouraged Denmark to provide more information in the next report.[115] In respect of

[112] Committee of Experts, Application of the Charter in Hungary, ECRML (2001) 4, 4 October 2001, para. 34.

[113] Committee of Experts, Application of the Charter in Hungary, ECRML (2004) 5, 1 July 2004, para. 46.

[114] Committee of Experts, Application of the Charter in Hungary, ECRML (2004) 5, 1 July 2004, para. 48.

[115] Committee of Experts, Application of the Charter in Denmark, ECRML (2004) 2, 26 May 2004, para. 29.

possible changes of administrative boundaries that would have the effect of making the German minority an even smaller minority within an expanded local administrative area, the Committee of Experts urged the Danish authorities to give full consideration to their undertakings under the Charter and the Framework Convention before implementing any changes to the relevant administrative divisions.[116] Finally, in its monitoring of Switzerland's second periodical report, the Committee of Experts noted, in the context of their consideration of Article 11(1)(e)(i) of the Charter, which obliges the state to encourage and/or facilitate the creation and/or maintenance of at least one newspaper in the regional or minority language, that a Romanch daily continued to be published, albeit amid signs of increasing financial difficulties. They encouraged the competent Swiss authorities to look into ways of ensuring that one newspaper in Romanch continues to exist, and in this respect they made reference to the Opinion on Switzerland adopted by the Advisory Committee of the Framework Convention for the Protection of National Minorities on 20 February 2003.[117]

5 Conclusion

While the Charter is of obvious relevance and importance to linguistic minorities, it is significantly different from minorities instruments and minorities-specific provisions in major international human rights instruments, both in terms of its object and purposes, and in terms of its substantive provisions, which in many cases may be much more detailed than the norms set out in other such instruments. There is, however, considerable scope for synergies in relation to the interpretation and implementation of the Charter, and many of these synergies are already developing.

First, while, as noted, many of the Charter's provisions are distinct from other instruments, even from other Council of Europe instruments such as the Framework Convention, some of the provisions are broadly similar, and most will apply in respect of many of the same linguistic minorities. While it is not essential, given the differences in many of the

[116] Committee of Experts, Application of the Charter in Denmark, ECRML (2004) 2, 26 May 2004, para. 34.

[117] ACFC/INF/OP/I(2003)007, para. 49.

substantive provisions, that the Charter be interpreted entirely consistently with such other instruments, there should be a broad consistency in approach, and based on the work of the Committee of Experts to date, and developments highlighted elsewhere in this volume, it is clear that such consistency is emerging. It is notable that even where the Charter may suggest a differing approach – notably in respect of its practical application to new minorities, there are hints that the Charter could be interpreted in a manner that is of relevance to at least those new minorities which have become established in the territory of the state.

Secondly, the Charter, like many of the other instruments, requires an identification of the territories of linguistic minorities and of levels of demand for various public services, and where the Charter and such instruments are being applied in respect of the same linguistic minorities, there is an obvious interest in the development of broadly consistent approaches for the determination of such issues. Once again, there is some evidence that the Committee of Experts is being guided by some of the same underlying principles, such as substantive equality and proportionality, which guide the application of other instruments. It is also clear that the Committee of Experts, like other treaty monitoring bodies – notably the Advisory Committee under the Framework Convention – has accordingly sought to limit the broad discretion which is sometimes assumed to be provided by the instruments themselves.

Finally, the Charter, like the Framework Convention, has developed some innovative practices in relation to its monitoring mechanism, and some of these same practices are being employed by other monitoring bodies referred to in this collection. Both the receipt of NGO submissions and the practice of engaging in on-the-spot visits have ensured that the treaty monitoring body, the Committee of Experts, has an impressive amount of information at its disposal to guide its monitoring of state obligations. When different treaty monitoring bodies are monitoring the same linguistic minorities, there would be obvious benefits in sharing information, at least as to the identity of relevant NGOs and governmental bodies, to ensure that all monitoring bodies have access to as much reliable information as possible. As is highlighted elsewhere in this book, this information-sharing is being practised, at least to some extent, and at least by certain monitoring bodies and other relevant international institutions.

PART B

Non-minorities-specific instruments, provisions and institutions

7

Developments relating to minorities in the law on genocide

WILLIAM A. SCHABAS*

Introduction

Raphael Lemkin first proposed the term 'genocide' in his seminal 1944 study on Nazi occupation policies.[1] Lemkin's interest in the subject dated to his days as a student at Lvov University, when he intently followed attempts to prosecute the perpetrators of the massacres of the Armenians.[2] Lemkin created the term 'genocide' from two words, *genos*, which means race, nation or tribe in ancient Greek,[3] and *caedere*, meaning to kill in Latin.[4] Lemkin suggested the following definition:

> a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and

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[1] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for World Peace, 1944).

[2] 'Totally Unofficial' (unpublished autobiography of Raphael Lemkin in the Raphael Lemkin Papers, New York Public Library), in United States of America, *Hearing Before the Committee on Foreign Relations, United States Senate, March 5, 1985* (Washington: US Government Printing Office, 1985), p. 204.

[3] Henry George Liddell and Robert Scott, *A Greek-English Lexicon* (Oxford: Clarendon Press, 1996), p. 344; William F. Arndt and F. Wilbur Gingrich, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature* (Chicago: University of Chicago Press, 1957), p. 155; Pierre Chantraine, *Dictionnaire étymologique de la langue grecque* (Paris, Editions Klincksieck, 1968), p. 222.

[4] During the drafting of the 1948 Convention, some pedants complained the term was an unfortunate mixture of Latin and Greek, and that it would be better to use the term 'generocide', with pure Latin roots: UN Doc. A/PV.123 (Henriquez Ureña, Dominican Republic).

> even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[5]

Lemkin called for the development of 'provisions protecting minority groups from oppression because of their nationhood, religion, or race'.[6] Noting that 'genocide' referred to the destruction of a nation or of an ethnic group, he described it as 'an old practice in its modern development'. Genocide did not necessarily imply the immediate destruction of a national or ethnic group, but rather different actions aiming at the destruction of the essential foundations of the life of the group, with the aim of annihilating the group as such:

> The objective of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[7]

Lemkin's initial definition envisaged the protection of 'national groups' rather than 'national minorities', but he situated his discussion of genocide within the context of the system of protection of national minorities set up in Europe and the Middle East following the First World War. He insisted upon the relationship between genocide and the growing interest in the protection of peoples and minorities by the post-First World War treaties and other legal instruments. The minorities treaties had been a noble experiment, but their practical accomplishments have generally been dismissed. According to Hersh Lauterpacht, the system 'acquired a reputation for impotence, with the result that after a time the minorities often refrained from resorting to petitions in cases where a stronger faith in the effectiveness of the system would have prompted them to seek a remedy'.[8] Yet to a certain and limited extent, their provisions stalled the advance of Nazism. In Upper Silesia, for example, the Nazis delayed introduction of racist laws because this would have violated the applicable international norms. Jews in the region, protected by a bilateral treaty

[5] Lemkin, *Axis Rule*, p. 79. [6] *Ibid.*, pp. 93–4. [7] *Ibid.*, p. 79.
[8] Hersh Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), p. 219.

between Poland and Germany, were sheltered from the Nuremberg laws and continued to enjoy equal rights, at least until the Convention's expiry in 1937.[9]

The genocide of the Second World War was prosecuted at Nuremberg, but under another heading, 'crimes against humanity'. Dissatisfaction with the International Military Tribunal's decision limiting 'crimes against humanity' to acts committed in association with aggressive war led some states to propose the recognition of 'genocide' as an international crime that could be committed in time of peace as well as in wartime. A United Nations General Assembly resolution adopted in December 1946 declared that 'Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part', suggesting that genocide addressed the protection of all 'groups' and not simply 'national groups'.[10] But, two years later, the General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide, in which the focus returned to national groups, rather than groups in a more general sense. Article II of the Convention states:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[11]

Often criticised as being too narrow and restrictive, either because of the limited scope of the groups it protects or the exhaustive list of punishable acts, the Convention definition has nevertheless stood the test of time. It is repeated without significant change in the statutes of the two *ad hoc*

[9] Jacob Robinson, *And the Crooked Shall be Made Straight* (New York: Macmillan, 1965), pp. 72–3.
[10] GA Res. 96(I).
[11] (1951) 78 UNTS 277. On the Convention generally, see William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000).

tribunals for the former Yugoslavia[12] and Rwanda,[13] established by the United Nations Security Council in 1993 and 1994 respectively, and in the Rome Statute of the International Criminal Court, adopted in 1998 and in force since 1 July 2002.[14] The scores of countries that have enacted crimes of genocide in their domestic criminal codes have, with only a few exceptions, satisfied themselves with repeating the verbatim text of Article II of the Convention. Any deviation is very much the exception that confirms the rule.[15]

There have been frequent suggestions over the years that the Convention's definition of genocide should be extended to cover political, social, economic and other groups.[16] At the time it was adopted in 1948, the intent of its drafters did not include such a broad range of criteria, but rather the already well-recognised concept in international law then known as 'national minorities'. In its first genocide conviction, in August 2001, the International Criminal Tribunal for the former Yugoslavia confirmed that this should be the scope of the term 'national, ethnical, racial or religious group' that appears in Article II of the Convention:

> The preparatory work of the *Convention* shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what were recognised, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups.[17]

The Tribunal explained:

> National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and

[12] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, Art. 4.

[13] Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1993), annex, Art. 2.

[14] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 6.

[15] For example, *Penal Code* (France), *Journal officiel*, 23 July 1992, Art. 211–1.

[16] See: Frank Chalk and Kurt Jonassohn, 'The conceptual framework', in Frank Chalk and Kurt Jonassohn (eds.), *The History and Sociology of Genocide* (New Haven and London: Yale University Press, 1990), pp. 3–43; Benjamin Whitaker, 'Revised and updated report on the question of the prevention and punishment of the crime of genocide', UN Doc. E/CN.4/Sub.2/1985/6.

[17] *Prosecutor v Krstić* (Case No. IT-98–33-T), Judgment, 2 August 2001, para. 556.

> national minorities partially overlap and are on occasion synonymous. European instruments on human rights use the term 'national minorities', while universal instruments more commonly make reference to 'ethnic, religious or linguistic minorities'; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that 'the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word "racial" by the word "ethnic" in all references to minority groups described by their ethnic origin.' The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.' The preparatory work on the Genocide Convention also reflects that the term 'ethnical' ' was added at a later stage in order to better define the type of groups protected by the Convention and ensure that the term 'national' would not be understood as encompassing purely political groups.[18]

In other words, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia situates the prohibition of genocide squarely within the context of the protection of minorities. It is, in a sense, the ultimate right of a minority: to have its survival and continued existence protected by law.

As a result, there are important synergies between the protection of minorities and the international prohibition of genocide. The 1948 Convention was viewed as the ultimate protection of national minorities, the favoured term at the time. Of course, the Convention itself refers to 'groups', but in practice the terminology would seem to be terribly consequential. It is argued that genocide can also be committed against the majority, reasoning that is relevant to the charges that the Khmer Rouge perpetrated the crime against their own people in Cambodia in the late 1970s. But the real paradigms, the destruction of the Armenians in 1915, the Jews in the 1940s and the Tutsi in 1994, are all conterminous with the subject matter of minority protection. Many of the issues involved in applying the law of genocide, such as the determination of the extent of protected groups or minorities, and the objective and subjective factors in

[18] *Ibid.*, para. 555 (references omitted). These words were endorsed by another Trial Chamber: *Prosecutor v Brđanin* (Case No. IT-99–36-T), Judgment, 1 September 2004, para. 682.

their identification, resonate throughout the broader law of minority protection.

1 Identifying the group

Identification of a protected group, within the parameters of the definition of genocide, has not always proved to be a simple matter. This is a problem which is not unfamiliar to specialists in the law of national or ethnic minorities. It has been present since the earliest days of litigation concerning national minorities, when these issues were debated before the Permanent Court of International Justice in the 1920s and 1930s.[19] Identification of the victim group was not an issue in the first prosecution taken under the provisions of the Genocide Convention, that of Adolf Eichmann. When it implemented the 1948 Convention, Israel reconfigured the crime of genocide as the 'crime against the Jewish People'. This was defined by section 1 of its legislation as 'any of the following acts, committed with intent to destroy the Jewish People in whole or in part'.[20] The Israeli legislation was identical to the Convention definition in all respects but one: the concept of 'national, ethnical, racial or religious group' was replaced with 'the Jewish people'. As a result, the judges who tried Eichmann did not need to consider whether the Jewish people as a whole, or European Jews, or German Jews, or parts of those groups, were contemplated by the Convention. Had they been required to do so, of course, there can be little doubt of the conclusion.

In its first contested case, heard in 1997 and 1998, a Trial Chamber of the International Criminal Tribunal for Rwanda struggled with the concept of groups protected by the prohibition of genocide. The judges were unsure of how to categorise Rwanda's Tutsi minority. The Tribunal searched for autonomous objective definitions of each of the four terms, and finally threw up its hands in frustration. Obviously, the concepts of 'national' and 'religious' groups were inapplicable. The judges resisted

[19] E.g., Rights of Minorities in Upper Silesia (Minority Schools), PCIJ, Series A, No. 15.

[20] Nazi and Nazi Collaborators (Punishment) Law, 1950 (Law 5710/1950), s. I(a). The legislation applied only to Nazi war criminals. Israel also enacted genocide legislation with a prospective effect: The Crime of Genocide (Prevention and Punishment) Law, Laws of the State of Israel, Vol. 4, 5710–1949/50 P101. This is discussed in: *A.-G. Israel v Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), para. 16; *A.-G. Israel v Eichmann* (1968) 36 ILR 277 (Israel Supreme Court), para. 10.

using the adjective 'racial', explaining that: 'The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'[21] Probably, they were also uneasy with the entire notion of racial groups, as a scientific concept. For the Trial Chamber, the word 'ethnic' came closest to the mark, yet it too was troublesome because the Tutsi could not be meaningfully distinguished, in terms of language and culture, from the majority Hutu population. Nevertheless, the Tribunal employed the 'ethnic' classification in applying the concept of crimes against humanity, finding Akayesu guilty of a 'widespread or systematic attack on the civilian population on ethnic grounds'. There is no explanation for the incoherence in its finding with respect to genocide and that with respect to crimes against humanity.[22]

Confronted with the prospect that none of the four terms of the definition might apply, the Trial Chamber held that the Convention could still extend to certain other groups, although their precise definition was elusive. Pledging fidelity to the Convention's drafters, the *Akayesu* judgment declared:

> On reading through the travaux préparatoires of the Genocide Convention (Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September–10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

The Trial Chamber continued:

> Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four

[21] *Prosecutor v Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 513.
[22] *Ibid.*, para. 652.

> groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.[23]

The same Trial Chamber reaffirmed this analysis in subsequent genocide judgments.[24]

However, its approach found little favour with other judges of the International Criminal Tribunal for Rwanda and its sister institution, the International Criminal Tribunal for the former Yugoslavia. In the next major judgment of the Rwanda Tribunal, a second Trial Chamber adopted a significantly different analysis. It determined that the Tutsi constituted an ethnic group essentially because the perpetrators of the genocide believed them to be one. The *Kayishema* Trial Chamber said that an ethnic group could be 'a group identified as such by others, including perpetrators of the crimes'.[25] It concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards describing them as such.[26] Subsequent judgments of both the Rwanda and Yugoslavia Tribunals confirm the triumph of this subjective approach to

[23] *Ibid.*, para. 515. But note that the same Trial Chamber, in a subsequent decision, *Prosecutor v Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, seemed to hedge its remarks somewhat: 'It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups' (reference omitted).

[24] *Prosecutor v Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 57; *Prosecutor v Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 162. According to Guénaël Mettraux, in his recent study, *International Crimes and the* ad hoc *Tribunals* (Oxford: Oxford University Press, 2005), p. 230: 'Although the meritorious agenda behind such a position is obvious, this proposition would appear to be, unfortunately, unsupported in law and at the time of its exposition in fact constitutes purely judicial law-making.'

[25] *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 98.

[26] *Ibid.*, paras. 522–30.

the question of identification of groups.[27] In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia concluded that the victims were members of the 'national group' of Bosnian Muslims.[28] Another Trial Chamber said: 'the relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.'[29] Nevertheless, in adopting an essentially subjective approach, the Tribunals have not entirely dismissed the relevance of objective factors. According to one Trial Chamber of the International Criminal Tribunal for the former Yugoslavia: 'subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the . . . must be in fact directed against "members of the group".'[30]

The issue resurfaced in January 2005, in the Report of the International Commission of Inquiry established by the United Nations to investigate allegations of genocide in Darfur made by the government of the United States. The Darfur Commission examined whether the victims of the attacks by Janjaweed militias fell within the rubric of 'national, ethnical, racial or religious groups'. It noted that the principal victims belonged to three main tribes, the Fur, the Massalit and the Zaghawa, and that they

> do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the

[27] *Prosecutor v Semanza* (Case No. ICTR-97–20-T), Judgment and Sentence, 15 May 2003, para. 317; *Prosecutor v Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 811.

[28] *Prosecutor v Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 599.

[29] *Prosecutor v Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 683. Also: *Prosecutor v Nikolić* (Case No. IT-94-2-R61), Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 27; *Prosecutor v Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 70.

[30] *Prosecutor v Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 584. Endorsed by *Prosecutor v Blagojević* (Case No. IT-02-60-T) Judgment, 17 January 2005, para. 667.

> distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them.[31]

The Commission signalled the obvious analogies with the situation of the Tutsi in Rwanda, and endorsed what it called the 'interpretative expansion' of the definition developed in the *Akayesu* judgment, by which 'national, ethnical, racial and religious' was transformed into 'stable and permanent'. [32]

But this was unnecessary, and actually worked at cross-purposes with the real reasoning of the Darfur Commission. The Commission concluded that the persecuted tribes were subsumed within the scope of the crime of genocide to the extent that victim and persecutor 'perceive each other and themselves as constituting distinct groups'.[33] The point here is that the victims were being persecuted not because the Janjaweed saw them as a 'permanent and stable group', but rather because they considered them to be a 'national, ethnical, racial or religious group'. The same can be said of the persecution of the Tutsi in Rwanda. Whether the Tutsi were in fact ethnically distinct from the Hutu, in an objective sense, is a question that has been set aside because the racist extremists who perpetrated the genocide *saw* them as being ethnically distinct. Once the subjective approach, which relies essentially on the perpetrator's perception of the victim group, is adopted, there is no longer a need to enlarge, by interpretation, the textual definition of the crime of genocide drawn from Article II of the 1948 Convention.

The Darfur Commission's report is clear in its reliance on this subjective test. The Commission notes that:

> The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim).[34]

Nevertheless, although 'objectively the two sets of persons at issue do not make up two distinct protected groups',[35] over recent years 'a

[31] Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, UN Doc. S/2005/60, para. 508.
[32] *Ibid.*, para. 498. [33] *Ibid.*, para. 509. [34] *Ibid.*, para. 508. [35] *Ibid.*, para. 509.

self-perception of two distinct groups' has emerged.[36] According to the Darfur Commission, the rebel tribes are viewed as 'African' and their opponents as 'Arab', even if this distinction may lack a genuinely objective basis.

Identification and delimitation of minorities or groups is not a problem that is peculiar to application of the law concerning genocide. Much useful discussion of these questions can be found in the work of other bodies concerned with minority rights, such as the Committee for the Elimination of Racial Discrimination, and the Advisory Committee established pursuant to the Framework Convention for the Protection of National Minorities of the Council of Europe. Unfortunately, none of this work appears to have influenced the thinking of the international tribunals in this area. There is evident potential for greater synergy here.

2 'Cultural' genocide and the Convention

Probably the principal legal difficulty facing those who seek to enforce the rights of national minorities by invoking the provisions of the Genocide Convention is establishing that the punishable acts fit within those enumerated in Article II. The list of five acts of genocide is an exhaustive one, as the rejection of various attempts to expand it over the years makes quite clear.[37] With the exception of the fifth act of genocide – forcibly transferring children from one group to another – the Convention appears to be limited to acts of what are usually described as physical and biological genocide. A recent ruling of the German Constitutional Court,[38] and some pronouncements from the International Criminal Tribunal for the former Yugoslavia,[39] suggest that the law may be evolving so as to broaden

[36] *Ibid.*, para. 511.

[37] For the debate in the Sixth Committee of the General Assembly of the United Nations at the time the Convention was being adopted, see: UN Doc. A/C.6/SR.78. For more recent consideration of transforming the list from an exhaustive to an indicative one, see *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 214, paras. 7–8; *ibid.*, 2251st meeting, pp. 292–3, paras. 9–17; Report of the Commission to the General Assembly on the work of its forty-third session, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, para. (2).

[38] *Nikolai Jorgic*, *Bundesverfassungsgericht* (Federal Constitutional Court), Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99.

[39] *Prosecutor v Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580; *Prosecutor v Krstić* (Case No. IT-98-33-A), Partial Dissenting Judgment of Judge Shahabuddeen, 19 April 2004, paras. 45–57; *Prosecutor v Blagojević* (Case No. IT-02-60-T) Judgment, 17 January 2005, paras. 659–60.

the prohibition on genocide to include acts more properly described as 'cultural genocide'.

There are many ways to destroy a national, ethnic, racial or religious group, of which extermination camps like those at Auschwitz-Birkenau, Treblinka and Belzec are only one. It is also possible to destroy a group by prohibiting its language, or by eliminating its traditional economy, or by a multitude of means falling short of actual physical elimination and whose consequence is loss of identity by a people. The introductory paragraph or *chapeau* of Article II of the Convention requires that a perpetrator of genocide has the 'intent to destroy' a protected group. But it does not specify the type of destruction. Obviously, this covers physical extermination. But does it also cover other means of destruction that ensure the disappearance of a group although by means that strike at its culture, its language and its economy rather than its physical or biological existence?

The drafters of the Genocide Convention meant to confine its scope to physical and biological genocide. At various stages in the process of negotiating the text, they debated whether to include 'cultural genocide' alongside physical and biological genocide. Advocates of a narrow approach argued that cultural genocide was more properly addressed under the rubric of minority rights in other human rights instruments, like the Universal Declaration of Human Rights, whose preparation was contemporaneous to that of the Convention, in the Third Committee of the General Assembly.[40] The opponents of including cultural genocide carried the day in the Sixth Committee of the General Assembly, which voted to exclude cultural genocide from the Convention.[41] Several delegations indicated that they had considered the possible application of the Convention to the situation of aboriginal and indigenous peoples within their borders. For example, Sweden noted that the fact that it had converted the Lapps to Christianity might lay it open to accusations of cultural genocide.[42] New Zealand argued that even the United Nations

[40] GA Res. 217 A (III), UN Doc A/810. But the minority rights clause in the draft declaration was dropped and did not appear in the final version: William A. Schabas, 'Les droits des minorités: Une déclaration inachevée', in *Déclaration universelle des droits de l'homme 1948–98, Avenir d'un idéal commun* (Paris: La Documentation française, 1999), pp. 223–42; Johannes Morsink, 'Cultural genocide, the Universal Declaration, and minority rights' (1999) 21 *Human Rights Quarterly* 1009.

[41] UN Doc. A/C.6/SR.83. [42] *Ibid.* (Petren, Sweden).

might be liable to charges of cultural genocide, because the Trusteeship Council itself had expressed the opinion that 'the now existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants'.[43] South Africa endorsed the remarks of New Zealand, insisting upon 'the danger latent in the provisions of Article III where primitive or backward groups were concerned'.[44]

The initial draft of the Genocide Convention, prepared by the United Nations Secretariat in 1947, referred to acts committed 'with the purpose of destroying it in whole or in part, or of preventing its preservation or development'.[45] This phrase was followed by a list involving physical acts, such as killing, biological acts, such as sterilisation or compulsory abortion, and 'destroying the specific characteristics of the group' by such measures as prohibition of the national language.[46] The final text of the Convention uses the word 'destroy', but without reference to 'preventing preservation or development'. Moreover, it eliminates the reference to 'destroying the specific characteristics of the group'. The list of acts of genocide in Article II of the Convention is considerably shorter than what appears in the original secretariat draft. One of them, forcibly transferring children, is all that remains of the cultural genocide provisions in the early version. And it was added as an exception to the general exclusion of cultural genocide, on a proposal from Greece, made long after the notion of cultural genocide had been definitively rejected.[47] Greece successfully argued that even states opposed to cultural genocide did not necessarily contest inclusion of forcible transfer of children.[48]Yet if the *travaux préparatoires* of the Convention attest to the exclusion of cultural genocide, a literal reading of the text can certainly support an alternative, broader interpretation. The Convention does not say that genocide is committed *by* one of the five prohibited acts, that is, that a perpetrator must intend to destroy a group *by* killing, causing serious bodily or mental harm, inflicting harsh conditions of life, imposing measures to prevent

[43] UN Doc. A/C.6/SR.83 (Reid, New Zealand). Referring to UN Doc. A/603, concerning Tanganyika.

[44] UN Doc. A/C.6/SR.83 (Egeland, South Africa). Also: UN Doc. A/C.6/SR.64 (Egeland, South Africa).

[45] Raphael Lemkin himself, in the book that initially proposed the term 'genocide', attached great importance to its cultural aspects. See Lemkin, *Axis Rule*, pp. 84–5.

[46] UN Doc. E/447, pp. 5–13. [47] UN Doc. A/C.6/242.

[48] UN Doc. A/C.6/SR.82 (Vallindas, Greece).

births and forcibly transferring children. The text of Article II says that genocide is perpetrated if one of those five acts is committed by a person with the intent to destroy the group. In other words, it can be argued that a person who intends to destroy a group by means that fall short of physical extermination, but who kills members of the group in so doing, or commits one of the other four prohibited acts, falls within the parameters of the definition of the crime. This view is supported by recent rulings of the German courts, in cases involving prosecution related to the war in Bosnia and Herzegovina. According to one judgment, the 'intent to destroy' set out in the *chapeau* of Article II of the Convention need not be to destroy the group physically. It is sufficient to put the group in a situation likely to result in its destruction.[49] In a ruling issued in December 2000, the Federal Constitutional Court said that:

> the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group . . . the intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.[50]

These words were cited with considerable sympathy the following August by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, when it held that the Srebrenica massacre of July 1995 could be described as genocide. Nevertheless, the Trial Chamber felt that such a progressive approach might offend the principle *nullum crimen sine lege*, which prohibits retroactive criminal offences. It said that:

> despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[51]

[49] *Kjuradj Kusljic*, *Bayerisches Oberstes Landesgericht*, 15 December 1999, 6 St 1/99, appeal dismissed: *Kjuradj Kusljic*, *Bundesgerichtshof* [Federal Court of Justice], 21 February 2001, BGH 3 Str 244/00.

[50] *Nikolai Jorgic*, *Bundesverfassungsgericht* [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para. 23.

[51] Cited in *Prosecutor v Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580.

The German jurisprudence was also endorsed in a dissenting opinion penned by Judge Shahabuddeen of the Appeals Chamber. According to Judge Shahabuddeen:

> provided that there is a listed act (this being physical or biological), the intent to destroy the group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part.[52]

Judge Shahabuddeen said that, to the extent that his views were inconsistent with the record of the drafting history of the Convention: 'the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*. On settled principles of construction, there is no need to consult this material, however interesting it may be.'[53]

In turn, Judge Shahabuddeen's dissent provided the underpinning for a ruling of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia. It wrote:

> The Trial Chamber finds in this respect that the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.[54]

[52] *Prosecutor v Krstić* (Case No. IT-98-33-A), Partial Dissenting Judgment of Judge Shahabuddeen, 19 April 2004; para. 54.
[53] *Ibid.*, para. 52.
[54] *Prosecutor v Blagojević* (Case No. IT-02-60-T) Judgment, 17 January 2005, paras. 659–60.

Care should be taken not to overstate the significance of these pronouncements. As the Trial Chamber insisted, it was not arguing for the inclusion of 'cultural genocide'. The act in question – the Srebrenica massacre – involved the summary execution of thousands of men of military age. Where the ambiguity arose was in the deportation of the women and children, an act that might well be taken as evidence of an intent not to physically destroy the Bosnian Muslim population. The Trial Chamber considered this to be further proof that the perpetrators intended to permanently eliminate the targeted minority from the Srebrenica area. These judgments cannot, then, be authority for an even more expansive position by which a classic example of cultural genocide – the prohibition of use of a language, for example, or the elimination of a traditional economy – would be included within the ambit of the Convention's definition.

Although the boundaries of the law appear to be softening somewhat in this area, it cannot be gainsaid that the definition of genocide derived from the 1948 Convention protects minorities only in cases of the most extreme threats to their very existence. The shortcomings and limitations reflect the level of commitment to fundamental human rights at the time the Convention was drafted. The great powers, for example, were loath to extend the concept of genocide to include what we would today call 'ethnic cleansing', lest the deportations of ethnic Germans in eastern Europe that followed the Second World War, and for which they were responsible, be subsumed within the definition. During drafting of the Convention, the United States expressed concern that the proposed definition of the crime 'might be extended to embrace forced transfers of minority groups such as have already been carried out by members of the United Nations'.[55] The fears of the United States were not totally misplaced. One academic writer has said that 'the expulsion of Germans and of persons of German descent living in the former eastern provinces of Germany and in eastern and south-eastern European countries frequently took place under conditions that are classifiable as genocide'.[56]

[55] Comments by Governments on the Draft Convention prepared by the Secretariat, Communications from non-Governmental Organizations, UN Doc. E/623. The United States cited specifically para. 3(b), 'Destroying the specific characteristics of the group by: (b) Forced and systematic exile of individuals representing the culture of a group'.

[56] Hans-Heinrich Jescheck, 'Genocide', in Rudolph Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II (Amsterdam: North-Holland Elsevier, 1995), p. 541.

3 Crimes against humanity and the protection of minorities

Gaps in international criminal law with respect to protection of minorities are also being filled by the progressive enlargement of other concepts, and more particularly the cognate category of crimes against humanity. Compared to genocide, crimes against humanity comprise a much broader range of acts directed against a 'civilian population'. Though not identical, the concept of 'civilian population' largely overlaps with the notion of 'groups' found in the law on genocide. There is no doubt that the acts contemplated by various definitions of crimes against humanity go well beyond physical and biological destruction. The most contemporary of definitions of crimes against humanity, Article 7 of the Rome Statute of the International Criminal Court, includes three specific acts of relevance to the rights of minorities: 'Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'; 'The crime of apartheid'; and 'Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.[57] The crime against humanity of 'persecution' is further defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[58] Reference here to 'group or collectivity' is reminiscent of the language used in the genocide definition. However, instead of a threat to existence and an act targeted at physical or biological destruction, all that is required is 'severe deprivation of fundamental rights'. The term 'fundamental rights' is not further defined. It is to be expected that the International Criminal Court, and other tribunals applying the definition in Article 7 of the Rome Statute, would look to various instruments of international human rights law for guidance. These might even include so-called 'soft-law' instruments, such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[59] and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

[57] Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, Art. 7(1), paras. h, i and k.

[58] *Ibid.*, Art. 7(2)(g). [59] UN Doc. A/RES/47/135.

There are some recent examples of how crimes against humanity may be used to protect minorities in the case law. So-called 'hate speech', which is prohibited in accordance with provisions of human rights treaties,[60] has also been held to constitute the crime against humanity of persecution. According to a recent judgment of a Trial Chamber of the International Criminal Tribunal for Rwanda,

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[61]

The Chamber added that

> hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.'[62]

Relying upon this and other rulings from the international criminal tribunals, the Supreme Court of Canada has also confirmed that hate speech, when it reaches an appropriate level of gravity, may constitute the crime against humanity of persecution.[63] Hate speech is only one example of a persecutory act directed against a minority that may fall within the scope of crimes against humanity.

Historically, there were legal impediments to the use of crimes against humanity in order to fill the gaps in the definition of genocide. At Nuremberg, where the concept of crimes against humanity was first elaborated, it was quite deliberately confined to acts committed in association with aggressive war. During the drafting of the Charter of the

[60] Universal Declaration of Human Rights, GA Res. 217 A (III) UN Doc. A/810, Art. 7; International Covenant on Civil and Political Rights (1976) 999 UNTS 171, art. 20(2); International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, Art. 4.

[61] *Prosecutor v Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1072.

[62] *Ibid.*, para. 1076.

[63] *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, para. 146.

Nuremberg Tribunal, in June and July 1945, the American negotiator, Robert Jackson, explained why this should be so:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this programme of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[64]

Speaking of the proposed crime of 'atrocities, persecutions, and deportations on political, racial or religious grounds', which was later renamed 'crimes against humanity', Justice Jackson betrayed the lingering concerns of his government:

> ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[65]

Jackson's references to minorities in these interventions are telling. He was the most forthright of those attending the drafting conference, but there can be no doubt that the other three powers who participated in the process, France, the United Kingdom and the Soviet Union, had similar concerns that an overly broad conception of crimes against humanity might speak to issues concerning the treatment of minorities within their own borders, as well as in their colonial empires.

[64] 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington: US Government Printing Office, 1949), p. 331.

[65] *Ibid.*, p. 333.

This terrible shortcoming in the concept of crimes against humanity employed at Nuremberg was criticised by other states at the first session of the United Nations General Assembly, which took place in late 1946, only weeks after issuance of the judgment of the International Military Tribunal. Rather than amend the definition of crimes against humanity, they called for recognition of a different, albeit related, concept. Cuba, India and Panama asked that the question of genocide be put on the agenda.[66] Cuba's Ernesto Dihigo, who presented the text, noted that the Nuremberg trials had precluded punishment of certain crimes of genocide because they had been committed before the beginning of the war.[67] The ultimate result, two years later, was the Genocide Convention. In Article I, it proclaims that 'genocide, whether committed in time of peace or in time of war, is a crime under international law'. Genocide was defined much more narrowly than crimes against humanity, of course. But, in return, it applied to acts committed in peacetime, and did not require any association with aggressive war, unlike crimes against humanity.

For the next five decades, the two concepts – genocide and crimes against humanity – had an uneasy relationship. As late as 1993, the limitation on crimes against humanity appeared to be confirmed by the United Nations Security Council. When it enacted the Statute of the International Criminal Tribunal for the former Yugoslavia, it required that crimes against humanity be 'committed in armed conflict'.[68] But in its first major ruling, the Tribunal's Appeals Chamber said that this condition of armed conflict was inconsistent with customary law.[69] Its holding was subsequently endorsed in the text of the Rome Statute of the International Criminal Court.[70] The Appeals Chamber has subsequently explained that:

> [in] drafting Article 5 of the Tribunal's Statute and imposing the additional jurisdictional requirement that crimes against humanity be committed in armed conflict, the Security Council intended to limit the jurisdiction of the

[66] UN Doc. A/BUR.50. For a summary of the history of the resolution, see UN Doc. E/621.
[67] *Ibid.*
[68] UN Doc. S/RES/827 (1993), annex, Art. 5.
[69] *Prosecutor v Tadić* (Case No. IT-94–1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141. Also *Prosecutor v Tadić* (Case No. IT-94–1-A), Judgment, 15 July 1999, para. 251; *Prosecutor v Kordić et al.* (Case No. IT-95–14/2-T), Judgment, 26 February 2001, para. 23.
[70] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 7.

Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia.[71]

The consequence of this development has been to eliminate the gaps between crimes against humanity and genocide, at least as far as individual criminal responsibility is concerned. The two categories now provide a relatively seamless package capable of addressing all serious attacks on minorities, from hate speech to physical destruction. A final discrepancy remained, however. The Genocide Convention also provided that states had a duty to prevent the crime, although the scope of such an obligation was not explored in the text and remains unclear in practice. There was no corresponding duty with respect to crimes against humanity, at least to the extent this could be found in a treaty or other normative instrument. Doubts about this issue were resolved in September 2005, in the Outcome Document issued at the conclusion of the United Nations Summit of Heads of State and Government. Adopted by consensus, it may reliably be viewed to declare what states consider to constitute customary international law:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and should support the United Nations to establish an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the

[71] *Prosecutor v Šešelj* (Case No. IT-03–67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13. See Larry D. Johnson, 'Ten Years Later: Reflections on the Drafting' (2004) 2 *Journal of International Criminal Justice* 368, 372.

> General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter of the United Nations and international law. We also intend to commit ourselves, as necessary and appropriate, to help states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflicts break out.[72]

Thus, the duty to prevent genocide, imposed by Article I of the 1948 Convention, is now matched by a corresponding duty to prevent crimes against humanity and ethnic cleansing. The 'duty to prevent' set out in the 1948 Convention has been reformulated as the 'responsibility to protect'.

Quarrels continue about whether to qualify specific acts as genocide or crimes against humanity. They may have some symbolic significance, driven by a perception that genocide brings with it greater stigmatisation and opprobrium. But in terms of the protection of minorities from discrimination, persecution and destruction, be it cultural or physical, crimes against humanity would now appear to be a far more robust concept than genocide. Genocide applies to the most brutal and extreme manifestations of racial hatred, namely the intentional physical destruction of an ethnic minority, yet vigorous and ultimately unproductive debates contest virtually every attempt to invoke the term. But while a charge of genocide will be challenged, usually there is very little quarrel about applicability of the concept of crimes against humanity. Crimes against humanity is the general rule, the umbrella clause, while genocide is the particular. Nevertheless, from the legal standpoint, any remaining differences between the two concepts are of minimal significance, if any. It was very much in this spirit that the Darfur Commission of Inquiry explained its finding of crimes against humanity, rather than genocide:

> The above conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region. As stated above genocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less*

[72] Outcome Document, 13 September 2005.

> *serious and heinous than genocide*. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.[73]

Largely because of the important evolution of crimes against humanity over the past decade, marked by the elimination of the requirement of an association with aggressive war and the recognition of an obligation of prevention, the potential of international criminal law to address violations of the rights of minorities has been greatly enhanced. These normative developments have been accompanied by the creation of vibrant new institutions, of which the most important is the International Criminal Court.

4 Conclusion

The Genocide Convention was the first human rights instrument of the United Nations system, adopted by the General Assembly on 9 December 1948, only hours before the Universal Declaration of Human Rights. The Convention was targeted at the great atrocity of the era, the attempted physical extermination of one of Europe's most significant and long-suffering minorities. The drafters of the Convention understood it as a prolongation of the protection that inter-war treaties had accorded to national minorities. But the obligations were extraordinary and unprecedented, and the General Assembly sought to limit the scope of the Convention in important ways. Perhaps the most important restriction, from the standpoint of protection of minorities, was the exclusion of acts of 'cultural genocide'. In voting to omit cultural genocide from the Convention, several delegates to the General Assembly said that the subject more properly belonged within the minority rights provisions of the Universal Declaration of Human Rights. But a draft minority rights clause was dropped from the Universal Declaration, leaving a gap in protection that it has taken decades to correct.

Today, the Genocide Convention forms part of a broader system of protection of minorities. It prohibits the most grievous attack upon minorities. But its relationship with the cognate concept of crimes against

[73] Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, UN Doc. S/2005/60, para. 533 (emphasis in the original).

humanity, within the overall system of international criminal law, has taken on a new and important dimension in recent years. A well-established and constantly growing network of international criminal tribunals, accompanied by other mechanisms of accountability such as commissions of inquiry and truth commissions, focuses attention on a broad range of threats to the rights of minorities.

8

The United Nations International Covenant on Economic, Social and Cultural Rights

MARÍA AMOR MARTÍN ESTÉBANEZ*

Introduction

In contrast with the International Covenant on Civil and Political Rights[1] (the 'ICCPR') discussed in Chapter 2, its twin, the International Covenant on Economic, Social and Cultural Rights[2] (the 'ICESCR' or simply 'the Covenant') contains no explicit reference to minorities. This is surprising, given that the concern of the ICESCR with cultural protection would more immediately bring minority protection concerns to mind. In the absence of an explicit reference to minorities, the initial question arises of whether the ICESCR is relevant to minority protection and what kind of protection the ICESCR grants.

Persons belonging to minorities and minority groups would appear to be, by their very nature, likely victims of the violations of the rights which the ICESCR enshrines. The importance of the inclusion of the minority concept under the Covenant would further reside in the fact that especially economic and social aspects of minority protection remain the least developed, both conceptually and in practice. Hence, from a human rights perspective, these are the aspects which demand a higher degree of attention and reference points as to their interpretation.

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[1] The text of the treaty can be found in a printed format in *Human Rights. A Compilation of International Instruments*, Vol. I (New York/Geneva: United Nations, 2002), pp. 17–34. It is also available on the UN Treaty Bodies Database: www.unhchr.ch/tbs/doc.nsf.

[2] The ICCPR and the ICESCR were adopted and opened for signature, ratification and accession by the same UN General Assembly Resolution 2200 A (XXI) of 16 December 1966. The ICESCR can be found in a printed format in *Human Rights. A Compilation*, pp. 7–16. It is also available on the UN Treaty Bodies Database: www.unhchr.ch/tbs/doc.nsf.

From the perspective of cultural protection, aspects of human rights protection which normally feature in international minority protection standards, such as the protection of language and educational rights and of national, ethnic, religious and linguistic identity[3] are sometimes comprised in definitions of culture. However, even the term 'culture' is not clear-cut, but has been attributed a variety of meanings. According to the preamble of the recently adopted Universal Declaration on Cultural Diversity:

> culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.[4]

The concept of 'cultural identity' not only is embedded in definitions of culture but also intersects with aspects of human rights protection, and it can hardly be omitted when minority protection is considered. Doctrinally, the concept of cultural identity has occasionally been identified as a 'separate right'[5] of which persons belonging to minority groups are called to become main beneficiaries.[6] However, an adequate development of this concept in international law, and especially its implications for minority protection are still missing. Besides definitional difficulties, note has been taken of the fact that it is actually the 'collective' aspect of cultural rights which is at the origin of their neglect generally, particularly under the UN system.[7]

Despite the lack of explicit references, several of the ICESCR provisions resonate with minority protection to such an extent that they actually render the Covenant a basic instrument of minority protection. As the Covenant's synergies with other instruments which deal with minority protection in fields such as education illustrate, the Covenant's lack of

[3] As illustrated by the title of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the 'UN Declaration'), *Human Rights. A Compilation*, pp. 104–7.

[4] Adopted at the General Conference of UNESCO on 21 November 2001, *ibid.*, p. 465.

[5] R. Stavenhagen, 'Cultural rights: a social science perspective', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights*, 2nd edn (Dordrecht/Boston/London: Martinus Nijhoff, 2001), pp. 87–91.

[6] Article 4 of the Universal Declaration on Cultural Diversity, refers to 'cultural diversity' as 'an ethical imperative, inseparable from respect for human dignity', bringing the 'cultural identity' concept to mind. *Ibid.*, p. 466.

[7] P. Hunt, 'Reflections on international human rights law and cultural rights', in M. Wilson and P. Hunt (eds.), *Culture, Rights, and Cultural Rights. Perspectives from the South Pacific* (Wellington, New Zealand: Huia Publishers, 2000), p. 28.

explicit references to minority protection is not so much an expression of unawareness of minority protection issues, as an indication that states found it easier to fall back on well-established normative spheres than to adopt explicit or innovative approaches to regulation. At the time of the adoption of the Covenant, the minority question was not a priority on the international cooperation agenda,[8] so no political pressure was felt to break new regulatory grounds. The weak protection provision contained in Article 27 of the ICCPR similarly illustrates this approach.[9]

In the absence of an explicit minority protection reference, the role played by the implementation monitoring procedures applicable under the Covenant in interpreting its text has acquired paramount importance. This is why this chapter, after addressing conceptual aspects relating to the relevance of the ICESCR's text for minority protection in its section 1, investigates in section 2 the approaches adopted by the international expert body made responsible, since 1987, for monitoring the implementation of the Covenant: the Committee on Economic, Social and Cultural rights ('the Committee').[10]

In contrast with the Human Rights Committee, which oversees the implementation of the ICCPR, the Committee has not been endowed with a quasi-judicial complaints procedure under which to express its views vis-à-vis particular cases brought to it directly by individuals or groups. Although the Human Rights Council decided in Resolution 1/3 to extend for a period of two years the mandate of the open-ended working group tasked with the elaboration of an optional protocol to the ICESCR, and the text of the draft optional protocol thus far previews such a complaints ('communications') procedure, agreement on a final text still appears a distant achievement.[11]

State reports submitted to the Secretary-General of the United Nations, in accordance with Articles 16 and 17 of the ICESCR, purport to

[8] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), p. 28. With regard to discrimination aspects, see W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983), pp. 136–52.

[9] See Martin Scheinin, Chapter 2, above.

[10] The Committee was established by a decision of the UN Economic and Social Council adopted in 1985 (ECOSOC Decision 1985/17). A. P. M. Coomans, 'The role of the UN Committee on Economic, Social and Cultural Rights in strengthening the implementation and supervision of the International Covenant on Economic, Social and Cultural Rights' (2002) 35 *Verfassung und Recht in Übersee* 182–200.

[11] See Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session (Geneva 16–27 July 2007), UN Doc. A/HRC/6/8.

constitute the main source for the Committee's analysis of states' compliance with the Covenant's provisions. The possibility of the Committee's conducting on-site visits to states was not envisaged in its rules of procedure,[12] and has been considered restrictively by the Committee. On-site visits have been limited to cases where the Committee considers that it is unable to obtain the information it requires on the basis of its more routine information gathering procedures, and must follow the acceptance by the state of the Committee's request to send a mission consisting of one or more of its members.[13] According to its official website, the Committee must have 'satisfied itself that there was no adequate alternative approach available to it and that the information in its possession warranted such an approach'.[14] Actual practice of field visits has been very limited.[15] This has been to the detriment of the identification of minority protection concerns, which are not always reflected in state reports or other sources of information, but often easily identifiable in the course of visits.

Nevertheless, non-governmental involvement has become a prominent feature of the Committee's work.[16] This has concerned both the Committee's state-specific monitoring activity and its more general doctrinal activity relating to the interpretation of the Covenant and its operation. NGOs are able to contribute to the Committee's activity from the moment of the entry into force of the Covenant vis-à-vis a particular state party on whose performance a given NGO may have relevant information, and throughout the process of consideration of state reports (also in cases when states do not comply with their reporting duties). They can also contribute to the monitoring of the implementation of the Committee's

[12] Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/3/Rev.2, pp. 3–24.

[13] Draft Report of the Committee on Economic, Social and Cultural Rights to the Economic and Social Council in Accordance with Economic and Social Council Resolution 1985/17, UN Doc. E/C.12/2003/CRP, p. 18.

[14] www.ohchr.org/english/bodies/cescr/workingmethods/htm (last accessed 22 May 2006).

[15] Coomans has reported on a total of three on-site visits (to the Dominican Republic, Panama and the Philippines) during the period between the establishment of the Committee and 2002: Coomans, 'The role of the UN Committee on Economic, Social and Cultural Rights', 185. However, the webpage mentioned at note 13 above, refers to a total of two instances in which the missions proposed by the Committee were accepted, and one in which the mission proposed was rejected.

[16] The NGO's contribution to the monitoring of the Covenant and other aspects of the implementation of economic, social and cultural rights are discussed in A. McChesney, *Promoting and Defending Economic, Social and Cultural Rights* (Washington, DC: American Association for the Advancement of Science, 2000).

concluding observations. Particularly relevant for the Committee's work are NGO contributions to its sessions, and to its pre-sessional working groups. In addition, NGOs are able to contribute to the Committee's day of in-depth discussion of specific issues relevant to its work which is organised at each of its sessions, as well as in activities relating to the drafting and adoption of the Committee's general comments. It is through the latter that the Committee issues generic interpretations of the Covenant's provisions and guidance to states as to how to implement them.[17]

Although the lack of explicit minority references in the Covenant, the relatively short life of the Committee and its broad mandate, as well as its particular rules of engagement have not facilitated the Committee's treatment of minority protection, the Committee has often taken a proactive stand in addressing minority concerns. However, the main minority protection outcomes deriving from monitoring activity under the Covenant have not necessarily coincided with those which could be anticipated on the basis of its text. Hence, before identifying the substantive components of minority protection which derive from practice under the Covenant in section 2, below, section 1 is devoted to analysing the content of those specific rights provisions, which have laid the ground for minority protection under this instrument. Particular attention is devoted to the approaches to differential identity in the regulatory system which the Covenant establishes; the incorporation of basic principles of minority protection into that regulatory system; and its substantive treatment of (differential) culture/identity. The chapter concludes with some brief remarks on the relevance of the Covenant for minority protection.

1 The conceptualisation of minority protection in the text of the Covenant

1.1 Non-discrimination, self-determination and the introduction of 'collective' and 'dynamic' components

In the first substantive paragraph of the ICESCR's preamble, the principles of inherent dignity, equality and solidarity of everyone combine

[17] Participation of non-governmental organisations in the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/6: www.ohchr.org/english/bodies/cescr/workingmethods/htm (last accessed 22 May 2006).

with those of the 'equal and inalienable rights of all members of the human family'. 'Gateway' references which have facilitated the treatment of minority protection under international instruments lacking a specific reference to it (such as those to 'racial or ethnic groups or individuals' under the Convention on the Elimination of All Forms of Racial Discrimination)[18] are not only present, but also find their highest expression in the reference to 'all peoples' (and their right to self-determination), contained in Article 1 ICESCR.

Much attention has been devoted by the international law doctrine to this most prominent of 'collective rights' provisions, which is furthermore shared with Article 1 ICCPR. However, the concepts of 'people' and 'minority' are not equivalent, although it is not always easy to draw the distinction between the two.[19] The detachment of the peoples' right to self-determination, in its classic sense, from minority protection has been strongly upheld by the international legal doctrine.[20] Similarly, the differentiation of the former right from an entitlement to secede has been strongly maintained.[21]

It has been in the light of the above, and of recent explorations of the contemporary meaning of a people's right to self-determination,[22] that some similarities with core elements of minority protection have actually been brought to light. This relates in particular to interpretations of the concept of 'internal' self-determination understood as self-government, and as demanding forms of democracy which allow for particular cultural identity recognition and appropriate channels of minority representation and participation in government.[23] The emphasis placed, by international conventions recently adopted at the European level (such as the Framework Convention for the Protection of National Minorities and the

[18] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), pp. 262–80.

[19] M. Scheinin, 'What are indigenous peoples', in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Leiden/Boston: Koninklijke Brill NV, 2005), pp. 6–13.

[20] R. Higgins, 'Postmodern tribalism and the right to secession, comments', in C. Brölman, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1993), pp. 32–3.

[21] T. M. Frank, 'Postmodern tribalism and the right to secession', in Brölman, Lefeber and Zieck, *Peoples and Minorities in International Law*, pp. 16–18 and 20.

[22] Ch. Tomuschat (ed.), *Modern Law of Self-Determination* (The Hague: Martinus Nijhoff, 1993), is a repository of relevant essays.

[23] See A. Eide, 'In search of constructive alternatives to secession' in *ibid.*, pp. 139–76.

European Charter for Regional or Minority Languages),[24] on minority participation in decision-making, have contributed to consolidate these interpretations.

Nevertheless, the focus of attention on Article 1 ICESCR, *inter alia*, as a source of inductions as to minority protection entitlements, particularly in NGO discourse, has deviated attention from other provisions which contribute to elucidate the position of minority protection within its text. For example, the ICESCR also shares with the ICCPR a final preambular provision which refers to 'the community' the individual belongs to, and towards which it is proclaimed to have duties. Although the concept of community is not clearly defined, its differentiation from the concept of state clearly derives from the wording chosen.[25] Definitions of 'community' have often served to convey the content of the minority concept,[26] given the general reluctance of states to use the term 'minority', perceived as problematic, demeaning, entitlement-granting or conflict-arousing.[27]

The very enunciation of subjective rights and state duties under the ICESCR, using all-embracing formulas (such as 'the right of everyone'), introduce the principle of non-discrimination in its broadest meaning as an inherent aspect of right recognition. Further, Article 2 of the ICESCR contains an explicit non-discrimination demand:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[24] Henceforth 'Framework Convention' and 'Languages Charter', respectively. The text of these and other Council of Europe conventions is available at http://conventions.coe.int.

[25] See further E. Brems, *Human Rights: Universality and Diversity* (The Hague/Boston/London: Martinus Nijhoff, 2001), p. 209.

[26] The first 'universal' definition of the minority concept under international law is usually considered to be that provided by the Permanent Court of International Justice ('PCIJ') in its Advisory Opinion on the Greco-Bulgarian 'Communities'. According to the PCIJ: 'The criterion to be applied to determine what is a community within the meaning of the articles of the Convention . . . is the existence of a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.' Advisory Opinion of 31 July 1930, PCIJ Series B, 17, p. 33. The correspondence between this definition and that of 'minority' was later established by the PCIJ in its Advisory Opinion on the Minority Schools in Albania, 6 April 1935, PCIJ Series A/B, 64, p. 11.

[27] Capotorti, *Study*, pp. 5–10.

While this approach brings the ICESCR into line with the dominant approaches to discrimination under international law, and incorporates protection domains, such as race, language, religion, national origin, included in minority definitions,[28] particular emphasis is given to right 'exercise' (i.e. to the implementation of rights at the domestic level) which extends to every right enunciated in the Covenant.

Moreover, specific right provisions of the Covenant incorporate aspects of non-discrimination thus transforming these provisions into a tool for minority protection. For instance, in Article 13, which deals with the right to education, references to the promotion through education, of 'understanding, tolerance and friendship among all nations and *all racial, ethnic or religious groups*'[29] potentially transform the substantive exercise of the right to education generally, into an instrument for minority protection.

In addition the Covenant incorporates *sui generis* 'dynamic' components which are crucial to the development of minority protection. It is in these dynamic aspects where the Covenant's potential to address minority protection mainly resides. For example, in dealing with education, the Covenant not only underlines the importance of 'equal access' to right enjoyment (such as in Article 13(2)(c), which deals with higher education) but also emphasises the importance of 'empowerment'. According to Article 13(1), education shall 'enable all persons to participate effectively in a free society'. This places the Covenant beyond 'uniform' equality, as the principle of non-discrimination is often understood – implying 'equal' treatment – and allows for the incorporation of 'differentiated' treatment which meets the particular needs of persons belonging to minorities when it comes to right enjoyment. The Covenant thus allows for a 'genuine' implementation of the principle of (and right to) non-discrimination which permits that the peculiarities and concerns of persons belonging to minorities be taken on board.

Although the Covenant often establishes quantitative parameters of state behaviour in defining state obligations, their qualitative conceptualisation (which would allow for the introduction of minority protection concerns) is mostly left open. For instance, in Article 12 the Covenant refers to the 'highest attainable standard of physical and mental health'. While this does not preclude the incorporation of minority protection

[28] *Ibid.*, p. 96, and the revision suggested by Thornberry, *International Law and the Rights of Minorities*, pp. 7–13.

[29] Emphasis added.

concerns, it does not encourage it explicitly. Indicating a higher degree of cultural 'sensitiveness' in Article 11, the reference to an 'adequate' standard of living, combines with the reference to 'free consent' as a basis for international cooperation aiming at its realisation.

In those instances where qualitative criteria are directly introduced in the Covenant, they are characterised by a lack of concrete definitions. For example, in Article 11(2)(b), the only yardstick established regarding the development and reform of agrarian systems is 'the most efficient development and utilization of natural resources'. Efficiency assessments vary, and are often affected by differences of perception. Local community, often minority-based, perceptions frequently differ from state, often central government-based ones.[30]

In the case of the ICCPR, the system of communications brought before the Human Rights Committee has facilitated the detailed presentation of these differences in perception, as well as the expression of expert views in their connection. The lack of a similar mechanism under the ICESCR has made it more difficult for existing differences to be brought to light and balanced.

Notwithstanding the generally neutral approaches of the Covenant vis-à-vis identity-bound assessments, there have been some instances where a 'cultural bias' has been reflected in the establishment of substantive definitions of right enjoyment. These seem to delimit the Covenant's obligational core concerning particular identity protection. Their importance extends beyond the regulatory sphere of the Covenant, given the linkage and synergies between the Covenant and other minority protection instruments.

1.2 The protection of the family and children

The regulation of the protection of the family and children, in Article 10, raises the most controversial questions. Article 10(1) sticks to the aforementioned qualitative neutrality which characterises most of the Covenant's provisions. Without providing a concrete definition of the 'family' concept or its substantive components, it just qualifies this entity as 'the natural and fundamental group unit of society'. However, in the last

[30] For an illustration, see K. S. A. Ebeku, 'Oil and the Niger Delta people: the injustice of the Land Use Act' (2002) 35 *Verfassung und Recht in Übersee* 201–31.

sentence of Article 10(1), the Covenant abandons its qualitative neutrality to uphold a particular 'cultural' view of marriage, stating that: 'Marriage must be entered into with the free consent of the intending spouses.' Hence, one aspect of marriage, consent,[31] ceases to be open to identity/culture-specific interpretations. Its substantive fixation becomes a core element of the protection regime which the Covenant establishes.

The question arises why the Covenant addresses this and not other particular aspects of marriage, and why it abandons its qualitative neutrality with regard to this and not to other aspects of human rights protection, which would appear, *prima facie*, to be important. The answer seems rather pragmatic, as the regulation in the Covenant appears to be determined by the preceding regulation of this issue in another instrument quasi contemporary to the Covenant: the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages[32] (particularly in Article 1). Despite the similarity of the latter article to the Covenant's provision, the value of its introduction in the Covenant's text goes beyond that of a mere repetition. The provision sees its regulatory scope expand from the field of civil rights to the field of economic, social and cultural rights. The Covenant's provision has actually resulted in a rather consistent doctrine of the Committee criticising states for allowing societal practices which enter into contradiction with it. Although this criticism has mostly related to practices by the majority population within states, it serves to illustrate how the presence of concrete guidelines for state behaviour in the Covenant which touch on the differential identity domain, has facilitated the determination of 'wrong' cultural practices under the Covenant. This is more about cultural relativism and the limits human rights impose on culturally inspired traditions.

By contrast, in the reference to child labour in the last paragraph of Article 10, the Covenant returns to its qualitative neutrality. It prohibits the employment of children 'in work harmful to their morals . . . or likely to hamper their normal development' without providing qualitative parameters of morality or as to what 'normal development' means. The Covenant does not specify practices that could run counter to morals or

[31] See further, M. K. Eirksson, 'Family rights and the United Nations Covenant on Economic, Social and Cultural Rights: Article 10(1)', in A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp/Oxford/New York: Intersentia, 2002), pp. 118–20.

[32] *Human Rights. A Compilation,* p. 479.

normal development of the child. It does not indicate parameters which would determine what 'normal development' is. Hence, in addressing the issue of child labour, the Covenant allows for a higher degree of 'cultural flexibility' than when addressing the character of marriage. It is possible to conclude that, with regard to various aspects of human activity, the Covenant adopts diverging levels of 'cultural intervention'.

1.3 The protection of education

The enunciation of the right to education under Article 13 of the Covenant, combines, as Manfred Nowak has noted, the liberal and socialist interpretations of this right.[33] On the one hand, in paras. (3) and (4), Article 13 enshrines the liberty to choose education and to establish and direct educational institutions within certain limits established by law. On the other hand, in para. (2), Article 13 establishes the state duty to make education compulsory and/or available at various levels.

The elements of the 'liberal tradition' have constituted a traditional building block of minority protection in the field of education. The transition between the two models is illustrated nowadays by jurisprudence under Article 2 of Protocol 1 of the European Convention of Human Rights.[34] However, under this jurisprudence minority identity is protected only to the extent that this is required for the exercise of a 'generic' right of education, where identity aspects as such are downplayed. This is to the advantage of the identity which enjoys a power position in a determined territory, usually that of the majority community.[35] The conclusion that the 'liberal' solution alone does not provide sufficient guarantees of minority protection is drawn by comparison with the provisions contained in various treaties or unilateral declarations adopted by states during the period between the two World Wars: the League of Nations period. These provisions went far beyond the 'liberal'

[33] M. Nowak, 'The right to education', in Eide, Krause and Rosas, *Economic, Social and Cultural Rights,* pp. 248–9.

[34] According to that article: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

[35] M. A. Martín Estébanez, 'Council of Europe Policies concerning the Protection of Linguistic Minorities and the Justiciability of Minority Rights', in Ghanea and Xanthaki, *Peoples, Minorities and Self-Determination,* pp. 292–5.

tradition. They prescribed, as a minimum, the establishment of adequate facilities in those towns and districts in which a considerable proportion of persons belonging to minorities was resident, to ensure that in primary schools instruction was given to children through the medium of their own language, under the public educational system.[36]

Article 13(2) of the ICESCR does not refer to the introduction of any minority protection element. Although the Covenant rests largely within the liberal realm in regulating aspects of education relevant to minority protection, it has nonetheless introduced elements of non-discrimination and interculturalism. The latter have only crystallised in the most recent approaches to contemporary regulation of minority concerns, particularly at the European level, as in the case of the Languages Charter. For instance, Article 13(1) ICESCR is almost a mirror image of Article 5(1)(a) of the UNESCO Convention against Discrimination in Education, adopted just a few years before the ICESCR.[37] The main difference between the two provisions resides in the ICESCR's reference to the enabling role of education in allowing effective participation in society. This is an important step forward, even though the ICESCR falls short of endorsing the express recognition of the right of members of national minorities to carry on their own educational activities, which Article 5(1)(c) and (6) of the UNESCO Convention contains.

1.4 The protection of culture

The 'cultural' section of the ICESCR is confined to its Article 15. The right-granting provisions within this article limit their scope to: (a) taking part in cultural life; (b) enjoying of the benefits of scientific progress and its implications; and (c) benefiting from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary of the right is the author. Although Article 15 does not provide a comprehensive regulation of the protection of any of the various interpretations of 'culture', it does explicitly bring together, besides literary and artistic aspects, scientific ones.

[36] *Protection of Linguistic, Racial and Religious Minorities by the League of Nations*, Publications de la Société des Nations, Geneva, Doc. C. L.110.1927. I. Annexe.

[37] Adopted by UNESCO on 14 December 1960. *Human Rights. A Compilation,* pp. 136–41.

From a minority protection perspective, the initial question arises of whether (a) and (b) have a narrow meaning, limited to everyone's right to participate in the dominant culture of the state and to benefit from its products, or whether they have a broader one. This broader meaning would include the possibility that everyone's particular culture (normally shared by the members of his/her particular community) be brought into the concept of general 'cultural life' of the state. It would also include the possibility that everyone's particular scientific achievement (or that of the particular community anyone belongs to) be brought into the broader concept of 'scientific progress'. Such broader meaning would widely open the door to minority protection under the Covenant, and to an interpretation of this protection in terms of multiculturalism and interculturalism.

Only on the basis of (c) can the Covenant's text be unequivocally considered to support this broader meaning. By protecting everyone's moral and material interests resulting from scientific, literary or artistic production of which he/she is the author,[38] the Covenant incorporates everyone's particular culture into the sources of 'moral and material interests' worth protecting.

Article 15(3) ICESCR, which is not formulated in terms of subjective rights, but rather of state duties, also appears to uphold this broader meaning: 'the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity'. Hence, not only can a particular culture be a source of interests worth protecting, but also the appropriate environment which allows for a variety of cultural forms to take shape should, according to the ICESCR, be in place.

The remaining provisions of Article 15, also formulated in terms of 'state duties', contain aspects of relevance to minority protection as well. This is notwithstanding that the value of these provisions is again dependent on whether 'culture' is interpreted as referring just to the majority culture or as also encompassing minority cultures. The latter interpretation appears necessary for a coherent interpretation of the Covenant. Article 15(2) includes one of the 'dynamic' features characterising the Covenant described in the previous section, referring not just

[38] The Covenant's text uses only the masculine form of the pronoun. See further, J. H. Holyoak and P. Torremans, *Intellectual Property Law*, 3rd edn (London: Butterworths, 2001).

to the 'conservation' but also to the 'development' and 'diffusion' of science and culture.

The provision of opportunities for cultural development and interaction connect the Covenant with contemporary minority-specific protection instruments, such as the UN Declaration,[39] the Framework Convention (which incorporates these principles into most of its provisions, although Articles 5 and 15 mention them explicitly); the Languages Charter (Articles 7, 11, 12 and 14, among others); and the African Charter on Human and Peoples' Rights (Article 22). The latter instrument goes beyond the preamble of the ICESCR in highlighting the duties of the individual towards its community in the cultural field.[40]

Finally, Article 15(4) contains another principle which points at increasing synergies among international instruments. The states parties to the Covenant recognise the benefits derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields. Although the UN Declaration has adopted a reductionist approach, focusing on 'inter-state' cooperation on questions relating to persons belonging to minorities,[41] other regional instruments, particularly in Europe, have been more open, promoting direct contacts between persons belonging to minorities or their organisations, as well as regional or local authorities. This has been the case of Article 14 of the Languages Charter, although the most prominent example is Article 17 of the Framework Convention. The latter recognises, as a subjective right of persons belonging to national minorities, the establishment and maintenance of free and peaceful contact across frontiers, in particular with persons who share the same ethnic, cultural, linguistic or religious identity or a common cultural heritage, as well as the participation in the activities of non-governmental organisations, both at the national and international levels.

2 The interpretation of the Covenant's text

As noted earlier, the interpretation of the Covenant's provisions has strongly contributed to broadening its potential to provide minority

[39] Article 4(2). See also Articles 1, 2(2), (5) and 4(5).

[40] The text of the Charter is available in M. Evans (ed.), *Blackstone's International Law Documents*, 6th edn (Oxford: Oxford University Press, 2003), p. 204.

[41] Articles 6, 5 and 7, in particular.

protection. This interpretation has mainly been reflected in direct statements by states regarding the Covenant's content and in the views expressed by the Committee, given the derived interpretative authority this body enjoys as a result of its mandate to monitor the Covenant's implementation.[42]

2.1 Direct state statements

Direct statements by states regarding the meaning of the Covenant provisions have frequently been made in the context of their accession to this treaty. Interestingly, a large proportion of the reservations made (which have normally adopted the form of 'declarations' or 'interpretative declarations') have touched on minority protection concerns. These reservations have therefore helped to highlight the Covenant's potential for minority protection generally and with regard to very specific aspects of protection. With regard to the former, an example is the declaration by the Maltese government 'that it is in favour of upholding the principle affirmed in the words' of Article 13(3):

> and to ensure the religious and moral education of their children in conformity with their own convictions. However, having regard to the fact the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, in which cases are very exceptional in Malta.[43]

In underscoring the content of Article 13(3) in principle, the Maltese government appears to downplay its concrete and binding character. Further, by introducing general, rhetorical qualifications about existing financial resources (bound to be, by their very nature, limited) and the small size of minority groups in the state, the government aims at preempting the application of proportionality criteria which should normally result from subsequent monitoring of the implementation of the Covenant's provisions. This proportionality criteria would relate in particular to the levels of protection granted and to the size required for the minority

[42] M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press, 1998), pp. 91–2.

[43] The text of the reservation is available at www.ohchr.org/english/countries/ratification/3.htm (last accessed 22 May 2006), p. 10.

group to receive adequate levels of protection. The pre-emptive aim of the Maltese government appears to extend both to the activity of international monitoring bodies and to supervisory bodies in the sphere of domestic jurisdiction. The application of proportionality criteria appears to be similarly jeopardised by the exclusion of aliens from the scope of protection of the Covenant by states such as Belgium,[44] France,[45] Kuwait,[46] and Monaco.[47]

The reservation to the ICESCR introduced by the United Kingdom concerning the postponement of the application of Article 10(1) paragraph 1 in regard to a small number of customary marriages within certain (minority inhabited) territories, illustrates how, as mentioned in the previous section, the dialectic between the protection of cultural identity on the one hand, and the core obligational content of the Covenant on the other, can run counter to certain aspects of minority identity. However, the majority of the reservations illustrate the positive role that the Covenant's provisions, generally, can play in minority protection.

Most often, the reservations have aimed at short-circuiting Covenant provisions which embody minority identity protection aspects. This has been reflected in statements of the superiority of the domestic legal system over those provisions. Some of those statements have related to the Covenant as a whole, as in the case of the reservation made by Pakistan.[48] Others have related to specific fields, such as education (as in the case of the reservations made by Algeria,[49] Bangladesh,[50] Rwanda[51] and Turkey[52]) and non-discrimination (as in the case of reservations made by Bangladesh[53] and Kuwait[54]). However, these reservations have met with the objection of other states parties,[55] including when, as in the case of Bangladesh, they have consisted in the expression of an inclination towards the 'progressive' implementation of some of the Covenant's provisions in the whole of the territory of the state, as opposed to their immediate effect.[56]

Some reservations have interpreted Article 1 of the Covenant with the aim of delimiting the right of self-determination, and excluding minorities

[44] *Ibid.*, p. 6. [45] *Ibid.*, p. 7. [46] *Ibid.*, pp. 9–10. [47] *Ibid.*, p. 10. [48] *Ibid.*, p. 11.
[49] *Ibid.*, p. 5. [50] *Ibid.* [51] *Ibid.*, p. 12. [52] *Ibid.*, p. 13. [53] *Ibid.*, p. 5. [54] *Ibid.*, pp. 9–10.
[55] See the objections by Finland, Germany, Italy, the Netherlands, Norway, Portugal and Sweden, at *ibid.*, pp. 15, 17, 19, 20, and 21, respectively.
[56] See the objection by France on 30 September 1999, concerning the declarations made by Bangladesh upon accession at *ibid.*, p. 17.

from it. India declared that 'the words ''the right of self-determination'' appearing in [this article] apply only to the peoples under foreign domination and that: these words do not apply to sovereign independent States or to a section of a people, or nation – which is the essence of national integrity.'[57] Interestingly, a state as traditionally reluctant to the international recognition of minority rights as France, objected to this statement, indicating that the Indian reservation 'attaches conditions not provided for by the Charter of the United Nations' to the exercise of self-determination. Germany simply 'strongly' objected to the Indian reservation, indicating that the right to self-determination under the Covenants 'applies to all peoples and not only to those under foreign domination'.[58] While Bangladesh followed in India's steps, albeit in a less emphatic manner, Algeria appears to have taken the opposite view, treating Article 1 as too restrictive.[59]

Finally, the reservation made by Ireland vis-à-vis Article 2(2), concerning the requirement of Irish language knowledge for certain occupations,[60] illustrates the Covenant's potential for minority protection generally and with regard to specific aspects. This reservation falls in line with the support of positive measures of minority protection which presently underlies the international minority protection regime. It is, however, a reminder of the linguistic requirements imposed by some states in the occupational sphere regarding the use of languages which, as in the case of Irish in Ireland, enjoy an official status, but in contrast with Irish, are spoken by the majority population. The latter linguistic requirements often act as barriers against access to certain occupations by persons belonging to minorities, including occupations connected with political participation and access to elected bodies under the general electoral system, touching on the exercise of civil and political rights as well.[61] The Advisory Committee under the Framework Convention has

[57] *Ibid.*, pp. 16–17. See also the declaration made by Bangladesh at *ibid.*, p. 5. [58] *Ibid.*, p. 17. [59] *Ibid.*, p. 5. [60] *Ibid.*, p. 9.

[61] This was recently addressed under the European Convention on Human Rights, in the Case of *Podkolzina v Latvia*, in which the European Court resolved in favour of the minority language speaker applicant on procedural grounds, without addressing the underlying minority protection question. *Podkolzina v Latvia*, Application 46726/99, Judgment of 9 April 2002. In its Opinion on Estonia, adopted on 14 September 2001, the Advisory Committee under the Framework Convention expressed its serious concern 'about the Estonian language proficiency requirements that the Law on Parliament Elections of 1994 and the Law on Local Government Council elections stipulate for candidates in the respective elections': CoE Doc.

advocated that this and other linguistic requirements be strictly limited to the situation where they are necessary to protect a specific public interest. The Advisory Committee noted with concern:

> the provision – contained in the Government decree on the mandatory Estonian language proficiency levels for employees in the private sphere adopted on 15 May 2001 – requiring an intermediate level of Estonian language proficiency for service and sales employees whose duties include providing information on the qualities, prices, origin or conditions for the use of goods or services offered.[62]

2.2 The Committee's interpretation

The Committee's interpretation of the Covenant has helped to conceptualise and establish elements of minority protection which derive from the Covenant's text and from state views expressed in connection with its normative content. Further, the broader perspectives of international – and in particular, human rights – law which the Committee needs to take into account in carrying out its monitoring activity have allowed additional minority protection implications to be deduced. This has brought to light new aspects of the Covenant's relevance for minority protection.

The Committee's interpretation of the Covenant's provisions takes shape through two main activities: (a) its consideration of individual state practice under the state reporting system which the Covenant establishes; and (b) its elaboration of 'General Comments' which 'codify' the Committee's interpretation of the Covenant's provisions on the basis of state practice. Given that the latter give a more elaborate picture of the essence of the Committee's understandings and approaches, it is on them that we will focus first.

2.2.1 The General Comments

2.2.1.1 Recognition and scope of protection An important aspect of the General Comments has been the introduction of specific references to

ACFC/INF/OP/I(2002)5, para. 55. See also P. Thornberry and M. A. Martín Estébanez, *Minority Rights in Europe* (Strasbourg: Council of Europe Publishing, 2004), p. 59.

[62] CoE Doc. ACFC/INF/OP/I(2002)5, para. 60.

the minority concept.[63] This, however, has not been a constant feature. The Committee has more frequently referred to broader concepts such as 'the vulnerable'; 'vulnerable groups'; 'vulnerable and disadvantaged'; 'disadvantaged and marginalized individuals and groups', 'groups not traditionally protected', etc., and even occasionally adopted spatial terminology such as references to 'areas' of particular vulnerability.[64] While in the absence of internationally agreed definitions of the minority concept, working definitions tend to be phrased in more positive terms which refer to the 'non-dominant position'[65] of minorities, there is little doubt that the Committee's interpretation of the former terms normally incorporates the minority concept, and this has sometimes been explicitly indicated.[66]

Another important aspect has been the General Comments' express introduction of minority protection concerns in connection with the interpretation of specific Covenant provisions. In this regard, however, the record has been mixed. Consideration of minority concerns has been much clearer in those General Comments which deal with provisions that establish 'substantive rights' (such as the right to adequate housing, or the right to education) than in those that establish 'state duties' under the Covenant.

A common characteristic of the various General Comments on 'substantive rights' has been the introduction of non-discrimination demands, along the lines of Article 2(1) of the Covenant, previously described. This is important in view of the fact that the announced 'separate' General Comment on non-discrimination[67] has only been adopted by the Committee in connection with 'the equal right of men and women to the enjoyment of all economic, social and cultural rights' (set out in Article 3 of the Covenant).[68]

Further, concrete aspects of protection which are relevant for minority protection have been elaborated upon. For instance, General Comment 4,

[63] E.g., General Comment 18, 'The Right to Work', adopted in 2005, UN Doc. E/C.12/GC/18, para. 23, and General Comment 13, 'The Right to Education', UN Doc. E/C.12/1999/10, para. 50.

[64] General Comment 10, 'The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights', UN Doc. E/CN.12/1998/25, para. 3.

[65] Capotorti, *Study*, p. 96.

[66] As in General Comment 18, UN Doc. E/C.12/GC/18, para. 23.

[67] General Comment 3, 'The Nature of States Parties' Obligations', para. 1: www.ohchr.org/english/bodies/cescr/comments.htm.

[68] *Ibid.*, General Comment 16, UN Doc. E/C.12/2005/4.

on the right to 'adequate' housing, which deals with one of the aspects of 'the right of everyone to an adequate standard of living', incorporates numerous qualitative considerations of direct concern for minority protection. 'Cultural adequacy' is included among the 'aspects of the right that must be taken into account ... in any particular context'.[69] This 'adequacy' is described as follows: 'The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.'[70]

In addition, this General Comment emphasises the need for the full enjoyment of other rights, including 'the right to freedom of association (such as of tenants and other community based groups)' and 'the right to participate in public decision-making' as indispensable for the realisation of the right to adequate housing.[71] These constitute 'dynamic components' which, as already described, are embedded in the Covenant's text. Additional dynamic, empowering elements from the perspective of minority protection emerge from the demand that government facilitates 'self-help' by affected 'groups'.[72]

Moreover, the General Comment refers to facilitating procedural mechanisms incorporated into substantive rights regulation, both at the international and domestic levels. The former focus on the Committee's own general guidelines regarding the form and content of state reports,[73] particularly on the need 'to provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing'.[74] The latter focus on the provision of domestic remedies regarding: 'complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination'; 'allegations of any form of discrimination in the allocation and availability of access to housing'; as well as the possibility 'of facilitating class action suits in situations involving significantly increased levels of homelessness'.[75]

[69] *Ibid.*, General Comment 4, 'The Right to Adequate Housing', para. 8.
[70] *Ibid.* [71] *Ibid.*, para. 9. [72] *Ibid.*, para. 10.
[73] UN Doc. E/C.12/1991/1. [74] General Comment 4, para. 13.
[75] *Ibid.*, para. 17. On the justiciable components of housing rights, see S. Leckie, 'The justiciability of housing rights', in F. Coomans and F. van Hoof (eds.), *The Right to Complain About Economic, Social, and Cultural Rights, SIM Special* No. 18 (Utrecht: Netherlands Institute of Humans Rights, 1995), pp. 68–75.

2.2.1.2 Education In interpreting 'the right to education', General Comment 13 includes, among the essential features of education in all its forms and at all levels: (a) 'convenient geographic location'; (b) education that is in substance 'culturally appropriate'; and (c) its adaptability to the needs of changing communities and its responsiveness to diverse 'cultural settings'.[76] These approaches imply a breakthrough.

In dealing in particular with the right to primary education, the General Comment refers to the need to ensure that 'the basic learning needs of all children are satisfied' and that 'the culture, needs and opportunities of the community' are taken into account. With regard to the former aspect, the Hague Recommendations Regarding the Education Rights of National Minorities, adopted under the auspices of the High Commissioner on National Minorities of the Organisation for Security and Co-operation in Europe, highlight the importance of the use of the mother tongue in education, particularly at the initial stages.[77] This is enshrined in Article 8 of the Languages Charter and, less precisely, in Article 14 of the Framework Convention. Importantly, General Comment 13 omits distinctions concerning the various levels of education present in the text of Article 13 of the ICESCR, establishing the requirement that education responds to needs of students in different social 'and cultural settings': both secondary and higher education have to be available 'in different forms'.[78] The General Comment also emphasises that: 'The right to fundamental education extends to all those who have not yet satisfied their "basic learning needs" ',[79] of which mother tongue learning can, in the light of the aforementioned instruments, be considered a building block.

Nevertheless, when it comes to the Committee's 'operational' responses to the implementation of the Covenant's provisions, the aforementioned requirements have not found a reflection in the articulation of 'plans of action for primary education' which General Comment 11 contains, and which aim at the establishment of state duties guaranteeing that children have access to education. Minority protection concerns can only be inferred from references to the nature of the education offered, including its adequacy 'in quality', its relevance to the child, and its promotion of

[76] General Comment 13, 'The Right to Education', para. 6.
[77] Para. 11 of The Hague Recommendations: www.osce.org/documents/hcnm.
[78] General Comment 13, para. 18. [79] Emphasis added.

'the realization of the child's other rights'.[80] This makes the considerations in General Comment 13 all the more important.

Another relevant aspect of primary education addressed is the duty to provide it free of charge, in accordance with the Covenant's text. General Comment 11 states that: 'this provision of compulsory primary education in no way conflicts with the right recognized in article 13, paragraph 3 of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".'[81] However, a requirement for the provision of minority-specific education is not included in the demand for compulsory primary education free of charge. The only enabling consideration envisaged is the general comment's provision for the 'participation of all sections of civil society in the drawing up' of education plans.[82]

This shortcoming in the Committee's interpretative approaches regarding minority-specific education is only partially addressed in General Comment 13 with regard to the religious aspect of minority education. The General Comment notes that 'public education that includes instruction in a particular religion or belief is inconsistent with article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians'.[83] Hence, according to the General Comment, state supported education must accommodate the religious specificities of minority groups. This does not imply a full departure from liberal approaches to minority-specific education under the Covenant. The comment refers to 'accommodation' as opposed to 'satisfaction'.

State responsibility in connection with education generally considered seems to be confined to the remedial sphere: states have an obligation to ensure that the liberty of individuals and bodies to establish and direct educational institutions 'does not lead to extreme disparities of educational opportunity for some groups in society'.[84] This approach is confirmed by General Comment 13. Detailing state obligations under Article 13, and following the standard delineation of state obligations under the Covenant as obligations 'to respect, protect and fulfil' (the latter

[80] General Comment 11, 'Plans of Action for Primary Education, Article 14 of the International Covenant on Economic Social and Cultural Rights', adopted in 1999, UN Doc. E/C.12/1999/4, para. 6.

[81] *Ibid.*, para. 7. [82] *Ibid.*, para. 8. [83] General Comment 13, para. 28. [84] *Ibid.*, para. 30.

including a dual obligation 'to facilitate' and 'to provide') General Comment 13 establishes that: '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] This is not a sufficient guarantee of right implementation which meets minority-specific demands. General Comment 13 elaborates:

> a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is *culturally appropriate for minorities and indigenous peoples*, and of good quality for all . . .[86]

The level and character of the positive measures requested, and whether they concern access to education free of charge, are not defined.

Another important aspect of education addressed concerns the delimitation of the apparently discretionary state powers recognised under Article 13(3) ICESCR, regarding the establishment of 'minimum educational standards' in schools 'other than those established by the public authorities'. General Comment 13 states that:

> These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in Article 13(1).[87]

As already mentioned, the latter objectives contain aspects of non-discrimination, multi- and interculturalism. Consequently, minimum standards should not result in undue restrictions in the provision of private, minority-specific education. Equally embedded in the liberal tradition of education regulation, is the recognition of 'the liberty' of non-nationals (both private persons and legal entities) to establish and direct educational institutions. While state funding of private educational establishments is left to state discretion, if the state does choose to fund, the prohibition of non-discrimination among them on any of the grounds enshrined in the Covenant applies.[88]

[85] *Ibid.*, para. 47. [86] *Ibid.*, para. 50. Emphasis added. [87] *Ibid.*, para. 29.

[88] *Ibid.*, para. 50. The implications of the application of the principle of non-discrimination in this context can be seen in the work of the Human Rights Committee under the ICCPR, in *Waldman v Canada*, Communication No. 694/1996, Views of 3 November 1999, for example,

Additional aspects relevant to minority protection addressed in General Comment 13 relate to respect for personal 'dignity' and the prevention of public humiliation, particularly in the exercise of discipline,[89] and the removal of 'stereotyping' which impedes access to education by, amongst others, 'disadvantaged groups'.[90]

2.2.1.3 Work 'Dignity' considerations are similarly part and parcel of the right to work, addressed in General Comment 18. Especially relevant for minority protection are those considerations relating to the freedom of the individual regarding the choice to work, those emphasising the importance 'of work for personal development as well as for social and economic inclusion',[91]and those relating to the respect for the 'mental integrity' of the worker.[92] In the interpretation of the right to work, collective 'dynamic components' acquire a very high profile, also relevant from a minority protection perspective. This concerns aspects of participation and non-discrimination, including: (a) the requirement for the 'effective involvement of the community'[93] in the promotion of employment; (b) the right of individuals and groups to participate in decision-making; and (c) collective (as well as individual) access to 'judicial or other appropriate remedies at the national level'.[94]

The protection against discrimination acquires a similarly high profile, when the question of access to employment is addressed, and in connection with migrant workers and their families.[95] Moreover, 'special' positive measures favouring the employment of the 'disadvantaged and marginalized' are explicitly foreseen.[96]

2.2.1.4 Gender Protection against discrimination and the adoption of special measures similarly permeate the Committee's approaches to the equal right of men and women to the enjoyment of all economic, social and cultural rights, addressed in General Comment 16. However, concepts of direct/indirect discrimination and *de jure* (formal)/substantive equality are defined in terms not necessarily instrumental to minority protection.

where state funding by the Canadian province of Ontario of Roman Catholic schools but not those of other denominations was successfully challenged by a parent of a child attending a non-state-supported Jewish school. See Chapter 2 for a discussion of this case.

[89] *Ibid.*, para. 41. [90] *Ibid.*, para. 55. [91] General Comment 18, para. 4. [92] *Ibid.*, para. 7. [93] *Ibid.*, paras. 42 and 52. [94] *Ibid.*, para. 48. [95] *Ibid.*, paras. 6, 11, 18, 23, 32 and 33. [96] *Ibid.*, para. 26.

This applies especially to the statement in para. 15 of the General Comment that 'Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others', a principle that is not circumscribed to gender aspects. References to time limits and substantive equality along these lines do not usually constitute a good springboard for 'minority sensitive' protection.

More relevant are the specific provisions which address gender equality in concrete terms. This is the case of the delineation of the obligation to protect (against discrimination), contained in the requirement that states parties:

> 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.[97]

Hence, General Comment 16 incorporates elements of 'cultural sensitiveness' (particularly those concerning diverse cultural approaches to gender-based relations) which are considered in the text of the Covenant only with regard to very limited protection domains, as already discussed.

2.2.1.5 Creation and authorship Finally, among the general comments dealing with 'subjective rights', General Comment 17, 'the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author' (contained in Article 15(1)(c) of the Covenant), adopted in 2005, stands out for its in-depth consideration of minority protection concerns. First, in defining 'scientific, literary or artistic production', the General Comment explicitly includes the 'knowledge, innovations and practices of indigenous and local communities'.[98] Further 'the Committee stresses the importance of recognizing the value of scientific, literary and artistic productions as expressions of the personality of their creator.'[99] This appears to include, vis-à-vis minority authors (also collectively considered) the expressions of their particular identity.

The definition of the right holder includes a 'collective' dimension of 'the author': 'the creator, whether man or woman, individual or group of individuals'. This is even if, in contrast with the approach adopted in

[97] *Ibid.*, para. 19. [98] *Ibid.*, para. 9. [99] *Ibid.* para. 14.

General Comment 13, legal entities are expressly excluded from the protection awarded.[100] In addition, right enjoyment is made dependent on the enjoyment of other human rights which incorporate collective, minority-related protection aspects, such as the right to own property alone as well as in association with others, and rights of cultural participation, including cultural rights of specific groups.[101]

The General Comment defines the content of Article 15(1)(c) as follows:

> the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and *their collective cultural heritage*, as well as their basic material interests necessary to enable authors to enjoy an adequate standard of living.[102]

Obligations to fulfil the right incorporate broad demands of participation, including ensuring the right of authors to take part in the conduct of public affairs and in any significant decision-making processes that have an impact on their rights and legitimate interests, and consulting these individuals or groups or their elected representatives prior to the adoption of any significant decisions concerning their rights.[103]

The entitlements established are delimited by public interest considerations. These relate to the guarantee of broad access, especially when this concerns core Covenant obligations in relation to the rights to food, health and education, as well as rights to take part in cultural life and enjoy the benefits of scientific progress and its applications. These public interest considerations actually constitute a source of additional minority protection guarantees as they are likely to benefit vulnerable groups most. Explicit state duties are established to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, as well as schoolbooks and learning materials, so that these do not undermine the rights of large segments of the population to health, food, and education.[104] This is particularly relevant for minorities, as they are often marginalised groups.

In defining specific legal obligations, the General Comment, adapting to the wording of Article 27 ICCPR,[105] establishes that 'State parties in

[100] UN Doc. E/C.12/GC/17, para. 7. [101] *Ibid.*, paras. 4 and 8. [102] *Ibid.*, para. 2.
[103] *Ibid.*, para. 34. [104] *Ibid.*, para. 35. [105] See Chapter 2.

which ethnic, religious and linguistic minorities exist' are under an obligation:

> to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures.[106]

Amongst the requirements for state compliance with Article 15(1)(c), affordability in access to remedies by 'disadvantaged and marginalized groups',[107] as well as access to information are highlighted. A minority language demand is introduced in the latter respect, which underscores the more general relevance for minorities of this article: 'information should be understandable to everyone and should be published also in the languages of linguistic minorities and indigenous peoples.'[108]

The General Comment devotes specific attention to the needs of indigenous peoples, establishing concrete state duties. A salient one is the need to take indigenous preferences into account. Among the measures foreseen are the recognition, registration and protection of the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and the prevention of the unauthorised use of their scientific, literary and artistic productions. The General Comment also previews, in respect of the free, prior and informed consent of the authors concerned, the provision for the collective administration by indigenous peoples of the benefits derived from their productions, and of the oral or other customary forms of transmission of those productions.[109]

A related aspect which deserves mention concerns international cooperation. This includes the demand that any system for the protection of the moral and material interests resulting from scientific, literary and artistic productions facilitates and promotes development cooperation, technology transfer and scientific and cultural cooperation.

2.2.1.6 Inter-state relations References to international obligations connected with inter-state cooperation characterise the Committee's interpretation of most of the Covenant's provisions. This derives from the Covenant's salient emphasis on the importance of international measures

[106] UN Doc. E/C.12/GC/17, para. 33. [107] *Ibid*, para. 18. [108] *Ibid.* [109] *Ibid.*, para. 32.

and action for the achievement of the rights it contains (Articles 22 and 23). However, the interpretation of the state duties in this field has, like the text of the Covenant, abstained from incorporating explicit minority-protection demands. In the particular case of General Comment 17, the aim to preserve 'biological' – as opposed to 'cultural' – diversity is highlighted.[110] Although General Comment 2, which deals with 'international technical assistance measures' refrains from addressing minority protection concerns directly, it does at least raise the question of non-discrimination and acknowledges that many activities undertaken in the name of 'development' have subsequently been recognised as ill-conceived and counter-productive in human rights terms.[111] A large number of minority protection situations can be considered from this standpoint.[112]

On the other side of the international relations coin, General Comment 8, which deals with 'The relationship between economic sanctions and respect for economic, social and cultural rights' largely focuses on the collateral infliction of suffering upon 'the most vulnerable groups'.[113] Although this General Comment, like others dealing with state duties, does not introduce specific minority protection concerns, it emphasises that: 'when an external party takes upon itself even partial responsibility of the situation within a country . . . it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population'.[114] Minority populations are often those most affected by economic sanctions.[115]

2.2.2 The Committee's assessment of individual state performance

Interestingly, the 'Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural

[110] *Ibid.*, para. 38.

[111] General Comment 2, 'International Technical Assistance Measures': www.ohchr.org/english/bodies/cescr/comments.htm.

[112] See further S. Spiliopoulou Akermark, 'The World Bank and Indigenous Peoples', in Ghanea and Xanthaki, *Minorities, Peoples and Self-Determination*, pp. 96–9.

[113] General Comment 8, UN Doc. E/C.12/1997/8, para. 4.

[114] *Ibid.*, para. 13.

[115] Regarding the situation of the Karen, in particular, see K. Shukla, 'Ending the waiting game: strategies for responding to internally displaced people in Burma', Refugees International Report, June 2006.

Rights'[116] – which was adopted by the Committee in December 1990 and has informed its assessment of state performance under the Covenant's monitoring procedure ever since – explicitly refer to minorities. This, however, is confined to the guidelines concerning reporting in the fields of the right to education and culture.

With regard to Article 13, the question of language facilities, 'such as the availability of teaching in the mother tongue of the students', is addressed by the guidelines. Importantly, the reference to difficulties encountered 'by those wishing to establish or to gain access' to public schooling, appears to open the door to the consideration of subsidised minority-specific education. The guidelines also refer more generally to measures of 'positive or affirmative action'. With regard to Article 15, the realisation of the right of everyone to take part in cultural life is qualified with the expressions 'which he or she considers pertinent' and further defined as the 'right to manifest' one's 'own culture', widening the possibilities for minority protection under the Covenant.

Despite these limited references, other aspects of the guidelines appear to broaden the scope for consideration of minority protection concerns. There is a rather consistent pattern of request for disaggregated data concerning the level of enjoyment of particular rights by 'different groups' within the society, which introduces a structural consideration of discrimination (including indirect discrimination). This is reinforced by express inquiries regarding right enjoyment by 'the most disadvantaged', 'vulnerable', or 'especially affected groups' or those in 'worse off' geographical areas.

Moreover, a high level of cross-fertilisation between Covenant articles is present. Express references are included to the right to food and education of migrant workers, and the *sui generis* coverage of non-nationals under Article 2 of the Covenant is substantially expanded. The aspects of interculturalism which Article 13 contains are translated into Article 15, and aspects of community participation extended from traditional domains (such as the right to work) into areas such as the planning, organisation, operation and control of primary health care.

Finally, a requirement of consent is introduced in connection with 'measures taken during, inter alia, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events . . . which guarantee protection from eviction or guaranteed rehousing'. This

[116] UN Doc. E/C.12/1991/1.

is important for minority protection, as the experience of the Roma population in Europe often illustrates.[117] Last, but not least, emphasis is placed on the requirement that development cooperation be used, on a priority basis, to promote the realisation of cultural rights, besides economic and social.

In recent years, the Committee has developed an additional practice of issuing so called 'lists of issues' which contribute to focus periodical reporting by states.[118] These consist of a series of targeted inquiries regarding specific aspects of state performance, which the Committee considers to be of special relevance for the implementation of the Covenant. Although the introduction of minority protection concerns has not been consistent, and the aspects covered have varied greatly from one state to another, the lists of issues containing no explicit references to minority protection have been the exception, and even then, minority protection aspects could be inferred from some of the questions addressed. For example, the list of issues, of December 2002, concerning Kuwait, refers to the fact that about 60 per cent of the population of that state is made up of non-Kuwaiti citizens, including the Bidoon, and inquires about the ensuing differences in right enjoyment, with specific regard to access to unemployment benefits.[119] The list also enquires about the compatibility of the prohibition that trade unions engage in any political or religious activity with Article 8 of the Covenant.[120]

Even though the lists of issues have not usually evidenced a 'thorough' treatment of minority concerns, discrimination considerations have become a constant feature, and the approach to the minority definition, especially in the latter connection, has been broad. It has encompassed immigrants 'and other foreign minorities', especially when dealing with such aspects as the right to work and housing, and even the enjoyment of economic, social and cultural rights more generally.[121] Occasionally, the lists have even addressed the question of the access to public services by illegal immigrants.[122]

[117] See, e.g., Report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Hellenic Republic, 2–5 June 2002, CoE Doc. Comm DH(2002)5, section III. B.

[118] On the antecedents to the introduction of the 'lists of issues', see Craven, *The International Covenant*, pp. 63–6.

[119] UN Doc. E/C.12/Q/KUW/1/Rev.1, paras. 9, 16. [120] *Ibid.*, para. 21.

[121] Lists of issues on Denmark, UN Doc. E/C.12/Q/DEN/1, para. 7; Spain, UN Doc. E/CN.12/Q/ESP/2, para. 18; and Malta, UN Doc. E/C.12/Q/MLT/1, 24 June 2003, para. 4, respectively.

[122] E.g., the list of issues on Greece, UN Doc. E/C.12/Q/GRC/1.

The exercise of the right to self-determination has become the object of both indirect and direct references. Direct references, occasionally general and all-embracing,[123] have often aimed at ascertaining the opportunities for the effective exercise of this right by the population concerned. This has related both to human right exercise in a consolidated form, incorporated into the legislative sphere (as with respect to Greenland),[124] and to its mere advocacy, touching on aspects of freedom of expression, as in the case of China, regarding the Tibetans, Mongols and Uighurs.[125]

The list of issues on Israel has inquired about the 'extent to and the manner in which the exercise by the State party of its powers and responsibilities in the occupied territories affects the enjoyment of economic, social and cultural rights by the inhabitants of these territories, including those in the Jewish settlements'. The same list of issues has specifically inquired how the Druze, Circassian and other officially distinct sectors feature in the minimum wage enforcement table provided in the state party's report.[126] Inquiries about the degree of autonomy and representation of indigenous peoples within the state's constitutional order,[127] and before international institutions,[128] have been introduced with regard to some other states.

Inquiries about disaggregated statistical data regarding rights enjoyment by particular groups have normally set the tone of the minority protection considerations with regard to other Covenant rights. Although minority protection aspects have been raised in one country or another with regard to most of the Covenant provisions, it has been with regard to the exercise of the right to education that more detailed inquiries about the exercise of minority rights have been introduced. This has ranged from the investigation of reasons for high rates of schooling drop-out by minority members, particularly women,[129] to the introduction of

[123] The list of issues on the Russian Federation of December 2002 inquires about the position of this state 'regarding the self-determination of all the peoples of the Russian Federation' paying particular attention to 'those people affected by conflict, including the Chechens', thereby recognising the existence of an armed conflict (as opposed to just 'terrorism', as argued by the Russian authorities) in Chechnya, UN Doc. E/C.12/Q/RUS/2, para. 7.

[124] UN Doc. E/C.12/Q/DEN/1, para. 2. [125] UN Doc. E/C.12/Q/CHN/1, para. 4.

[126] UN Doc. E/C.12/Q/ISR/2, paras. 1 and 8, respectively.

[127] List of issues on Guatemala, UN Doc. E/C.12/Q/GTM/1, para. 1.

[128] List of issues on New Zealand, UN Doc. E/C.12/Q/NZE/1, para. 1.

[129] *Ibid*., para. 27 and the lists of issues on Italy, UN Doc. E/C.12/Q/ITA/2, para. 31, and China, UN DOC.E/C.12/Q/CHN/1, para. 41.

institutions and curricula for the purpose of preserving and studying the indigenous languages and the provision of bilingual education, including in linguistic minority dialects,[130] or more generally the access to education in the mother tongue,[131] occasionally being treated as an element of the enjoyment of cultural rights.[132]

In addressing the right to culture, inquiries have tended to be of a more general nature, although occasionally such aspects as the use of minority languages in the media,[133] and technical aspects of cultural protection, including regarding the protection of material interests,[134] have captured the Committee's attention. Interestingly, access to administrative services, justice and all public services in the mother tongue have been included among cultural (Article 15) concerns, opening the door to a whole new dimension of minority protection under the Covenant.[135]

Finally, in the Committee's concluding observations regarding the implementation of the Covenant by the states parties, an absence of minority protection references has increasingly become the exception.[136] For example, while the concluding observations on Morocco, adopted in May 1994, contained no reference to minority protection (even though references to the non-exercise of the right to self-determination in Western Sahara were made),[137] the concluding observations adopted in December 2000 devote especial attention to 'the Amazigh people, including their right to participate in cultural life in Moroccan society'.[138]

Divergences in the level of thoroughness with which minority protection is addressed vis-à-vis particular states have been more strongly felt in the concluding observations than in the lists of issues. While, in the case of some states suffering very harsh economic conditions, the lack of attention to minority protection in the concluding observations could be

[130] UN Doc. E/C.12/Q/GTM/1, paras. 26–8.
[131] E.g., the list of issues on Azerbaijan, UN Doc. E/C.12/Q/AZE/2, para. 37.
[132] List of issues on Chile, UN Doc. E/C.12/Q/CHL/1, para. 34.
[133] UN Doc. E/C.12/Q/GTM/1, para. 29, and UN Doc. E/C.12/Q/GRC/1, para. 37. On this aspect of minority protection, see further the 'Guidelines on the Use of Minority Languages in the Broadcast Media' adopted under the auspices of the OSCE High Commissioner on National Minorities: www.osce/org/documents/hcnm.
[134] UN Doc. E/C.12/Q/AZE/2, para. 40. [135] UN Doc. E/C.12/EQU/1, para. 31.
[136] Particularly striking is the almost total absence of references to the minority question in the Concluding Observations on Canada, UN Doc. E/C.12/1993/5.
[137] UN Doc. E/C.12/1994/5. [138] UN Doc. E/C.12/1/Add.55, para. 57.

explained by the focusing of monitoring on other protection aspects,[139] in other instances no similar expediency appears applicable.[140]

Nonetheless, minority protection aspects can generally be considered to have acquired a high profile. In some of the concluding observations, the situation of minorities is considered to be among the major factors impeding the implementation of the Covenant,[141] and the adoption of national strategies to address their situation, particularly in the educational field, is sometimes requested.[142] Much of the attention focuses on addressing aspects of non-discrimination, many of the concluding observations, as the lists of issues, incorporating requests for the provision of data disaggregated by ethnicity, regarding the implementation of the various Covenant rights. While in some instances attention focuses on the recognition of the minorities' existence, and thus on their entitlement to the enjoyment of the Covenant's rights,[143] or even on the protection provided under other international instruments,[144] it is mostly situations of violence against minorities which are highlighted. This concerns both physical violence,[145] and the destruction of the cultural heritage or of the minorities' living environment.[146] Although these types of situations and their connection with the traditional lifestyle of the particular group have been a long-standing concern addressed by the Human Rights Committee in various communications,[147] they have also become the source of special reporting requests under the ICESCR.[148] The latter, however, do not seem have been directly linked to the gravity of the allegations presented by the Committee.[149]

[139] See Concluding Observations on the Democratic People's Republic of Korea, UN Doc. E/C.12/1/Add.95.

[140] See the Concluding Observations on Iceland, UN Doc. E/C.12/1/Add.89.

[141] See the Concluding Observations on the Russian Federation, UN Doc. E/C.12/1/Add.94, paras. 10, 11 and 13; Mexico, UN Doc. E/C.12/1993/16, para. 5; and Estonia, UN Doc. E/C.12/1/Add.85, para. 12.

[142] See Concluding Observations on Australia, with regard to the Aboriginals and Torres Strait Islanders, UN Doc. E/C.12/1993/9, para. 4 and on Poland, with regard to the Roma, UN Doc. E/C.12/1/Add.82, para. 36.

[143] See the Concluding Observations on Israel, as they deal with the recognition of the Bedouin villages, UN Doc. E/C.12/1/Add.90, para. 43.

[144] See the call upon Greece to ratify the Framework Convention, UN Doc. E/C.12/1/Add.97, para. 31.

[145] UN Doc. E/C.12/1/Add.82, para. 13.

[146] See the Concluding Observations on Iraq, UN Doc. E/C.12/1994/6, paras. 12, 14.

[147] See Martin Scheinin, Chapter 2, above.

[148] UN Doc. E/C.12/1994/6, para. 19.

[149] Allegations of threats and danger to life as well as executions of indigenous people in Brazil, connected with their expulsion from their living environment do not appear to have given rise to special reporting requests by the Committee, see UN Doc. E/C.12/1/Add.87, paras. 35 and 58.

Whilst the question of land distribution generally considered has frequently been raised in the concluding observations, specific issues surrounding it, such as the lack of sufficient legal guarantees of land tenure,[150] or even the presence of state-sponsored use of force against indigenous peoples,[151] have occasionally been raised. The Committee has sometimes reported on the illegal occupation of minority-owned property and requested information on the number and nature of evictions,[152] and encouraged the implementation of legislation allowing indigenous peoples in particular to participate in the management and control of natural resources in their areas of traditional habitation.[153] In the case of Ecuador,[154] the Committee has requested that the state consult and seek the consent of the indigenous people concerned prior to the implementation of natural resource extraction projects, and on the public policy affecting them, in accordance with ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.[155]

Requests for the use of minority languages in education have frequently featured in the concluding observations,[156] and occasionally these have demanded that funding of private schools be without discrimination on any of the prohibited grounds,[157] which under the Covenant include language and religion (as discussed above). The question of school segregation, particularly of Roma, has been a matter of deep concern for the Committee.[158] The Committee has also insisted on the broader use of minority languages in public life, and more specifically in dealings with the public authorities.[159] Regarding Libyan Arab Jamahiriya in particular,

The same applies to reports of forced abortions and forced sterilisations imposed on women, including those belonging to minority groups in China, see UN Doc. E/C.12/1/Add.107, para. 36.

[150] See Concluding Observations on Argentina, UN Doc. E/C.12/1/Add.38, para. 29.

[151] See the concern expressed by the Committee with regard to the application of special laws, such as the Law of State Security and the anti-terrorism law, in the context of current tension over ancestral lands in the Mapuche areas in Chile, UN Doc. E/C.12/1/Add.105, paras. 14, 35.

[152] See Concluding Observations on Azerbaijan, UN Doc. E/C.12/1/Add.104, paras. 28, 54.

[153] See Concluding Observations on Norway, UN Doc. E/C.12/1/Add.109, para. 26.

[154] UN Doc. E/C.12/1/Add.100, para. 35.

[155] *Human Rights, A Compilation*, pp. 91–103.

[156] As a recent example, the Concluding Observations on Slovenia, UN Doc. E/C.12/SVN/CO/1, para. 24.

[157] Concluding Observations on Italy, UN Doc. E/C.12/1/Add.43, para. 35.

[158] See Concluding Observations on Bosnia and Herzegovina, UN Doc. E/C.12/BIH/CO/1, para. 28.

[159] See, e.g., those on Estonia, UN Doc. E/C.12/1/Add.85, para. 32 and Bolivia, UN Doc. E/C.12/1/Add.60, para. 24.

the Committee has insisted on the right of every person to use his or her surname and first names in his or her own language.[160] Similarly, the requirement of the availability of minority language broadcasting has been raised with regard to some states, such as Iraq.[161]

3 Conclusion

Notwithstanding the lack of explicit minority protection references, or a clear attempt for states to regulate minority protection under the Covenant, the relative underdevelopment of the economic, and social and cultural dimensions of minority protection at the international level, combined with the Covenant's emphasis on collective aspects of human rights protection and on the principles of equality and the prohibition of discrimination have turned the Covenant into a beacon of minority protection. This has been reflected both in the individual interpretation of the Covenant by the states parties and in the interpretation that the Committee provides.

The content of some of the Covenant's specific rights provisions, particularly those relating to non-discrimination, the protection of the family and children, education and culture, have laid the ground for minority protection under this instrument. Although most Covenant provisions are 'identity neutral', in connection with some of the rights and duties established, the Covenant has indirectly set the limits of admissible differential identity-specific behaviour, thereby contributing to the definition of international minority protection.

The presence of 'dynamic components' within the Covenant, which support minority empowerment, especially in the field of effective participation, have helped to compensate the paucity of identity-sensitive considerations. These components and considerations have been utilised by the Committee in bringing the implications for minority protection of the Covenant's implementation to light. The Committee's attitude has proved invaluable, in view of the limitations on its monitoring activity and of the Covenant's text. The Committee has made use of some of its tools, such as its General Comments, reporting guidelines and lists of issues, to address minority protection concerns. In some substantive

[160] UN Doc. E/C.12/LYB/CO/2, 25 January 2006, para. 42.
[161] UN Doc. E/C.12/1994/6, para. 13.

domains, such as the protection of scientific, literary and artistic productions, the contribution of the Covenant's interpretation in the furtherance of minority protection is impressive.

Generally, however, the limitations mentioned above have proved too big a hurdle for the development by the Committee of a thorough, systematic and sophisticated response to minority protection concerns. For so long as these limitations, particularly those of a procedural nature remain, it will appear advisable that the Committee draws on the acquis under other international instruments, including those which are minority-specific, in supporting, consolidating, systematising and strengthening its responses to minority protection demands.

9

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination

IVAN GARVALOV

Introduction

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') was adopted by the General Assembly of the United Nations on 21 December 1965,[1] and entered into force on 4 January 1969.[2] As of 21 April 2008, the ICERD has been ratified or acceded to by 173 states.[3] The ICERD is the only international instrument specifically directed at racial discrimination. It is a comprehensive and legally binding instrument, and has procedures for implementation; indeed, the ICERD was the first United Nations human rights treaty which provided for a monitoring mechanism, namely, the Committee on the Elimination of Racial Discrimination ('CERD/C').[4] The ICERD is based on the principles of equality and non-discrimination, which are set out clearly in the Charter of the United Nations.[5]

In this chapter, the ICERD and the work of the CERD/C will be examined with a view to identifying their relevance to the protection of minorities, and to identifying any synergies, whether substantive or procedural, with other instruments and in the work of other relevant treaty bodies and international organisations.

[1] Resolution 2106 A (XX), 1965. [2] In accordance with Article 19 ICERD.

[3] The first state to ratify the Convention was Bulgaria on 8 August 1966, the latest one was Montenegro on 23 October 2006: www.ohchr.org/english/countries/ratification/2.htm. Two international human rights instruments have more states parties, namely, the Convention on the Rights of the Child (193 states parties, as of 8 June 2007) and the Convention on the Elimination of Discrimination against Women (185 states parties as of 2 November 2006).

[4] Article 8 ICERD. [5] Articles 1(3), 13(b), 55(c), 76(c) of the Charter of the United Nations.

1 Scope of application of ICERD: the concept of racial discrimination

The concept of 'racial discrimination' is central to the operation of the ICERD. 'Racial discrimination' is defined broadly in Article 1(1) as follows:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This definition does not make explicit reference to concepts such as 'minorities' or 'national minorities', and it is obviously not a minorities-specific human rights instrument. Furthermore, unlike Article 27 of the United Nations International Covenant on Civil and Political Rights ('ICCPR'), which is a minorities-specific provision, no direct reference is made to religion or language. However, the concept of racial discrimination, and therefore the scope of application of the ICERD, has been interpreted widely by the CERD/C, and in a manner that is clearly of relevance to members of virtually all minorities. Indeed, the definition of 'racial discrimination' itself indicates the potentially wide scope of application of the ICERD: such discrimination is to be determined by reference not only to race, colour and descent, but also to national and ethnic origins, and the concept of ethnicity would clearly result in the coverage of many minorities, as the monitoring work of the CERD/C has acknowledged. It should also be noted that the definition makes reference to acts which have a discriminatory purpose *or effect*, thus ensuring that the ICERD addresses both direct and indirect discrimination, a point to which further reference will be made. To the extent that discrimination based on language or even religion could be characterised as indirect discrimination on the basis of ethnicity – language, in particular, is frequently an important marker of ethnicity – the ICERD also applies to discrimination based on these grounds.[6] Thus, virtually all of the

[6] It should, for example, be noted in this regard that Article 5 ICERD refers to the obligation of states parties to guarantee equality before the law in the enjoyment of a range of rights including, in sub-para. (d)(vii) the right to freedom of thought, conscience and religion,

characteristics by which minorities are identified in provisions such as Article 27 of the ICCPR are covered by the ICERD.[7]

A number of the CERD/C's General Recommendations have illustrated the broad scope of application of the ICERD, and its relevance to members of groups which would constitute minorities. General Recommendation 27[8] concerns discrimination against Roma. General Recommendation 23[9] concerns the rights of indigenous peoples; in it, the CERD/C stated that, in its practice, the situation of indigenous peoples has always been a matter of close attention and concern, that it has consistently affirmed that discrimination against indigenous peoples falls under the scope of the ICERD and that all appropriate means must be taken to combat and eliminate such discrimination.[10] In the preamble to General Recommendation 29,[11] on discrimination based on descent, the CERD/C confirmed its consistent opinion that the term 'descent' in Article 1(1) of the ICERD does not refer solely to 'race', but also has a meaning and application which complement other prohibited grounds of discrimination (such as national and ethnic origins), and strongly reaffirmed its consistent view that discrimination based on 'descent' included discrimination against 'members of communities based on social stratification, such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights'. In the preamble, the CERD/C also made reference to discrimination against persons of Asian and African descent and indigenous and other forms of descent.

The CERD/C has made clear in several General Recommendations[12] that states parties are obliged under the ICERD to produce detailed

implying the relevance of the treaty to members of religious minorities, and in sub-para. (d)(viii) the right to freedom of opinion and expression, rights which are clearly of relevance to linguistic minorities.

[7] The particular relevance of the ICERD to ethnic groups, in particular, is emphasised by the specific reference to such groups in Article 1(4) and to the concept of ethnic origins in Article 4 and in Article 5, for example.

[8] General Recommendation 27, 'Discrimination against Roma', (2000) UN Doc. A/55/18.

[9] General Recommendation 23, 'Rights of Indigenous Peoples', (1997), UN Doc. A/52/18, annex V (1997).

[10] Paragraph 1.

[11] General Recommendation 29, 'Discrimination Based on Descent' (2002), UN Doc. A/57/18.

[12] See General Recommendations 4 and 24 (on the demographic composition of the populations), 8 (membership of racial and ethnic groups), 14 (definition of racial discrimination), 21 (right to self-determination), 23 (rights of indigenous peoples), and 27 (discrimination against Roma).

information on the demographic composition of their populations, and in particular information on the existence of the racial and ethnic groups which exist in the state. This has also frequently been made clear in concluding observations on state reports: 'such information is necessary for an assessment of the implementation of the Convention as well as for the monitoring of policies *in favour of minorities and indigenous peoples*' (emphasis added).[13] The CERD/C reporting guidelines are even more specific:

> States which do not collect information on [race, colour, descent, national and ethnic origins] in their censuses are requested to provide information on mother tongues as indicative of ethnic differences, together with any information about race, colour, descent, national and ethnic origins derived from social surveys. In the absence of quantitative information, a qualitative description of the ethnic characteristics of the population should be supplied.[14]

The reasons for the failure to collect and report such information are varied. In some cases, states take the view that soliciting such information could have the effect of reinforcing divisions in society and can actually give rise to discrimination. The CERD/C has generally rejected such arguments. In General Recommendation 24, for example, it pointed out that: 'If the Committee is to secure the proper consideration of the periodic reports of States parties, it is essential that States parties provide as far as possible the Committee with information on the presence within their territories of [different races, national or ethnic groups and indigenous peoples].'[15] In its reporting guidelines, it has emphasised that: 'if progress in eliminating discrimination based on race, colour, descent, national and ethnic origin is to be monitored, some indication is needed of the number of persons who could be treated less favourably on the basis of these characteristics.'[16]

[13] E.g., Concluding Observations on Argentina, CERD/C/65/CO/1, para. 8.
[14] Reporting Guidelines of the Committee, CERD/C/70/Rev5, para. 8.
[15] General Recommendation 24, 'Reporting of Persons Belonging to Different Races, National/Ethnic or Indigenous Peoples', (1999), UN Doc. A/54/18, annex V, para. 1. See, also, General Recommendations 4 (on the demographic composition of the populations), 8 (membership of racial and ethnic groups), 14 (definition of racial discrimination), 21 (right to self-determination), 23 (rights of indigenous peoples), and 27 (discrimination against Roma).
[16] Reporting Guidelines of the Committee, CERD/C/70/Rev5, para. 8.

In some cases, however, failure to provide information relates to how some states parties perceive the scope of application of the ICERD. For example, some states parties, on the basis that they protect all citizens regardless of identity, simply refuse to recognise the existence of different groups on their territories,[17] while others recognise the existence of some groups but not of others,[18] and there are still other states parties which maintain that there is simply no racial discrimination on their territories, and therefore no need to provide information on the composition of the population. Furthermore, there are states parties which have reversed their position, from recognising persons belonging to different ethnic, religious and linguistic groups to totally rejecting the existence of such groups. A case in point was Bulgaria.[19] In 1986, it retracted its periodic report, submitted to the CERD/C in 1984, in which the existence of Turks, Roma, Jews, Armenians, Greeks, and so forth, was acknowledged, and in its place submitted a new one, which contained no mention whatsoever of these persons belonging to national or ethnic, religious and linguistic minorities. The CERD/C has generally strongly rejected all such selectivity, and in this respect, the approach of the CERD/C is consistent with that of other monitoring bodies which are discussed in this collection, such as the Advisory Committee under the Council of Europe's Framework Convention for the Protection of National Minorities (the 'Framework Convention'). Indeed, this issue was specifically addressed in

[17] CERD/C reports A/54/18 on Dominican Republic (p. 48); Haiti (p. 29); A/56/18 on Trinidad and Tobago (p. 59); A/57/18 on Jamaica (p. 31); Qatar (pp. 38–9); A/58/18 on Vietnam (p. 69); A/59/18 on Libya (p. 23); A/60/18 on Azerbaijan (p. 19) and Bahrain (p. 23).

[18] CERD/C Concluding Observations in report A/56/18 on Egypt, Algeria, Argentina, Bangladesh, Georgia, Germany, Greece, Japan, Sudan, Ukraine; A/60/18 on France, Nigeria, Turkmenistan, Tanzania, Bahamas; A/59/18 on Libya, Argentina, Belarus; A/58/18 on Ecuador, Morocco, Tunisia, Uganda, Iran, Norway, Republic of Korea; A/57/18 on Saint Vincent and the Grenadines, Moldova, Armenia, Senegal, Yemen; A/54/18 on Uruguay; A/53/18 on Cameroon and Gabon.

[19] Between 1984 and 1989 Bulgaria pursued a policy of non-recognition of the existence of minorities on its territory, and in the case of Bulgarian citizens of Turkish origin pursued an assimilation policy, depriving them of ethnic origin, substituting Bulgarian names for their Turkish ones, etc. In 1991, during the consideration by the Committee of Bulgaria's ninth to eleventh periodic reports (SR, 919th meeting, Geneva, Palais des Nations, Thursday, 8 August 1991), Bulgaria officially retracted that position and reiterated the official position of the country, adopted in November 1989 after the political changes in the country, recognising again the existence on its territory of persons belonging to ethnic, religious and linguistic minorities.

General Recommendation 24,[20] in which the CERD/C drew the conclusion, based on its considerations of states parties' reports and other information, that:

> a number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others. Certain criteria should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, colour, descent or national or ethnic origin different from the majority or from other groups within the population.[21]

The CERD/C went on to note the following:

> Some States parties fail to collect data on the ethnic or national origin of their citizens or of other persons living on their territory, but decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognized and treated as such. The Committee believes that there is an international standard concerning the specific rights of people belonging to such groups, together with generally recognized norms concerning equal rights for all and non-discrimination, including those incorporated in the International Convention on the Elimination of All Forms of Racial Discrimination.[22]

This approach suggests that the CERD/C is generally of the view that the existence of racial, national and ethnic groups is a matter than can and should be objectively determined.

Notwithstanding its strong endorsement of the view that the existence of groups must be determined on an objective basis and reported accordingly, CERD/C has also emphasised that the question of *membership* in such groups is a matter for the individual. For example, General Recommendation 8, on membership of racial and ethnic groups,[23] makes it clear that where individuals are identified as being members of a particular racial or ethnic group, such identification should be made on the basis of 'self-identification by the individual concerned'. In this respect, the approach of the CERD/C is in accordance with that taken, for

[20] General Recommendation 24, 'Reporting of Persons Belonging to Different Races, National/Ethnic or Indigenous Peoples', (1999), UN Doc. A/54/18, annex V.
[21] General Recommendation 24 (1999), UN Doc. A/54/18, annex V, para. 2.
[22] *Ibid*., para. 3.
[23] General Recommendation 8, 'Membership of Racial or Ethnic Groups Based on Self-identification', (1990), UN Doc. A/45/18.

example, in the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[24] and the Framework Convention.[25]

Like other treaty bodies and other international institutions considered in this volume, the CERD/C has had to address the difficult question of the application of the ICERD to non-citizens. Article 1(2) of the ICERD provides that the ICERD shall not apply to distinctions, exclusions, restrictions or preferences made by a state party between citizens and non-citizens. Notwithstanding this, however, Article 1 obliges states parties to provide certain guarantees vis-à-vis nationality, citizenship and naturalisation. In particular, Article 1 contains the obligation that states parties must not discriminate against any particular nationality.[26] In General Recommendation 11 (1993), on non-citizens, the CERD/C noted that:

> Article 1, paragraph 2, has on occasion been interpreted as absolving States parties from any obligation to report on matters relating to legislation on foreigners. The CERD/C therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation.

More importantly, in 2004, the CERD/C adopted its General Recommendation 30, 'Discrimination against Non-Citizens',[27] which is the fullest ever drafted on this issue, and which replaces General Recommendation 11. While, as noted, Article 1(2) of the ICERD permits states parties to distinguish between citizens and non-citizens, General Recommendation 30 clarifies that this exception must be interpreted in a very limited fashion. There are many states parties which are confronted with the inevitability of differentiating between citizens and non-citizens, at least in some respects, in relation to certain areas. In this sense,

> the provisions of Article 1, paragraph 2, should not be interpreted as a means of detracting in any way from the rights and freedoms recognized and enunciated in such basic human rights instruments as the Universal

[24] UN General Assembly Resolution 47/135, adopted on 18 December 1992.
[25] Council of Europe Framework Convention for the Protection of Minorities, adopted on 1 February 1995.
[26] Article 1(3) ICERD.
[27] General Recommendation 30, 'Discrimination against Non-Citizens' (2004), UN Doc. CERD/C/64/Misc.11/rev.3, which replaced General Recommendation XI of 1993.

> Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[28]

The position of the CERD/C was further underscored in sub-para. 3 of the General Recommendation, where it observed that: 'States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.'[29] However; it is para. 4 of the General Recommendation where CERD/C's position is made even clearer, by indicating that:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discrimination.

Arguably, this implies that any discrimination on the basis of nationality – that is, a differentiation on that basis for which there is no objective and reasonable justification – amounts to indirect racial discrimination prohibited by ICERD.

To conclude on this point, the generally broad approach to the question of the scope of application of the ICERD to non-citizens is largely in keeping with the approach taken by other UN treaty bodies, for example, that of the Human Rights Committee in respect of the scope of application of Article 27 ICCPR.

2 Monitoring of the implementation of the ICERD

As has already been noted, the ICERD is monitored by the CERD/C, which is established under Article 8. It has eighteen members, who serve a four-year term, and who are chosen by the states parties from a list of persons 'of high moral standards and acknowledged impartiality'. Each state party may nominate one person, who must be a national of a state party, to the list.

[28] *Ibid.*, Part I, para. 3. [29] *Ibid.*, Part I, para. 5.

The primary mechanism under the ICERD for the monitoring of state compliance is state reports which, by virtue of Article 9(1), must refer to the legislative, judicial, administrative or other measures which they have adopted and which give effect to the ICERD. Under this same paragraph, such state reports must be submitted within one year of the entry into force of the ICERD for the particular state, and thereafter every two years, or whenever the CERD/C may request. In the course of over thirty-five years of existence, the CERD/C has acquired considerable practice in scrupulously examining states parties' initial and periodic reports, the outcome of which are the CERD/C's extensive Concluding Observations. State reporting procedures such as this are common to many of the instruments and institutions examined in this collection.

Like other UN and regional human rights instruments, the ICERD also contains complaints procedures. Under Article 11 of the ICERD, a state party which considers that another state party is not giving effect to the provisions of the ICERD may bring the matter to the attention of the CERD/C, which, under Article 12, can ultimately refer the matter to an *ad hoc* Conciliation Commission and, under Article 13, this commission will issue a report to the Chairman of the CERD/C. Of perhaps more practical importance is Article 14, which is, however, the only optional article of the Convention. Under Article 14(1), a state party may at any time declare that it recognises the competence of the CERD/C to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that state party of any of the rights set forth in the ICERD. No communication shall be received by the CERD/C if it concerns a state party which has not made such a declaration. Regrettably, forty-three years after the adoption of the ICERD, only fifty-three states parties[30] have made a declaration under Article 14. This is definitely a problem plaguing the effective implementation of the ICERD, and it is for this reason that the fifty-eighth session of the United Nations General Assembly (September–December 2003) 'Urges

[30] The states parties are the following: Algeria, Austria, Australia, Azerbaijan, Belgium, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, former Yugoslav Republic of Macedonia, Germany, Georgia, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Mexico, Monaco, Netherlands, Norway, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Ukraine, Uruguay and Venezuela.

States parties to the Convention to consider making the declaration provided for in Article 14 thereof'.[31] This problem is compounded by the fact that the process of admitting individual communications as relevant, considering them, and eventually deciding on them is time-consuming. It takes years before petitioners are compensated for the human rights violations committed against them.[32] According to the CERD/C's report to the United Nations General Assembly for 2005,[33] there have been a total of thirty cases declared admissible and duly considered. All petitioners, being of different ethnic origin, complained that they were denied basic human rights in the fields of jobs, housing, education, hate speech, etc.[34]

Set against this weakness is the development of early warning and urgent procedures, which can be considered to be successes of the ICERD monitoring process. In 1993, the CERD/C adopted a working paper, entitled 'Prevention of racial discrimination, including early warning and urgent procedure'.[35] This innovative method was envisioned as preventive diplomacy

> to address existing structural problems from escalating into conflicts. Early warning measures could include confidence building measures to identify and support structures to strengthen racial tolerance and solidify peace in order to prevent a relapse into conflict in situations where it has occurred.[36]

Based on this, the CERD/C has sent two 'good offices' missions – one to the Federal Republic of Yugoslavia and one to Croatia. This *ad hoc* procedure could be seen as being somewhat analogous to the work of the OSCE High Commissioner on National Minorities, the subject of Chapter 4, above.

[31] General Assembly Resolution 58/160 of 22 December 2003.

[32] The CERD/C began its work on individual communications as late 1984, when its competence to exercise its functions under Article 14 became effective on 3 December 1982.

[33] CERD/C Report, General Assembly, Supplement No. 18 (A/60/18).

[34] CERD/C Report, General Assembly, Supplement No. 18 (A/60/18), Communication No. 30/2005, submitted by the Jewish Community of Oslo, the Jewish Community of Trondheim and individual petitioners, pp. 154–68; Communication No. 22/2002, submitted by the Umbrella Organization for the Ethnic Minorities and the Association of Muslim Students in Denmark, pp. 115–26; Communication No. 24/2002, submitted by a Basque Association teaching the Basque language, pp. 127–31; Communication No. 25/2002, submitted by the Documentation and Advisory Centre on Racial Discrimination, Denmark, pp. 1132–8.

[35] Working paper by the CERD/C, CERD/C Report, General Assembly, Supplement No. 18 (A/49/18), pp. 125–9.

[36] *Ibid.*, p. 126.

3 Themes in the monitoring of the ICERD of particular relevance to minorities

3.1 Equality issues

The ICERD is uncompromisingly clear that: 'Any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination in theory or in practice, anywhere.'[37] In this way, the ICERD obligates states parties not to engage in any act or practice of racial discrimination, nor to sponsor, defend or support racial discrimination. Moreover, states parties are under an obligation to review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination, to prohibit and put a stop to racial discrimination by persons, groups and organisations, and to encourage integrationist or multiracial organisations and movements and other means of eliminating barriers between races.[38] The ICERD clearly aims at the full equality and smooth integration of all racial groups – as we have seen, a concept that is broadly defined in the treaty – and this is of particular importance to minorities and indigenous peoples, as they have typically been in a disadvantageous position in the societies in which they are found.

One important development under the ICERD has been the greater attention given by the CERD/C to the question of *indirect discrimination*. As noted above, Article 1(1) of the ICERD defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms. The reference to 'effects' of measures means that the prohibition applies to indirect as well as direct discrimination. This has allowed the CERD/C to address measures that are apparently neutral in their formulation, but which have had a disproportionate impact on members of certain groups. This is very important, because many states parties continue to channel their efforts to combat the traditional direct forms of racial discrimination; however, if these were very much in the eyes of public opinion years ago, nowadays they are

[37] Para. 6 of the preamble of the ICERD. [38] Articles 2–7 ICERD.

being complemented with less obvious, even hidden forms and manifestations of racial discrimination.

One must admit that the days in which racial discrimination could be seen in clear-cut, simple forms, are largely in the past. Some members of the CERD/C repeatedly draw attention to this fact. The author of this chapter himself made the point in a number of discussions with states parties during the 1990s, when he served on the CERD/C.[39] He also raised it at meetings with the Commission on Human Rights, the Sub-Committee on Prevention of Discrimination and Protection of Minorities, and with the chairpersons of the treaty bodies. His settled opinion, which others maintained as well, was that beyond the simple forms of racial discrimination lay subtler ones, not easily detected. However, while more traditional and obvious forms of racial discrimination continued to be reported and assessed, the subtler ones, particularly when manifested against racial and ethnic groups, were less easily detected. Of course, this never escaped the close attention with which the CERD/C considered states parties' reports, and was reflected in its concluding observations and general recommendations, as is clear, for example, in General Recommendation 14, in which the CERD/C made these comments:

> In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.[40]

The work of the CERD/C in this regard has been influential, and has both foreshadowed and paralleled developments within other international supervisory bodies, for example the UN Human Rights Committee, in which indirect discrimination has been an issue for some time. The European Union's Race Directive,[41] which has singled out indirect discrimination in its instructions, is an example of the increasing importance being attached to this issue. As far as racial and ethnic minorities are concerned, this directive has produced a groundbreaking novel legal

[39] The author was a member of the CERD/C for three consecutive mandates (1988–2000), and was elected CERD/C Chairman in 1994 and 1995.

[40] General Recommendation 14, 'Definition of discrimination' (1993), UN Doc. A/48/18.

[41] Race Directive, adopted by the European Union on 29 June 2000 (Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin).

provision.[42] Non-discrimination provisions in the ECHR such as Article 14 and Optional Protocol 12 do not make explicit reference to the principle of indirect discrimination, and the case law of the European Court of Human Rights is somewhat mixed in relation to the application of the principle; nevertheless, the groundbreaking work of the CERD/C may become more influential in the work of that court as such case law develops.

More generally, it can be pointed out that in the monitoring work of the CERD/C there has been a focus on, and an enriched understanding of, the concept of *substantive equality*, a concept that is of particular significance to minorities, and one of the overriding goals of minority protection more generally, as other contributions to this volume make clear. The concept and implications of indirect discrimination are clearly geared towards substantive equality. However, a more controversial component of a substantive equality strategy concerns affirmative action.

At present, the ICERD is the only treaty of global reach which requires states to take special measures in favour of 'racial and ethnic groups'. Article 2(2) provides that states parties shall, when the circumstances warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. As a corollary to this provision, Article 1(4) provides that special measures taken by a state party for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals shall not be considered to be racially discriminatory if they are in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms. These references to 'special measures' are generally understood as referring to affirmative action measures.

While affirmative action measures are in any event important for minorities, the words 'special measures' could also be interpreted more broadly, so as to include special minority rights. In the absence of any binding international instrument of global reach on the rights of minorities, this is particularly significant. Both provisions require, however, that such measures should only exist for as long as is necessary to achieve their objectives; the maintenance of permanent separate and

[42] See Bruno de Witte and Enikő Horváth, Chapter 13, below.

unequal rights for different racial groups is not permitted. The risk against which these restrictions are set is evident: a situation may develop into reverse discrimination when one or more racial and ethnic groups or minorities are placed in a more favourable position vis-à-vis others. On the other hand, the restrictions are subject to criticism to the extent that they would limit the ability of states parties to take more enduring and institutionalised measures to support the special needs of racial and ethnic groups. In other words, these provisions of ICERD appear not to offer an appropriate basis for full-blown enduring minority rights.

Nevertheless, the CERD/C has offered some comfort in this regard, and has taken a fairly expansive approach in respect of the sorts of special, 'positive' measures of support which need to be taken in respect of minorities, mirroring provisions in (and interpretations of) minority-specific instruments. Of particular importance is the recognition of the need for positive measures to be taken for the preservation of the culture and identity of persons belonging to ethnic groups and, interestingly, linguistic groups. In General Recommendation 21, for example, CERD/C stated the following:

> In accordance with article 2 of the [ICERD] and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to *ethnic groups*, particularly their right to lead lives of dignity, *to preserve their culture*, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic and linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the *preservation of the identity* of such persons or groups.[43]

3.2 Linguistic issues

Based on this approach to the ICERD, the CERD/C has made a number of comments with respect to linguistic issues. It has, for example, expressed concern at the limited possibilities of certain linguistic minorities to communicate with the state through their own language, and has

[43] General Recommendation 21, 'Right to self-determination' (1996), UN Doc. A/51/18, para. 5.

recommended that states parties ensure this possibility, if necessary through the provision of translation services.[44] In recommending that measures be taken to ensure that certain minorities can exercise their rights to their own culture, the use of their own language, and the preservation and development of their own identity, the CERD/C has, for example, recommended that states do not prohibit the entry of their first names in their own language in the civil register.[45] The CERD/C has made reference to access for members of minorities to media in their own language, in some cases recommending that more programmes be included in the public broadcast media,[46] and in other cases welcoming decisions to increase broadcasting time in minority languages on public radio and television.[47] In respect of Tajikistan, the CERD/C recommended that 'the State party ensure that sufficient time is devoted to programmes in minority languages on public radio and television' and that it 'take steps to facilitate the publication of newspapers'.[48]

3.3 Education

Access to education through the medium of a minority language or access to the teaching of a minority language has been a recurrent theme in the work of the CERD/C. As a general matter, the CERD/C has stressed that the lack of such education or teaching is a major issue, and that states parties should consult with the groups concerned in order to identify adequate solutions to overcome lack of provision.[49] It has, for example, noted the lack of mother tongue instruction outside the regions where certain minorities are traditionally concentrated, and while recognising that the right to study and be taught in the mother tongue requires a certain level of local demand, nevertheless recommended that the state party concerned 'ensure that the rights of members of minorities are not unduly restricted outside areas where the minorities are concentrated'.[50]

[44] See, e.g., CERD/C, Concluding Observations on Latvia, UN Doc. A/58/18, para. 445.
[45] See, e.g., CERD/C, Concluding Observations on Morocco, UN Doc. A/58/18, paras. 142–3.
[46] *Ibid.*, para. 145.
[47] See, e.g., CERD/C, Concluding Observations on Albania, UN Doc. A/58/18, para. 317.
[48] CERD/C, Concluding Observations on Tajikistan, CERD/C/65/CO/8, para. 18.
[49] See, e.g., Concluding Observations on Mauritania, CERD/C/65/CO/5, para. 20, Argentina, CERD/C/65/CO/1, and Tajikistan, CERD/C/65/CO/5, para. 17.
[50] CERD/C, Concluding Observations on Albania, UN Doc. A58/18, para. 310.

CERD/C has also made reference to the lack of teachers from the particular minority or indigenous group, together with lack of training for such teachers.[51]

3.4 Roma

The problem of the Roma is of special importance to the CERD/C. The CERD/C's General Recommendation on the Roma is the first time that a treaty body discussed the problems of the millions of Roma. The Roma issue is certainly one which has involved synergies, in the sense used in this volume, since it is also high on the agenda of other treaty bodies and United Nations human rights organs,[52] as other contributions to this collection will illustrate. This is more than a question of common characteristics. It is a question of common forms of racial discrimination, pursued against Roma in each of the states parties where Roma live. It must be acknowledged that Roma everywhere are the object of the worst forms and manifestations of racial discrimination. Roma are present in virtually every European state, and the question of discrimination against Roma is therefore a problem which directly concerns states parties to the ICERD in Europe. As such, it deserves continued attention, interaction, and effective measures directed at combating it. Special measures should be taken in the field of education, particularly ones that ensure that all Roma children are admitted to schools and regularly attend classes. The question of preventing and avoiding the segregation of Roma students and ensuring basic education and bilingual or mother tongue tuition for Roma children to the greatest extent possible is of paramount importance.[53] These are all themes which were highlighted by the CERD/C in the General Recommendation.

It may be of some interest to note that nowhere in General Recommendation 27 relating to Roma can one find an explicit reference to the necessity for Roma to learn their Roma language(s). The chapter on 'Education' in the above-mentioned General Recommendation 27 does

[51] See, e.g., Concluding Observations on Argentina, CERD/C/65/CO/1, para. 19, and on Slovakia, CERD/C/65/CO/7, para. 8.

[52] The Human Rights Council is the latest United Nations organ, created in May 2006, which is now in the process of establishing its procedures and agenda. The Roma issue will feature prominently on its agenda.

[53] General Recommendation 27, UN Doc. A/57/18, annex V (2000).

address concrete requests to states parties to support the inclusion in the school system of all children of Roma origin, and to 'ensure a process of basic education for Roma children and traveling communities'. However, the terms 'keeping open the possibility for bilingual or mother tongue tuition' and 'including languages spoken by them', used in the General Recommendation, fall short of the requirement that states parties should take adequate measures to train and educate Roma children and students in their own Roma language(s). But, in its concluding observations on states parties' reports,[54] the CERD/C has been more specific, referring to the duty of states parties to take measures for training and educating Roma school children in the Roma language(s).

3.5 Virulent racial discrimination

The prevention of genocide is a matter that has obvious importance for minorities, and the relevance of the United Nations Convention on the Prevention of the Crime of Genocide is the topic of Chapter 7, above. Acts of genocide do not occur in a vacuum, but are generally committed against a backdrop of continued and virulent racial discrimination. Thus, it is not surprising that the CERD/C would turn its attention to this matter, and at its sixty-sixth session in March 2005, the CERD/C adopted its 'Declaration on the Prevention of Genocide'.[55] It voiced its concerted opinion that it was

> imperative to stimulate stronger ties and interaction between local and global levels in developing national strategies for the prevention of genocide linked to national action plans for the elimination of racial discrimination developed in close collaboration with civil society, national human rights institutions and other non-State actors, as well as involving international bodies such as the CERD/C on the Elimination of Racial Discrimination and the Office of the United Nations High Commissioner for Human Rights.[56]

At the same time, the CERD/C reiterated its resolve 'to strengthen and refine its anti-racial discrimination early warning and urgent action as

[54] CERD/C Report, General Assembly, Supplement No. 18 (A/52/18), pp. 39–42, on Bulgaria; CERD/C Report, General Assembly, Supplement No. 18 (A/57/18), pp. 64–6, on Hungary; CERD/C Report, General Assembly, Supplement No. 18 (A/54/18), pp. 30–1, on Romania.
[55] CERD/C Report, General Assembly, Supplement No. 18 (A/50/18), pp. 95–7.
[56] CERD/C Report, General Assembly, Supplement No. 18 (A/60/18), p. 96.

well as follow-up procedures in all situations where indications of possible violent conflict and genocide prevail'.[57] This is another clear example of the sorts of synergies that exist between different UN instruments, and of the way in which the work of one treaty body can enhance the implementation of, and compliance with, other international standards of relevance to minorities.

General Recommendation 15[58] on measures to eradicate incitement to or acts of discrimination is of importance because it deals with Article 4 of the Convention. Article 4 requires states parties to attack not only acts of racial discrimination, but also the ideology that underlies and the discourse that fosters them. Thus, states parties are required to condemn all propaganda and all organisations which are based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. They are also required to make four types of acts offences punishable by law: (1) dissemination of ideas based upon racial superiority or hatred; (2) incitement to racial discrimination; (3) all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin; and (4) the provision of any assistance to racist activities. States parties are also required to declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall make the participation in such organisations and activities an offence punishable by law. When General Recommendation 15 was adopted, Article 4 was regarded as central to the struggle against racial discrimination. At that time, there was widespread fear of the revival of authoritarian ideologies. In this sense, the dissemination of ideas of racial superiority, and the existence of organised activity likely to incite persons to racial violence, were properly regarded as problems of crucial importance. More recently, the CERD/C has received evidence of organised violence against individuals and groups and communities, based on ethnic origin and the political exploitation of ethnic difference. As a result, the implementation of Article 4 is now of even greater importance.

[57] *Ibid.*

[58] General Recommendation 15, 'Measures to eradicate incitement to or acts of discrimination' (1993), UN Doc. A/48/18.

It is worthwhile to recall that in its first general recommendation on measures to eradicate incitement to or acts of incitement (General Recommendation 7,[59] adopted in 1985) the CERD/C explained that the provisions of Article 4 were mandatory. In order to comply with the obligations under this article, states parties must not only enact appropriate legislation, but must also ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts, and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.

In the opinion of the CERD/C, the prohibition on the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in Article 19 of the ICCPR and is recalled in Article 5(d)(viii) of the ICERD. However, there is also the provision in Article 20 of the ICCPR according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law and, unsurprisingly, the CERD/C places an obligation on states parties under the authority of Article 4 not to allow the dissemination of racist ideas.

As noted, Article 4 also penalises the financing of racist activities, namely, activities deriving from ethnic and racial differences. The CERD/C calls upon states parties to investigate whether their national law and its implementation meet this requirement. Furthermore, Article 4 outlines the obligations of public authorities, which must ensure that they observe these obligations and report on this.

3.6 Self-determination

Finally, CERD/C has considered the issue of the right to self-determination. The right to self-determination is embodied in the Charter of the United Nations,[60] in the ICCPR and in the International Covenant on Economic, Social and Cultural Rights.[61] The right of self-determination is a norm of international law which is granted to 'peoples', without any specification as

[59] General Recommendation 7, 'Measures to eradicate incitement to or acts of discrimination' (1985), UN Doc. A/40/18/ (1985).
[60] Article 55 of the Charter of the United Nations.
[61] Article 1 in the ICCPR, the International Covenant on Economic, Social and Cultural Rights.

to how the concepts 'peoples' and 'minorities' are related. However, as is discussed elsewhere in this volume, the right may be of relevance for minorities, particularly when seen in its internal dimension related to participatory rights.

The ICERD itself does not make reference to the right of self-determination. However, in considering many states parties' reports, reference was made to this right, and the CERD/C has become painfully aware of the need to explain this right and its relation to the ICERD. There are racial and ethnic minorities in the overwhelming majority of states parties to the ICERD which enjoy different degrees of legal status, including self-government and autonomy. At the same time, there are cases where minorities demand autonomy, separation, merger with neighbouring states, or simply to become independent states. For this reason, the CERD/C adopted General Recommendation 21 (1996),[62] on the Right to Self-Determination. In this General Recommendation, the CERD/C stated that it

> notes that ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession . . .
>
> The right to self-determination of peoples is a fundamental principle of international law . . . The Committee emphasizes that . . . none of its actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory, without distinction as to race, creed or colour.

The CERD/C went on to conclude that, in its view, 'international law has not recognised a general right of peoples unilaterally to declare secession from a State'.[63] In this respect, then, the CERD/C has taken a rather doctrinaire approach to the question of the right to self-determination in

[62] Report of the Committee on the Elimination of Racial Discrimination, General Assembly, fifty-first session, Supplement No. 8 (A/51/18), pp. 125–6, adopted on 8 March 1996.

[63] General Recommendation 21 (48) was adopted by the CERD/C by consensus on 8 March 1996. See document CERD/C/SR. 1147, p. 8. However, a member of the CERD/C who was absent during the adoption of the general recommendation explained later on that, had he been present, he would have voted against the General Recommendation, because he could not agree with the view that minorities did not have the right to secession. Other members assumed that the reference was to the case of Kashmir.

its external aspect. In its internal aspect, however, the CERD/C does suggest that the right to self-determination is relevant to minorities. In particular, it called upon governments to adhere to and implement fully the international human rights instruments and in particular the ICERD, 'in order to respect fully the rights of all peoples *within* a State'[64] (emphasis added). As noted above, the CERD/C went on to note that, in accordance with Article 2 of the ICERD, governments should, in particular, be sensitive towards the rights of persons belonging to ethnic groups to preserve their culture and to consider vesting persons belonging to ethnic or linguistic groups with the right to engage in activities of particular relevance to the preservation of their identity.

4 Relative successes and failures in implementation

The CERD/C has established mutually beneficial relations with states parties, which have been instrumental in the search for the effective implementation of the ICERD. The CERD/C has provided states parties with guidelines on reporting under Article 9(2) of the ICERD.[65] These include an in-depth analysis and profound understanding of the provisions of the ICERD, clarifying a number of them to highlight states parties' obligations and to help them implement the ICERD fully and effectively, becoming more detailed and specific in its concluding observations, stressing the need for states parties to supply information on the demographic composition of the population, including racial and ethnic groups, Roma, indigenous peoples, non-citizens, refugees and displaced persons, etc. Since 1972, the CERD/C has set up the practice, followed by other treaty bodies, of considering periodic reports in the presence of states parties' representatives. This is a form of constructive dialogue[66] between the treaty body, the CERD/C, and states parties. There is undoubtedly a very close and beneficial cooperation between the CERD/C, on the one hand, and the states parties, on the other. The CERD/C has in many ways been instrumental in inducing states parties to better understand the provisions of the ICERD, and in the light of this, to effect a number of constitutional and legislative amendments and to improve their administrative practices. In many cases, the CERD/C has conducted a

[64] *Ibid.*, para. 5. [65] General Recommendation 5.
[66] Doc. HRI/MC/2006/4, 17 May 2006, p. 16, para. 49.

very positive dialogue with states parties in focusing on their obligation that they must 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races'.[67]

4.1 Changes to domestic laws

The work of the CERD/C has resulted in a large number of changes in state practice that are of significance to particular minorities. For example, a number of states parties have deemed it necessary to amend their constitutions, following closely the definition in Article 1 ICERD,[68] by including specific provisions prohibiting racial discrimination. Others have incorporated the ICERD as an integral part of their domestic legislation that can be invoked in courts of law.[69] Still others have made the ICERD directly applicable in courts of law.[70] Many states parties have accepted the *raison d'être* behind the CERD/C's concluding observations and have systematically reviewed their laws and regulations, including the Penal Code and Penal Procedure, amending those which tend to perpetuate (or have been judged to have the effect of perpetuating) racial discrimination.[71] States parties have accepted the CERD/C's suggestions to introduce national action plans or national affirmative action programmes, with a view to combating racism, xenophobia, homophobia and discrimination. In quite a few cases, following the CERD/C's advice, states parties have established 'racial hatred or incitement to racial hatred' as offences punishable by law or as an aggravating circumstance in the commission of criminal offences.[72] Some states parties have gone even

[67] Article 2(2) ICERD.

[68] CERD/C Reports (A/52/18, A/53/18, A/59/18 and A/60/18) on Bahrain, Brazil, Bulgaria, Czech Republic, Cameroon, Columbia, Gabon, Guinea, Mongolia, Slovakia and Switzerland.

[69] CERD/C Reports (A/52/18, A/53/18, A/59/18 and A/60/18) on Austria, Algeria, Bulgaria, Burkina Faso, Chile, Costa Rica, Czech Republic, Haiti, Latvia, Mauritania, Poland, Portugal and Syria.

[70] CERD/C Report, A/54/18, p. 13, on Austria; CERD/C Report, A/52/18, p. 40, on Bulgaria.

[71] CERD/C Reports (A/52/18, A/53/18, A/59/18 and A/60/18) on Argentina, Azerbaijan, Brazil, France, Ireland, the Netherlands, Nigeria, Spain, Sweden, Ukraine, United Kingdom and Venezuela.

[72] CERD/C Reports (A/52/18, A/53/18, A/59/18 and A/60/18) on Australia, France, Luxembourg and Tajikistan.

further, by amending their Penal Codes to comply fully with Article 4 of the Convention.[73] Many states parties have provided legal guarantees against discrimination in the spheres of justice, security, political rights, or access to places intended for use by the general public.[74] A number of states parties have introduced and/or expanded educational programmes in junior and senior high school curricula, which focus on understanding racial discrimination and training pupils in how to combat it.[75] New agencies have been set up to deal with problems of racial discrimination and to protect the interests of indigenous groups. Among them are national councils, centres, special secretariats and/or federal commissions for combating racial discrimination and for promoting racial equality, for immigration policies, social integration of ethnic groups and immigrants and immigration affairs, as well as offices for immigration and ethnic affairs.[76] The CERD/C has been successful in convincing a number of states parties to accept its proposal relating to providing information on the ethnic composition of their populations. Some states parties have also introduced this category in their periodical surveys and censuses.

4.2 CERD/C's 'good offices'

Another success has been the CERD/C's 'good offices' missions, taken in the wake of the 1993 working paper on 'Prevention of racial discrimination, including early warning and urgent procedures', referred to above; as was noted, the CERD/C has sent two 'good offices' missions, one to the Federal Republic of Yugoslavia[77] and one to Croatia.[78] It was the grave and urgent situation of Kosovo and the ongoing ethnic conflict in Croatia that prompted the CERD/C to act in this way. The early warning and urgent procedures turned out to be very important. They were used in cases concerning more than twenty states parties. The CERD/C employed these procedures to identify specific problems existing in certain states parties, and to offer ways and means of preventing the problems from escalating into new conflicts. Because of the origin of these crises, the procedures focused primarily on issues and problems relating to racial

[73] CERD/C Reports (A/52/18, A/53/18, A/59/18 and A/60/18) on Lebanon, Netherlands, Switzerland and Tajikistan.
[74] CERD/C Reports from A/52/18 to A/60/18. [75] *Ibid.*
[76] CERD/C Reports (A/52/18–A/57/18) on Portugal, Spain, Sweden and Switzerland.
[77] CERD/C Report, General Assembly, Supplement No. 18 (A/49/18), p. 6. [78] *Ibid.*, p. 7.

and ethnic minorities. Decision 1 (42)[79] of 19 March 1993, expressing its grave concern over the ongoing ethnic conflict in former Yugoslavia, was considered as the starting point.

For the first time in 1994, in its report to the United Nations General Assembly, the CERD/C included a separate chapter, entitled 'Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures'.[80] It contained the CERD/C's findings on Yugoslavia in respect of the problem of Kosovo, in particular the breakdown of any dialogue between the Yugoslav government and the Kosovo Albanians, Croatia in respect of the drafting of legislation on ethnic and national minorities, Burundi in respect of its serious ethnic crises, Rwanda in respect of ethnically motivated murders on its territory, Israel in respect of the occupied territories and the Palestinians, and Papua New Guinea in respect of the situation in Bougainville.

Later on, the CERD/C adopted a number of decisions on: the Russian Federation in respect of Chechnya; Mexico in respect of the Chiapas; Bosnia and Herzegovina in respect of Srebrenica and Zepa;[81] Cyprus and Liberia in respect of different ethnic groups;[82] the Democratic Republic of Congo in respect of ethnic violence and refuges;[83] Australia in respect of the 1993 Native Title Act; the Czech Republic in respect of the Roma;[84] the Sudan; the human rights of the Kurdish people; Kosovo;[85] Côte d'Ivoire in respect of displaced persons; Guyana in respect of extensive ethnic conflicts; Suriname in respect of violations of the rights of indigenous peoples; Lao People's Democratic Republic in respect of human rights violations of minorities;[86] Darfur in respect of human rights violations of ethnic minorities;[87] New Zealand in respect of racial tensions and the Maori group;[88] and the Declaration on the Prevention of Genocide.[89] Obviously, certain cases defied tangible solutions and remained on the CERD/C's top priority list. These were the conflicts in former Yugoslavia, Bosnia and

[79] *Ibid.*, p. 112. [80] *Ibid.*, pp. iii–iv.
[81] CERD/C Report, General Assembly, Supplement No. 18 (A/50/18), pp. iii–iv.
[82] CERD/C Report, General Assembly, Supplement No. 18 (A/51/18), p. iii.
[83] CERD/C Report, General Assembly, Supplement No. 18 (A/52/18), p. iii.
[84] CERD/C Report, General Assembly, Supplement No. 18 (A/53/18), p. 4.
[85] CERD/C Report, General Assembly, Supplement No. 18 (A/57/18), p. iii.
[86] CERD/C Report, General Assembly, Supplement No. 18 (A/58/18), p. 3.
[87] CERD/C Report, General Assembly, Supplement No. 18 (A/59/18), p. iii.
[88] CERD/C Report, General Assembly, Supplement No. 18 (A/6018), p. 7.
[89] CERD/C Report, General Assembly, Supplement No. 18 (A/60/18), p. 10.

Herzegovina, Chechnya, Rwanda, Burundi, Darfur, Australia and the Middle East.

Seen from a different angle, the CERD/C's early warning and urgent procedures may be construed as a means for the CERD/C to focus on serious crises, and to bring them to the attention of the United Nations and the international community. A serious attempt was made by the CERD/C to ensure that the procedure was accorded a high priority status by the United Nations Secretary-General,[90] and through him eventually to be brought to the attention of the Security Council. There are enough valid reasons to conclude that the CERD/C saw the procedures as a channel of direct communication to provide immediate information on ethnic conflicts and crises to the highest United Nations authorities for their attention and action. The similarities with the role, mandate and operations of the OSCE's High Commissioner on National Minorities are striking. It is only to be regretted, however, that the efforts of the CERD/C yielded much less than expected. One reason may lie in the vision of certain United Nations mechanisms at that time, which remained reluctant to accept the possibility of the Security Council taking up problems of human rights violations of persons belonging to ethnic, religious and linguistic minorities before these problems had escalated into armed conflicts endangering world and regional peace and security.

4.3 Interaction with other international bodies

The interaction of the CERD/C with other international bodies should be noted, for this is a good example of direct, *operational synergie*s. Since the early 1990s, the CERD/C has been instrumental in starting a series of inter-committee meetings of human rights treaty bodies. There is the initiative of annual meetings of the chairpersons, which has subsequently developed to also include inter-committee meetings.[91] The CERD/C has held a number of meetings with the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to discuss issues of mutual

[90] CERD/C chairman in 1994 and 1995 brought this procedure to the attention of the United Nations Secretary-General and the United Nations High Commissioner for Human Rights in his meetings with them.

[91] There were eighteen meetings of chairpersons, the last held in Geneva on 22 and 23 June 2006; there were also five inter-committee meetings with the last held in Geneva on 19–21 June 2006.

interest, including the situation of racial and ethnic, religious and linguistic minorities. In 1996–8, a joint four-member working group of the two bodies prepared a study on Article 7[92] of the ICERD. It urged states parties to adopt immediate and effective measures in the field of teaching, education, culture and information. There were also a number of contacts between the Commission on Human Rights and the the CERD/C.[93]

It should also be noted that the CERD/C is on record as calling for stronger interaction 'between United Nations human rights treaty bodies and the Security Council'.[94] It proposed that treaty bodies work together in raising awareness about possible outbreaks of violent conflict and genocide and in requesting that the United Nations Secretary-General pass on these concerns and warnings to the Security Council.[95] The CERD/C also took a very active part in the preparation for the First and Second World Conferences to Combat Racism and Racial Discrimination. It submitted its studies,[96] and discussed and prepared suggestions for the states parties.

4.4 Continuing obstacles

At the same time, the CERD/C has met with some obstacles. It is, for example, still trying to convince those states parties which have not made racial discrimination and incitement to, and acts of, racial discrimination into criminal offences to do so. In this regard, some states parties continue to maintain their position that, according to their legal order, it is inappropriate to declare illegal an organisation before its members have specifically acted to promote or to incite racial discrimination.[97] However,

[92] Doc. E/CN.4/1998/Sub. 2/4, prepared jointly by Mrs Sadiq Ali and Mr Ivan Garvalov on behalf of the Committee, and Mr Jose Bengoa and Mr Mustafa Mehdi on behalf of the Sub-Commission.

[93] The CRDC/C's chairperson appeared before the Commission on several occasions addressing it on issues of mutual interest, mainly dealing with racial and ethnic minorities.

[94] Declaration on the Prevention of Genocide, adopted on 11 March 2005; see CERD/C Report, General Assembly, Supplement No. 18 (A/60/18), p. 97, para. 5.

[95] *Ibid.* [96] Doc. E.85.XIV.2 on Article 4, and Doc. E.85.XIV.3 on Article 7 ICERD.

[97] But other states parties have incorporated provisions in their relevant domestic criminal legislation. See Article 4(b) and CERD/C Report A/54/18, on Austria (p. 13), Finland (p. 16), Portugal (p. 18), Peru (p. 21), Costa Rica (p. 24), Chile (p. 38), Latvia (p. 39), Columbia (p. 44); CERD Report A/55/18, on Denmark (p. 23), Malta (p. 30), Spain (p. 35), Zimbabwe (p. 39), Slovenia (p. 46), Czech Republic (p. 50), Sweden (p. 59), United Kingdom (p. 61), Norway (p. 69); CERD Report A/56/18 on Germany (p. 27), Japan (p. 36), China (p. 45), Egypt (p. 51), Ukraine (p. 62), USA (p. 65), Vietnam (p. 69); CERD/C Report A/57/18, on Belgium (p. 19), Croatia (p. 26), Qatar (p. 39).

appropriate amendments here are required under Article 4 of the ICERD, which is mandatory. It provides that states parties must declare such organisations illegal and prohibit them. Also, a number of states parties have failed to provide information with regard to the ethnic composition of their populations, in spite of the requirement of the CERD/C, discussed above, that they should do so.[98] As noted above, such information usually gives a picture of the existence of ethnic, religious and linguistic communities in a given country. It has, as also noted, become obvious that some states parties are reluctant to acknowledge the existence of ethnic groups or minorities living on their territories. Others recognise only certain groups or minorities. A limited number of states parties have given full recognition of the existence of ethnic, religious and linguistic minorities within their jurisdiction. And, of course, there are still states parties which claim that there are no ethnic groups in their territories. In this respect, it is to be recalled that, as noted earlier, the CERD/C came up with several explicit General Recommendations,[99] referring to the obligation of states parties to provide such information. The latter will enable the CERD/C to have a clear picture of the demographic composition of different populations, and on this basis, to evaluate the full and effective implementation of the ICERD.

In a number of states parties, domestic legislation has not been amended to take into account Article 1 of the Convention;[100] racial motivation has not been included as an aggravating factor in criminal law;[101] and, statistical information has not been given about prosecutions launched, and penalties imposed, in cases of offences which relate to racist crimes.[102] There is flagrant racial discrimination against the Roma in many states parties.[103] There is insufficient protection of human rights of

[98] CERD/C Report, General Assembly, Supplement No. 18 (A/59/18), on Bahamas (p. 11), Libya (p. 22), Spain (p. 33), Sweden (p. 42), Argentina (p. 46), Portugal (p. 67).

[99] General Recommendations 4 (1973), 8 (1990), 24 (1999), and related ones, such as 22 on refugees and displaced persons (1996), 23 on indigenous peoples (1997), 27 on Roma (2002), 29 on descent (2002) and 30 on non-citizens (2004).

[100] CERD/C Report, General Assembly, Supplement No. 18 (A/59/18), on Bahamas (p. 11), Lebanon (p. 20), Tajikistan (p. 74).

[101] *Ibid.*, on Bahamas (p. 11), Portugal (p. 67).

[102] *Ibid.*, on Brazil (p. 16), Lebanon (p. 20), Sweden (p. 42), Belarus (p. 52).

[103] CERD/C Report, General Assembly, Supplement No. 18 (A/52/18), on Bulgaria (p. 39); CERD/C Report, General Assembly Supplement No. 18 (A/54/18), on Romania (p. 31); CERD/C Report, General Assembly Supplement No. 18 (A/59/18), on Spain (p. 35), Sweden (p. 43), Belarus (p. 51), Portugal (p. 69), Slovakia (p. 71), Tajikistan (p. 75).

migrant workers, refugees,[104] non-citizens[105] and indigenous peoples,[106] and no adequate policy measures to ensure proper representation of ethnic minority groups in the labour market.[107] One must recall here the relevance of certain general recommendations, discussed elsewhere in this chapter, concerning Roma, migrant workers and refugees, non-citizens and indigenous peoples.

As noted above in the context of the scope of application of the treaty, the CERD/C has been concerned that the ICERD applies to the fullest extent possible to non-citizens. There are, however, still glaring differences as far as the issue of nationality is concerned. In one particular state party, an individual may lose his or her nationality if he or she acquires that of another state. However, in that state party, foreigners[108] are allowed to acquire dual citizenship. Children with foreign nationality are not required to attend elementary and lower secondary education,[109] which is a clear case of different standards. In yet another case, a state party applies different standards of treatment for different categories of asylum-seekers, granting refugee status to individuals from specific countries and refusing the same treatment to others.[110] In some cases, foreign domestic workers could not seek other employment,[111] and there has existed ill-treatment of foreigners by law-enforcement officials, of asylum-seekers and citizens of foreign origin,[112] and problems have been encountered by mixed couples when passing one of the parent's nationality to their children.[113]

[104] CERD/C Report, General Assembly Supplement No. 18 (A/59/18) on Lebanon (pp. 19–20), Libya (p. 22), Portugal (p. 68).
[105] *Ibid*., on Belarus (p. 52), Tajikistan (p. 75).
[106] *Ibid*., on Sweden (p. 43).
[107] *Ibid*., on the Netherlands: European part of the Kingdom (p. 31).
[108] Fifteenth and sixteenth periodic reports of Iceland, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 32.
[109] Initial and second periodic reports of Japan, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 34.
[110] Ninth, tenth and eleventh periodic reports of Sudan, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 40.
[111] Eighth and ninth periodic reports of China, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 44.
[112] Fifteenth periodic report of Germany, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 27, and the fifteenth and sixteenth periodic reports of Cyprus, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 48.
[113] Thirteenth, fourteenth, fifteenth and sixteenth periodic reports of Egypt, Report of the Committee on the Elimination of Racial Discrimination, 2001, Supplement No. 18 (A/56/18), p. 50.

5 Conclusion

In spite of the lack of direct reference to minorities in the ICERD, its scope of application is wide and it clearly applies to, and is of considerable relevance to, members of minorities. Of particular importance has been Article 2(2), which requires states parties to take additional positive measures in order to ensure full and effective equality for racial and ethnic groups that have suffered discrimination. While the ICERD is not precise on the modalities by which this should be accomplished, the CERD/C, both through its ongoing monitoring work and through its general recommendations, has built upon this general requirement in a number of important ways, in respect of things such as the use of minority languages in the provision of administrative services, in the media, and in education. The CERD/C has been particularly active in respect of Roma issues, and to a considerable degree in respect of indigenous peoples as well. The dynamic interpretation of the ICERD is therefore in keeping with wider developments in international law in respect of minorities. However, it is the author's view that, in spite of such developments under the ICERD, an international legally binding instrument dealing with the rights of national or ethnic, religious and linguistic minorities it still of great importance, and such an instrument should be drafted and adopted by the United Nations. It is to be hoped that the example of the Council of Europe, with its Framework Convention, will inspire such an international treaty.

10

The United Nations Convention on the Rights of the Child and Children Belonging to Minority Groups

JAAP E. DOEK[1]

Introduction

The United Nations Convention on the Rights of the Child ('CRC') is a very rich human rights treaty. It covers most of the traditional civil and political rights and economic, social and cultural rights tailored to the child as a person with evolving capacities and with full respect for the responsibilities, rights and duties of parents.[2] In addition, the CRC contains various provisions for the protection of children from all forms of violence and abuse (Article 19), economic exploitation, (commercial) sexual exploitation, abduction, and sale or traffic (Article 32–39). Other articles provide for the protection of refugee children (Article 22) and of children with disabilities (Article 23).

The CRC is applicable to every human being below the age of eighteen years in the 193 states that ratified this Convention.[3] They have committed themselves to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind (Article 2). This means that children belonging to minorities have the right to the full enjoyment of the rights enshrined in the CRC. The CRC is not a minority-specific human rights instrument but it does contain some unique references to minority groups, in particular to indigenous children.

[1] Chairperson of the UN Committee on the Rights of the Child.

[2] Within the context of this chapter, these important features of the CRC cannot be elaborated in detail. See, e.g., Gerison Lansdown, *The evolving capacities of the child*, *Innocenti Insight* (Florence: UNICEF Innocenti Research Centre, 2005). For the role of parents, legal guardians and others responsible for the child, see Articles 5, 7(1), 9, 10, 14, 18 and 27 CRC.

[3] Montenegro became an independent state in 2006 and ratified the CRC as state no. 193. Only two states – the US and Somalia – have not yet ratified the CRC.

In this chapter, I shall present and discuss the monitoring activities of the CRC Committee charged with the task of examining the progress made by states parties in achieving the realisation of their obligations under the CRC, including the difficulties they are facing in this regard (Articles 43 and 44). After giving a brief description of the monitoring role of the CRC Committee, I will focus on minority-specific provisions, and other provisions of the CRC which have special significance to minorities. I will also, by way of example, mention some of the recommendations the Committee made to states parties with regard to the implementation of these provisions.

1 Reporting, monitoring, concluding observations

In order to allow the CRC Committee to carry out its monitoring functions, states parties have to submit to the Committee 'reports on the measures they have adopted that give effect to the rights recognized herein and on the progress made on the enjoyment of those rights' (Article 44). The first report has to be submitted within two years after the ratification and thereafter every five years. So far almost all states parties (± 97 per cent) have submitted their initial reports. Currently, the Committee is receiving second and third reports. The state parties, reports are the basis for the Committee's monitoring of the progress made. But the Committee encourages (inter)national NGOs and UN agencies to submit additional reports. In this regard the NGO group on the CRC (located in Geneva) and UNICEF play a very positive role. The NGO group has issued guidelines for reporting by national NGOs and encourages national NGOs to submit one comprehensive report (not separate reports per NGO) and to consider the establishment of a coalition or forum of NGOs actively involved in implementing children's rights. In many states parties such coalitions/forums are established and can (and often do) play an important role in the follow-up to the concluding observations. Unlike the practice, for example under the Languages Charter, the Secretariat of the CRC Committee is not directly involved in the reporting activities of NGOs and does not assist them by providing guidelines or instructions. However, it does provide some procedural indications and strongly encourages national NGOs to submit information on the implementation of the CRC. In addition to the guidelines for NGO reporting produced by the NGO Group, there is also an excellent reference guide for Reporting

on Ethnic Discrimination against Children,[4] which provides information on the reporting procedure under the CRC and a reporting checklist that makes it possible to produce a very comprehensive report on the implementation of the CRC for children belonging to minorities. The NGO group and UNICEF regularly provide technical and other assistance to NGOs in their efforts to participate actively in the monitoring process under the CRC.

The NGO reports and the reports of UNICEF and other specialised UN agencies, such as the WHO, UNESCO, OHCHR, UNHCR and the ILO, are crucial for the Committee's understanding of the implementation of the rights of children in the country under consideration. It also makes it possible for the Committee to provide the state party with concrete and specific recommendations for further actions.

The information provided by NGOs and UN agencies is discussed at a closed meeting of the pre-sessional working group of the committee. The meeting takes place about three months before the state party's report is discussed and results in a list of additional and specific requests for further information sent to the state party (the 'list of issues'). The written responses to these requests and the reports mentioned will be discussed with a delegation of the state party in a public meeting.

After this public dialogue, the Committee issues (per state party) concluding observations containing specific recommendations for further action. Follow-up to these recommendations by the states parties with targeted measures is a crucial element in achieving the realisation of the obligations under the CRC. Unfortunately, the CRC does not provide a specific mandate for an active follow-up by the Committee of the implementation of its recommendations, except for the examination of the next report of the state party with information about the implementation of the recommendations made after the consideration of the previous report. However, this next report should be submitted five years later and several states are late in submitting.

The Committee does not have, for example, a well-organised and systematic programme of country visits to support and/or promote an adequate follow-up to its recommendations. The lack of a specific mandate also explains why the CRC Committee (or any other human rights

[4] *Reporting on Ethnic Discrimination Against Children – A Reference Guide* (Stockholm: Save the Children Sweden, 2001).

treaty body for that matter) does not receive any UN budget for follow-up activities. But, even with a UN budget, the capacity of the Committee would still be limited. The reason is quite simple: members of the Committee are expected to spend three months per year in Geneva and receive an honorarium of one US dollar per year. Many members have a job at home and the employer does not receive any financial compensation for their absence. For these members it is almost impossible to devote more time (in between the sessions) to activities of the Committee.

Nevertheless, some members are very active and visit countries, meet children, NGOs, UN agencies and representatives of governments, and/or attend conferences, workshops or children's rights courses. Some take unpaid leave or are retired and the cost of these activities are covered by, *inter alia*, UNICEF, Save the Children, Plan International or the organisers of conferences, etc.

These country visits and other activities of members of the Committee have proved to be an important tool in raising or strengthening awareness regarding children's rights by discussing the Concluding Observations or by presentations on specific topics such as juvenile justice, the problems related to refugee/asylum-seeking children, the problems of alternative care for children without parental care (foster care/adoption/institutional care), violence against children, child labour, commercial exploitation of children, etc. Such activities are constructive and supportive of implementation efforts at the national level and are much appreciated, not only by NGOs, UNICEF and other UN agencies, but also by the governments.

In addition, in close cooperation with the OHCHR and with the support of UNICEF, Plan International and others, the CRC Committee organises regional seminars for follow-up to Concluding Observations.[5]

Finally, and most importantly, there is the role of NGOs and UN agencies, UNICEF in particular, in some 150 developing countries, regarding the follow-up to the recommendations. Their involvement in the reporting process not only provides the Committee with very valuable information and concrete suggestions for recommendations, but also results in a strong commitment by many states parties to promote and support actions for implementation of the Committee's recommendations.

[5] Syria, 2003; Thailand, 2004; Qatar, 2005; Argentina, 2005; Costa Rica, 2006; other seminars are planned for Korea and Burkina Faso in 2007.

2 Specific CRC provisions for minority groups

2.1 Some general remarks

The CRC contains some provisions that make explicit reference to minority groups using terms like 'minority group or who is indigenous' (Article 17 (d)), 'ethnic origin' (Article 2), 'ethnic background' (Article 20(3)), 'ethnic groups and persons of indigenous origin' (Article 29(1)(e)) and the core Article 30, dealing with the rights of 'ethnic, religious or linguistic minorities or persons of indigenous origin'. This chapter will now discuss in more detail what we will call 'minority protection provisions', since they are provisions with an explicit minority focus. In general terms, the following can be said:

1. The right to non-discrimination (Article 2) explicitly requires states parties to respect and ensure the rights in the CRC to each child within their territory.
2. The other articles can be seen as an elaboration of this right in a way that comes close to what is sometimes called positive discrimination, because it requires that states encourage mass media to pay special attention to the linguistic needs of the child who belongs to a minority group or who is indigenous (Article 17), that they pay due regard to the child's ethnic background when providing her/him with alternative care (Article 20), and that they direct the child's education, *inter alia*, to fostering friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin (Article 29). The core Article 30 is apparently meant to underscore the right of children belonging to ethnic or other minorities to enjoy and practise their own culture, religion and language.

But when the Committee examines a state party's progress in the realisation of the rights of children belonging to minority groups, it does not limit its attention to the implementation of these articles.

The Committee's holistic approach (human rights of children are indivisible and interdependent) to the implementation of the CRC means that attention is given to other articles of the CRC and the degree to which children of minority groups do enjoy these rights, for example: the right to participation (Article 12); the right to specific protection from abuse, violence and exploitation (Articles 19, 32–39); the right to the enjoyment

of the highest attainable standard of health (Article 24), to an adequate standard of living (Article 27) and to education (Article 28).[6]

The Committee did not develop a specific concept (or definition) of minority groups. But in the light of the CRC provisions and the country-specific information, the Committee takes a rather broad approach and pays special attention to children of ethnic, religious, linguistic or national minorities and also to children of migrants and refugee children. This is reflected in the recommendations of the Committee regarding, for example, the non-discriminatory implementation of the right to education or to an adequate standard of living, recommendations which quite often call for specific measures to address the disparities in the enjoyment of these and other rights recognised in the CRC.

From the articles already mentioned, it should be noted that children belonging to indigenous peoples are given explicit attention, a unique aspect of the CRC since none of the other international human rights treaties makes that specific reference. This explains why the CRC Committee devoted one of its annual Days of General Discussion to the rights of indigenous children (2003). The recommendations adopted after this Day of General Discussion[7] are an example of the Committee's holistic approach to the rights of children belonging to minorities. In addition, the Committee is preparing a General Comment on the rights of indigenous children (which will be discussed below).

In the following section we will discuss and present some of the recommendations the Committee made in relation to the minority protection provisions mentioned above. In that regard, and in order to avoid misunderstandings, the Committee does not conduct independent investigations in the state party concerning the (possible) problems of children belonging to minorities. The Committee makes its recommendations on the basis of the information provided (see above). The reports submitted do contain specific information on, for example, the lack of protection for minorities, existing *de facto* discrimination and disparities in, for example, access to education and health care. The groups presented in the reports as minorities or indigenous are the ones the Committee considers as such on an *ad hoc* basis. While the Committee has not

[6] See, e.g., Concluding Observations on the second report of Thailand, UN Doc. CRC/C/THA/CO/2, paras. 60 and 61, 17 March 2006.

[7] CRC/C/133, 4 December 2003.

promulgated a definition, it obviously uses some implicit criteria (including non-dominance, numerical minority position, and separate ethnic – in the broad sense – identity). The reach of the concept of, for example, 'indigenous peoples', is too complex to be decided by definitions which try to determine who qualifies as indigenous peoples.

2.2 Article 2: non-discrimination

Under this article the Committee regularly expresses its concern at the discrimination against children belonging to ethnic, national, religious or linguistic minorities. In most states parties discrimination is prohibited by law (often in the Constitution) but the major problem is *de facto* discrimination and the related disparities which the Committee does address under Article 2 in rather general terms and more specifically under other articles, such as Article 24 on the right to the highest attainable standard of health, Article 28 on the right to education and articles on special protection (Articles 19, 20, 32–39). This *de facto* discrimination is also reflected, for example, in the high number of children of minorities not registered at birth (Article 2(7)), a disproportionately high number of drop-outs in education and of minority children disrespecting the law. In this regard the Committee has recommended, *inter alia*:

1. The adoption of legal provisions specifically prohibiting all forms of discrimination. In the Concluding Observations for the Czech Republic,[8] the Committee recommends that the state party continue and strengthen its legislative efforts to integrate the right to non-discrimination fully into all legislation concerning children and to ensure that this right is effectively applied in all political, judicial and administrative decisions and in projects, programmes and services which have an impact on all children, including non-citizen children and children belonging to minority groups such as the Roma.
2. Strengthening the administrative and judicial measures to prevent and eliminate discriminatory attitudes and stigmatisation against children belonging to ethnic minorities. In the Concluding Observations for Australia,[9] the Committee recommends that the state party strengthen

[8] CRC/C/15/Add.201, 18 March 2003, para. 29.
[9] CRC/C/15/Add. 268, 20 October 2005, para. 25.

its administrative and judicial measures within a set time period in order to prevent and eliminate *de facto* discrimination and discriminatory attitudes towards especially vulnerable groups of children such as asylum-seeking children and children belonging to ethnic and/or national minorities.

3. To undertake comprehensive public education campaigns to prevent and combat negative social attitudes and behaviour including discrimination based on ethnicity or nationality.[10] Specific recommendations are often made with regard to discrimination against minority children, including children belonging to Gypsy or Traveller communities, Roma children, refugee and asylum-seeking children and children of migrant workers. With regard to this last category of children the Committee has, in its Concluding Observations for Canada,[11] reiterated the concern of the Committee on the Elimination of Racial Discrimination[12] about allegations that children of migrants with no status are being excluded from school in some provinces.

In many instances, the focus is on *de facto* discrimination reflected in significant disparities between minority and other children. Part of these categories of children may not belong to what are considered minorities under international law, but in the context of Article 2 the Committee uses a rather broad concept of minorities that considers children who do not belong to the mainstream/dominant group of children as *de facto* minority children. It is the experience of the Committee that these children are quite often the most vulnerable to various forms of discrimination and that they are in need of special protection. In relation to Article 30, the minority-specific provision of the CRC, the Committee seems to be somewhat less generous, still avoiding the formulation of a particular definition.

The disadvantaged position of the children of ethnic minorities, for example, in the Netherlands, led the Committee to urge the Netherlands to consider the possibility of providing further assistance to these children and their families, thus addressing the root causes of educational performance.

[10] See, most recently, the Concluding Observations on Turkmenistan's first report, UN Doc. CRC/C.TKM/CO/1, 2 June 2006, paras. 22 and 23 and the Concluding Observations on Uzbekistan's second report, UN Doc. CRC/C/UZB/CO/2, 2 June 2006, paras. 21–25, with attention to refugee and asylum-seeking children.

[11] CRC/C/15/Add. 215, 27 October 2003, para. 44. [12] A/57/18, para. 337.

The Committee also expressed concerns and made specific recommendations to address access to education 'on the basis of equal opportunity' (Article 28(1)) for refugee and asylum-seeking children.[13] In this regard, reference should also be made to the Committee's General Comment on the treatment of unaccompanied and separated children outside of their country of origin. The committee is of the opinion, for example, that these children should be registered with appropriate school authorities as soon as possible and get assistance in maximising learning opportunities and that they have the right to maintain their cultural identity and values, including the maintenance of, and development of, their native language.[14]

A standard paragraph for every state party contains the request that specific information will be included in the next periodic report on the measures and programmes relevant to the Convention on the Rights of the Child undertaken by the state party to follow up on the Declaration and Programme of Action adopted at the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also taking into account General Comment 1 on Article 29(1) of the Convention (aims of education). Most states parties receiving this request have not yet submitted their next report.

2.3 Article 17: right to information

This article deals with the important role of mass media and requires that states parties ensure that the child has access to information and material from a diversity of national and international sources. Specifically relevant in this context is that states parties 'shall 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' (Article 17(d)). It means that governments should take actions aimed at the promotion – including via specific financial support – of producing materials, for example, special pages in newspapers or magazines and programmes on radio and TV, in minority languages.

[13] Concluding Observations on the first report of the Netherlands, UN Doc. CRC/C/15/Add. 114, para. 29.

[14] Concluding Observations on first report of India, Ghana, Armenia, South Africa and Georgia and on second reports of Finland and Norway. See, for details, http://www2.ohchr.org/english/bodies/crc/index.htm, the web page of the Committee on the Rights of the Child.

The reports of states parties show that some of these specific actions have been taken, albeit to a very limited degree. According to the Committee, more needs to be done, however, such as providing special radio programmes in minority languages.

These materials and programmes are also necessary to meet the obligation of states parties under Article 42: to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike. In this regard, there are examples of translations of the CRC in the local/minority language, sometimes including a child-friendly version, and the dissemination of these translated documents to minority groups. These dissemination activities are crucial for the empowerment of the children, families and community leaders of minority groups.

2.4 Article 29: aims of education

This is not a minority-oriented article but is nevertheless crucial for the protection of the rights of persons (adults and children alike) belonging to minority groups. The article contains a specific and elaborated set of aims of education on which the states parties agree. These aims are equally applicable to all forms of education at all levels and in different settings of, for example, public, private or religious schools.

One of the aims of education is that children should be educated to develop respect for their own cultural identity, language and values, for the values of the country they live in and of their country of origin and for civilisations different from their own. In addition, they should be prepared for a responsible life in a free society in a spirit of understanding, tolerance and friendship among all people, ethnic, national and religious groups and persons of indigenous origin. Article 29 requires states parties to include in the school curricula the teaching of children's rights with a view to achieve the aims of education enshrined in this article. In this way, children will be informed about other civilisations and about the cultural identity, language and values of ethnic and other minority groups and of indigenous peoples.

As the Committee observes in its General Comment 1 on the aims of education:

> Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of differences, the exploitation of prejudices or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these

> failings is the provision of education which promotes an understanding and appreciation of the values reflected in Article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudices.[15]

In its recommendations, particularly under Articles 29 and 30, the Committee regularly refers to this General Comment and more specifically on, for example, training on inter-ethnic tolerance, not only of students but also of teachers. For instance, in the Concluding Observations for Canada, the Committee recommended that the state party ensure that free quality primary education that is sensitive to the cultural identity of every child is available and accessible to all children with particular attention to aboriginal children, as well as children from other disadvantaged groups and those who need special attention, including in their own language.[16] In this regard, the Committee has also recommended promoting participation of parents and communities, especially ethnic minorities, in school governance to monitor the quality of education.[17] It is important to remember that the Committee is in favour of education that includes minorities – including children of migrant workers – and encourages states parties to promote, and where appropriate to support, active participation of parents and children belonging to minorities. There are indications that such participation contributes to successful completion of education of children belonging to minorities.

Indonesia, Turkey and Thailand made a reservation on Article 29. The Committee, observing that this reservation (and the one on Article 30) may have a negative impact on children belonging to ethnic groups, urged Turkey to withdraw its reservation.[18] While Thailand has withdrawn its reservation and Indonesia suggested that it intends to withdraw its,[19] Turkey has not yet done so.

2.5 Article 30: specific rights of minority groups

As mentioned above, this article is the specific/core provision on the right of children belonging to an ethnic, religious or linguistic minority or who

[15] UN Doc. CRC/GC/2001/1, para. 11.
[16] CRC/C/15/Add. 215, para. 45; see, for similar, recommendations, the Concluding Observations for the Czech Republic, CRC/C/15/Add.201, para. 55
[17] COs CRC/C/15/Add 136 and CRC/C/15/Add 127, on Tajikistan and Kyrgyzstan.
[18] COs on first report, CRC/C/15/Add 152.
[19] See COs on Indonesia's first report, CRC/C/15/Add 25.

are indigenous not to be denied the enjoyment of his or his own culture, or the ability to profess and practice his or her own religion or to use his or her own language. The text of this article is almost exactly the same as that of Article 27 ICCPR, with one rather important difference: it does – in addition to the minorities mentioned – explicitly mention the indigenous child. Given the similarity in the two texts, General Comment 23 (1994) on Article 27 (rights of minorities), of the Human Rights Committee is roughly applicable to children.[20]

It is important to note that indigenous groups are not always a minority group: in Bolivia 71 per cent of the people are indigenous and in Guatemala the figure is 66 per cent (see section 2.6 below). But one should keep in mind that the indigenous peoples are not a homogenous group but are, in fact, composed of various indigenous minorities, each with their own specific cultures/identities. In addition, the statistical majority does not automatically mean that the indigenous peoples have a dominant position in the decision-making processes in society.

The Committee makes, when relevant, reference to recommendations of other Human Rights Treaty bodies. Take, by way of example, para. 59 of the Concluding Observations for Canada:[21] the Committee urges the government to pursue its efforts to address the gap in life chances between Aboriginal and non-Aboriginal children. In this regard, it reiterates in particular the observations and recommendations with respect to land and resource allocations made by United Nations Human Rights Treaty bodies, such as the Human Rights Committee,[22] the Committee on the Elimination of Racial Discrimination[23] and the Committee on Economic, Social and Cultural Rights.[24] A few specific observations in relation to the supervisory practice under Article 30 CRC follow.

2.6 Reservations/declarations to Article 30

Only three countries (France, Oman and Turkey) have made a reservation to Article 30 CRC. France declared that, in the light of Article 2 of the French constitution, Article 30 CRC is not applicable. The provision in Article 2 of the French Constitution that the Republic shall ensure the

[20] See, for the text, UN Doc. HRI/GEN/1/Rev. 8 (8 May 2006), pp. 197–200.
[21] CRC/C/15/Add.215. [22] CCPR/C/79/Add.105, para. 8. [23] A/57/18, para. 330.
[24] E/C.12/1/Add. 31, para. 18.

equality of all citizens before the law without distinction of origin (etc.) cannot and should not ignore the fact that minorities do exist in France. Nor does it mean that Article 2 of the Constitution requires that they have to be denied the right to enjoy their own culture, etc. The Committee has recommended that France withdraw its reservation, because the argument that there is no discrimination on the basis of ethnicity, language or religion cannot be used to deny the existence of such minorities. Not to respect the right to enjoy one's own culture does not necessarily contribute to the development of respect for the child's cultural identity, language and values as required under Article 29(1)(c).

Furthermore, it was recommended that Turkey withdraw its reservation because it recognises only minorities registered under the Treaty of Lausanne 1923 and thus ignores the existence of Kurdish minorities and denies them the rights enshrined in Article 30 CRC. Oman stated that it is not bound by Article 30 as far as it allows a child belonging to a religious minority to profess and practise her/his own religion.

In 2006 the Committee repeated its previous recommendation on withdrawing this reservation.[25] Canada made an interesting statement: when implementing Article 4 CRC, requiring states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRC, Article 30 must be taken into account. This would mean that, when deciding what measures are appropriate to implement the rights of aboriginal children, due regard must be given *not to* deny their rights to enjoy their own culture (etc., Article 30). Accordingly, specific measures must sometimes be taken to ensure the rights enshrined in Article 30. It seems that Canada understands better than France the meaning of Article 30.

2.7 Concluding observations concerning Article 30

The Committee usually devotes some paragraphs to the implementation of Article 30 if, according to state party's report and/or other information, for example from NGOs, considerable minority groups exist in the state

[25] See: for France, Concluding Observations (COs) CRC/C/15/Add 20 and CRC/C/15/Add 240, 30 June 2004, paras. 4, 5, 60 and 61; for Turkey, COs on its first report, CRC/C/15/Add 152, 9 July 2001, paras. 11, 12 and for Oman, COs on its second report, CRC/C/OMN/CO/2, 29 September 2006, paras. 7 and 8.

party. Those paragraphs regularly address other aspects of the implementation of the rights of minority children than those covered by the text of Article 30.

For instance, concerns are expressed about negative attitudes and prejudices among the media, teachers and doctors, about incidents of police brutality, about limited access to education and health care, stigmatisation and persecution by armed forces and the increased risk of abuse and exploitation of children belonging to minority groups. Country-specific recommendations are made, for example, to:

1. Improve protection of children of minority groups and to eliminate the impunity of those who harass these groups and to stimulate a process of reconciliation and confidence building.[26]
2. Initiate educational campaigns addressing negative attitudes towards Roma, in particular, among police and professionals providing health care and education.
3. Develop curriculum resources for all schools including in relation to Roma history and culture in order to promote understanding, tolerance and respect for Roma.[27]
4. Pay attention to the problems of a shift from bilingual education in primary education to a single (national) language education at the secondary level of education. For instance, in Latvia bilingual education will be provided until the end of primary education (ninth grade) but secondary and vocational education will be provided in the Latvian language only, with the exception of subjects related to language, identity and culture of minorities, which can be taught in the minority language. The Committee is concerned that this shift to another language may create difficulties, and recommends that the state party continue to inform children and parents about this shift and to assist children who may experience difficulties and train teachers to ensure that children are not disadvantaged by this change in the language of instruction.[28]
5. To ensure birth registration for all indigenous and minority children and to take measures to prevent statelessness and to preserve their historical and cultural identity.[29] While the preservation of cultural

[26] CRC/C/15/Add 243, 3 November 2004. [27] CRC/C/16/Add 201, 18 March 2003.
[28] See CRC/C/LVA/CO/2, 2 June 2006, paras. 63 and 64.
[29] CRC/C/THA/CO/2, 17 March 2006.

identity is not explicitly mentioned in Article 30, Article 8 is relevant and important in this respect as it enshrines respect for the right of the child to preserve his or her identity, including nationality, name and family relations and the obligation of the state party, in the case of a child illegally deprived of some or all elements of his or her identity, to provide appropriate assistance and protection with a view to speedily re-establishing his or her identity.

It goes beyond the scope of this chapter to discuss the history and meaning of this article.[30] However, it would appear that this article can support and strengthen the full implementation of Article 30. In this regard, note the practice for many years in the second half of the twentieth century, of placing children of indigenous or other minority groups in boarding schools or similar institutions, with the intention to give them an education/upbringing away from their own (cultural) identity, resulting in a deprivation of some or all elements of their identity. See, for example, the Concluding Observations for Australia of October 2005, in which the Committee encourages the state party to continue and strengthen as much as possible its activities for the full implementation of the recommendations of the 1997 HREOC report, 'Bringing them Home' (a report of the Australian Human Rights Commission on the past policies of placing Aboriginal children in alternative settings, foster families or institutions) and to ensure full respect for the rights of Aboriginal and Torres Strait Islander children to their identity, name, culture, language and family relationships.[31] The Concluding Observations to Article 30 confirm the interdependence and indivisibility of children's rights.

2.8 Indigenous children

Most of what has been presented so far is also applicable to children who are indigenous. It is nevertheless important here to pay some specific attention to indigenous children, for at least two reasons. First, the CRC is the only human rights treaty that specifically mentions persons/children who are indigenous. It should be noted that in the other human rights

[30] See, e.g., Geraldine van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff), Ch. 4; and Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1999), pp. 159–69.

[31] CRC/C/15/Add. 26820, October 2005, paras. 31 and 32.

conventions a phrase like 'indigenous minority' is (intentionally?) avoided. One of the reasons may be that in some countries the indigenous peoples are not a minority (e.g. Bolivia, Guatemala). But even then they are entitled to specific attention and special rights.

Secondly, indigenous peoples constitute, despite many definitional difficulties, an identifiable category of an estimated 300 million persons living in around seventy different states. Half of them live in Asia, under different names, and an estimated 32–50 million in Latin America. The CRC Committee felt that it was quite appropriate – also in the light of many actions of indigenous NGO groups and others – to pay more focused attention to the rights of indigenous children.

Of course, this does not mean that children belonging to (other) ethnic, religious or linguistic minorities do not deserve special attention. The activities of the Committee regarding indigenous children – as briefly described below – can serve as an example for similar activities for Roma children, for instance, and/or for national minorities/migrant children. Two particular activities of the Committee in relation to indigenous children should be noted and deserve further explanation.

First, reference should be made to the organisation of a Day of General Discussion on the Rights of Indigenous Children in 2003. These annual events are meant to raise awareness and initiate, support and promote discussions and consequent actions in order to strengthen the implementation of the CRC.[32]

The dedication of this particular Day of General Discussion to the rights of indigenous children signals the special importance attributed to this theme. The immediate result of this event was a set of recommendations for states parties, primarily, but also for NGOs, UN agencies and others.

The Day of General Discussion was organised at the request of the Permanent Forum on Indigenous Issues. In its recommendations, the Committee makes reference not only to the work of the Permanent Forum (the first two sessions of the Forum in 2002 and 2003 were devoted to indigenous children) but also to the work of the Special Rapporteur on the

[32] Other examples of Days of General Discussion are on violence against children and a report submitted to the GA of the UN in October 2006; on implementing children's rights in early childhood (2004); on children without parental care (2005); and on child participation (2006).

Situation of the Human Rights and Fundamental Freedoms of Indigenous People, and the Working Group on Indigenous Populations.[33]

The Committee calls on states parties, UN specialised agencies, funds and programmes, the World Bank and regional development banks, and civil society to adopt a broader, rights-based approach to indigenous children, based on the Convention and other relevant international standards – such as the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries – and encourages the use of community-based interventions in order to ensure the greatest possible sensitivity to the cultural specificity of the affected community. The Committee also acknowledges that, as stated in the Human Rights Committee's General Comment 23 on the rights of minorities (1994) and in ILO Convention 169, the enjoyment of the rights under Article 30, in particular the right to enjoy one's culture, may consist of a way of life which is closely associated with the territory and use of its resources. This may be particularly true for members of indigenous communities. The recommendations further deal with issues like the importance of systematic collection of disaggregated data (unfortunately lacking in most states with indigenous groups), child participation, non-discrimination, the right to identity (including the need for free and effectively accessible birth registration, allowing indigenous parents to give their children a name of their own choosing, and respecting the right of the child to preserve her/his identity), family environment and the need to pay special attention in case alternative care is needed (e.g. foster care/adoption) to continuity in the child's upbringing taking into account the child's religious, cultural, ethnic and linguistic background (see Article 20(3) CRC), health, education and the need for more international cooperation. It should be highlighted that the Committee recommends involving education, for example to review and revise school curricula and textbooks, to develop respect among all children for indigenous cultural identity, history, languages and values, to implement indigenous children's right to be taught to read and write in their own indigenous language, and to increase the number of teachers from indigenous communities or who speak indigenous languages.

[33] It is beyond the scope of this chapter to elaborate in more detail on these and other activities. See, e.g., S. James Anaya, *Indigenous Peoples in International Law*, 2nd edn (Oxford: Oxford University Press, 2004).

This kind of broad, rights-based approach is also reflected in the Concluding Observations of states parties with considerable groups of indigenous peoples (e.g. Indians, Aboriginals, Maori, etc.), such as Australia, Bolivia, Brazil, Canada and Ecuador, to mention but a few.

Secondly, it should be noted that a General Comment on the Rights of Indigenous Children is under preparation, which uses the recommendations of the Day of Discussion as an important starting point. It will cover all the areas of the Convention using the structure of the eight clusters (of Articles of the CRC) that the Committee recommends states parties use in their reporting. The observations and recommendations regarding each of these clusters are, of course, focussed on, and specific to, the situation of indigenous children.[34]

The drafting of the General Comment is a participatory process, meaning that as far as possible (without delaying the process too much), consultations/discussions will be organised with indigenous NGO's, children, community leaders and experts. The Committee hopes that the drafting of this General Comment can be completed soon. It is expected to become an important instrument for furthering the implementation of the rights of indigenous children and an inspiration for other minority groups.

3 Some final remarks

The description of the various monitoring activities of the CRC Committee indicates that some considerable attention – from various angles – is being paid to the rights of children belonging to minority groups or who are indigenous. It is also clear that it is a work in progress and that further actions are needed to develop a systematic, comprehensive approach to the protection of the rights of these children.

Most promising in this respect are the monitoring activities of the CRC Committee regarding the rights of indigenous children, which are quite unique within the Human Rights Treaty bodies. This process can and should be strengthened via, *inter alia*, close cooperation with other

[34] The eight clusters are: General Measures of Implementation (see in this regard also General Comment 5 (2003)); Definition of the Child, General Principles (Articles 2, 3, 6, 12); Civil Rights and Freedoms (Articles 7, 8, 12–17, 37a); Family; Environment; Health and Welfare; Education; and Special Protection.

bodies/agencies in this field, such as the Permanent Forum, the UN Working Group on Indigenous Populations, the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples and other Human Rights Treaty bodies.

This process should set an example and encourage the undertaking of similar actions for other minority groups, such as Roma and Travellers/Gypsies in Europe and elsewhere.

11

UNESCO's Convention Against Discrimination in Education

FONS COOMANS

Introduction

The United Nations Educational, Scientific and Cultural Organisation ('UNESCO') is well known for its activities that promote the right to education, the freedom of expression and the cultural rights of individuals and groups. Member states of UNESCO have also adopted Conventions and recommendations that aim at the promotion and protection of the human rights that fall within the organisation's mandate. One of these Conventions deals with the right to education. The Convention Against Discrimination in Education ('CADE') was adopted in 1960.[1] It is rather obscure, owing to its relatively small number of states parties, its weak supervisory system and the difficulty of getting access to Convention documents. According to its preamble, the main purpose of the Convention is to proscribe any form of discrimination in education and to promote equality of opportunity and treatment for all in education. In addition to provisions that lay down in detail general obligations of states parties to realise the purposes of the treaty, the Convention recognises the right of members of national minorities to carry on their own educational activities.[2] After discussing the features of the Convention and its monitoring procedure, this chapter will analyse the meaning of the minority rights provision and ask whether that provision has been given substance by the Committee on Conventions and Recommendations. This is the body that monitors implementation of the Convention's provisions by UNESCO member states. From the perspective of synergy between

[1] Convention Against Discrimination in Education, Paris, 14 December 1960, in force 22 May 1962, 429 UNTS 93. Number of states parties on 1 January 2007: 93.

[2] Article 5(1)(c).

various interpretations of minority rights issues in international human rights law, one of the main issues dealt with in this chapter is whether the supervisory committee has clarified and developed the standards on minority rights education that are part of CADE.

1 UNESCO's mandate in the field of human rights

UNESCO is a specialised agency of the United Nations ('UN'). Its main purpose is to contribute to peace and security by promoting collaboration between nations through education, science and culture in order to further universal respect for justice, the rule of law, human rights and fundamental freedoms without distinction as to race, sex, language or religion.[3] This reference to human rights and fundamental freedoms means that the promotion and protection of these rights plays a key role in the activities of the organisation. UNESCO's actions in *promoting* human rights focus on advancing mutual knowledge and understanding of peoples, giving an impetus to popular education and the spread of culture and maintaining, increasing and diffusing knowledge and information.[4] To this end, UNESCO sets up programmes, conducts studies, organises conferences and publishes books and brochures. The *protection* of human rights deals with the adoption of international standards and the establishment of supervisory mechanisms and procedures relating to human rights that fall within UNESCO's field of competence. Since 1945, when UNESCO was established, quite a number of Conventions, declarations and recommendations have been adopted which deal with the protection of rights relating to education, science and culture.[5] UNESCO's General Conference, which meets on a biannual basis, is competent to adopt recommendations and international Conventions. The General Conference is composed of representatives of states that are members of UNESCO. Each member state is under an obligation to submit standard-setting instruments to its competent authorities within a period of one year from the close of the session of the General Conference at which they

[3] UNESCO Constitution, Article I(1), 4 UNTS 275. [4] UNESCO Constitution, Article I(2).

[5] See, for an overview of standard-setting instruments, UNESCO's website: www.unesco.org. See also Stephen P. Marks, 'Education, Science, Culture and Information', in Oscar Schachter and Christopher C. Joyner (eds.), *United Nations Legal Order* (Cambridge: Cambridge University Press, 1995), vol. II, pp. 577–630.

were adopted.[6] Member states shall report to the General Conference on the action taken to implement Conventions and recommendations at the domestic level.[7] Consequently, even states that have not ratified a specific convention are required to report by virtue of the fact that a recommendation on the same subject matter has been adopted.

2 The Convention Against Discrimination in Education (CADE)

2.1 The general provisions

The Convention Against Discrimination in Education was the outcome of a process of standard-setting at the international level which was initiated by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The Sub-Commission entrusted one of its members, Charles D. Ammoun, with the task of conducting a study with a worldwide scope on *de jure* and *de facto* forms of discrimination in education.[8] In his report, Mr Ammoun made a recommendation to draft a separate international instrument. In his view, this was necessary because such an instrument would show the determination of governments to combat discrimination in education, pending the drafting of the two UN covenants on human rights. While governments were reluctant to agree on treaties that deal with more general human rights obligations, which cover a large variety of subjects and provisions, they would be more willing to adopt a special convention on discrimination in education.[9] In Ammoun's view, *de facto* discrimination in the area of education mainly entails inequality of opportunity due to social, economic, political and historical circumstances. This form of discrimination was especially widespread in the field of education.[10] The UN Commission on Human Rights invited UNESCO to prepare an 'appropriate international instrument' to deal with the phenomenon of discrimination in education.[11]

[6] UNESCO Constitution, Article IVB(4).
[7] UNESCO Constitution, Article IVB(6) and Article VIII.
[8] Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Resolution B (VI), 1954 (Resolution on a Study of Discrimination in Education).
[9] Charles D. Ammoun, 'Study of Discrimination in Education', UN Doc. E/CN.4/Sub.2/181/Rev.1, UN Sales No. 1957 XIV.3, pp. 154–9.
[10] Ammoun, 'Study', pp. 4–5. [11] UN Doc. E/CN.4//740, Res. B. 47 (1958).

On 14 December 1960, the General Conference of UNESCO adopted the CADE.[12]

The object and purpose of CADE is to prohibit and combat forms and instances of discrimination in education and foster equality of opportunity and treatment for all in education.[13] When implementing this obligation, states must respect 'the diversity of national educational systems'.[14] According to Pierre Juvigny, who acted as a Rapporteur during the drafting process: 'because they are universal in scope, the Convention and the Recommendation are applicable to situations of varying character, form and gravity, from one country to another; this diversity is the token and the condition of their universality.'[15] This means that the Convention provides for the recognition of the specific characteristics of educational systems and situations of individual countries and differences between them.

The key provision of the Convention is Article 1(1). This article provides for a definition of the notion of discrimination in matters of education. It reads as follows:

> 1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
>
> (a) Of depriving any person or group of persons of access to education of any type or at any level;
> (b) Of limiting any person or group of persons to education of an inferior standard;

[12] On the same day, the General Conference adopted a Recommendation Against Discrimination in Education. Apart from the inherent differences in wording and legal scope, the recommendation is identical in content with the Convention. Some member states preferred a recommendation, because they had difficulties in ratifying the Convention due to their federal structure. On the legal history of the Convention, see W. McKean, *Equality and Discrimination under International Law* (Oxford: Oxford University Press, 1983), pp. 128–35; Hanna Saba, 'La Convention et la Recommendation concernant la lutte contre la discrimination dans le domaine de l'enseignement' (1960) 6 *Annuaire français de droit international* 646–52; P. Juvigny, *The Fight Against Discrimination in Education – Towards Equality in Education* (Paris: UNESCO, 1963), pp. 9–14; Y. Daudet and P. M. Eisemann, *Commentary on the Convention Against Discrimination in Education* (Paris: UNESCO, 2005), pp. 1–3.

[13] See the Preamble of CADE, para. 4. [14] *Ibid.*

[15] Juvigny, *The Fight Against Discrimination in Education*, p. 15.

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons;[16] or
(d) Of inflicting on any person or groups of persons conditions which are incompatible with the dignity of man.

Article 1(1) aims at prohibiting and eliminating discrimination in education and applies both to intentions (in law and policy) and facts (practice). In addition, it lists four instances ((a)–(d)) of discriminatory treatment in education. These may be illustrated by the following examples. In Iran the members of the Bahá'í minority have been denied access to institutions of public higher education and an institute for higher education established by the Bahá'í themselves has been closed.[17] Children belonging to the Roma minority in several central and eastern European countries have been channelled to schools for the mentally retarded, while there were no objective indications that these children were mentally impaired. Education offered to them was clearly of a standard that was inferior and not adjusted to their capabilities, needs and culture.[18] An example of maintaining separate educational systems for persons belonging to specific groups was the system of apartheid education in South Africa. Finally, corporal punishment in schools as a method to maintain school discipline has been characterised as inconsistent with one of the key principles of international human rights law, that is the dignity of man.[19]

Article 1(2) further explains that the term 'education' refers to all types and levels of education, and includes access to education, the standard and equality of education, and the conditions under which it is given. In addition, Article 3 lays down a number of obligations for states parties

[16] Article 2 deals with situations that do not constitute discrimination within the meaning of Article 1(1). These include: separate educational institutions for boys and girls; separate educational institutions established for religious and linguistic reasons; private educational institutions.

[17] See Bahá'í International Community, 'Closed Doors – Iran's Campaign to Deny Higher Education to Bahá'ís', at http://denial.bahai.org.

[18] For a background study about this problem see the report by the European Roma Rights Centre, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe* (Budapest: European Roma Rights Centre, 2005), available at www.errc.org. See also *D.H. and others v Czech Republic* (Application. No. 57325/00), ECtHR, 7 February 2006 and 13 November 2007 (Grand Chamber).

[19] UN Committee on Economic, Social and Cultural Rights, General Comment 13 on the Right to Education, UN Doc. E/C.12/1999/10, para. 41.

that emanate from the general obligation to eliminate and prevent discrimination. For example, a state party must ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions (Article 3(b)). Article 4 lists a number of steps to be taken by the state that contribute to promoting equality of opportunity and treatment in the matter of education. These measures aim at achieving substantive equality.

2.2 The minority provision

Article 5 contains a provision on the educational rights of minorities. It reads as follows:

> (1)(c) It is essential to recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of the State, the use or the teaching of their own language, provided however:
>
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
> (iii) That attendance at such schools is optional.[20]

This provision lays down the right of members of national minorities to establish and manage their own schools. It is the consequence of the application in law and in practice of the principle of non-discrimination in matters of education to members of national minorities. It is noteworthy that Article 5(1)(c) is the only CADE provision in which there is an explicit reference to the recognition of a right. The exercise of this right is conditional: it belongs only to members of national minorities, that is minorities who have always been regarded as such by states. Immigrants should not be given the same right, because it is neither desirable nor possible to give immigrant minorities the right to open schools in which

[20] To this Article 5(2) adds: 'The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.'

teaching would be given in their mother tongue.[21] Furthermore, the enjoyment of the educational rights of such minorities is limited by observance of the three conditions laid down in the article. First, there should be safeguards against minority education isolating itself from the culture and language of the community as a whole. In other words, national sovereignty should not be prejudiced. Secondly, certain quality standards for minority education have to be met. Thirdly, attendance at such schools should be optional.

There are different interpretations of the meaning of the clause 'depending on the educational policy of the State'. This clause was finally adopted as an alternative for another clause which conditioned the enjoyment of this minority right to 'the national policy of the State'. The relevant issue is whether the former clause limits or, alternatively, enlarges the educational rights of minorities. Daudet and Eisemann argue that:

> the insertion of the term 'educational' reflects the [drafting] Committee's fear of giving States too much freedom in the application of this provision of the Convention and of the risk that might consequently arise of national policy being overused as an argument to lessen or weaken the rights that the article grants to national minorities.[22]

On the other hand, Tabory is of the view that: 'once the entire right to ''the use or the teaching of their own language'' is made contingent upon a State's educational policy, it seems to be stripped of any objective criteria or contents.'[23] In the present author's view, the precise interpretation given to the said clause is less important, because the exercise of the educational rights of national minorities is already considerably limited by the three conditions that are part of the article, thus giving ample discretion to a government of a state party to regulate minority education that is thought to be undesirable for political reasons.[24]

[21] Report of the Special Committee of Governmental Experts on the Preparation of a Draft International Convention and a Draft Recommendation on the Various Aspects of Discrimination in Education (UNESCO House, 13–29 June 1960), UN Doc. E/CN.4/Sub.2/210, Annex II, 5 January 1961, para. 52. It should be added that the drafters concluded that, as the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities had been unable at that time to adopt a definition of minorities, they preferred the term 'national minorities' to 'ethnic or linguistic minorities'. See UN Doc. E/CN.4/Sub.2/210, Annex II, para. 52.

[22] Daudet and Eisemann, *Commentary on the Convention*, p. 31.

[23] M. Tabory, 'Language rights as human rights' (1980) 10 *Israel Yearbook on Human Rights* 184.

[24] In Juvigny's opinion, the three conditions have a different meaning: 'these are, then, three aspects of the problem which can only be treated with a great deal of nicety, reflecting the

Article 5(1)(c) contains the so-called freedom dimension of the right to education: the free choice of education by parents and the establishment of schools outside the public system of education by private bodies. The nature of state obligations resulting from this freedom is negative: the state should abstain from interference in the enjoyment of this right. Seen from this perspective, Article 5(1)(c) only implies a safeguard against discrimination against minorities in educational matters. It does not include the idea of promoting equality of opportunity and treatment for all in education through the taking of differential measures. In other words, the said provision does not imply positive obligations.[25] The idea of *de facto* equality, in addition to *de jure* equality, to be guaranteed through differential treatment was an important feature of the treaties for the protection of national minorities before the Second World War. This idea has been affirmed in the case law of the Permanent Court of International Justice when it dealt, for example, with the abolition of schools for the Greek minority by the Albanian authorities.[26] Article 5(1)(c), however, does not embody the idea of special educational measures for the benefit of the minorities.[27] Consequently, it is a provision with a rather limited content and scope, compared to more recent provisions on educational rights of persons belonging to minorities, such as laid down, for example, in the Framework Convention for the Protection of National Minorities of the Council of Europe, or the European Charter for Regional and Minority Languages.[28]

infinite variety of laws and practices in the world.' Juvigny, *The Fight Against Discrimination in Education*, pp. 19–20.

[25] This is also clear from Article 5(2), quoted in footnote 20 above and Article 3(d). Article 3(d) reads: 'States Parties undertake not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group.'

[26] See the Advisory Opinion on Minority Schools in Albania, PCIJ (1935), Series A/B, No. 64.

[27] McKean, *Equality and Discrimination Under International Law*, p. 135.

[28] Compare Articles 12–14 of the Framework Convention and Article 8 European Charter for Regional and Minority Languages.

There is one other Convention adopted under the auspices of UNESCO that contains a few references to (educational) rights of minorities. This is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005, which entered in force on 18 March 2007. Text available at: www.unesco.org/Legal Instruments.

The Preamble of this Convention recalls that linguistic diversity is a fundamental element of cultural diversity, and reaffirms the fundamental role that education plays in the protection and promotion of cultural expressions.

In addition, Principle 3 of Article 2 provides that the protection and promotion of the diversity of cultural expressions presupposes the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

Article 2(b) CADE may also be relevant for the protection of educational minority rights, because it provides an option for a state to establish and maintain, for religious or linguistic reasons, separate education systems which conform to the wishes of a pupil's parents. The difference with Article 5(1)(c) is that the latter deals with schools established by the minorities themselves, while Article 2(b) refers to separate education systems that are not necessarily private.[29] It could be argued that, in principle, minority schools that operate on the basis of Article 5(1)(c) would provide for greater autonomy than those established by the state on the basis of Article 2(b).

3 CADE's supervisory mechanism

The monitoring of states' compliance with CADE's obligations is subject only to a state reporting procedure; there is no complaints procedure under this Convention. According to Article VIII of UNESCO's Constitution, each member state shall submit periodic reports on the action taken upon recommendations and Conventions adopted within the framework of the organisation. The General Conference shall receive and consider these reports (Article IV(6) Constitution). In addition, Article 7 CADE lays down the reporting obligation for states parties to this Convention in more detail. It reads:

> The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this convention, including that taken for the formulation and the development of the national policy defined in Article 4 as well as the results achieved and the obstacles encountered in the application of that policy.

Finally, Article 7(1)(a) reads: 'Parties shall endeavour to create in their territory an environment which encourages individuals and social groups: to create, produce, disseminate and distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women, as well as various social groups, including persons belonging to minorities and indigenous groups.'

From these provisions a right for persons belonging to minorities to have access to their own educational facilities and programmes could be derived.

[29] UN Doc. E/CN.4/Sub.2/210, Annex II, para. 40.

The task of examining the reports of states is entrusted to the Committee on Conventions and Recommendations ('CCR'), which is a permanent subsidiary body of the Executive Board.[30] The CCR is composed of thirty members, elected by the Executive Board, who serve as representatives of the governments of states that are members of the Executive Board. States have to report on a periodic basis. Between 1968 and 2005, six periodic consultations of member states have been organised on the implementation of CADE and the related recommendation. Five consultations used a questionnaire for structuring state reports, while the sixth consultation invited states to report on the educational situation of four particular groups: women and girls; persons belonging to minorities; refugees; and indigenous people.[31] UNESCO's Secretariat prepares an analytical summary of the reports received for consideration by the CCR. Next, the report of the CCR will be sent to the General Conference, together with the comments made by the Executive Board.[32]

The CCR does not examine state reports on a country-by-country basis and it does not engage in a written or oral exchange of views with the state party about progress made and obstacles encountered in the process of implementing the provisions of CADE or the recommendation. Neither does the CCR adopt conclusions on individual countries. Its general conclusions on the range of state reports submitted are rather poor. They do not assess whether a state has complied with its obligations. They merely contain broadly formulated general observations from which no specific recommendations at country level can be derived. A number of years ago, several members of the CCR pointed out that:

> the Committee did no more than examine the synoptic documents drawn up by the Secretariat on the periodic reports, without scrutinizing carefully

[30] The reporting procedure is governed by Part VI of the Rules of Procedure of the General Conference; see Article 18 of the Rules of Procedure, UNESCO Doc. 32 C/Resolution 77 (2003). For the mandate of the CCR, see UNESCO Doc. 98 EX/Decision 9.6 (II). The CCR is also charged with the examination of communications relating to cases and questions concerning the exercise of human rights in UNESCO's field of competence. This is a human rights complaints procedure whose legal basis lies in a decision of UNESCO's Executive Board, see 104 EX/Decision 3.3 (1978). On this procedure, see David Weissbrodt and Rose Farley, 'The UNESCO Human Rights Procedure: an evaluation' (1994) 16 *Human Rights Quarterly* 391–415 and Stephen P. Marks, 'The complaint procedure of the United Nations Educational, Scientific and Cultural Organization', in Hurst Hannum (ed.), *Guide to International Human Rights Practice*, 4th edn (Ardsley, NY: Transnational Publishers, 2004), pp. 107–23.

[31] Daudet and Eisemann, *Commentary on the Convention*, pp. 34–42.

[32] Article 18(2) of the Rules of Procedure of the General Conference.

> the reports submitted by the Member States or engaging in a dialogue with the countries concerned, as did other United Nations bodies, such as the United Nations Committee on Economic, Social and Cultural Rights (CESCR).[33]

These Committee members wondered whether the CCR was capable of carrying out its mandate of considering all questions relating to the implementation of UNESCO's standard-setting instruments, including member states' periodic reports on the implementation of Conventions and recommendations.[34] Another weakness of CADE's supervisory procedure is the relatively small number of member states that comply with their reporting obligation. For example, during the sixth consultation less than one third of member states submitted a report and 65 per cent of states parties to CADE did not fulfil their reporting obligation under Article 7.[35]

4 CCR's examination of minority issues

Over the years, six consultations of states on the implementation of CADE's provisions have taken place and a seventh one was concluded in August 2007. The documents that relate to these consultations deal with minority issues only to a very limited extent.[36] In all cases the Executive Board has limited itself to providing an analytical summary of the state reports received. The reports do not contain an evaluation or critical assessment about whether or not states comply with CADE's standards. They are mainly of a descriptive nature. A few examples may illustrate this. In the report on the first consultation CCR observed:

> The replies received demonstrate that States have varying ideas about the extent of their obligations concerning the educational activities of minorities. Some countries are content simply to provide for the mother tongue itself to be taught, but most of them provide for it to be used as the regular vehicle of instruction when a given number of pupils from minority groups requires it (15 in Hungary, 40 in India).[37]

[33] UNESCO Doc. 162 EX/53 Rev. (2001), para. 27. [34] *Ibid.*
[35] UNESCO Doc. 30 C/29 (1999), para. 3 and Doc. 156 EX/21 (1999), para. 7 and Appendix 2.
[36] See UNESCO Docs. 15 C/11 (1968, first consultation); 17 C/15 (1972, second consultation); 20 C/40 and 21 C/27 (1978 and 1980, third consultation); 23 C/72 (1985, fourth consultation); 26 C/31 (1991, fifth consultation), 156 EX/21 and 30 C/29 (1999, sixth consultation). The present contribution does not deal with the seventh consultation. See further Doc. 177 EX/36.
[37] UNESCO Doc. 15 C/11, para. 195.

In the fourth consultation no attention at all was paid to the educational rights of minorities: the questionnaire that was meant to structure state reports did not contain a reference to Article 5. It is therefore quite logical that the report of CCR said nothing about minorities.[38] In the report on the fifth consultation it was said that:

> It is clear that education of different linguistic or ethnic groups is a major concern of many educational systems. Yet, just under a third of the 71 responding States take up this issue. Often minorities experience themselves as disadvantaged groups for example in Burkina Faso: while minorities in the country may be in need of specific education provisions, it is felt that their problems cannot be solved by using the means at the disposal of the existing education system.[39]

As already mentioned above, it was decided that the sixth consultation should focus, *inter alia*, on the basic education of persons belonging to minorities. According to the guidelines drafted for this consultation, states should provide information on (legislative) measures and programmes 'for avoiding situations which might lead to unintentional discrimination or unequal treatment, or to compensate for disadvantages a person suffers because his or her unfavourable starting or living conditions with regard to equivalent access to basic education with equal standard and equality of educational opportunity and treatment'.[40] In addition, reports should contain information on specific measures for persons belonging to national or ethnic, religious or linguistic minorities, in particular measures and arrangements for using their mother tongue and taking into account their culture, also in the curriculum of the

[38] UNESCO Doc. 23 C/72 and Annex A.

[39] UNESCO Doc. 26 C/31, paras. 33, 34. The questionnaire for this consultation contained the following section on Article 5(1)(c):

> '8. To what extent does your Government give effect to the rights of members of national minorities to carry on their own educational activities, including the maintenance of schools?
> 8.1 Are languages of national minorities used or taught in such educational institutions?
> 8.2 Is the standard of education of such activities equivalent to the general standards laid down or approved by the competent authorities?
> 8.3 Is participation in such activities or attendance at such schools optional?'
>
> The format of this question is a rather closed one. It does not invite reports about obstacles in law and in fact that impede equal opportunity for members of minorities in matters of education.

[40] UNESCO Doc. 147 EX/23, Annex I, para. A.

majority. Finally, an evaluation of the results of the measures taken with statistical data where available, an assessment of the most effective specific educational measures in the light of Article 5(1)(c) and measures planned should be included.[41] The report by the CCR presented an overview and compilation of governmental measures and programmes for using the mother tongue of minorities and taking account of their culture in the curriculum. Some countries reported that they did not have minorities on their territory. The majority of countries said that members of minorities enjoyed equal rights with the majority of the population in all sectors of society. They therefore concluded that no discrimination against minorities in educational matters existed.[42] Many states with a large multicultural population indicated in their reports that they had developed special governmental programmes promoting equality of opportunity and treatment of persons belonging to minorities, including the creation of special funds and necessary social and cultural awareness programmes which are reflected in school curricula. Examples include New Zealand and Portugal.[43] One obstacle identified was that, in the development of the networks for mother tongue teaching, resource constraints existed in terms of the availability of qualified teachers and curriculum developers from minority groups. Other obstacles related to the fact that commercial publishers have no incentive to develop teaching materials because of the limited market. In addition, the formal criterion for the establishment of a minority school (minimum number of pupils) is not always met by a small minority.[44] When this report was discussed by UNESCO's General Conference, some CCR members emphasised the 'especially serious situation' regarding the right of persons belonging to minorities to education in their own language.[45] However, the report of the CCR does not contain any pointers to this conclusion.

In 2004 the Executive Board took the initiative to organise a seventh consultation of member states which should cover a six-year period (2000–05).[46] In 2003 the CCR had considered that there was a need to promote wider acceptance and effective application of UNESCO's standard-setting instruments. This proposal was endorsed by the Executive Board.[47] Also in 2003, UNESCO adopted a Strategy on Human Rights which sets as

[41] *Ibid.*, para. B. [42] UNESCO Doc. 156 EX/21, para. 29. [43] *Ibid.*, para. 31.
[44] *Ibid.*, para. 33. [45] UNESCO Doc. 30 C/29, para. 6. [46] UNESCO Doc. 170 EX/16.
[47] UNESCO Doc. 165 EX/Decision 6.2 and Doc. 171 EX/Decision 28.

one of its objectives to rationalise and increase the efficiency of UNESCO's reporting and monitoring procedures related to human rights within its field of competence.[48] In addition, UNESCO's Medium-Term Strategy 2002–7 stipulates that:

> particular emphasis will be placed on ensuring that education becomes truly inclusive, in particular by effectively reaching the unreached – especially the poor, women and girls, rural populations, minorities, refugees and countries or populations victims of disasters and people with special needs.[49]

The seventh consultation was launched in September 2005. Member states were asked to submit a report on the implementation of the CADE or the recommendation by September 2006. According to the revised guidelines for this consultation, states were allowed to refer in their reports to relevant information already submitted to UN treaty monitoring bodies, such as the UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination. The guidelines emphasise the role of CADE as a key pillar in the worldwide Education For All ('EFA') process, for example by requiring states to indicate to what extent members of vulnerable groups are enabled to enjoy the right to education as part of the EFA process.[50] The revised guidelines also found inspiration in the guidelines for the drafting of state reports under the Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination.[51] The revised guidelines for Article 5(1)(c) are as follows:

> How are the rights for national minorities protected for carrying out their own educational activities in accordance with Article 5(1)(c) of the Convention/Recommendation? Please describe the legal and policy framework relating to the educational standards in educational institutions run by minorities, as provided for in this Article. Information should cover the language facilities, such as the availability of teaching in the mother tongue of the students, use of teaching of languages in education policy, etc.[52]

[48] UNESCO Strategy on Human Rights, adopted by the General Conference at its thirty-second session (2003), para. 36.
[49] UNESCO's Medium-Term Strategy 2002-2007, UNESCO Doc. 31 C/4, para. 62.
[50] See UNESCO Doc. 171 EX/22, Annex I, para. 11 and Doc. 171 EX/61, para. 27.
[51] These guidelines are contained in UN Doc. HRI/GEN/2/Rev.1 (2001).
[52] UNESCO Doc. 171 EX/22, Annex I, para. 31.

This guideline appears to be formulated in a more open way than previous ones, inviting states to give a complete overview of the framework of educational facilities for minorities. In addition, the general part of the guidelines invite states to report about the legal norms, as well as the actual situation in a country, the difficulties encountered, affirmative action and positive measures taken and the effects of such measures, illustrated by disaggregated data on educational opportunities for particular social groups.[53]

5 An assessment of CCR's examination of minority issues

The question may be raised whether CCR's practice and procedure for studying state reports are satisfactory from the perspective of contributing to a creative interpretation of the minority provision in CADE. It should be recalled that CCR is not composed of independent experts, but of representatives of governments. Its composition is thus completely different from the UN Human Rights Treaty bodies. Once a state report has been submitted, states are no longer involved in the process of examining the reports. State reports are not published as individual documents; only an analytical summary of the reports drafted by UNESCO's Secretariat is available. This summary is mainly of a descriptive nature. There is little attention to obstacles encountered by states. It is not known whether states, in their reports, indicate the obstacles in law and in fact that have hampered implementation of CADE's obligations. The consideration of the analytical summary by the CCR does not end with the adoption of conclusions or recommendations to states, but with a report to the Executive Board and the General Conference that is framed in a rather general wording. Perhaps this is also due to the fact that members of CCR are not, per se, experts in the field of the right to education or human rights in general. It is therefore not very likely that an in-depth and independent

[53] *Ibid.*, paras. 8–17. On the sidelines of the thirty-third session of UNESCO's General Conference, on 15 October 2005, an informal meeting of states parties to CADE was organised in order to make these states more aware of the significance of the reports and the methodology for their preparation. A number of documents were issued as background materials for this meeting. One document discussed the methodology for the preparation of reports on the implementation of the Convention and the Recommendation against Discrimination in Education (1960) by Eibe Riedel, Member of the UN Committee on Economic, Social and Cultural Rights, UNESCO Doc. ED-2005/WS/41 (on file).

examination of reports will occur. However, independence of its members is crucial for the credibility and effectiveness of a monitoring body.[54] Moreover, the procedure for dealing with state reports is one-sided in the sense that no public dialogue between the CCR and states takes place. Tomuschat has rightly observed that examination of state reports without representatives of governments being present is largely futile, because there is no one to listen to the views of Committee members and no one to respond. Consequently, it is not effective.[55]

As for issues relating to the educational rights of minorities, the CCR failed to comment on states' performance and practices in this particular field. It also failed to interpret and develop the meaning of Article 5(1)(c). This is due to the inherent features of CADE's reporting procedure in terms of the mandate, composition and working methods of the monitoring body. The Committee's record in dealing with minority issues is very poor. For example, the CCR did not refer to other international instruments that deal with the (educational) rights of minorities, such as Article 27, International Covenant on Civil and Political Rights, or Article 13 of the International Covenant on Economic, Social and Cultural Rights.[56] It did not adopt conclusions on the implementation or lack of implementation of Article 5(1)(c). Consequently, the conclusion should be that

[54] I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights – Practice and Procedures of the Human Rights Committee* (Antwerp: Intersentia, 1999), p. 52.

[55] C. Tomuschat, *Human Rights Between Idealism and Realism* (Oxford: Oxford University Press, 2003), pp. 142–3.

[56] In 2002 a Joint Expert Group of UNESCO and the UN Committee on Economic, Social and Cultural Rights was established, reflecting the importance of developing a coherent structure for monitoring the right to education. This Expert Group is composed of two representatives of the CCR and two representatives of the UN Committee. In 2003 this group held its first (annual) session. Its terms of reference are:

(a) to identify practical suggestions for strengthening the growing collaboration between the CCR and the UNCESCR for monitoring and promoting the right to education in all its dimensions;
(b) to suggest specific measures for cooperative action by the two bodies with a view to imparting synergy to the follow-up to the Dakar Framework for Action within the United Nations system;
(c) to consider the possibilities for reducing the reporting burden on states in relation to the right to education and identify ways in which arrangements could be both streamlined and made more effective;
(d) to advise on right to education indicators.

So far, this Expert Group has not dealt with the educational rights of minorities. See UNESCO Docs. 162 EX/53 Rev., 171 EX/INF.17, 172 EX/25, 177 EX/37.

from the perspective of the main theme of the present volume, no synergy in the interpretation of minority rights in the area of education was found in the activities of UNESCO's CCR.

In addition, the work of the CCR is hardly known in human rights circles and states appear to give little priority to their reporting obligations under CADE if one looks at the number of states that submitted a report during the sixth consultation. The guidelines for the seventh consultation seem to be a bit more promising. However, its potential impact will probably still be limited because of the inherent deficiencies of the monitoring procedure itself. Taking into account the fact that the CCR started its monitoring role in the 1960s, the conclusion is justified that its work in monitoring implementation of the educational rights of minorities under Article 5(1)(c) CADE is still inadequate after all these years.

12

A patchwork of 'successful' and 'missed' synergies in the jurisprudence of the ECHR

KRISTIN HENRARD[1]

Introduction

In line with the theme of a book concerning synergies in minority protection, this chapter sets out to analyse the strands of the European Court of Human Rights jurisprudence which might enable the identification of synergies with developments under other instruments. In the first part of the chapter, the jurisprudential developments in relation to the synergy topics identified elsewhere will be evaluated,[2] more specifically an increasing attention to the principle of substantive equality (in relation to minorities), to the participatory rights of members of minorities, as well as to the need for minority language rights and educational rights, while exhibiting extra attention to the particularly vulnerable position of the Roma (Gypsies).

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[2] See Kristin Henrard, 'An ever increasing synergy towards a stronger level of minority protection between minority specific and non specific instruments' (2003/4) 3 *European Yearbook of Minority Issues*, pp. 15–41. It is worth stressing that one important development in terms of minority-specific instruments is an unlikely candidate for a synergy. The acceptance of the minority status of 'new' or immigrant minorities cannot really emerge because of the fact that the general human rights Conventions simply do not have a minority focus and hence will not refer to old versus new minorities. Nevertheless, it should be noted that the trend towards acknowledging new minorities as minorities (visible in the practice of the Advisory Committee of the FCNM) has a counterpart in the trend in the EU towards enhancing the rights of long-term resident third country nationals (bringing them closer to the status of 'citizens of the EU'); see, *inter alia*, Council Directive 2003/109/EC, 25 November 2003, concerning the status of TCN who are long-term residents. Similarly, the ECHR has ruled in *Sisojeva and others v Latvia* (16 June 2005) that when persons have lived almost their entire life in a country, and hence have developed personal, social and economic ties there that are strong enough for them to be regarded as sufficiently integrated, only particularly serious reasons should justify the refusal to regularise the applicants' residential status.

The second part of the chapter will then go on to discuss case law relevant to the broad underlying theme of the above-mentioned synergies, namely special attention for the minority phenomenon and the specific (protection) needs of persons belonging to minorities, including in terms of general (not minority-specific) human rights.

In the pre-1995 case law of the supervisory organs of the ECHR, little or no attention was paid to the special needs of minorities.[3] While the Court seems increasingly aware of the especially vulnerable position of minorities,[4] and adopts important theoretical approaches with considerable potential for minority protection, the actual protection flowing from the case law is far from consistently positive. The developments that can be identified are not linear and do not point in one specific direction, which contributes to the 'patchwork of successful and missed synergies', referred to in the chapter's title. Sometimes the main hurdle lies with the standard of proof, sometimes the Court's balancing of the respective interests can be criticised as giving undue weight to the states' interests (and arguments, while not addressing important elements adduced by the claimants), and sometimes (related to the previous issue) the reasoning of the Court is not satisfactory because it exhibits internal contradictions, or strange leaps in reasoning.

Prior to presenting a succinct overview of the work of the European Commission against Racism and Intolerance and of the Venice Commission and how the mandate and activities of the re-instated Committee of Experts on Issues relating to the Protection of National Minorities (DH-MIN) contribute to various synergy lines, an overall assessment will be given of the jurisprudence of the European Court of Human Rights in terms of successful and missed synergies.

1 Synergies '*sensu stricto*'?

Because of the foundational importance of equality for human rights generally and minority protection more specifically, it seems appropriate first to discuss the relevant developments under Article 14 ECHR.

[3] Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Dordrecht: Kluwer Law International, 2000), p. 142.

[4] To some extent these developments were already under way by 2000: *ibid.*, p. 144.

Subsequently, several strands of 'participatory rights' in the broad sense are analysed. While some careful developments have taken place in terms of the acknowledgement of linguistic components of the electoral rights and the right to education, overall the European Court has not shown a particularly keen interest in language rights (for members of minorities). Finally, the discussion of several cases in this and the following part reveal a heightened attention for the Roma, their vulnerable position and additional protection needs.

1.1 Equality and non-discrimination

The only equality dimension explicitly taken up in the ECHR is the prohibition of non-discrimination (Article 14 and now also the twelfth Additional Protocol). Non-discrimination is widely seen as the *conditio sine qua non* for an adequate minority protection, the necessary but not sufficient requirement for a comprehensive system of minority protection. This is related to the broad acceptance that such a system should be based on two pillars, namely non-discrimination (and individual human rights of special relevance to minorities), on the one hand, and special measures designed to protect and promote the separate identity of minorities, on the other.[5] In this regard, it should be highlighted here that, to the extent that 'non-discrimination' opens up towards concerns of substantive equality (and is read to include an obligation to adopt special measures for people in substantively different situations, like members of minorities), more can be achieved through the first pillar, concomitantly reducing the additional need for the second pillar (with minority-specific rights).

However, and in direct relation to the focus on substantive equality, it should be underlined that not all conceptions of non-discrimination are equally 'open' towards substantive equality considerations. Several points should be assessed in order to evaluate to what extent the

[5] *Inter alia*, Florence Benoit-Rohmer, *The Minority Question in Europe: Towards a Coherent System of Protection of National Minorities* (Strasbourg: International Institute for Democracy, 1996), p. 16; Asbjørn Eide, 'Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities' (UN Doc. E/CN.4/Sub.2/1991/43, 1991), pp. 11–12; Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), p. 10. See also the Advisory Opinion regarding Minority Schools in Albania, 6 April 1935, PCIJ, [1935] *CIJ Reports Series A/B No 64*, 17.

interpretation of the prohibition of discrimination takes substantive equality considerations into account. This is obviously the case for the recognition of an obligation to differentiate (in relation to persons in substantively different situations), and the concept of 'indirect discrimination', since these clearly transcend mere 'formal' equality, and take into account either differences in starting positions, or differences in effect. Substantive equality considerations also play a role in the distinction of several levels of scrutiny and the related symmetrical versus asymmetrical approach to non-discrimination.[6] The underlying idea of different levels of scrutiny is that some grounds of differentiation are 'suspect'[7] and therefore should be assessed more strictly than other grounds.

Traditionally, the jurisprudence of international supervisory bodies, like the European Court of Human Rights, reveals a focus on formal equality, as was demonstrated, *inter alia*, by the *Belgian Linguistics*

[6] Another point of critique which has been voiced in relation to the jurisprudence in terms of Article 14 is the position of the Court that, after having found a violation of an article in itself, it considers it no longer necessary also to evaluate whether there is a violation of that article in combination with Article 14, unless a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case. Examples where this approach by the ECHR has worked against the development of the protection potential of non-discrimination in favour of minorities include *Informationsverein Lentia and others v Austria* (24 November 1993), para. 44; and *Sidiropoulos v Greece* (10 July 1998), para. 52. The problem is that there do not seem to exist clear criteria for deciding whether or not there is a 'clear inequality of treatment which is a fundamental aspect of the case'. Compare in this respect *Nachova v Bulgaria*, para. 161 and *Bekos and Koutropoulos v Greece* (13 December 2005), paras. 79–81, on the one hand, with *Osman v Bulgaria* (16 February 2006), para. 91, on the other. Also in more recent case law, often in relation to religious minorities, the Court seems to dispense with an investigation of a violation of Article 14 even though the cases arguably offer excellent opportunities for clarifying and developing the protection potential of Article 14 for minorities: *Ivanova v Bulgaria* (12 April 2007, concerning the dismissal of a teacher because of her religious convictions and adherence to a minority religion); *Biserica Adevarat Ortodoxa Din Moldova and others v Moldova* (27 February 2007, concerning the refusal to register a church of a minority religious denomination), *Fener Rum Erkek Lisesi Vakfi v Turkey* (9 January 2007, concerning a differential treatment of 'foundations whose membership was made up of religious minorities'), and *Barankevich v Russia*, 26 July 2007, paras. 39–40. However, see below for a discussion of *97 members of the Gldani congregation of Jehovah's witnesses and four others v Georgia* (3 May 2007), where the Court did establish a violation of Article 14 but its reasoning was so thin that it was not satisfactory either, from the perspective of possible clarification and development of the protection potential of Article 14.

[7] It is generally accepted that making distinctions on certain grounds is reprehensible, so that these distinctions are almost always presumed illegitimate. Grounds are suspect when they concern traits that are immutable and or irrelevant, and/or when they go hand in hand with stigmas and prejudices: See, *inter alia*, Janneke H. Gerards, *Rechterlijke Toetsing aan het Gelijkheidsbeginsel* (The Hague: SDU, 2002), pp. 85–90.

case.[8] Furthermore, in the evaluation of whether or not in terms of Article 14 ECHR a differential treatment has a reasonable and objective justification, and thus a legitimate aim and a proportional relation to that legitimate goal, the contracting states tend to get a rather broad margin of appreciation, which is most evident in the application of the proportionality test.[9] This has provoked the justifiable criticism that the supervision by the Court is too deferential to the contracting states, with the danger of a reduced level of protection.[10] In this respect, the development of heightened scrutiny as regards certain 'suspect' grounds is to be welcomed, especially insofar as they concern typical minority characteristics, like religion and race (see below).

A first important development, reflecting an opening towards 'substantive equality', can be identified in *Thlimmenos v Greece* of 6 April 2000. The Court significantly expanded its non-discrimination jurisprudence in favour of substantive equality by acknowledging that:

> The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification . . . However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is *also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*[11] (emphasis added)

In other words, the prohibition of discrimination can, in certain circumstances, entail an obligation for states to treat persons differently

[8] ECtHR, Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (23 July 1968). See also its assessment in Henrard, *Devising an Adequate System of Minority Protection*, pp. 119–21.

[9] See also Alexander E. Morawa, 'The evolving right to equality' (2001–2) 1 *European Yearbook of Minority Issues* 168–71; Dajo de Prins, Stefan Sottiaux and Jochum Vrielink, *Handboek Discriminatierecht* (Antwerp: Intersentia, 2005), pp. 23–5.

[10] Olivier De Schutter, 'Observations: Le droit au mode de vie Tsigane devant la Cour Européenne des Droits de l'Homme', (1997) *Revue Trimestrielle des Droits de l' Homme* 89–90. See also R. Eissen, 'Le Principe de Proportionalité dans la Jurisprudence de la Cour Européenne des Droits de l'Homme', in L. E. Pettiti *et al.* (eds.), *La Convention Européenne des Droits de l'Homme: Commentaire Article par Article* (Brussels: Bruylant, 1995), p. 80.

[11] ECtHR, *Thlimmenos v Greece* (6 April 2000), para. 44.

'whose situations are significantly different', which is clearly geared towards substantive equality. Depending on how far the Court is willing to stretch this rationale, it could be the basis for the recognition of positive state obligations to adopt (certain) special minority rights, attuned to the specific needs and position of the members of the minority concerned. In this regard, it is appropriate to see how the Court has used the '*Thlimmenos*' principle in subsequent cases.

In *Thlimmenos*, the Court agreed that someone who is convicted for being a conscientious objector, exercising his freedom to manifest his religion, could not be treated the same as someone who had committed another type of offence unrelated to the exercise of fundamental rights. In *Nachova v Bulgaria* the Court established the principle, which has been confirmed many times since,[12] that state authorities have a special duty to investigate possible racist overtones in the use of violence.[13] This is undoubtedly important for ethnic minorities, since it is supposed to contribute to the effectiveness of the prohibition of racial discrimination.

However, insofar as the Court has used the *Thlimmenos* rationale in other cases related to (ethnic or national) minorities, the results have been rather modest. The Court is clearly very careful to 'impose' exceptions to the application of general norms, which could be qualified as a duty of reasonable accommodation, when it is not related to the exercise of the freedom to manifest one's religion. *Chapman v UK* might have established the important rule that states have a positive obligation to facilitate the Gypsy way of life (in terms of Article 8 ECHR, see below), but the Court was not willing to follow the argument of the claimant that applying the general planning regulations and policies (without modification) to Roma failed to accommodate their particular needs arising from their tradition of living and travelling in caravans.[14] It remains to be seen how the Court would react to claims that states should adopt special minority rights flowing from their special needs, like rights on language use in relation to public authorities, mother tongue education, or other special measures attuned to specific minority needs. The Court's reasoning thus far does

[12] *Inter alia*, ECtHR, *Bekos and Koutropoulos v Greece* (13 December 2005), para. 73; ECtHR, *Ognyanova and Choban v Bulgaria* (23 February 2006), para. 148.
[13] ECtHR, *Nachova v Bulgaria* (26 February 2004), para. 158.
[14] ECtHR, *Chapman v UK* (18 January 2001), para. 127.

not seem to be too promising;[15] even in relation to the freedom of religion the Court remains reluctant to develop its case law in order to recognise and embrace a state duty of reasonable accommodation.[16] This is also visible in its jurisprudence about claims to adapt working conditions to religious prescripts. In these cases the Court simply does not accept that the refusal to work on particular days because of one's religious conviction would be protected by Article 9(1). Not even acknowledging the existence of an interference allows the Court to avoid an explicit argument in terms of reasonableness and proportionality.[17]

It should be remarked that the *Thlimmenos* rationale also has the potential to be used in relation to affirmative action or positive discrimination, aimed at redressing disadvantages from the past and ultimately achieving substantive equality. While most attention goes to the acceptability of affirmative action, in terms of *Thlimmenos* it could be argued that there could be an obligation to adopt affirmative action measures. It is, in any event, important to realise that the prohibition of discrimination constitutes the outer limit of acceptable affirmative action. In other words, in order to be legitimate, an affirmative action measure should be objectively and reasonably justified, requiring both a legitimate aim and a relationship of proportionality between aim and differentiation (the criteria to assess whether a differentiation is a prohibited discrimination or not). While the legitimate aim is clear, namely trying to achieve real, substantive equality, the contentious dimension lies in the proportionality test and more specifically the level of scrutiny adopted.

An important point here, that the jurisprudence of the ECtHR reveals, is that, in relation to differentiation on certain 'suspect grounds'[18]

[15] It should be noted, though, that an occasional dissenting opinion has hinted at this kind of positive obligation (e.g. in relation to education: Judge Cabral Barreto, in *D. H. and others v Czech Republic* (10 January 2006), para. 4).

[16] *Vergos v Greece* (ECtHR, 24 June 2004) is, however, not a good example of this reluctance, notwithstanding the conclusion that there was no violation of Article 9. The Court considered that the refusal to modify the planning regulations in order to build a prayer house was justified, *inter alia*, because the applicant was the only member of that religious movement in the locality concerned. Furthermore, the Court explicitly acknowledged the possibility that neutral rules not aimed at the practice of religions could have negative repercussions for the manifestation of these religions (para. 34).

[17] Julie Ringelheim, *Diversité Culturelle et Droits de l'Homme* (Brussels: Bruylant, 2006), pp. 159–61 and 327–32. See, for a recent example, ECtHR, *Kosteski v Former Yugoslav Republic of Macedonia* (13 April 2006).

[18] See below for an enumeration and discussion.

it departs from its general marginal review (which entails a considerable margin of appreciation for states), and demands that states provide 'very weighty reasons'.[19] When such different levels of scrutiny are used, a crucial question is whether a *symmetrical* or an *asymmetrical* approach to non-discrimination is adopted by the supervisory body. In the case of a symmetrical conception of discrimination, the heightened scrutiny for a suspect classification would be used irrespective of the group in whose favour the norm works. Conversely, in the case of an asymmetrical approach to discrimination, the heightened scrutiny would be adopted only when the suspect classification is used to the (further) detriment of the historically disadvantaged group. This asymmetrical approach thus acknowledges that harm caused by measures which further disadvantage vulnerable groups is a greater evil, which merits more suspicion than measures disadvantaging the powerful groups.[20] An asymmetrical approach to non-discrimination thus tends to be more favourable towards affirmative action measures and minority protection measures writ large, as this approach is geared towards substantive equality.

Although the Court has not yet been confronted with a 'real' case of affirmative action,[21] it did have to rule in a few cases on measures which entailed treatment which benefited women, while excluding men, most particularly *Petrovic v Austria*[22] (parental leave allowance only for women) and *Van Raalte v The Netherlands*[23] (only women above 45 could be exempted from paying a children-related levy). In the initial establishment of the appropriate level of scrutiny, the Court seems to favour the symmetrical approach.[24] Nevertheless, in *Petrovic*, when considering parental leave allowance, the Court noted that there was no common European standard yet, which *de facto* reduced the level of scrutiny, enabling it to conclude that Article 14 was not violated.

[19] See also Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law* (Brussels: European Commission, 2005), pp. 14–15.

[20] Titia Loenen, 'Indirect discrimination: oscillating between containment and revolution', in Titia Loenen and Peter R. Rodriguez (eds.), *Non-discrimination Law: Comparative Perspectives* (The Hague: Martinus Nijhoff, 1999), p. 205.

[21] de Prins, Sottiaux and Vrielink, *Handboek Discriminatierecht*, p. 38; de Schutter, *The Prohibition of Discrimination*, pp. 19–20.

[22] ECtHR, *Petrovic v Austria* (27 March 1989).

[23] ECtHR, *Van Raalte v The Netherlands* (21 February 1997).

[24] Gerards, *Rechterlijke Toetsing aan het Gelijkheidsbeginsel*, p. 202.

The recent judgment by the Grand Chamber in *Stec and others v United Kingdom* seems to give stronger indications of the use of an asymmetrical approach. The case concerned differential rights to social security entitlements related to and because of differences in pensionable ages between men and women. It should be underscored that the Court explicitly stated that:

> Article 14 does not prohibit a Member State from treating groups differently in order to correct 'inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequalities through different treatment may in itself give rise to a breach of the article . . . At their origin . . . the differential pensionable ages were intended to correct 'factual inequalities' . . . and appear therefore to have been objectively justified under Article 14.[25]

Arguably, not only does the Court seem to accept positive action measures as being related to substantive equality, while acknowledging that non-discrimination determines the limits of these measures, but it even hints at an obligation to adopt such positive action measures.[26] Strikingly, in terms of the discussion here, no reference is made to the heightened scrutiny normally used in relation to differentiations on the basis of gender. This could be seen as pointing to the use of an asymmetrical approach. It remains to be seen, though, how 'accommodating' the Court will be in relation to hard forms of positive action.[27]

Another point of critique in relation to the traditional jurisprudence of the ECtHR in terms of Article 14 concerned exactly the restrictive attitude towards *indirect discrimination*,[28] which also revealed that the states' interests tend to predominate in the weighing process. Indirect discrimination recognises the fact that a formally equal application of apparently neutral rules can lead to a *de facto* inequality (disparate impact on a particular group). Obviously, 'indirect discrimination' often works to the disadvantage of minorities. The broad margin of appreciation of states granted by the Court, in combination with its refusal to review legislation

[25] ECtHR, *Stec et al. v UK* (12 April 2006), paras. 51 and 61.

[26] It should be highlighted that the Court explicitly refers to its Thlimmenos reasoning (para. 44) when making this statement.

[27] See also A. Hendriks and F. Wegman, 'Straatsburg ziet onderscheid naar geslacht bij pensioenen door de vingers': noot bij EHRM, Stec e.a. t het Verenigd Koninkrijk (2006) 31 *NJCM Bulletin* 892.

[28] See, *inter alia*, de Schutter, *The Prohibition of Discrimination*, pp. 16–19.

in abstracto in individual complaints, often implied an avoidance of the issue of indirect discrimination.

The Court's reluctance even to accept the notion of indirect discrimination was very visible in *Abdulaziz, Cabales and Balkandali*.[29] The Court's reasoning in that case demonstrated that it would be virtually impossible to successfully rely on indirect discrimination since it classified the disparate impact on certain groups (because of their typical characteristics) of apparently neutral rules as irrelevant.[30] The Court tended to give the strong impression of not investigating thoroughly enough whether a certain measure could indirectly have discriminatory effects because it neglected the broader context determining the position of the people concerned when assessing the alleged discriminatory treatment.[31] The latter is particularly problematic in cases of systemic discrimination, as is the case with regard to minorities such as the Roma.[32]

It might very well be that *Thlimmenos* also provided a first indication that the Court was (slightly) shifting its case law in regard to 'indirect discrimination'. It is precisely this opening towards and attempt to achieve substantive equality which brings the *Thlimmenos* rationale close to the acknowledgement of indirect discrimination.[33]

However, only in May 2001, in *Hugh Jordan v UK* and *Kelly v UK*, the Court explicitly acknowledged that: 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding

[29] ECtHR, *Abdulaziz, Cabales and Balkandali* (28 May 1985), para. 85.

[30] See also Gerards, *Rechtelijke Toetsing aan het Gelijkheidsbeginsel*, p. 114.

[31] De Schutter, 'Mode de Vie Tsigane', pp. 79–85.

[32] ECtHR, *Buckley v UK* (25 September 1996) is a paradigmatic case of this restrictive attitude of the Court as regards claims by Gypsies. See also de Schutter, 'Mode de Vie Tsigane', pp. 84–5.

[33] Titia Loenen and Art Hendriks, 'Case Note with Thlimmenos', (2000) *NJCM Bulletin* 1102. See also Anastasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (London: Kluwer, 1997), p. 5. Be that as it may, it should also be pointed out that the Court has been criticised in relation to the *Thlimmeno*s case for not having examined whether the impositions of serious sanctions on conscientious objectors to military service could not, in itself, amount to indirect discrimination contrary to Article 14. See also the discussion pertaining to assessment by the ECtHR in several cases against Turkey (of about the same date as *Kelly* and *McShane*), which deal with the complaint that Kurds are disproportionately more arrested under the emergency laws than the rest of the population: Geoff Gilbert, 'The burgeoning minority rights jurisprudence of the European Court of Human Rights' (2002) 24 *Human Rights Quarterly* 748–9.

that it is not specifically aimed or directed at that group.'[34] The 'founding' cases all concerned the claim that the activities of the security services in the conflict in Northern Ireland entailed a disproportionately high number of deaths of members of one particular religious group, which would amount to a violation of Article 14 in combination with Article 9.[35] Although this acknowledgement is to be welcomed, its importance should not be overrated, because the Court immediately added:

> However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the *Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory* within the meaning of Article 14.

It is obvious that the Court seems to require a heavy burden of proof, while not identifying exactly what that should be.

The Court seemed to make a quantum leap in its reasoning on indirect discrimination in the admissibility decision in *Hoogendijk v The Netherlands*,[36] when it appeared to accept that 'convincing official statistics' could amount to a *prima facie* case of indirect discrimination. However, this was reversed again in the chamber judgment *D.H. and others v Czech Republic*,[37] concerning the pervasive problem of Roma children being segregated in special schools for mentally retarded children in the Czech Republic. First, the Court seemed to question again the whole idea of 'indirect discrimination', by putting extensive emphasis on the importance of 'intent'.[38] However, the question of intent is irrelevant in relation to indirect discrimination, which focuses on disparate impact.[39] Moreover, the Court does not confirm its positive stance regarding 'convincing official statistics' in *Hoogendijk* and instead goes back to its old formulation that statistics in themselves are not sufficient. Overall, this case has left more questions than it answered. In its more recent judgment, *Zarb*

[34] ECtHR, *Kelly v United Kingdom* (4 May 2001), para. 148; *Hugh Jordan v United Kingdom* (4 May 2001), para. 154; ECtHR, *McShane v United Kingdom* (28 May 2002), para. 135.

[35] ECtHR, *Nachova v Bulgaria* (26 February 2004), para. 167.

[36] ECtHR, *Hoogendijk v The Netherlands* (6 January 2005). I have developed this fully elsewhere (in a case note to *D. H. and others v Czech Republic*: 'Noot bij D.H. et al t. Tsjechië, EHRM 7 februari 2006', EHRC 2006/43, 388–395) but it is too technical and detailed to be repeated here.

[37] ECtHR, *D. H. and others v Czech Republic* (7 February 2006).

[38] *Ibid.*, paras. 48, 52–53.

[39] Loenen, 'Indirect discrimination', p. 201; Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerp: Intersentia, 2005), p. 114.

Adami v Malta,[40] the Court seemed easily persuaded to find a violation of Article 14 on the basis of statistical evidence showing that mostly men (and hardly any women) were called for obligatory jury service.[41] Indeed, the Court, without much ado, deduced from the fact that statistics show a huge discrepancy of women versus men called for compulsory jury service, that there had been 'a difference in treatment between two groups in a similar situation'.[42] A strict assessment of the availability of a reasonable and objective justification resulted in a finding of a violation of Article 14.[43] The Grand Chamber judgment in *D.H. and others v Czech Republic* (13 November 2007) confirms the Court's position in *Zarb Adami* in a minority context (Roma), thus adding an important synergy, making this judgment possibly into the new landmark judgment concerning indirect discrimination. First, the Court uses the term 'indirect discrimination' several times and explicitly recognises (again) that when a neutral rule has a disproportionate impact on a group, this can constitute indirect discrimination, without the need to demonstrate discriminatory intent.[44]

The Court furthermore proceeds to acknowledge that statistical evidence can suffice to provide prima facie evidence of indirect discrimination, insofar as it complies with certain quality demands: 'undisputed official statistics', 'statistics evidence when valid and relevant', 'statistics which appear on critical examination to be reliable and significant'.[45] The burden of proof would subsequently shift to the government.[46]

A final point in regard to discrimination and the potential it contains in terms of minority protection concerns the use by the Court, already hinted at above, of heightened forms of scrutiny for certain, suspect grounds of classification. A differentiation on the basis of these grounds would be very difficult to justify, as the Court requires 'very weighty reasons'.[47] This

[40] ECtHR, *Zarb Adami v Malta* (20 June 2006).

[41] Nevertheless, the Court still seems rather hesitant to make use of the indirect discrimination concept. In *Podkolzina v Latvia* (more fully discussed below), the Court did not even look into the possible violation of Article 14, while a key issue of the case concerned harsh language requirements in Latvian electoral legislation with their possible discriminatory indirect effects. This is all the more regrettable since such language requirements are at the heart of the problem vis-à-vis linguistic minorities. See also Spiliopoulou Akermark, *Justifications of Minority Protection*, p. 6.

[42] ECtHR, *Zarb Adami v Malta*, 20 June 2006, paras. 77–78. [43] *Ibid.*, paras. 80–83.

[44] EHRM (GK), D.H. e.a. t. Tsjechië, 13 November 2007, para. 184.

[45] *Ibid.*, paras. 187–8. [46] *Ibid.*, para. 189.

[47] A. W. Heringa, 'Standards of review for discrimination: the scope of review by the Courts', in T. Loenen and P. R. Rodriguez (eds.), *Non-discrimination Law: Comparative Perspectives* (Dordrecht: Martinus Nijhoff, 1999), pp. 29–31.

heightened scrutiny could also be considered as a manifestation of attention to real, substantive equality, because only 'suspect' grounds would trigger this more critical attitude by the Court. While the Court has not provided general criteria to determine suspect grounds, the existence of a common ground among European states seems to carry most weight.[48] In this respect, developments in other organisations and/or in terms of other instruments are bound to play a role, achieving a further element of synergy.

The jurisprudence to date reveals that suspect grounds include gender, sexual orientation, illegitimate birth, nationality and arguably also religion and race (including ethnic origin),[49] the last two of which are obviously of special relevance for minority protection purposes.

Even though the inclusion in Article 14 ECHR of 'association with a national minority' as a prohibited ground of discrimination seemed to reflect, right from the start, a concern that the contracting states should not neglect the minority issue, the ECtHR has been rather restrictive in its assessment of claims put forward by members of minorities.[50] Furthermore, the Court has been reluctant to address claims in terms of this prohibited ground of discrimination. For example, in the chamber decision of *D. H. and others v Czech Republic*, the Court chose to ignore the fact that the claimants had, in addition to race and ethnic origin, also invoked 'association with a national minority'.[51] This does not augur too well for a possible recognition of this ground as suspect, engendering heightened scrutiny. In any event, several of the other enumerated grounds, like religion and race, cover aspects of the identity of many minorities.

The acceptance of heightened scrutiny for differentiations on the basis of religion arguably can be traced back to *Hoffmann v Austria*, even though it has not been explicitly confirmed since,[52] and the court does not

[48] Gerards, *Toetsing aan het Gelijkheidsbeginsel*, p. 200.

[49] For a thorough overview and discussion of the most prominent cases, see Gerards, *Toetsing aan het Gelijkheidsbeginsel*, pp. 199–207. The Court clearly tends to perform a very strict review, even though not always in the explicit 'very weighty reasons doctrine', see, e.g., *Hoffmann*, discussed above.

[50] *Inter alia*, A. Fenet, 'Europe et les minorités', in A. Fenet, G. Koubi and I. Schulte-Tenckhoff (eds.), *Le Droit et les Minorités: Analyses et Textes* (Brussels: Bruylant, 1995) pp. 97, 102; G. Gilbert, 'The legal protection accorded to minority groups in Europe' (1992) 23 *Netherlands Yearbook of International Law* 90.

[51] See also P. Thornberry and M. A. Martín Estébanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2005), pp. 49–50.

[52] de Prins, Sottiaux and Vrielink, *Handboek Discriminatierecht*, pp. 30–1.

use the typical 'very weighty reasons' language. Nevertheless, by indicating that 'a distinction based essentially on a difference in religion is not acceptable',[53] the Court clearly adopts a level of scrutiny which is above average and seems even stricter than the 'very weighty reasons test'.[54] Unfortunately, the Court's reasoning in the *Jehova's Witnesses of Gldani* case is not very explicit in this respect and also does not follow the typical justification reasoning. Nevertheless, it seems that insofar as the Court deduces from the facts that the authorities have been negligent in relation to grave illegal acts by private parties against members of this congregation because of their religious conviction, this would be sufficient to conclude a violation of Article 14.[55]Arguably, this indicates strict scrutiny and can be related to the Hoffmann quote that a distinction (in the event of protection being offered by the public authorities) based essentially on a difference in religion is simply not acceptable.

The ECtHR has traditionally been rather conservative in ruling on racial discrimination. Nevertheless, there were some tentative indications that race could be considered a 'suspect ground',[56] particularly in the cases which qualified (certain forms of) racial discrimination as degrading treatment, which is absolutely prohibited (without any possible justification) by Article 3,[57] and in the more recent cases of *Nachova v Bulgaria*,[58]

[53] ECtHR, *Hoffmann v Austria* (23 June 1993), para. 36.

[54] Nevertheless, it is not likely that the Court intended to distinguish a super-suspect class within the category of suspect classes: de Prins, Sottiaux and Vrielink, *Handboek Discriminatierecht*, p. 31; Gerards, *Toetsing aan het Gelijkheidsbeginsel*, p. 204.

[55] ECtHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and four others v Georgia* (hereinafter '*Gldani*') (3 May 2007), paras. 140–2.

[56] One can point to certain case law exposing at least a special attention and concern for manifestations of racially inspired actions and violence (e.g. *Jersild v Denmark* (23 September 1994)). In *L. and V. v Austria* (9 January 2003), the ECtHR actually seems to move in that direction, albeit in an *obiter dictum*. After denouncing a 'predisposed bias on the part of a heterosexual majority against a homosexual minority', the Court underlined that 'these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour' and concluded that 'the government has hence not offered convincing and weighty reasons justifying . . .' (paras. 52–53).

[57] See ECommHR, *East African Asians* case (10 October 1970). See also ECtHR, *Cyprus v Turkey* (10 May 2001), paras. 308–10; and ECtHR, *Moldovan et al. v Romania* (12 July 2005), para. 111. It should be noted that a similar case was held admissible on 15 May 2005: *Sandor Kalanyos et al v Romania*.

[58] It should be underlined that *Nachova* concerned Roma, the prototype of a very vulnerable minority. The first decision in *Nachova* is a particularly clear example of synergies at work in favour of minority protection, as the Court relied on the EC Race Directive (2000/43/EC),

but doubts remained. Only in *Timishev v Russia,*[59] a case of 13 December 2005 concerning the refusal to allow a Chechen person entry into one of the Russian republics, did the Court take a clear position. Interestingly, also in *Timishev v Russia*, the Court does not use the typical 'very weighty reasons' language but states very categorically that: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.'[60]

Overall, when assessing the extent to which the prohibition of discrimination as developed in the jurisprudence of the European Court of Human Rights has revealed an opening towards substantive equality (of special relevance to minorities), it would be difficult to maintain that an unequivocal picture emerges. On the one hand, the *Thlimmenos* case constitutes an immensely important opening towards substantive equality considerations, towards establishing positive obligations on states to adopt differential treatment and special measures. On the other hand, the use of the *Thlimmenos* rationale has not yet led to the recognition that states should adopt minority-specific measures. The Grand Chamber judgment in *D.H. and others v Czech Republic* and its acknowledgement of 'indirect discrimination' has added an important opening towards substantive equality in a minority context, which strengthens the synergy in this respect.

Finally, the importance of the prohibition of discrimination for an adequate minority protection implies that it is crucial that this protection against discrimination is effective. Such an effective protection is not only dependent on the use of an appropriate (not too lenient) level of scrutiny, but also on the use of adequate standards of proof, and an adequate level of protection against discrimination by private parties.

Tackling private discrimination is generally acknowledged to be an essential component of a comprehensive and effective strategy to combat discrimination effectively.[61] Hence, it is to be welcomed that the Court has

which arguably reflects a common European standard, to shift the burden of proof to the state. Unfortunately, the Grand Chamber reversed precisely this component of the first judgment, and in subsequent cases the Court has maintained a rather strict and cautious stance in this respect (See, *inter alia*, *Bekos and Koutropolous v Greece* (13 December 2005), paras. 63–5). So, one could at present speak of a 'failed' synergy.

[59] ECtHR, *Timishev v Russia* (13 December 2005); and the case note by K. Henrard, EHRC 2006/19 (pp. 186–94).

[60] ECtHR, *Timishev v Russia,* para. 58.

[61] Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002), p. 31.

recently pronounced itself in cases of discriminatory violence against Roma[62] and against Jehovah's Witnesses[63] by private parties, in which it highlighted the positive obligations of the state in this respect. In both cases the Court concluded that there had been a violation of Article 14, which arguably indicates a reduced reluctance to find violations of the prohibition of discrimination. However, both of these findings were limited to the procedural dimension of the prohibition of discrimination. Indeed, the Court did not provide clear guidelines about the positive obligation of the state to prevent this private discrimination. Nevertheless, it is striking how critically the Court scrutinised the authorities' performance in relation to their special (enhanced) procedural obligation to investigate the possible discriminatory motives behind the racial violence (in the former case)[64] and their obligation to investigate the privately inflicted maltreatments in a non-discriminatory fashion (in the latter).[65]

Similarly, these two cases seem to relax the burden of proof somewhat,[66] even though this perception could be misguided in relation to the latter case, considering the absence of an explicit assessment in terms of the model of review and burden of proof, and the overall lack of precise argumentation (in this respect). There were undoubtedly strong elements of proof, including a videotape showing maltreatments inflicted to the Jehovah's Witnesses,[67] creating strong presumptions which were not rebutted by the government. Nevertheless, it would have been preferable had the Court been more explicit about the distinctive steps of its reasoning, especially in terms of the burden of proof (and also in relation to those alleged victims not visible on the videotape and in relation to the causal factor between the inaction of the authorities and the religious identity of the victims) and the (relation with the) level of scrutiny adopted.

The possible impact of additional Protocol 12, which entered into force on 1 April 2005, is still difficult to gauge as it has not yet been considered by the Court.

[62] ECtHR, *Secic v Croatia* (31 May 2007).

[63] ECtHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and four others v Georgia* (3 May 2007).

[64] ECtHR, *Secic*, paras. 67–70.

[65] ECtHR, *Gldani*, para. 141.

[66] See also EHRM, *Secic v Croatia* (31 May 2007), paras. 69–70 and the case note with this judgment by Kristin Henrard, EHRC 2007/92, p. 881.

[67] ECtHR, *Gldani*, paras. 104, 105, 111, 133, 140. See also, in relation to differential treatment on the basis of sexual orientation: *Baczkowski and others v Poland* (3 May 2007).

1.2 Participatory rights

When reviewing the extent to which the case law of a supervisory body protects (and promotes) the participatory rights for minorities, it is important, first, to explain this concept a bit more precisely. This is particularly relevant as there does not exist, as yet, a generally agreed upon, let alone legal, definition, of this concept. Nevertheless, it is generally agreed that it has, potentially, a very broad reach.[68] In this respect the 1999 Lund Recommendations on the Effective Participation of National Minorities could be a useful reference point, as they are said to be rooted in minority rights and more general human rights pertaining to the question of participation.[69] It can immediately be seen that two dimensions of participation are distinguished, namely 'participation in decision-making' and 'self-governance' (or autonomy). While a significant level of synergy in regard to the first dimension has been identified, there is not (yet) a similar one in terms of the second dimension.[70] The following paragraphs will therefore deal only with the so-called 'representation' dimension. In this regard it should be underlined that this dimension is very broad and does not stop at representation in Parliament or other legislative bodies and the related electoral system, but also concerns questions of representation in the civil service of the country, the judiciary and the police.[71] Even though the Lund Recommendations themselves do not contain any stipulations on this matter, the more specific 'Guidelines to Assist National Minority Participation in the Electoral Process' elaborated by the Office for Democratic Institutions and Human Rights ('ODIHR') and the office of the HCNM, explicitly mention that stipulating a language requirement for public office is a problematic restriction of the right to stand for elections (passive right to vote).

In any event – and there is ample case law of the ECtHR to be discussed in this respect – the Lund Recommendations underscore, in the part on

[68] See also Yash Gai, *Public Participation and Minorities* (London: Minority Rights Group International, 2001), p. 5.

[69] *Introduction to the Lund Recommendations* (The Hague: Foundation on Inter-Ethnic Relations, 1999), p. 6.

[70] Henrard, 'An ever increasing synergy', pp. 39–40.

[71] See also the typology of different forms of participation of minorities in decision-making processes by Frowein and Bank (for the Council of Europe): J. A. Frowein and R. Bank, 'The Participation of minorities in decision-making processes' (2001) 61 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht*, pp. 1–28.

elections, the importance of the principle of freedom of association which would include 'the freedom to establish political parties based on communal identities' (Recommendation 8). This may not be considered to be a component of participatory rights *sensu stricto*. Nevertheless, because of 'the potentially very broad reach' of the concept, it does seem appropriate to include matters related to the right to set up and manage associations to protect the interests of minorities. Unfortunately, the case law of the European Court in this respect is not entirely consistent.

First, an assessment will be given of the relevant case law of the European Court in relation to Article 3, Protocol 1, which clearly concerns the 'representation dimension', as it demands states parties to have free elections at reasonable intervals by secret ballot. Secondly, the case law under Article 11, relating to political parties and associations respectively, will be assessed.

1.2.1 Article 3, First Additional Protocol

It should be clarified that it was recognised relatively early that Article 3 of the First Additional Protocol enshrined a subjective right to vote and to be elected – in other words, it included both the active and passive right to vote.[72] A steady line of jurisprudence has clarified that referendums, even on questions of self-determination of parts of contracting states, are not within the field of application of Article 3 of the First Additional Protocol.[73] It is furthermore obvious that it concerns only a fraction of the broader 'representation' dimension of participation, and does not deal with representation in the judiciary, civil service or with consultation structures of some kind.

Nevertheless, several 'participatory rights' themes can be traced in the jurisprudence of the European Court of Human Rights. First, the electoral process can be used to facilitate the participation of minorities in the political sphere. While the European Convention would not impose a particular electoral system, the requirement of Article 3 that elections be held under such conditions that they ensure the 'free expression of the will of the people', raises the question of the meaning of the concept 'people',

[72] Note that there is an interesting line of case law which clarifies that this article does not exclusively apply to the national parliament, but also to other 'legislators', depending on the competencies and/or involvement with the legislative process of the body concerned.

[73] *Inter alia*, ECtHR, *Boskoski v Macedonia* (inadmissibility decision) (2 September 2004), para. 1.

particularly in relation to minorities. In this respect a few older cases should be highlighted.

In *Lindsay v UK* the European Commission held it acceptable to have different election systems within one state in order to protect the rights of minorities. The differential treatment involved would have a reasonable and objective justification and would thus not amount to discrimination.[74] The Commission went even further in *Moureaux v Belgium*, since it seemed there to indicate that, when electors generally choose on the basis of criteria such as belonging to an ethnic or religious group, there might be an obligation for the state to take the special position of minorities into account (and devise special measures to ensure an equitable representation of these minorities).[75]

The Court has, however, not followed up on these promising decisions of the Commission, which can be explained in terms of the margin of appreciation it allows states in electoral matters. This wide margin of appreciation is not only to be explained in terms of a lack of a common European standard, but is also related to the deference shown towards existing constitutional regimes in a state. The Court in *Mathieu, Mohin and Clerfayt* allowed that the interests of a linguistic minority and its complaint about its limitations in terms of the existing system were outweighed by the interest of the state in the maintenance of that system.[76]

1.2.1.1 A linguistic component Another participatory rights dimension requires that persons belonging to national minorities should be guaranteed the right to stand for office without discrimination. In this respect the European Court formulated an important judgment which imposed limits on states as to the extent and especially the way in which they can legitimately impose linguistic requirements to stand for elections. This is furthermore a nice example of synergies as the ECtHR's pronouncement in *Podkolzina v Latvia*[77] is very similar to the views of the Human Rights Committee in the equivalent case of *Ignatane v Latvia*.[78]

Podkolzina v Latvia concerned a Latvian national and member of the Russian-speaking minority who wanted to run for and was initially duly registered to be eligible for the national Parliament. She was in possession

[74] ECommHR, 8 March 1979, *DR* 15, 251. [75] ECommHR, 12 July 1983, *DR* 33, 114.
[76] ECtHR, *Mathieu, Mohin and Clerfayet v Belgium* (2 March 1987), paras. 52–7.
[77] ECtHR, *Podkolzina v Latvia* (9 April 2002).
[78] HRC, *Ignatane v Latvia*, Communication No. 884/1999 (25 July 2001).

of a certificate testifying that her knowledge of Latvian had reached the upper level, as required by the Parliamentary Elections Act. However, the State Language Centre decided to subject her to a new language examination, the outcome of which was negative and resulted in her name being struck from the list of candidates for the elections.

The Court started off by acknowledging that states have a wide margin of appreciation in the sphere of regulations of elections, and that requiring a candidate for election to the national Parliament to have sufficient knowledge of the official language pursues a legitimate aim.[79] However, in its evaluation of the proportionality of the infringement the Court emphasised that the re-assessment of Ms Podkolzina's linguistic competence had not followed the normal procedure for the certification of linguistic competence, in that it seemingly left the decision to the full discretion of a single civil servant. The Court concluded that there was a violation of Article 3 of the First Additional Protocol because, 'in the absence of any guarantee of objectivity . . . the procedure applied to the applicant was in any case incompatible with the requirements for procedural fairness and legal certainty'.[80]

In *Ignatane v Latvia*, a similar case of a Latvian national of the Russian-speaking minority who wished to stand for the local elections, but who was struck off the list because she would not have the required proficiency in Latvian, the Human Rights Committee came to similar conclusions. The procedural flaws, similar to those in the Podkolzina case, entailed – also according to the Human Rights Committee – a disproportionate restriction of the right to participate in public life in terms of Article 25 ICCPR.

However, it should be underlined that the Court (in contrast to the HRC) did accept that it is legitimate for a state to set linguistic requirements for candidates for Parliament. The Court concluded that there had been a violation, not because the content of the measure, the linguistic requirement itself, was disproportionate, but because of the way it was administered in practice. Even though it would have been welcome had the Court explicitly indicated that there are also limits on what exactly can be required (content of the measure) in this respect, this judgment in any event sends the signal to states that they do not have unlimited discretion in the way in which they impose linguistic requirements for certain functions. This could be an indication that the Court might, in future,

[79] ECtHR, *Podkolzina v Latvia*, para. 34. [80] *Ibid.*, para 36.

be more attentive to protecting linguistic minorities more generally,[81] which would be in conformity with the broader international trend, and thus exhibit a case of synergy. Nevertheless, it is impossible to maintain that on the basis of this single judgment.

1.2.2 Freedom of association

The right to freedom of association under Article 11 includes the freedom to establish political parties based on communal identities, which is particularly important for minorities and their quest to protect and promote their separate identity.

Since *Sidiropoulos v Greece*, there has been a long line of case law in which the Court emphasises that states are not allowed to limit the freedom of association of members of minorities because the association would aim to promote the culture of a minority.[82] Overall, these cases reveal that the Court seems to adopt a strict scrutiny approach as regards states' attempts to restrict minority associations, including minority political parties. However, in more recent years, the Court has, in two Grand Chamber judgments,[83] allowed far-reaching limitations on the freedom of association both as regards political parties and other 'associations', which seem difficult to reconcile with the rest of the case law.

The (Grand Chamber) judgment in *Gorzelik and others v Poland* of 17 February 2004 concerns a complex case which turns on the refusal to register an association under the name 'Union of People of Silesian Nationality'.[84] The Polish legal system seems actually rather ambivalent

[81] See also below in terms of Article 8.

[82] ECtHR, *Sidiropoulos and five others v Greece* (10 July 1998), paras. 41 and 44. See also *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (2 October 2001), in which the Court repeats that the fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 (para. 89). Furthermore, the Court emphasises that 'national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views no matter how unpopular they may be' (para. 107).

[83] For a critical analysis of the Chamber judgments in these cases, which were confirmed by the Grand Chamber judgments, see S. Spiliopoulou Akermark, 'The limits of pluralism – recent jurisprudence of the European Court of Human Rights with regard to minorities: does the prohibition of discrimination add anything?' (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe*, pp. 11–15.

[84] Since the Grand Chamber judgment confirms the Chamber judgment, only the former is analysed here. For a critical assessment of the Chamber judgment, see Spiliopoulo Akermark, 'The Limits of Pluralism', pp. 13–16.

regarding minorities, at least 'national minorities'.[85] On the one hand, certain privileges are granted to recognised minorities, more specifically in terms of the electoral legislation, while, on the other hand, there is no legal definition of 'national minority' and no specific procedure for a minority to register. When minorities then use this avenue to register as an association with a clear minority goal, do the national courts deny registration because the groups would not be a 'national minority'? This seems a rather circular reasoning, which ultimately thwarts the possibility of registering an association with a minority objective.

When assessing whether the interference amounts to a violation or a legitimate limitation to the freedom of association, the Court highlights that states have a broad margin of appreciation concerning the balancing of conflicting individual interests and rights, as well as in regard to the definition of 'national minority' and the practice of official recognition of minorities.[86] Furthermore, states also tend to receive a broad margin of appreciation in electoral matters.[87] This broad margin appears to cancel out the normal starting point that the freedom of association should be limited only in narrow circumstances.[88] Be that as it may, considering the extensive margin of appreciation left to Poland, it is not surprising that the Court concludes the absence of a violation of Article 11. While there are no clear context-specific variables which explain the atypical outcome in *Gorzelik*, the combination of two areas in which states are accorded a broad margin of appreciation, namely minorities and electoral matters, could explain the particular outcome. Considering the fact that the Polish authorities have never denied the presence of a Silesian minority as an ethnic minority if its territory, nor its right to associate to pursue common goals,[89] the electoral privilege granted to national minorities (and not to ethnic minorities), and thus electoral matters, seems to play an important role indeed.[90]

[85] The Polish system indeed operates a distinction between ethnic and national minorities (GC, *Gorzelik v Poland*, para. 69), which is, however, entirely glossed over in regard to Article 14.

[86] ECtHR (GC) *Gorzelik v Poland*, paras. 59, 67–8.

[87] This was also confirmed in ECtHR (GC), *Zdanoka v Latvia* (16 March 2006).

[88] ECtHR, *Gorzelik v Poland*, para. 58. See also Spiliopoulou Akermark, 'The Limits of Pluralism', p. 14.

[89] ECtHR, *Gorzelik v Poland*, para. 105.

[90] However, that puts the differential treatment between national and ethnic minorities by the Polish legal system squarely on the agenda, which is neatly passed over by the ECtHR. It should furthermore be highlighted that the discrimination argument put forward by Poland was not addressed by the Court either. Poland had argued that the registration of the

In subsequent cases,[91] the Court reverts to its strict scrutiny approach regarding refusals to register associations with the aim of protecting a minority. In *UMO Ilinden* the ECtHR also explicitly emphasises that 'associations for . . . purposes . . . including seeking an ethnic identity or asserting a minority consciousness are also important to the proper functioning of a democracy'.[92]

The Court has been equally, if not more, vigilant that the freedom of association of *political parties* has not been illegitimately interfered with. The long line of cases against Turkey in relation to the dissolution of political parties is well known in this respect. Also in these cases the Court exhibited special care to ensure this freedom of fundamental importance for minority groups, in the sense that it did not allow states' anxieties about minorities and their quest to protect their own identity to interfere to a disproportionate extent with these groups' right to freedom of association.

In *Refah Partisi v Turkey*, however, the Court (also in Grand Chamber formation) accepted the dissolution of a political party, Refah Partisi (and the prohibition barring its leaders from holding similar office in any other political party) on the ground that it allegedly threatened to undermine secularism, a key constitutional, democratic principle in Turkey, *inter alia* by advocating a plurality of legal systems. The Grand Chamber did reiterate that states have only a limited margin of appreciation in regard to limitations to Article 11. However, this starting point seems to be counterbalanced (and subsequently outweighed) by the essential nature of the principle of secularism for Turkey, against the background of its history of theocratic regimes and its predominantly Muslim population. The Court considered in any event that the Turkish constitutional court was 'justified in holding that Refah's policy of establishing Sharia was incompatible with democracy',[93] and also emphasised that a plurality of legal systems cannot be considered to be compatible with the Convention system.[94]

applicant's association would have an 'adverse' effect on the rights of 'other ethnic groups in Poland'. However, this argument draws attention to the question of the appropriate comparator in discrimination complaints. Are these ethnic groups that have not yet put forward a similar demand for registration part of the appropriate comparator? See also Spiliopoulou Akermark, 'The Limits of Pluralism', p. 15.

[91] ECtHR, *Ivanov and others v Bulgaria* (24 November 2005) and ECtHR, *UMO Ilinden and others v Bulgaria* (19 January 2006).

[92] ECtHR, *UMO ILinden and others v Bulgaria*, para. 58.

[93] ECtHR (GC), *Refah Partisi v Turkey*, para. 125. [94] *Ibid.*, para. 119.

While there are several criticisms possible in relation to the reasoning of the Court in this case,[95] the outcome seems very context-specific to the Turkish situation.[96] In this case, the urge to guarantee the principle of secularism was probably felt more strongly by the Court as it felt the imminent threat of a Muslim party becoming the sole governing party in Turkey.[97]

The more recent cases of the *United Macedonian Organisation Ilinden–Pirin and others v Bulgaria* and *Ouranio Toxo v Greece*, both dealing with a political party with an outspoken minority character (as it happens both being the Macedonian minority in the countries concerned), and *Demokratik Kitle Partisi and Elci v Turkey* confirm that *Refah Partisi* does not imply a general reduction in protection for the freedom of association for minorities. In the first case, the Court underlined that even a separatist goal of a party does not automatically mean that it would not respect democratic principles, and hence would not automatically justify an interference (declaration of unconstitutionality and dissolution).[98] This idea is also confirmed in the case against Turkey, where the dissolution of a political party because it alleged the existence of minorities in the Turkish state and criticised the government's treatment of the Kurdish people, without adopting violent or undemocratic methods, could not be considered 'necessary in a democratic society'.[99] In *Ouranio Toxo* the Court underlined the positive obligations of states to protect the enjoyment of fundamental freedoms against possible interferences by other private entities, including in regard to a political party which set out to defend the interest of a minority. Preserving and developing a minority culture should definitely not be considered a threat to democracy.[100]

Overall, it can still be maintained that the European Court tends to be very protective towards associations and political parties with a minority mandate. The judgments in *Gorzelik* and *Refah Partisi* seem to be exceptions that prove the rule (to the extent that they cannot be explained

[95] *Inter alia*, Spiliopoulou Akermark, 'The Limits of Pluralism', pp. 11–13.

[96] Similar reasoning was already visible in the Commission's 1993 decision in *Karaduman*, concerning the legitimate prohibition of wearing a headscarf in a secular university in Turkey, and repeated in the more recent, similar case of *Leyla Sahin* (see below).

[97] ECtHR (GC), *Refah Partisi v Turkey*, para. 107.

[98] ECtHR, *Case of the United Macedonian Organisation Ilinden-Pirin and others v Bulgaria* (20 October 2001), para. 61.

[99] ECtHR, *Demokratik Kitle Partisi and Elci v Turkey* (3 May 2007), paras. 31–3.

[100] ECtHR, *Ouranio Toxo v Greece* (20 October 2005), para. 40.

by context-specific factors). In a recent judgment concerning the refusal to allow a service of religious worship by a minority religion, the Court similarly underscored that:

> the mere fact that the Evangelical Christian religion was practiced by a minority of the town residents was not capable of justifying an interference with the rights of followers of that religion . . . It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.[101]

Even though the Human Rights Committee has very little case law in terms of Article 22 ICCPR,[102] in a recent view the Committee seemed to adopt a similar strict scrutiny approach towards 'unreasonable' conditions imposed on the registration of a religious minority association.[103]

With regard to the participatory rights that are included in the ECHR, there appears to be a rather strong, albeit it not totally consistent, case of synergy with the more general developments towards the recognition and protection of participatory rights for members of minorities. The Court has, overall, been very protective towards associations and political parties with a minority protection mandate, while demonstrating vigilance in relation to attempts to abuse linguistic requirements for representative functions.

1.3 Educational rights

The jurisprudence under Article 2 of the First Additional Protocol has not developed significantly towards a more minority-friendly jurisprudence since 2000,[104] in relation to either the linguistic dimension of the right to education, or obligations in terms of broader curriculum questions.

While the Court had indicated in *Kjeldsen, Busk Madsen and Pedersen v Norway* that the information transferred in public education should be objective, neutral and pluralistic,[105] the Court's scrutiny in this respect seems rather weak, in other words, granting the states a considerable

[101] ECtHR, *Barankevich v Russia* (26 July 2007), para. 30.
[102] S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004), p. 568.
[103] HRC, *Malakhovsky and Pikul v Belarus* (26 July 2005), paras. 7.6–7.7.
[104] Henrard, *An Adequate System of Minority Protection*, pp. 118–24.
[105] ECtHR, *Kjeldsen, Busk Madsen and Pedersen v Norway* (7 December 1976), para. 53.

margin of appreciation. This attitude was confirmed in the chamber decision of *D.H. and others v the Czech Republic*[106] (even though this case did not touch on curriculum issues in the strict sense).

Importantly, there does seem to be some movement pertaining to language in education issues, even though it is not that explicit and the reasoning followed does not exhibit an awareness of the importance of mother tongue education from a substantive equality viewpoint. In its judgment in *Cyprus v Turkey*[107] of 10 May 2001, the Court seemed to be moving away from its refusal in the *Belgian Linguistics* case[108] of 1968 to provide protection under the ECHR to instruction in the language chosen by the parents and to recognise that instruction in a particular (non-official) language could indeed affect the effective enjoyment of the right to access to education of a particular group.[109] Although the Court in *Cyprus v Turkey* at first repeated its stance that the provision on the right to education 'does not specify the language in which education must be conducted in order that the right to education be respected',[110] it did conclude that 'the failure of the TRNC authorities to make continuing provision for [Greek-language schooling] at the secondary school level must be considered in effect to be a denial of the substance of the right at issue'.[111] Indeed, it argued that because the children had already received their primary schooling through the Greek medium of instruction, 'The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language'.[112]

While this appears to give additional weight to the wish of the parents concerning the language of instruction, the Court's reasoning is equally strongly influenced by the fact that the authorities had assumed responsibility for the provision of Greek-language primary schooling, and also by the particular circumstances concerning the lack of actual availability of instruction in Greek in the south (reflecting substantive equality

[106] ECtHR, *D. H. and others v Czech Republic* (7 February 2006), para. 47.
[107] ECtHR, *Cyprus v Turkey* (10 May 2001).
[108] For a critical analysis of the *Belgian Linguistics* case, see *inter alia* Henrard, *An Adequate System of Minority Protection*, pp. 119–21, Christian Hillgruber and Mark Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Cologne: Verlag Wissenschaft und Politik, 1994), pp. 25–31.
[109] Julie Ringelheim, *Diversité culturelle et droits de l'homme: La protection des minorités par la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2006) p. 206.
[110] ECtHR, *Cyprus v Turkey*, para 277. [111] *Ibid.*, para 278. [112] *Ibid.*, para 278.

considerations), because of which the refusal to provide Greek medium secondary education in the TRNC, amounted to a denial of the substance of the right.[113]

The subsequent decision in *Skender v Former Yugoslav Republic of Macedonia* allows the implications of *Cyprus v Turkey* for minority education to be questioned, since it strongly affirms the position taken in the *Belgian Linguistics* case and moves away from any incipient recognition of a right to mother tongue education or at least instruction in a language other than an official language of the state in accordance with the preferences of the parents. The Court even harks explicitly back to the *travaux préparatoires* of the Protocol, in which such proposals were explicitly rejected because they would concern the problem of 'ethnic minorities' which would fall outside the scope of the Convention.[114] Here, the Court appears conveniently to forget its own references to the Framework Convention for the Protection of National Minorities and its identification of a state obligation to protect the Gypsy way of life in terms of the ECHR.

It is to be hoped that future cases on the right to education will induce the Court to take up its reasoning in *Cyprus v Turkey* again and elaborate and enhance the protection of mother tongue education for minorities, while allowing substantive equality considerations to influence its judgments.

By way of conclusion on the synergetic strand in relation to the recognition of the importance of mother tongue education for members of minorities, one can at most detect a modest, rather inconclusive opening.

1.4 Linguistic rights

The ECHR does not contain many language rights. Nevertheless, as becomes clear in the other chapters in this volume, the lack of clear

[113] One could argue that this approach of the Court does not go further then a 'rights accessibility' yardstick (María Amor Martín Estébanez, 'Council of Europe Policies concerning the Protection of Linguistic Minorities and the Justiciability of Minority Rights', in Nazila Ghanea and Alexandra Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Leiden: Martinus Nijhoff, 2005), p. 294). Nevertheless, when the Court is lenient in evaluating 'practicabilities' of 'rights accessibility', this arguably reflects substantive equality considerations. Martín Estébanez acknowledges herself that in the Cyprus case 'the Court started to acknowledge that the enjoyment of ECHR rights (no matter whether they possess right accessibility features) may require that identity aspects are taken on board in order to guarantee 'generic' enjoyment through mother tongue use' (*ibid*., p. 295).

[114] ECtHR, *Skender v Former Yugoslav Republic of Macedonia* (10 March 2005), para. 3.

language rights has not prevented supervisory organs of similar non-minority-specific instruments to highlight linguistic components of rights (and more specifically their minority dimension) which were similarly not explicit.

The few linguistic rights that are present in the ECHR concern fair trial rights and the rights of those held in detention[115] and are interpreted in a 'minimalistic' way.[116] The jurisprudence under other articles of the Convention, like the right to freedom of expression (Article 10)[117] or the right to freedom to manifest a belief (Article 9) have never been accepted as a basis for language rights or for 'linguistic freedom, e.g. in relation to communications with the public authorities'.[118]

[115] Articles 5(2) and 6(3)(a) and (e) ECHR.

[116] See also Martin Estebanez, 'Council of Europe Policies concerning the Protection of Linguistic Minorities', p. 291.

[117] The Court's reasoning in *Ulusoy v Turkey* is rather ambiguous but could be understood as indicating that the perception created by public authorities, that the use of the Kurdish language in a play would enhance its potential to disturb public order, would not be necessary in a democratic society, and hence would entail a violation of Article 10. However, another possible reading of the case attributes the violation of Article 10 mostly to the lack of foreseeability of the law (compare paras. 34 and 53).

[118] Henrard, *An Adequate System of Minority Protection*, pp. 125–8. While the admissibility decision in *Bulgakov v Ukraine* (22 March 2005) seemed very promising in relation to a typical minority concern in terms of language use by public authorities under Article 8 ECHR, the actual judgment (11 September 2007) does not live up to this promise. The case concerns a complaint by a Ukrainian citizen of Russian origin regarding the use of Ukrainian etymological equivalents of his first name and patronymic on his external passport and in most official documents, instead of their original Russian forms transliterated into the Ukrainian alphabet. By accepting its admissibility, the Court had indicated that the complaint was not manifestly ill founded. A possible synergy with Article 8 of the FCNM appeared, at least in relation to the use of these etymological equivalents. In earlier case law, the ECtHR has already accepted the use of transliteration (see, *inter alia*, *Mentzen v Lithuania* and *Kuhareca v Lithuania*, both of 7 December 2004), in contrast to the practice of the Advisory Committee. It still seemed possible, however, that the European Court would be stricter in relation to the use of etymological equivalents. The more extensive assessment of the case in the judgment of 11 September 2007 revealed, however, several factors which led the Court to conclude to an absence of violation of Article 8. The last two arguments in particular do not seem unreasonable. The Court underscored the great variety of rules in relation to the recognition of names in unofficial languages, and consequently granted the state a very extensive margin of appreciation (para. 43). A stronger argument seems the importance to society of legal certainty concerning the identification of persons: the Court's assessment was influenced by the fact that the complainant had accepted this Ukrainization of his name when it had been introduced a few years earlier (paras. 50–51). Finally, it also seems relevant that the complainant had not used an available procedure to change his name, even though this would have been relatively easy to obtain (para. 53).

Nevertheless, in terms of Articles 2 and 3 of the First Additional Protocol, it was obvious (above) that there have been some interesting developments, which might forestall more far reaching ones.

In terms of linguistic rights overall, the jurisprudence of the ECtHR can arguably not be qualified as successful synergy, rather the contrary, even though the first positive signals should not be ignored.

1.5 Special attention to Roma

Prior to analysing the ECtHR's jurisprudence in terms of 'synergies in the broad sense', a last possible specific strand of synergetic developments should be highlighted, more specifically in relation to the Roma and their special protection needs. It is noticeable that the Court, during the last couple of years, has increasingly taken into account the especially vulnerable position of Roma when evaluating the violation of fundamental rights, including the right to life, the prohibition of torture and inhuman and degrading treatment, the right to security of the person and the prohibition of discrimination.

The particular predicament of the Roma is well documented. Problems of pervasive discrimination go hand in hand with numerous instances of racial violence and mistreatment by the police. Numerous complaints by Roma before the ECtHR concern torture, inhuman and degrading treatment, including during detention, and discriminatory (in relation to the above but also in relation to the right to education, the freedom of movement, etc.) acts which stem from prejudice against Roma because of their own, separate way of life.

In the past, these complaints were not successful.[119] In the last few years, however, several cases concerning Roma reached the Court and led to findings of (often numerous) violations of the ECHR.[120] The main focus of these cases concerns abuse of power and use of violence by public authorities against Roma, but more recently the Court has developed important principles in its case law pertaining to Roma, not least concerning the prohibition of discrimination (see above) and the right to

[119] Complaints by Roma were often found to be manifestly unfounded and hence not even admissible.

[120] *Inter alia* ECtHR, *Assenov v Bulgaria* (28 October 1998); ECtHR, *Velikova v Bulgaria* (18 May 2000); ECtHR, *Anguelova v Bulgaria* (13 June 2002); ECtHR, *Nachova v Bulgaria* (26 February 2004 and GC 6 July 2005); ECtHR, *Chapman v United Kingdom* (18 January 2001).

their own, traditional way of life (see below). Nevertheless, these cases also highlight the more general problems already indicated above concerning the (too) high demands as to the required burden of proof, and the tendency to allow states' interests to outweigh those of its subjects. Thus, in regard to this possible strand of synergy, the picture is also rather mixed.

2 Synergies in the broad sense: special attention for the minority phenomenon

2.1 The right to respect for one's own way of life

It is not difficult to maintain that the right to lead one's own, traditional way of life is very important for minorities. Although there is no such right explicitly provided in the ECHR, the European Commission of Human Rights already established its implicit inclusion in Article 8 ECHR in 1983, in relation to the Lapp minority in Norway.[121] Only recently, however, did the Court follow suit. Indeed, the Court finally acknowledged that the right to one's own way of life is protected by Article 8 in *Chapman v United Kingdom*,[122] a case concerning Roma's difficulties in stationing their caravans.

In *Chapman v United Kingdom*, the Grand Chamber of the European Court of Human Rights departed from its previous case law in *Buckley v United Kingdom*[123]and realised a significant development concerning minority protection in two respects, while still leaving crucial problems as to the actual strictness of supervision on the facts.[124] The first positive development was that the Court for the first time recognised that Article 8 ECHR indeed enshrines a protection for the traditional life of a minority group.[125]

[121] ECommHR, *G and E v Norway* (Application No. 9278/81, 3 October 1983), *DR* 35, pp. 35–36.
[122] ECtHR (GC), *Chapman v United Kingdom* (18 January 2001).
[123] ECtHR, *Buckley v United Kingdom* (25 September 1996).
[124] L. Farkas, 'Knocking at the Gate: The ECHR and Hungarian Roma' (2002) at www.eumap.org/journal/features/2002/may02/echrandhunroma; E. Sebok, 'The Hunt for Race Discrimination' (2002) at www.eumap.org/journal/features/2002/may02/racediscrencourt. For an extensive discussion of the implications of Chapman, see F. Benoit-Rohmer, 'Observations: a propos de l'autorité d'un precedent en matière de protection des droits des minorités' (2001) *Revue Trimestrielle des Droits de l'Homme*, pp. 905–15.
[125] ECtHR, *Chapman v United Kingdom*, para. 73. See also Gilbert, 'Burgeoning Minority Jurisprudence', p. 779.

Secondly, the Court recognises that Article 8 also entails positive obligations for the state in this respect:

> although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented . . . the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.[126]

It should, furthermore, be highlighted that the Court, in its assessment of whether the interference was in line with the conditions of para. 2 and hence proportional to the legitimate aim, explicitly took into account the:

> emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle (see . . . in particular the Framework Convention for the Protection of Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[127]

The explicit reference to the Framework Convention is important, as this might signal that the Court will take the provisions of that Convention more generally into account when interpreting the rights enshrined in the ECHR, which would surely strengthen the minority protection regime in terms of it. Furthermore, the establishment of some kind of European common standard tends to limit the margin of appreciation left to the states and thus leads to stricter scrutiny by the Court, which in fact would be favourable towards a more pronounced minority protection.

Nevertheless, the Court immediately added that it was not persuaded that the consensus is sufficiently concrete to derive specific rules on the kind of action which is expected from states in any particular situation.[128] More specifically, it would be impossible to interpret Article 8 as involving a far-reaching positive obligation of general social policy,

[126] ECtHR, *Chapman* v *United Kingdom*, para. 96. [127] *Ibid.*, para. 93.
[128] *Ibid.*, para. 94.

such as providing a sufficient number of adequate housing and camping facilities for the Roma.[129] Overall, the Court allows the states *de facto* a wide margin of appreciation, and concludes that Article 8 is not violated.

While the reasoning of the Court arguably denotes a more favorable stance to the special needs of minorities,[130] the application to the facts and the ensuing result remain rather disappointing.[131] Nevertheless, the significant dissent,[132] challenging the lenient supervision by the Court,[133] indicates a clear potential for further, more positive developments for minority protection generally.

So far, the position of the ECtHR appears in conformity with the international trend towards recognising wholeheartedly the general principle (protection of the own, separate way of life), while leaving extensive discretion to the states how to fill this in.

2.2 Freedom of religion

The fact that earlier research into synergies had not identified a religious component has been apparent from the outset. When reading the minority-specific instruments, it is indeed striking that hardly any explicit standards for persons belonging to religious minorities are incorporated. This could be explained by the conviction that the freedom of religion would in itself contain adequate protective principles for religious minorities, and that there would be no need for minority-specific instruments in this respect.

[129] *Ibid*., para. 98.

[130] Farkas, 'Knocking at the Gate'; Sebok, 'The Hunt for Race Discrimination'. For an extensive discussion of the implications of *Chapman*, see Benoit-Rohmer, 'A Propos de l'autorité d'un précédent', pp. 905–15.

[131] The position of the ECtHR appears in conformity with the international trend towards wholehearted recognition of the general principle (protection of the own, separate way of life), while leaving extensive discretion to the states how to fill this in.

[132] Seven of the seventeen judges of the Grand Chamber concluded that there had been a violation of Article 8 under the circumstances and criticised the majority for being too careful and reserved: Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Staznicka, Lorenzen, Fischbach and Casadevall.

[133] For a critical assessment of the problems as regards the kind of supervision exercised by the Court, see Benoit-Rohmer, 'A Propos de l'autorité d'un précédent', pp. 911–13; Ringelheim, *Diversité Culturelle*, pp. 244–7.

While the following overview will show that the freedom of religion, as interpreted by the ECtHR,[134] has to a great extent provided adequate protection for religious minorities, the case law in relation to possible prohibitions to wearing headscarves and similar religious (head)gear tends to offer sub-optimal protection. The Court's decision in relation to ritual slaughter and possible state limitations in this respect has also met with considerable criticism. This makes one wonder whether explicit minority standards in relation to religion would not be welcome; if not to confirm and strengthen the existing, minority-conscious lines in the jurisprudence in relation to the freedom of religion, then in any event to provide guidance for outstanding sensitive aspects in relation to the freedom to manifest one's religion.

The Court traditionally came out in favour of religious minorities through its protection of the freedom of religion (and the freedom of association),[135] and especially the related obligation of states to promote (religious) pluralism and guarantee religious tolerance. This positive state obligation may make it necessary to place restrictions on freedom of religion to reconcile the interests of the various religious groups. At the same time, it emphasises that these restrictions must respect the criteria of para. 2, and should thus be proportionate. Sometimes these restrictions[136] are focused on the activities of minorities but also the religious feelings and preferences of the majority can be legitimately limited (to some extent), so that its prejudices against certain religious minorities – e.g.

[134] There is no similar quasi jurisprudence of the Human Rights Committee in relation to a possible positive obligation of states to safeguard religious pluralism, or to the questions of restrictions to state interferences with internal leadership questions of religions etc. In terms of possible limitations on wearing headscarves and similar religiously inspired clothing, General Comment 22 stipulates explicitly that: 'the observance or practice of a religion . . . may include . . . also . . . the wearing of distinctive clothing or head coverings.' However, this is not an absolute right. The HRC seems equally ready to allow far-reaching limitations in this respect, as was visible in its opinion in *Singh Bhinder v Canada*, concerning the wearing of a turban by a federal worker (versus his obligation to wear safety gear). Arguably, the laws concerned were not proportionate to the legitimate aim of protecting public safety: Joseph, Schultz and Castan, *The ICCPR*, p. 509; B. G. Tahzib, *Freedom of Religion or Belief* (Dordrecht: Martinus Nijhoff, 1996), pp. 296–7.

[135] See, *inter alia*, ECtHR, *Biserica Adevarat Ortodoxa din Moldova and others v Moldova* (27 February 2007), para. 34.

[136] Furthermore, as the Court underlined in *Kalac v Turkey* (1 July 1997), 'Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account', like the acceptance of a system of military discipline (para. 27).

Jehovah's Witnesses – are not allowed to prevail. The typical balancing act in its evaluation of whether or not Article 9 is violated does not, *ipso facto*, lead to negative results for religious minorities, as was made clear, *inter alia*, in *Kokkinakis v Greece* and *Hoffmann v Austria*.[137] These and other cases reveal a steady jurisprudence in which it is underlined that the freedom of thought, conscience and religion is one of the foundations of a democratic society and that the pluralism inherent in a democratic society depends on it.

These established principles have been further refined in more recent years, demonstrating a strong overall protection of religious diversity, and hence of religious minorities, both concerning the *forum internum* and the *forum externum* (related to manifestations). In regard to the former, *Ivanova v Bulgaria* shows that to dismiss someone because of their particular religious persuasion amounts to a violation of the right to have a particular religion.[138] As to the *forum externum*, more recent jurisprudence of the Court also revealed both a strong protection against direct interferences by the public authorities[139] and a condemnation of lack of protection by public authorities against interferences by private parties.[140]

On the basis of Article 9, the Court has also developed a strong line of jurisprudence, constraining possible state interference with the appointment of religious leaders and more generally circumscribing the appropriate attitude of states in relation to tensions and schisms within one particular religious stream. Also in this respect, the Court strongly emphasises the importance of religious pluralism, and the obligation not to meddle with internal organisation and leadership issues.[141] In the sense

[137] ECtHR, *Kokinakkis v Greece* (25 May 1993) and ECtHR, *Hoffmann v Austria* (23 June 1993). See also ECtHR, *Buscarini and others v San Marino* (18 February 1999) and ECtHR, *Manoussakis v Greece* (29 August 1996). See also the discussion in Henrard, *An Adequate System of Minority Protection*, pp. 110–14.

[138] ECtHR, *Ivanova v Bulgaria*, para. 83 ff.

[139] See the discussion above of *Biserica Adevarat Ortodoxa din Moldova*. See also *Kutsenov and others v Russia* (11 January 2007) concerning the disturbance by police authorities of a meeting of a religious community without basis in national law and obviously breaking the state official's duty to be neutral and impartial.

[140] See above in relation to the case of *Gldani*.

[141] *Inter alia*, ECtHR, *Agga v Greece* (25 January 2000), paras. 58–60; ECtHR, *Serif v Greece* (14 December 1999), paras. 49–53; ECtHR, *Metropolitan Church of Bessarabia and others v Moldova* (13 December 2001) paras. 123–30; ECtHR, *Hasan and Chaush v Bulgaria* (26 October 2000); ECtHR, *Supreme Holy Council of the Muslim Community v Bulgaria* (16 December 2004), paras. 93–9.

that this line of jurisprudence strengthens the autonomy, self-governance and development of religious groups it undoubtedly contributes to the accommodation of religious diversity.

In view of the above, some legitimate criticism seems in order regarding the Grand Chamber judgment in *Cha'are Shalom VE Tsedek v France* of 27 June 2000. The case concerned the complaint by a Jewish organisation in France which had not received authorisation to perform its own type of ritual slaughter, following the strictest version of Judaism in line with the religious prescriptions of the members of the association.

The alleged reasoning behind this refusal was the fact that authorisation for ritual slaughter was already granted to an organisation which was supposed to be broadly representative of the Jewish community in France. This case actually concerns state obligations in relation to a minority within a minority. However, the Court entirely glossed over this dimension, which might also have influenced the demarcation of the margin of appreciation.

Because it was possible in practice for the applicant association and its members to obtain and eat meat which is compatible with their religious prescriptions (glatt meat), *inter alia*, via Belgium, the Court held that there was not even an interference with the right enshrined in Article 9.[142] Furthermore, even if there had been an interference, Article 9 would not have been violated, according to the Court, as the requirements of para. 2 were met. Concerning the required proportionality, the Court found that: 'regard being had to the margin of appreciation left to Contracting States, particularly with regard to establishment of the delicate relations between the Churches and the State, [the restriction] cannot be considered excessive or disproportionate.'[143]

However, and as was pointed out by the joint dissent of seven judges, the 'mere fact that approval has already been granted to one religious body does not absolve the State authorities from the obligation to give careful consideration to any later application made by other religious bodies professing the same religion'. In contrast to the majority, which had disposed of the Article 14 complaint without much argument, the dissent qualified the differential treatment as a central problem of the case. While the dissenting judges accepted that the states enjoy a wide margin of appreciation with regard to the establishment of the delicate relations between the churches and the state, it emphasised another principle of

[142] ECtHR, *Sha'are Shalom v France*, para. 82. [143] *Ibid.*, para. 84.

steady jurisprudence according to which the margin of appreciation is also determined by what is at stake. In practice, the need to secure true religious pluralism, an inherent feature of a democratic society, would be very weighty, reducing the margin of appreciation. Conferring an exclusive right to authorise ritual slaughters to one Jewish community amounted to a failure to secure religious pluralism, entailing a violation of Article 14 in combination with Article 9.[144]

An interesting line of jurisprudence has developed in cases concerning limitations on the manifestation of one's religion aimed at securing secularism, which invite elucidation. Most of these cases are against Turkey, where the majority of the people are Muslim and women often wear the veil. However, prohibitions against wearing the veil in education and at work are increasingly sensitive issues in most Council of Europe countries where Muslims do constitute a minority.

The Court has underlined in several of its judgments that 'the principle of secularism is certainly one of the fundamental principles of the State which is in harmony with the rule of law and respect for human rights and democracy'. Hence, when states restrict the use of the headscarf by teachers in state schools in order to guarantee secularism, this amounts to a proportionate (legitimate) limitation of the freedom to manifest one's religion. While the Court's reasoning concerning secularism is best known in relation to Turkey, *Dahlab v Switzerland*[145] demonstrates that this reasoning is not confined to Turkey.

The latter does take up a special position in this respect, as is reflected in several judgments of the ECtHR.[146] In a country like Turkey, where the great majority of people are Muslim, where there is a history of a sensitive, fragile relations between church and state and a perceived danger of religiously inspired movements/political parties taking over, the supervisory organs of the ECHR seem willing to accept considerable limitations to the freedom to manifest one's religion.

[144] As Spiliopoulou Akermark points out, the Convention does not guarantee as such the right of minorities to be recognised. However, if recognition and privileges have been granted to one religious group, church, conviction or other minority institution, this should be done on a non-discriminatory basis (Spiliopoulou Akermark, *Justifications of Minority Protection*, p. 16). See also Gilbert, 'A burgeoning jurisprudence', p. 768.

[145] ECommHR, *Dahlab v Switzerland* (15 February 2001).

[146] This secularism reasoning is not limited to cases on the freedom of religion, but was for example also central in the Grand Chamber judgment in the case of *Refah Partisi and others v Turkey* (13 February 2003).

The case which has received most attention so far is *Leyla Sahin v Turkey*, which was ultimately decided by the Grand Chamber,[147] and which actually 'confirmed' to a great extent the reasoning of the European Commission in *Karaduman v Turkey*.[148] According to the Court, the margin of appreciation of states would be particularly extensive in relation to the determination of the relationship between state and religions, and especially so as regards the regulation of wearing of religious symbols in teaching institutions considering the absence of a common European standard.[149] Furthermore, the Court had already accepted in previous cases that the goal of upholding secularism is indeed necessary for the protection of the democratic system in Turkey. The Court accepted that the prohibition to wear the veil in Turkey was also based[150] on the equality of sexes. Since gender equality is undoubtedly one of the key principles underlying the ECHR, this influenced the margin of appreciation left to Turkey.[151] The grant of an extensive margin of appreciation already signals the conclusion of the Court that Article 9 was not in fact violated.

Several critical comments can be made in relation to the arguments of the Court in this case,[152] which would also be relevant for a case on veils in the education sphere of other Council of Europe countries. First, the Court underlines the absence of a common European standard in relation to regulation of religious wear in education. However, as was noted by Judge Tulkens in her dissent at the Grand Chamber judgment, in none of the other member states of the Council of Europe do universities prohibit the wearing of the veil by students. The argument that grown women would be 'pressurised' into wearing the veil by seeing other students do so, seems far-fetched. Lastly, the position of the Court in relation to the qualification of the wearing of the veil as discriminatory concerns a highly controversial point within the religion, which the Court would do well

[147] See also Luc Verhey, 'Noot bij EHRM, *Leyla Sahin v Turkey*, 29 juni 2004', EHRC 2004/80. See also the inadmissibility decision in *Kose and others v Turkey* (24 January 2006), in which the Court considered the application (similar to Leyla Sahin's) manifestly ill-founded.

[148] ECommHR, *Karaduman v Turkey* (3 May 1993).

[149] ECtHR (GC), *Leyla Sahin* (10 November 2005), paras. 101–2.

[150] ECtHR (GC), *Leyla Sahin*, para. 104.

[151] ECtHR (GC), paras. 105–7. It needs to be argued, though, that qualifying the veil as discriminatory against women touches on a controversial point within the religion, which the Court should stay out of. See also the dissent of Judge Tulkens. See also L. Verhey, 'Noot bij EHRM, *Leyla Sahin v Turkey*, 29 juni 2004', EHRC 2004/80.

[152] See also Verhey, *ibid.*

to stay out of. In this respect it is to be welcomed that in two recent admissibility decisions regarding the wearing of the veil in Turkey, the Court no longer relies on this line of reasoning.

In *Kose and others v Turkey* (24 January 2006) the Court considered the application (similar to Leyla Sahin's) manifestly ill-founded. In the context of Turkey with its specific sensitive history in terms of secularism, the Court seems to send the signal that its acceptance of the prohibition of the veil aimed at securing that principle is set, for the time being at least. It is to be hoped that the Court will be equally context-sensitive if a case comes before it from a Muslim girl faced with a similar prohibition in a country without this specific historical background.[153]

Finally, a few remarks about *Kosteski v the Former Yugoslav Republic of Macedonia* are necessary. The Court confirms here, as hinted above, that, like the European Commission in the old days, it is not willing to establish an explicit duty of reasonable accommodation of religious differences which would require the state to take reasonable measures to ensure the effective enjoyment of the freedom to manifest one's religion, including by members of religious minorities.[154] By excluding staying away from work in order to celebrate a religious holiday from the field of application of Article 9, the Court arguably strengthens the dominant norm, and does not even invite the contracting states to adopt a more pluralistic approach. Unfortunately, the Court was not called upon to investigate whether what could be qualified as a lack of differential treatment (of someone who finds himself in a substantively different situation) amounts to a violation of Article 14 following the *Thlimmenos* principle.

Another reason why this case is remarkable is that the Court had to pronounce on the obligation imposed by national law to prove the

[153] While this restrictive case law regarding wearing religious headgear in the education sphere relies heavily on the importance of the principle of secularism and its relation to the protection of a democratic society in Turkey, the Court seems to allow states also outside this context the imposition of arguably far-reaching (disproportionate) interferences with the wearing of religious headgear. In *Phull v France* (11 February 2005) the Court considers it a justified interference with the freedom to manifest one's religion to oblige a Sikh to take off his turban to go through the scanners at the airport as it would be necessary for public security. The Court's reasoning in this case is very thin and fails to screen the proportionality and the subsidiarity of the measure. Unlike the obligation to wear helmets when on a motorcycle, there were obviously alternatives available to screen the turban (with the hand detector, or the Sikh could walk through the security gate with the turban on): L. Verhey, 'Noot bij EHRM, Phull t. Frankrijk' (11 January 2005), EHRC 2005/41.

[154] Ringelheim, *Diversité Culturelle*, p. 169.

adherence to a particular religion. The Court accepts that it is indeed reasonable to impose an obligation to prove adherence to a particular religion in order to benefit from a privilege attached by law to such adherence. However, the Court is, at the same time, wary of the possible abuse by the authorities of such a proof requirement.[155] In fact the Court does not have to give precise criteria about the limits of such proof requirements, since the claimant refused to give any proof whatsoever, which was clearly inadequate. It would have been preferable, however, if the Court had provided certain guidelines in this respect, which would have departed from a purely objective point of view. The latter always carries the risk of not doing justice to the full range of distinctive degrees in which a person can be an adherent of a particular belief. This in turn is particularly negative for minorities within minorities.

2.3 Freedom of expression

Freedom of expression is, in at least two respects, of special relevance for minorities. It allows them to express their own identity as well as to advocate a change of current government policies of particular relevance to their lives and identity.[156] However, it is also important for minorities to be protected against hate speech. In other words, the protection of the freedom of expression should not be so strong that it does not allow for the banning of hate speech. A related point is the question of how far the state may go in restricting speech in order to protect religious sensitivities.

The Court has a steady line of jurisprudence of strongly protecting the right to freedom of expression, which is considered to be one of the essential foundations of a democratic society. Expression is especially protected when it concerns questions of politics or issues touching society as a whole. In this respect reference can be made to the famous *Handyside*[157] quote, according to which the freedom of expression also extends to ideas etc. that offend, shock or disturb the state or any sector of the

[155] See also the Commission's approval of national rules regarding religious objectors to military service which avoided the need of this kind of proof: ECommHR, *Autio v Finland* (6 December 1991).

[156] Benoit-Rohmer, *The Minority Question in Europe*, p. 46.

[157] ECtHR, *Handyside v UK* (7 December 1976), para. 49.

population. In other words, states have to put up with the expression of critical, offensive and disturbing expressions.

The spate of cases against Turkey, regarding in violations of Article 10 ECHR, usually had an explicit minority dimension, as they concerned restrictions on critical comments by politicians, journalists and authors about Turkey's policy towards the Kurdish minority. The Court has undeniably sent a strong message that it protects dissident voices against the current state structure and government, provided that they cannot be said to be advocating or inciting the use of violence.[158] In most of the Article 10 cases against Turkey, the restrictions imposed were held to be disproportionate and hence illegitimate because the grounds for a legitimate limitation were not met.[159]

It is obvious that the assessment of whether or not a certain form of expression advocates or incites the use of violence determines the outcome of the cases. In this respect, the case law of the Court has not yet revealed clear criteria, in the sense that such criteria are not always that straightforward in their application. In the few cases in which the Court has concluded that the interference with the freedom of expression did not amount to a violation of Article 10, the relevant variables seem to be whether (and to what extent) the freedom struggle is being glorified, the tension in the region being very high at the relevant moment, the reach of the medium used, and the extent to which the expressions could result in violence. Nevertheless, the last variable, in particular, is not easy to determine, hence the decision of the Court is not always predictable.[160]

[158] ECtHR, *Ayse Oztürk v Turkey* (15 October 2002); ECtHR, *Karakoc and others v Turkey* (15 October 2002); EctHR, *Ozgur Gundem v Turkey* (16 March 2000), para. 70; ECtHR, *Incal v Turkey* (9 June 1998), para. 50. See also ECtHR, *Association Ekin v France* (17 July 2001). See also, concerning criticism about the attitude of state forces in prison (against prisoners' riots), *Emir v Turkey* (3 May 2007), para. 37.

[159] *Inter alia*, ECtHR, *Oztürk v Turkey* (15 October 2002); ECtHR, *Müslüm Gunduz v Turkey* (4 February 2003); ECtHR, *Özçelik and others v Turkey* (20 October 2005).

[160] It is obvious that the assessment of whether or not a certain form of expression advocates or incites the use of violence determines the outcome of the cases. In this respect, the case law of the Court has not yet revealed clear criteria in this respect, in the sense that these criteria are not always that easy or straightforward in their application. In the few cases in which the Court has concluded that the interference with the freedom of expression did not amount to a violation of Article 10 (ECtHR, *Zana v Turkey* (25 November 1997); ECtHR, *Sürek* (*1*) *v Turkey* (8 July 1999); ECtHR, *Sürek* (*3*) *v Turkey* (8 July 1999), the relevant variables seem to be whether (and to what extent) the Kurdish freedom struggle is being glorified, the tension in the region is very high at the relevant moment, the reach of the medium used, and the extent to which the expressions could result in violence. Nevertheless, the last variable,

2.3.1 Protection against hate speech It cannot be denied that 'for many members of minority groups, the problem of hateful speech in the media is a sensitive question'.[161]

There is not yet a judgment available in which the Court has clearly stated that a state would have, in terms of Article 14, a positive obligation to ensure that there is no private discrimination,[162] including no advocacy of racial hatred between individuals, *inter alia* by prohibiting that kind of speech by law (entailing an obligation as found in Article 20(2) ICCPR). Although this may be related to the margin of appreciation granted to states in relation to discrimination and/or to the fact that no cases have been brought before the Court where was an issue,[163] it cannot be denied that, even in regard to so-called suspect grounds, like religion and race, the Court has not identified such an obligation, in contrast to its practice under other Convention rights.[164] Furthermore, it does not seem likely that positive obligations will be created in the near future, in view of the position taken in the Explanatory Report to the Twelfth Additional Protocol to the ECHR, which is clearly a cautious one, as it is underlined that 'while such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals'.[165] An exception seems to be when there would be a 'clear-cut and grave' lack of protection against discrimination.[166] This leaves one with a rather ambiguous situation, since it seems to presume that there should be at least some legislation prohibiting private discrimination, without giving guidance on what would be sufficient. Interesting questions arise in relation to states providing funding for political parties advocating racial or religious intolerance.

especially, is not easy to determine, hence the decision of the Court is not always predictable (Janneke H. Gerards, 'Noot bij *Oztürk v Turkey*, 15 oktober 2002', EHRC 2002).

[161] Helen Darbishire, 'Hate speech: new European perspective', www.errc.org/cikk.php?cikk=1129.

[162] Geert Goedertier, 'Verbod van Discriminatie', in Johan Vande Lanotte and Yves Haeck (eds.), *Handboek EVRM: Deel 2 Artikelsgewijze Commentaar* (Antwerp: Intersentia, 2005), p. 148.

[163] *Ibid.*

[164] For a detailed study of positive obligations as recognised by the ECtHR, see Allan R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

[165] *Explanatory Report to Additional Protocol 12 to the ECHR*, p. 24. [166] *Ibid.*, 26.

Be that as it may, legislation banning hate speech, or convictions of persons for having engaged in hate speech does seem, at first sight, to be contrary to the full and adequate protection of freedom of expression. Here also the *Handyside* quote needs to be kept in mind, namely that: freedom of expression also extends to ideas etc. that offend, shock or disturb the state or any sector of the population. Arguably, hate speech would therefore also be covered and protected by the freedom of speech.

Nevertheless, state activities that restrict, prohibit and/or punish hate speech could be 'saved' in several ways, some in relation to Article 10(2), others in terms of Article 17. Most cases of hate speech (and complaints about convictions in this respect) are stopped at the admissibility stage (manifestly unfounded) because of Article 17, which does not allow ECHR rights to be invoked in order to destroy (other) rights enshrined in this Convention.[167] To the extent that Article 20 ICCPR, by obliging states to prohibit certain expressions by law, also limits the freedom of expression, it serves the same purpose as Article 17 ECHR in relation to Article 10 ECHR.

The Human Rights Committee indicates in its General Comment on Article 20 ICCPR that the duty of states to prohibit certain types of speech is fully compatible with the right to freedom of expression in Article 19, in view of the 'duties and responsibilities' the exercise of this right carries with it.[168] Since this reference to 'duties and responsibilities' is taken up in the paragraph concerning legitimate limitations to the freedom of expression and is similarly found in Article 10(2) ECHR, the Court could also save state interferences with hate speech in these terms. Similarly, the case law of the Court also reveals that it provides much less protection in relation to insults that are not related to an actual political or societal debate.[169] This could reinforce the preceding line of thought.

The Commission had already acknowledged in 1979 that the expression of political ideas containing elements of racial discrimination constitutes an activity within the meaning of Article 17 ECHR, which does not benefit from protection by Article 10.[170] The Court confirms this line of reasoning in

[167] See also a case in which the Court does not refer to Article 17 but emphasises that 'seeking expulsion of others from a given territory on the basis of ethnic origin is a complete negation of democracy' (ECtHR, *Stankov and the UMO Ilinden v Bulgaria* (2 October 2001), para. 100).

[168] HRC, General Comment 11: Article 20 ICCPR, para. 2.

[169] ECtHR, *Janowski v Poland* (21 January 1998), para. 32.

[170] ECommHR, *Glimmerveen and Hangenbeek v Netherlands* (11 October 1979). See also ECommHR, *Hennick v Germany* (21 May 1997) unpublished.

Jersild v Denmark. This case was decided on the merits because it concerned a journalist, who did not harbour these ideas himself, but had broadcast the views of others in the public interest, to expose the problem. While the Court considered the conviction of the journalist a violation of Article 10 (indicating that the press must be free to report on the problem of racial hatred in society), it did emphasise that the persons actually making these statements could not rely on Article 10 themselves because of Article 17.[171]

2.3.2 Protecting religious sensitivities? A similar tension can be detected in terms of the freedom of religion and the freedom of expression and the Court has on several occasions been confronted with a case concerning a state interference with the freedom of expression that would be disrespectful of religious sensitivities. While these cases did not really deal with religious minorities, the reasoning of the Court seems equally applicable in cases that would turn around the protection of sensitivities of a religious minority.

In *Otto-Preminger-Institute v Austria* (concerning the seizure and confiscation of a film which would hurt the religious feelings of an important part of the population), the Court explicitly stipulated that a state might have a positive obligation to ensure the peaceful enjoyment of the right under Article 9. While those:

> who choose to exercise the freedom to manifest their religion, *irrespective of whether they do so as members of a religious majority or a minority*, cannot reasonably expect to be exempt from all criticism . . . the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State . . . Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.[172]

When assessing whether an interference with the freedom of expression for a similar reason was legitimate (in terms of Article 10(2)) in *Wingrove v UK* (concerning the refusal by the UK authorities to issue a visa for a video in which Jesus Christ is implicated in sexual activities with a woman), the Court underlined that a:

[171] ECtHR, *Jersild v Denmark* (23 September 1994), paras. 33 and 35.
[172] ECtHR, *Otto-Preminger-Institut v Austria* (20 September 1994), para. 47.

> wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions.[173]

In both cases the Court allowed the freedom of religion and the protection of religious sentiments (and the positive state obligations in this respect) to outweigh the freedom of expression (and the negative state obligation), which is related to the fact that the goal of the interference would give the states a wide margin of appreciation (the more so because of the absence of a common European standard in the matter). Also the fact that, here, the expressions were held not to 'contribute to any form of public debate capable of furthering progress in human affairs'[174] arguably influenced the Court in reducing the strictness of its scrutiny.[175]

Three more recent cases have enabled the Court to develop its jurisprudence in this respect in that they clarify that the most important question seems to be whether the comment is either an objective and abstract criticism or a gratuitous hurtful comment which focuses on particularly important religious symbols or persons of a religion. In the former case the restriction to the freedom of expression would amount to a violation, while in the latter this restriction would be legitimate (and the protection of the religious sentiments of the believers would prevail). In *I. A. v Turkey*,[176] I. A.'s statements about the prophet Mohammed would, according to the Court, qualify as gratuitously hurtful, while *Tatlav v Turkey*[177] and *Giniewski v France*[178] would fall in the other category, as the comments concerned the particular religion more generally. It is nevertheless not that easy to predict where exactly the line between these two categories will be drawn. Furthermore, the relative importance

[173] ECtHR, *Wingrove v UK* (25 November 1996), para. 58. See also ECtHR, *Otto-Preminger-Institut*, para. 49.
[174] ECtHR, *Wingrove*, para. 49.
[175] Dirk Voorhof, 'Vrijheid van Meningsuiting', in Vande Lanotte and Haeck (eds.), *Handbook EVRM*, p. 992.
[176] ECtHR, *I. A. v Turkey* (13 September 2005).
[177] ECtHR, *Aydin Tatlav v Turkey* (2 May 2006).
[178] ECtHR, *Giniewski v France* (31 January 2006).

and possible role of other criteria, like the reach of the medium, the possible artistic nature of the expression, etc. requires further elucidation. While it seems surely legitimate to protect vulnerable minorities against unnecessarily and gratuitous hurtful comments about their innermost beliefs, it is equally important (for minorities) that this case law will not have a chilling effect,[179] which could also reduce minorities' *de facto* freedom to speak out and voice their potentially controversial ideas.

At the moment, it is hard to predict how this line of jurisprudence will develop,[180] for example in a case that might be brought by a Muslim minority in relation to the recent Danish cartoons of the prophet Mohammed.

3 Overall assessment of the ECHR's jurisprudence and minority protection: successful and failed synergies

While this has not been discussed previously, it is possible to distinguish a more informational type of synergy, in addition to the more 'substantive' ones which have been traced until now. In regard to the former, it was pointed out that the European Court takes note of the relevant stances and developments not only in other organs and instruments of the Council of Europe (ECRI, FCNM), but also in other organisations (EU, UN-CERD). However, the extent to which the Court allows its decisions effectively to rely on these 'parallel' positions and developments is rather limited. In some respects, this careful attitude is totally justified, as in the case of the FCNM, which is indeed meant to offer only a broad framework, so it would be difficult for the Court to deduce, for example, very specific rules as to numbers of caravan sites a country should have. Nevertheless, the Court could have done more with the consensus it perceived as regards positive obligations on states 'to facilitate the gypsy way of life'. The Chamber decision in *Nachova v Bulgaria* contained an explicit reference to

[179] See, *inter alia*, the joint dissent by judges Costa, Cabral Barreto and Jungwiert in *I. A. v Turkey*; the dissent of Judge Lohmus in *Wingrove v United Kingdom*; and the joint dissent of judges Palm, Pekkanen and Makarczyk in *Otto-Preminger-Institut*.

[180] The Court seems to have overstretched this line of jurisprudence when it concluded in *Murphy v Ireland* that Article 10 was not violated even though the authorities had prevented the transmission of a commercial about a movie that would be shown providing proof of Jesus' resurrection, so called to protect the religious sensitivities of a part of the population. The striking difference with the two older cases was that the commercial was in no way offensive or hurtful (see also E. Brems, 'Noot bij Murphy t. ierland, 10 juli 2003', EHRC 2003/72.

the EU Race Directive and its rule on the 'reversal' of the burden of proof, which was absent in the Grand Chamber decision. Nevertheless, both seem in principle to accept that a *prima facie* case of discrimination shifts the burden of proof to the respondent state. However, the Chamber and the Grand Chamber used different standards for what would amount to such a '*prima facie* case', the former being closer to the international trend towards loosening the burden of proof on claimants of racial discrimination than the latter. It should also be underscored that the Grand Chamber in *D.H. and others v Czech Republic* was willing to take into account broader contextual information on the Roma and their disproportionate presence in schools for special education. More specifically, it was willing to take into account reports of other supervisory mechanisms, even when based on unofficial statistics,[181] while the Chamber had only acknowledged these worrying reports without actually including them in its assessment.

As regards the more 'substantive' synergies, a mixed picture emerges, with very few completely successful synergies. This is probably also caused by the fact that the Convention itself does not have a specific minority focus, and does not contain explicit minority rights, while the Court is cautious of being too enthusiastic in 'expanding' the reach of the Convention to areas the contracting states did not envisage when drawing it up (especially as this could entail far-reaching positive obligations with financial repercussions).

While the Court now undoubtedly shows more attention to the minority dimension in its cases, and is even willing to accept that states would have an obligation to facilitate the minority way of life, it has so far not given more concrete guidance as to what that would entail, while granting the states an extensive margin of appreciation. Both the *Thlimmenos* rationale and the acceptance in principle of indirect discrimination are important overtures towards substantive equality. However, the *Thlimmenos* rationale has so far not led to the recognition of positive obligations to adopt minority-specific measures (in certain circumstances). Furthermore, the Court still seems to struggle fundamentally with 'indirect discrimination'.

Similarly, while the Court seems in many respects to protect the participatory rights of members of minorities, some of its statements are too lenient on states, while the reasoning in some cases is frankly worrying, and not only from a minority protection perspective. In regard to Roma, the Court is willing to acknowledge their particularly problematic

[181] EHRM (GK), D.H. e.a. t. Tsjechië, 13 November 2007, para. 195.

situation, but their complaints still fail regularly because of the often criticised high burden of proof, and/or the Court's unease with the concept of indirect discrimination.

Especially in terms of the more specific 'identity' issues, related to language use, *inter alia* in relation to education, the protection flowing from the ECHR is marginal at most. Nevertheless, even these cases still have some potential, in view of the fact that the Court seems willing to move away from its very strict stance in the past (concerning language in education) and the possible implications in this respect of the *Thlimmenos* rationale. In this regard, one could refer to the concurring opinion of Judge Costa in *D. H. and others v Czech Republic*, which seemed to hint at a task for the Grand Chamber in clarifying the *Thlimmenos* rationale in terms of positive discrimination in the education sphere. Also, the admissibility decision in *Bulgakov v Ukraine* should be highlighted, as it arguably implies that complaints about transliteration of names versus translation of names to the majority/official language are not manifestly unfounded.

4 Succinct overview of synergies in relation to minority protection in the work of other Council of Europe bodies: ECRI, the Venice Commission and DH-MIN

The following overview and analysis will be restricted to a brief assessment of the most relevant components of the mandate and the actual activities undertaken by these three bodies, while drawing out the most striking synergies in relation to minority protection.

4.1 ECRI[182]

ECRI is an independent human rights monitoring body on racism and racial discrimination, which was established by the first Summit of Heads of State and Government of the member states of the Council of Europe in

[182] The website of the Council of Europe contains the following information in its human rights section, ECRI, 'presentation of ECRI', ECRI and its programme of activities. Under publications (of ECRI) the numerous general policy recommendations can be found, while the 'country reports' are also available on line. A nice overview is provided by the booklet published by the Council of Europe: Mark Kelly, *ECRI: 10 Years of Combating Racism: A Review of the Work of the European Commission against Racism and Intolerance* (Strasbourg: Council of Europe, 2004).

1993. Its statute was renewed on 13 June 2002 and further strengthened in May 2005. ECRI's task of combating racism, xenophobia, anti-Semitism and intolerance is obviously relevant for minorities in view of the crucial importance of non-discrimination for minorities; minorities being the typical targets of intolerant attitudes and reactions, while fighting anti-Semitism benefits the Jewish minorities.

ECRI's action covers all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of 'race', colour, language, religion, nationality and national or ethnic origin. The grounds enumerated to circumscribe ECRI's actions are clearly all specifically relevant for minorities.

While the statute does not focus explicitly on minorities, this focus is in any event implicitly there and comes to the forefront in the choice of topics of (some of) the General Policy Recommendations and Country Reports by ECRI.[183] In March 1998 ECRI adopted a General Policy Recommendation aimed at combating racism and intolerance against Roma/Gypsies, which was clearly in line with the trend towards devising measures attuned to the special needs and vulnerabilities of the Roma. April 2000 saw the emergence of a recommendation aimed at combating intolerance and discrimination against Muslims, who constitute a religious minority in most Council of Europe member states.

General Policy Recommendation 7 of 2002 on national legislation to combat racism and racial discrimination contains a very broad definition of racism, referring not only to race and colour but also to language, religion, nationality and national or ethnic origin, again emphasising the broad coverage of ECRI's focus. The recommendations explicitly include the prohibition of indirect discrimination, and call on states to prohibit private discrimination, *inter alia* in housing, employment, goods and services intended for the public and public places. States are furthermore urged to penalise hate speech (broadly defined). This progressive interpretation of the prohibition of discrimination takes up and strengthens the international trend which is noticeable in this respect, while maybe even going beyond.

ECRI's country reports also reveal special attention to minorities and their concerns. Among the main messages in the second round of country

[183] ECRI's General Policy Recommendations can be accessed at www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-Policy_Recommendations/index.asp#TopOfPage.

reports, ECRI 'encourages States to establish and maintain legal provision for the recognition of minority languages, where appropriate with regard to the population of such minorities in the territory',[184] which clearly confirms the growing prominence of minority language rights. ECRI's country reports also emphasise the importance of the participatory rights of members of minorities, taking up and confirming another pro-minority development. ECRI is not only of the opinion that the 'involvement of members of minority or other vulnerable groups should be secured in respect of all efforts to ameliorate their situation, from the planning to the implementation phase' but also that 'additional efforts should be undertaken to increase representation of members of minority groups in public life (where such groups are under-represented)'.[185]

Furthermore, ECRI:

> supports the introduction and retention of legal provisions guaranteeing members of national, ethnic or other minority groups the freedom to maintain and develop their customs and traditions. Typically, such provisions may include establishing the right of minority groups to establish cultural institutions, cultural autonomy and to participate in the resolution of matters connected with their cultural identity.[186]

This clearly takes up the special attention for minorities' right to identity, as also noticed (to some extent) in the jurisprudence of the European Court of Human Rights.

4.2 Venice Commission – commission of democracy through law[187]

The Venice Commission is the Council of Europe's advisory body on constitutional matters, which was established in 1990, but since 2002 has also been open to the full membership of non-European states. While it was originally conceived as a tool of emergency constitutional engineering, it has developed into an internationally recognised independent think-tank. The documents it produces are in any event not limited to

[184] Kelly, *ECRI: 10 Years of Combating Racism*, pp. 25–6. [185] *Ibid.*, p. 74. [186] *Ibid.*, p. 26.
[187] The website of the Council of Europe contains not only a general presentation of the Venice Commission but also provides access to its reports and other documents: www.venice.coe.int/site/main/representation.

country-specific comments on particular national laws, draft laws or policies but also include thematic reports and studies.

The Venice Commission aims at upholding the three underlying and closely interwoven principles of Europe's constitutional heritage, namely democracy, human rights and the rule of law. Also minority protection is interrelated with these themes, as is borne out by the numerous minority-specific documents produced by the Commission.

In addition to the various country-specific documents (e.g. the Opinion on the draft law on the Statute of National Minorities living in Romania, October 2005; and the Opinion on possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium, March 2002); there are also various other thematic reports on minority issues. Several of these thematic reports actually confirm the growing prominence of typical minority themes, like the Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-making Processes in European Countries of March 2005.

4.3 Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN)[188]

The Committee of Experts consists of government representatives with expertise and experience in the field of protection of national minorities, and is subordinate to the Steering Committee for Human Rights of the Council of Europe. The Committee was reinstated in November 2004 after having been inoperative for several years following the adoption of the Framework Convention for the Protection of National Minorities, which it developed. Its current terms of reference clarify that it is not supposed to monitor the situation in individual member states but is rather intended as a forum for the exchange of information and good practices for the protection of national minorities at national level. The fact that it is supposed to draw on the results of the monitoring mechanism of the FCNM and also 'where appropriate the work of other bodies

[188] The website of the Council of Europe, more specifically that on the Framework Convention for the Protection of National Minorities, also contains a section with information on DH-MIN, including mandate, meeting reports and the lists of decisions taken at these meetings: www.coe.int/t/e/human_rights/minorities/4._intergovernmental_ co-operation_(dh-min).

dealing with these issues, and especially the OSCE High Commissioner on National Minorities' clearly contains potential for synergies.

When considering the themes which have been focused upon so far, often through the collection of expert advice by independent experts, it is striking that considerable attention has been given to participation issues, including studies on electoral laws and the law of political parties that are relevant for national minorities, and on consultation mechanisms of national minorities.[189] DH-MIN also decided during the October meeting of 2006 to pursue its work on access of national minorities to new media. In addition to these 'typical' minority themes, DH-MIN has also extensively discussed the most central debating point in relation to minority protection, namely the relationship between non-discrimination and minority protection.[190] It is difficult to gauge the implications and impact of the ensuing documents because they are written by independent experts and do not necessarily reflect the opinions of the government representatives who are members of DH-MIN. Nevertheless, the focus of DH-MIN's work does confirm certain development lines concerning minority protection. This is also true for the themes considered for possible future work of DH-MIN. In addition to the question of the protection of 'new communities', and the promotion of minority languages, the tension between the need for disaggregated data to develop adequate minority protection policies and data protection will be tackled.

In this respect it should be highlighted that the Advisory Committee actually consistently requests such disaggregated data, a tendency which is also visible among the UN Treaty bodies. Arguably, this theme will receive heightened attention in the future. While it does not concern a substantive synergy, the need for states to have such data in order to develop an appropriate minority protection policy can arguably be considered a methodological synergy for the future.

[189] See DH-MIN(2005)011-final, Report by Marc Weller on Consultation Arrangements concerning National Minorities, which was published as DH-MIN(2006)012, *Handbook on Minority Consultative Mechanisms*.

[190] This has resulted in four papers, two by this author (DH-MIN(2006)021 and DH-MIN(2006)020 on the impact of non-discrimination norms in combination with general human rights for the protection of national minorities), one by Olivier de Schutter (DH-MIN(2006)019 on the EU legislation and the norms of the FCNM) and one by Rainer Hoffman (DH-MIN(2006)018 on the added value and the essential role of the FCNM).

13

The many faces of minority policy in the European Union

BRUNO DE WITTE AND ENIKŐ HORVÁTH

Introduction: a fragmented regime

The European Union is an odd candidate for a role in the synergy of minority protection regimes, since it has never developed a self-conscious minority protection policy or adopted a legal instrument expressly aimed at protecting minority rights. Accordingly, its 'synergetic potential' has usually been depicted as passive:[1] it took up minority protection standards from elsewhere (mainly those adopted in the framework of the Council of Europe and the Organization for Security and Co-operation in Europe ('OSCE')) and gave them its backing in the context of relations with countries seeking accession. In recent years, however, the European Union ('EU'), as an increasingly all-purpose organisation, has started claiming a more active role, developing new approaches to minority protection which are both innovative and complementary to what is done elsewhere. This role has been acknowledged and is being examined systematically in the literature,[2] even though the official legal instruments and policy

[1] See Kristin Henrard, 'Ever-increasing synergy towards a stronger level of minority protection between minority-specific and non-minority-specific instruments' (2003/4) 3 *European Yearbook of Minority Studies* 15–41, at 23.

[2] Some of the most important recent contributions on minority protection in and by the European Union include: Gabriel N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest: LGI Books, 2004); Frederic Van den Berghe, 'The European Union and the protection of minorities: how real is the alleged double standard?' (2003) 22 *Yearbook of European Law* 155–202; Peter Hilpold, 'Minderheiten im Unionsrecht' (2001) 39 *Archiv des Völkerrechts* 432–71, and a monograph (focusing on the linguistic aspects of minority protection) by Niamh Nic Shuibhne, *EC Law and Minority Language Policy* (The Hague/London: Kluwer Law International, 2002). For early essays on the same subject (when nothing much was happening yet), see M. A. Martín Estébanez, 'The protection of ethnic, religious and linguistic minorities', in Nanette Neuwahl and Allan Rosas (eds.), *The European Union and Human Rights* (The Hague/London: Kluwer Law International, 1995), 133–63; and Bruno de Witte, 'The

documents of the EU itself have not, thus far, offered any comprehensive statement on the EU's position in this area.

For an entity with policies on practically everything, then, the EU has been slow to develop one in relation to minorities. Even the concept of 'minority', let alone 'minority protection' or 'minority rights', is absent from the EU and EC Treaties, and was included in the Constitutional Treaty ('CT') only after much haggling at the Intergovernmental Conference which followed the drafting Convention. A reference to respect for 'the rights of persons belonging to minorities' did, finally, find a place among the values of the Union,[3] but was not followed up further in the operational provisions of the CT. Or rather, it was followed up only in parts and not with direct reference to 'minorities'. Article II-81 CT included a long list of prohibited grounds of discrimination (by means of the incorporation of the Charter of Fundamental Rights), but the competence to enact European legislation to combat discrimination, included in Article III-124, did not include all prohibited grounds – language and membership of a national minority, among others, are conspicuously missing. Or, to take another example, whereas regions were to have a constitutionally protected place in the EU system (see CT Article I-5(1)) and already hold a place in its structure through the Committee for the Regions, minorities have no such channels for participation.[4]

In light of the failure of all Member States to ratify the CT and the uncertain future of the Treaty of Lisbon, only the still non-binding Charter of Fundamental Rights (adopted in 2000) among the main legal instruments of the EU presently includes a reference to minorities: in Article 21, 'membership of a national minority' is listed as a prohibited ground for discrimination,[5] after the example of Article 14 of the

European Community and its minorities', in Catherine Brölmann, René Lefeber and Marjoleine Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993), pp. 167–85. See also Richard L. Creech, *Law and Language in the European Union: The Paradox of a Babel 'United in Diversity'* (Groningen: Europa Law Publishing, 2005).

[3] See Article I–2 of the Treaty Establishing a Constitution for Europe, OJ 2004 C310. The Constitutional Treaty was signed on 29 October 2004 by all twenty-five member states. Due to the failure of all Member States to ratify the CT, the European Council meeting in June 2007 decided to start negotiations on a Reform Treaty, now the Treaty of Lisbon, signed on 13 December 2007. The reference to the rights of minorities was carried over into the Treaty of Lisbon: Article 1, para. 3.

[4] In fact, a proposal for a Committee of National and Ethnic Minorities was rejected during the Convention process. See CONV 580/03 (Contribution of József Szájer, 26 February 2003).

[5] Despite proposals for a separate clause on minority rights by a number of NGOs, as well as EU institutions (such as Parliament and the Committee of the Regions), no such provision was

European Convention on Human Rights ('ECHR'). The concept of 'minority' thus remains somewhat of an interloper in EU law. Rarely referred to in EU documents, and still left for the member states to accept and define, minority protection would seem an unlikely subject for an active EU policy. However, when looking at the actual range of EU action with effects on minorities, the picture changes dramatically: to name but the most obvious, non-discrimination on an ever-expanding range of bases is a pre-eminent principle of EU law; cultural diversity is a value to be respected by the EU and by its member states; and policies on integration of migrants and on social exclusion have become priority concerns at the Union level. All of these matters have a minority protection dimension.

The EU Network of Independent Experts on Fundamental Rights (the closest thing, thus far, to a human rights monitoring mechanism in the EU) recently summed up the emerging approach:

> 'minority rights' should be understood, rather than a set of rights recognized to certain groups recognized as '(national) minorities', as a list of guarantees which are recognized to individuals as members of certain groups, or to these groups themselves, but whose beneficiaries will vary according to the identity of the right which is at stake.[6]

In effect, to understand the role of the EU one must first mentally dismantle the idea of minority rights into its constituent elements, then reconstruct it by putting measures from a number of diverse, interlocking policy areas into a comprehensive minority protection framework – or, in the words of one writer, into a general 'diversity management' framework.[7] One must note that any such 'ex post' framework is just the product of scholarly analysis; the European institutions themselves do not act within an explicit minority protection framework. It would be misguided, therefore, to think that minority protection benefits from a

included during the drafting process of the EU Charter of Rights. See discussion in Guido Schwellnus, "'Much ado about nothing"? Minority protection and the EU Charter of Fundamental Rights' (2001) *Constitutionalism Web-Papers* (ConWEB), No. 5/2001, 7 et seq.

[6] EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union (2005) CFR-CDF.Them.Comm2005.en, pp. 7–8. See also p. 15.

[7] Gabriel N. Toggenburg, 'Who is managing ethnic and cultural diversity in the European condominium? The moments of entry, integration and preservation' (2005) 43(3) *Journal of Common Market Studies* 718.

coherent 'mainstreaming' approach similar to that developed, for example, for gender equality or environmental protection in the EU system. Thus, the EU approach to minority protection differs sharply from the standard tack of the Council of Europe and the OSCE, the main sources of standard-setting on minority protection in Europe. These organisations have openly relied on a concept of minority protection rooted in the public recognition of particular groups, and on a listing of enumerated rights for the members of these groups and/or obligations for host states.[8] By contrast, the EU focuses on different types of measures (only some of which can be regarded as 'rights') to address specific issues, the beneficiaries of which are identified on a case-by-case basis without the need for a set of pre-determined and generally applicable criteria.

This 'fluid' approach makes it difficult to identify how much of an added value the EU represents in regard to minority protection. However, the strategy makes sense if one considers the general lack of agreement on what constitutes a 'minority' for the purposes of international law or the varied (and in some cases diametrically opposed) positions of individual member states on minority issues, with Hungary and France, say, at opposite ends of the spectrum.

In the following pages, we will highlight some of the disparate sources of the EU's minority policy, more particularly: the rights associated with free movement of persons (both EU citizens and others), fundamental rights, minority protection in external policy, and action in the fields of education and culture.[9]

1 The main strands of the European Union's minority policy

1.1 The rights of EU citizens and third-country nationals

In the first place, the rights associated with the *free movement of EU citizens* can be considered an element of minority policy, in the widest sense, to the extent that European citizens constitute minorities in their states of residence – consider, for example, the numerous Portuguese nationals in Luxembourg. The increasingly wide scope accorded to these

[8] See various other chapters in this volume.

[9] This division builds on earlier work by one of the authors: Bruno de Witte, 'The Constitutional Resources for an EU minority protection policy', in Toggenburg, *Minority Protection and the Enlarged European Union*, pp. 107–124.

rights by the European Court of Justice ('ECJ') – particularly in the area of welfare and education benefits[10] – has made the legal status of European citizenship a basis for almost complete equal treatment between EU citizens and the host state's own nationals. This includes the right to avail themselves of minority protection rights originally intended for use only by the host state's own nationals. Thus, EU citizens have been granted the right to benefit from language rights accorded to the German-speaking minorities in Belgium and Italy.[11] In addition, the 2004 Directive on the rights of EU citizens curbed the existing range of restrictions on rights of entry and residence, added a new right to 'permanent residence' and extended a number of new rights to cover family members (in addition to broadening this category),[12] so that the process of ever-broader equal treatment of European citizens continues. In fact, the expansion of these rights has strengthened calls for similar (or even equal) rights for (what in European Community jargon are called) 'third-country nationals', in other words all foreign nationals who are not EU citizens.

There has indeed been, in recent years, a slow movement towards the approximation of their rights to those of EU nationals through a different EU policy context, namely the development of a Community migration policy. Though relatively young (introduced by the Amsterdam Treaty and elaborated on at the European Councils in Tampere and Laeken),

[10] See Case 184/99 *Rudy Grzelczyk v le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR 6193; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573; and Case C-209/03 *R* (*on the application of Dany Bidar*) *v London Borough of Ealing* [2005] ECR I-2119. On these recent developments in ECJ case law, see the contributions in Eleanor Spaventa and Michael Dougan (eds.), *Social Welfare and EU Law* (Oxford: Oxford University Press, 2005), and Síofra O'Leary, 'Solidarity and citizenship rights in the Charter of Fundamental Rights of the European Union', in Gráinne de Búrca (ed.), *EU Law and the Welfare State – In Search of Solidarity* (Oxford: Oxford University Press, 2005), pp. 39–87.

[11] This happened in the ECJ judgments in the cases *Mutsch* and *Bickel and Franz*, decided in 1985 and 1998 respectively. ECJ, Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681; Case C-274/96 *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7650. For an analysis of the (limited) implications of these judgments on national minority policies, see Francesco Palermo, 'The use of minority languages: recent developments in EC Law and judgments of the ECJ' (2001) 8 *Maastricht Journal of European and Comparative Law* 299, and Nic Shuibhne, *EC Law and Minority Language Policy*, pp. 71–9 and 278–84.

[12] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ 2004 L 229; and the European Commission's Fourth Report on Citizenship, COM (2004) 695 final, at 8–9 and 11 (discussing the possibility of a right for EU citizens to participate in national and regional elections in their country of residence).

it has resulted not only in a stronger focus on the rights of third-country nationals generally[13] and in a host of initiatives for special categories within them (especially in relation to refugees, asylum-seekers and, most recently, students and researchers),[14] but also in concern with the 'integration' of immigrants into their host societies.[15] The measures discussed under this catch-all term are wide-ranging and may entail both rights and obligations for the members of migrant minorities. Although single European states tend to consider such questions to be within their national competence, the need for learning from other countries' experience is generally acknowledged, so that the EU quickly gains a role in coordinating national policies on management of inter-ethnic relations and has become a new source of (still rather limited) rights for 'new' minorities.

1.2 The policy on race and ethnic discrimination

In a closely related matter, the development of *fundamental rights* – most notably the emergence of the guiding norm of non-discrimination – has also served as a general source of measures that may benefit minorities.

[13] See Council Directive 2003/86/EC of 22 September 2003 on the right to family unification, OJ 2003 L251/14; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L16/44; Council Regulation 859/2003 of 14 May 2003 extending the provisions of Regulation 1408/71/EEC and Regulation 574/72/EEC to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ 2003 L124/1; and the Race Discrimination and Employment Directives discussed below. For a general discussion of the place of third-country nationals in the EU legal framework, see Sonja Boelaert-Suominen, 'Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: five paces forward and possible three paces back' (2005) 42 *Common Market Law Review* 1011–52.

[14] For an overview of the most recent measures for those special categories, see Steve Peers, 'Key legislative developments on migration in the European Union' (2005) 7 *European Journal of Migration and Law* 87–118.

[15] See Communication from the Commission, On Immigration, Integration and Employment, COM (2003) 336 final; European Commission, First Annual Report on Migration and Integration, COM (2004) 508 final; and Communication from the Commission, A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union, COM (2005) 389 final. The emergence of this 'European policy on migrant integration' is documented, for example, in Ryszard Cholewinski, 'Migrants and minorities: Integration and inclusion in the enlarged European Union' (2005) 43 *Journal of Common Market Studies* 695–716 at 697; and in Thomas Gross, 'Integration of immigrants: the Perspective of European Community law' (2005) 7 *European Journal of Migration and Law* 145–61.

Obviously, this is the case with the Race and Ethnic Discrimination Directive,[16] which seeks to ensure 'equal treatment between persons irrespective of racial or ethnic origin'. In 2000, only one year after the entry into force of the Treaty of Amsterdam – which granted the European Community an express competence to adopt measures to combat discrimination based on a variety of grounds – the Council of the EU enacted this far-reaching piece of legislation in a surprisingly rapid manner. It seems obvious that the prohibition of discrimination on the ground of *ethnic origin* may also be applied to discrimination based on membership of a cultural or linguistic minority. Discrimination on grounds of *nationality* is, as such, not prohibited by the Directive. Still, it is quite clear that the authors of this Directive were aiming primarily at the protection of certain immigrant groups, like North African immigrants and their descendents in France, or Turkish immigrants and their descendents in Germany, many of whom do not have the nationality of their country of residence. In addition, the general wording used in the Directive could also provide protection against invidious discrimination for, say, the Roma or Basque minorities living in France. What is crucial for the application of the Race Directive (as it is commonly but improperly known) is the fact that persons and groups of persons are singled out for discriminatory treatment because of their real or perceived ethnic identity – and this may well be the case with some cultural minorities.[17]

The Race Directive's material scope of application is particularly broad, given that it is not limited to employment but also extends to direct and indirect discrimination in the fields of education, housing and social protection. Moreover, it applies both vertically (as a duty for public authorities) and horizontally (in the context of private legal relations), and contains strong remedial provisions. The Directive thereby follows the model of Regulation 1612/68 on the free movement

[16] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22. See, for a general presentation, Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002), ch. 3.

[17] For an elaboration of this point, see in particular Dimitrina Petrova, 'Racial discrimination and the rights of minority cultures', in Sandra Fredman (ed.), *Discrimination and Human Rights – The Case of Racism* (Oxford: Oxford University Press, 2001), pp. 45–76. For an analysis of the Race Directive emphasising its minority protection dimension, see Gabriel N. Toggenburg, 'The Race Directive: a new dimension in the fight against ethnic discrimination in Europe' (2001–2) 1 *European Yearbook of Minority Issues* 231–44.

of workers,[18] which also set out (almost forty years ago now) a wide scope for the protection of EU citizens against nationality discrimination. Thus, linguistic proficiency requirements that are not justified by the nature of the job could, for example, be considered an indirect form of racial or ethnic discrimination by the terms of the Directive, irrespective of whether they are imposed by public or private employers.[19] Similarly, employment conditions unduly prohibiting the use of minority languages during work hours could amount to indirect discrimination on the grounds of race.[20] The Directive also allows (but does not impose) measures of positive action in favour of ethnic minorities, although it is questionable whether far-reaching measures, like minority quotas for access to public employment or education, would be compatible with the Directive.

The Directive is thus innovative and quite radical in a number of respects, thereby rendering it perhaps the most efficient of EU minority protection tools for years to come. At present, we find ourselves at the phase of implementation in national legal orders, accompanied by the first attempts to use the Directive in domestic litigation. The series of decisions rendered in Bulgarian courts, finding for Romani applicants in contexts ranging from entrance to local discotheques to schooling and employment, on the basis of anti-discrimination legislation transposing this and other relevant Directives (in force since 1 January 2004), is the most notable example of such attempts.[21] Some first country-by-country assessments on

[18] Council Regulation 1612/68/EEC of 15 October 1968 on the free movement of workers within the Community, OJ 1968 L257/2.

[19] On the contrary, linguistic proficiency requirements that are required for the performance of a particular job do not constitute indirect discrimination on the grounds of race or ethnic origin. Thus, if the Welsh government requires proficiency in Welsh from applicants to a civil service job which involves the use of both English and Welsh, this requirement is not discriminatory in the sense of the Directive.

[20] An example from practice is the decision of the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*) of 28 March 2000. It held that the internal rules of firms that impose the use of Dutch as the language of communication within the workforce could be disproportionate and therefore discriminatory. This is the case where no linguistic conditions had been formulated upon recruitment for the job, for example. (The text of the decision is on the website of the CGB: www.cgb.nl/oordelen/tekst/2000-15.)

[21] See European Roma Rights Centre Press Releases, 'Justice for Romani Victims of Racial Discrimination in Bulgaria' (8 June 2006), 'Bulgarian Court Finds the National Prosecutor's Office Discriminated Against Roma' (3 February 2005), 'First Five Roma Rights Victories under New Bulgarian Equality Law' (30 September 2004), available at www.errc.org/News_-index.php.

its impact on the ground have also become available.[22] The Directive is accompanied by an action programme on discrimination, which provides EU funding for research projects, awareness raising and capacity building that serve to combat discrimination.[23] Both the Directive and the action programme have, in Commission practice, become strongly focused on the situation of the Roma. Indeed, the European Union's policy to remedy the discrimination and exclusion of Roma is fast becoming the best formulated and most active part of an otherwise rather unstructured minority policy. Accordingly, the Commission has prepared a detailed report on the situation of Roma in member states, with a number of policy recommendations.[24] The Third Thematic Comment of the Network of Independent Experts, on minorities, in turn gave special attention to Roma and suggested the preparation of a directive aimed at encouraging their integration.[25] The European Parliament, in turn, has adopted two resolutions on the Roma, both highlighting the need for urgent action.[26] It is still too early to say whether such efforts will be able to make a significant difference, given the ingrained social and cultural problems faced by the Roma population.[27] In fact, a broader approach, rooted in social inclusion – rather than just anti-discrimination – is probably necessary for active steps forward.[28]

[22] For the formal state of implementation in all twenty-five states as of 1 April 2005, see European Commission, Annual Report on Equality and Non-Discrimination 2005, pp. 13–16. For the wider context, see also European Monitoring Centre on Racism and Xenophobia, Racism and Xenophobia in the EU Member States, Trends, Developments and Good Practice, Annual Report 2005-Part 2 (available on the EUMC website: http://eumc.eu.int), particularly ch. 2, 'Legislative and institutional initiatives against racism and discrimination'.

[23] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001–2006), OJ 2000 L 300/23.

[24] See European Commission, The Situation of Roma in an Enlarged European Union (2004).

[25] EU Network of Independent Experts, note 6, at 52.

[26] See European Parliament resolution on the Situation of Roma in the European Union, 28 April 2005 (P6 TA-PROV(2005)0151); European Parliament resolution on the situation of Roma women in the European Union, 1 June 2006 (P6_TA-2006-0244).

[27] See Council of Europe, Final report on the Human Rights situation of the Roma, Sinti and Travellers in Europe (2006) CommDH(2006)1; and European Commission, Annual Report on Equality and Non-Discrimination 2005, at 25–36. For a presentation of recent policy developments, followed by thoughts on future policy initiatives with regard to the Roma, see Olivier De Schutter and Annelies Verstichel, 'The role of the Union in integrating the Roma: present and possible future', *European Diversity and Autonomy Papers* 2(2005) online at: www.eurac.edu/documents/edap/2005_edapoz.pdf.

[28] In this respect, see section 3.6 of Communication from the Commission, Non-discrimination and equal opportunities for all – A framework strategy, COM(2005) 224 final. See also European Commission, Report on social inclusion in the 10 new member states 2005, at 78 ff.

1.3 Education and culture

Another strand of minority-relevant EU policy is in the fields of *education* and *culture*, relative newcomers that were added to the EU's domain of activity by the Maastricht Treaty in 1992. Articles 149 EC Treaty (on education) and 151 (on culture) define the competence of the Community in these areas in limited terms, as that of merely 'supporting and supplementing' the action of member states. Therefore, no groundbreaking initiatives can be expected under these auspices. Explicit minority protection measures could not, in any case, be enacted for their own sake on the basis of these treaty articles, but only as an integral part of a measure whose central aim is defined in cultural or educational terms under Articles 149 and 151 EC Treaty, so as to allow the EU to enact incentive measures. Whereas such incentive measures, in turn, may not amount to harmonisation, their exact scope is nowhere clearly spelled out. In practice, they have essentially taken the form of so-called action programmes, through which the EU funds projects proposed either by member state authorities or by private actors and organisations within the framework of policy objectives set at the European level.

Within this framework, the European Community budget has for many years offered some modest financial support to projects aimed at 'the promotion and preservation of regional and minority languages and cultures'. This budget line (B3-1006) was created back in 1982 at the insistence of the European Parliament and was continued year after year as a 'pilot programme'.[29] The European Bureau for Lesser Used Languages was set up for the purpose of accompanying the implementation of the programme.[30] However, in a judgment of 12 May 1998, the European Court of Justice annulled a Commission scheme of financial grants for projects to fight social exclusion.[31] The general point made by the Court in that ruling was that significant EC expenditure required the prior

[29] The story is recounted by Donall Ó Riagáin, 'The European Union and lesser used languages' (2001) 3(1) *International Journal on Multicultural Societies*, at www.unesco.org/most/jmshome.htm.

[30] See the website of the Bureau: www.eblul.org. On the history and role of the Bureau more generally, see Donall Ó Riagáin, 'Many tongues but one voice: a personal overview of the role of the European Bureau for Lesser Used Languages in Promoting Europe's regional and minority languages', in Camille O'Reilly (ed.), *Language, Ethnicity and the State* (Basingstoke: Palgrave, 2001), p. 20.

[31] Case C-106/96 *United Kingdom v Commission* [1998] ECR I-2729.

adoption of a basic Act by the EC legislative authority. Following this judgment, the Commission considered the feasibility of proposing a genuine multi-annual action programme for the benefit of regional and minority languages, which would put future funding for this purpose on firm footing.[32] Although the European Parliament, the traditional champion of minority interests in the EU, supported the plan, several member states in the Council working groups did not, so that nothing came of it.[33]

In the absence of a dedicated minority languages funding programme, financial support has since continued in a piecemeal and indirect way. The Commission's latest plan is to include support for regional and minority languages in a broader effort to promote multilingualism in Europe, as can be seen in the recently unveiled 'Framework Strategy for Multilingualism',[34] which follows on an earlier Commission document from 2003 setting out an Action Plan on Language Learning and Linguistic Diversity.[35] The Framework Strategy is disappointing for linguistic minorities, however, since it does not promise any funding earmarked for them. (The European Parliament, in turn, advocates a different approach. In its Resolution of 4 September 2003, based on the Ebner report, it called for the setting up of an autonomous European Agency for Linguistic Diversity and Language Learning (at arm's length from the Commission) – but any action is not likely to occur soon.[36])

In any case, the Commission's plan, if adopted as it stands, would not alter much in the current state of things. Today, linguistic diversity is present as an aim or as an object of special consideration in the description of several EC programmes. Accordingly, one of the objectives of Media Plus, the well-funded programme for the development, distribution and promotion of European films, is 'to support linguistic

[32] Commission Notice, Support from the European Commission for measures to promote and safeguard regional or minority languages, OJ 1999 C 125/14.

[33] Since Article 151 EC Treaty would presumably have been the legal basis, or one of the legal bases, of the programme, it would have required the unanimous agreement of all member state delegations. See Ó Riagáin, 'The European Union and lesser used languages', p. 8.

[34] Communication from the Commission, A New Framework Strategy for Multilingualism, COM(2005) 596 of 22 November 2005.

[35] Communication from the Commission, Promoting Language Learning and Linguistic Diversity: An Action Plan 2004–2006, COM (2003) 449 of 24 July 2003.

[36] European Parliament resolution with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity, 4 September 2003 (A5-0271/2003).

diversity'.[37] The Culture 2000 programme also has, among its many goals, that of 'supporting the translation of literary, dramatic and reference works, especially those in the lesser-used European languages and the languages of central and east European countries'.[38] Finally, the most important example is the Socrates programme in the field of education. It incorporates the formerly separate Lingua programme dedicated to improvement of the language skills of students and pupils and to language teacher training, by means of mobility grants and the development of language learning materials. The objective of the Lingua part of the Socrates programme is 'to promote a quantitative and qualitative improvement of the knowledge of languages of the European Union, in particular those languages which are less widely taught, so as to lead to greater understanding and solidarity between the peoples of the European Union and promote the intercultural dimension of education'.[39] This statement could give the mistaken impression that regional and minority languages are included. In fact, the Annex of the Socrates Decision makes clear that only the official languages of the European Community are covered, together with Irish and Letzeburgesch. Therefore, the special priority given to the 'less widely used and less taught languages' does not refer to regional and minority languages (such as Catalan, Basque and Welsh) – which is strange, considering that improved knowledge of these languages seems equally able to 'lead to greater understanding among the peoples of the European Union', in accordance with the declared underlying aim of Lingua. There is an obvious double standard here, which contradicts and annihilates the modest existing EU funding for minority language projects.

The generic commitment to the value of cultural and linguistic diversity (which is solemnly restated in Article 3 of the Constitutional Treaty) thus does not translate into clear rights for citizens or obligations for states as regards their minorities. It rather takes the form of some, rather modest, financial contributions from the EU budget to projects aiming at the promotion and preservation of regional and minority languages and cultures.[40]

[37] Decision 821/2000 of 20 December 2000, OJ 2000 L 336/82.

[38] Decision 508/2000 of 14 February 2000, OJ 2000 L 63/1, Annex II, I b.

[39] Decision 253/2000 of 24 January 2000, OJ 2000 L 28/1, Article 2(b).

[40] For further details, see Bruno de Witte, 'The constitutional resources for an EU minority protection policy', in Toggenburg, *Minority Protection and the Enlarged European Union*, pp. 118–22; and Tawhida Ahmed and Tamara Hervey, 'The European Union and cultural diversity: a missed opportunity?' (2003/4) 3 *European Yearbook of Minority Issues* 43–62.

1.4 External relations

A final major area of minority-related policy developments is in the sphere of the EU's external relations. The relatively explicit advocacy of minority protection by the EU in its external relations has boomeranged to give the subject increased political prominence within the Union and has resulted in the re-framing of existing policies and competences. From 1991, when OSCE standards were made a prerequisite to recognition of new states of the Balkan region and the former Soviet Union, to the 1993 Copenhagen criteria, which included 'respect for and protection of minorities' among the political preconditions for the accession of new countries, to the actual monitoring of candidate states by the Commission, minority protection has become a pillar in the human rights conditionality imposed on states that aspire to membership of the EU or, more broadly, the establishment of close economic and political ties with it.[41] With respect to the question of synergy among European minority protection instruments, which is the underlying theme of this volume, it is worth noting that the European Commission, when drafting its annual regular reports in which it commented on candidate states' compliance with the political conditions for accession, referred not only to the ECHR, but also to the Framework Convention and its monitoring body, the Advisory Committee, as well as a number of OSCE and UN instruments. References to Council of Europe and OSCE standards of minority protection were most consistently made in the case of Estonia and Latvia.[42]

The political criteria for EU membership as formulated by the Copenhagen European Council in 1993 included 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and

[41] This part of the EU's minority protection record is more richly documented than the others. See in particular: Gwendolyn Sasse, 'Minority rights and EU enlargement: normative overstretch or effective conditionality', in Toggenburg, *Minority Protection and the Enlarged European Union*, pp. 59–83; Christophe Hillion, 'Enlargement of the European Union – the discrepancy between membership obligations and accession conditions as regards the protection of minorities' (2004) 27 *Fordham International Law Journal* 715–40; Antje Wiener and Guido Schwellnus, 'Contested norms in the process of EU enlargement: non-discrimination and minority rights', in George A. Bermann and Katharina Pistor (eds.), *Law and Governance in an Enlarged European Union* (Oxford: Hart, 2004), pp. 451–83.

[42] For a detailed analysis of the actual drafting of the minority chapters in the regular reports and of their impact on the ground, see Gwendolyn Sasse, 'EU conditionality and minority rights: translating the Copenhagen Criterion into policy', EUI Working Papers RSCAS No.2005/16 (available online at http://econpapers.repec.org/paper/erpeurisc/p0154.htm).

protection of minorities'. This formula did not entirely correspond to the subsequent text of Article 6(1) EU Treaty, which was enacted a few years later (in the Treaty of Amsterdam) for the EU's internal usage. This latter states only: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' The formula which was used for the purpose of the enlargement process was more encompassing, as it also included protection of minorities as one of the indispensable premises for membership. Thus, among the political criteria set out by the EU as preconditions for the accession of candidate states, the insistence on genuine minority protection stood apart from the others and was somehow inconsistent with the EU's agnosticism in respect of how its existing member states dealt with their own minorities.[43]

Perhaps because of this discrepancy between the external and internal domains, EU institutions took a rather pragmatic approach in assessing the minority protection records of candidate countries in the annual reports drafted from 1998 until the time of accession. The countries were praised for the reforms they undertook and criticized for their failure to address specific problems, but the normative minority protection standards that underlay such praise and criticism remained very generic. Still, one may consider the EU's minority monitoring to have had a more than marginal impact on the position of minorities in countries such as Estonia, Latvia and Slovakia.

The accession of the ten new member states in May 2004, and the subsequent accession of Bulgaria and Romania, has terminated much of this external minority protection policy[44] – but not all of it. It remains a part of the political conditionality imposed on the new candidates for EU membership, in particular for Turkey and, if and when accession talks are opened, for Croatia and Macedonia. For these countries, human rights conditionality in general, and minority protection standards in particular,

[43] See on this point, in addition to the works cited in the previous footnotes, Bruno de Witte, 'Politics versus law in the EU's approach to ethnic minorities', in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (London and New York: Routledge, 2002), pp. 137–60, and Gaetano Pentassuglia, 'The EU and the protection of minorities: the case of eastern Europe' (2001) 12 *European Journal of International Law* 3–38.

[44] For an account of developments since accession, see Enikő Horváth, 'European entanglements: minority issues in post-accession Hungary and the EU', in Wojciech Sadurski, Jacques Ziller and Karolina Zurek (eds.), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence: European University Institute, 2006), pp. 285–309.

are vital points on which the decision whether to proceed towards membership will continue to hinge.

Turkey's minority protection performance poses a special conundrum. In its latest progress report on the country, the European Commission comments favourably on recent legislative changes, but also expresses strong and detailed criticism about the way in which non-Muslim religions and their associations are treated in practice. As regards linguistic rights, the Commission is less outspoken. It monitors the evolution of language regulation but does not express the view (as it previously did with some central and eastern states) that Turkey *must* ratify the Framework Convention on National Minorities and implement the linguistic rights contained therein. Indeed, as long as some of the current member states (including France and Greece) remain free to decide whether or not to ratify the Framework Convention, the European Commission is not in a comfortable position to put pressure on the Turkish government to take that step, although it has presented such ratification as a possible and desirable option. While being cautious, the Commission is nonetheless critical towards Turkey's performance as regards linguistic and religious minority rights; and this critical attitude seems justified, for there are many signs that the 'implementation gap' between lofty constitutional proclamation and the situation on the ground is still wide in Turkey.[45] It is clear that minority issues will continue to play a prominent role in the assessment of Turkey's political readiness for membership, so that continued improvement in the quality of the annual progress reports – which have become more detailed and well-informed in recent years – is of crucial importance.

Apart from the enlargement context, minority protection continues to form part of the external relations of the EU, more generally. It is a key element of the stabilisation and association process with countries in the western Balkans,[46] but is also part of the wider 'human rights

[45] For detailed accounts of the evolution of minority rights in Turkish law in connection with EU membership conditionality, see Dilek Kurban, 'Confronting equality: the need for constitutional protection of national minorities in Turkey's path to the EU' (2003) 35 *Columbia Human Rights Law Review* 101–68, and Dilek Kurban 'Unravelling a trade-off: reconciling minority rights and full citizenship in Turkey' (2004/5) 4 *European Yearbook of Minority Issues* 341–72.

[46] See, e.g., the prominent place occupied by minority protection objectives in the European Partnership with Bosnia and Herzegovina (but a similar emphasis can be found in the partnerships 'imposed' on the other western Balkan countries): Council Decision of

conditionality' the EU seeks to infuse, more or less successfully, into its foreign policy and treaty relations with third countries.[47] Two regulations of 1999, which set out the criteria for funding of external human rights and democratisation projects by the European Community in developing and 'non-developing' countries, respectively, are still the only binding pieces of EU legislation that openly refer to support for minorities as part of their aims.[48] Each year, NGO projects aimed at strengthening the protection of minorities are thus earmarked for funding by the European Commission under what is known as the European Initiative for Democracy and Human Rights.[49]

The insistence on minority protection in external relations remains, as before, open to the criticism of double standards, since it entails requiring third states to comply with standards that the EU does not impose on its own member states. However, in view of the flurry of recent minority-related developments in 'domestic' EU law and policy, described above, such criticism is perhaps less compelling than, say, ten years ago. In any event, a conscious sensitivity to – if not activity in – minority protection has infiltrated EU law. The most flagrant example of this 'migration' from the external to the internal domain of EU policy is the policy with regard to the Roma.[50] Though it emerged as a 'problem of Central and Eastern Europe' and was addressed in the context of the conditionality policy of the 1990s, it has, as already noted, since become an active focus of the European Union's internal anti-discrimination and anti-exclusion policies.

2 A note on monitoring

There clearly is no EU body specially dedicated to the monitoring of compliance by the EU or its member states with minority-related

30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina, OJ 2006 L 35/19, at 22.

[47] See generally Elena Fierro Sedano, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague/London: Kluwer Law International, 2003), and Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005).

[48] See Recommendation 14 and Article 2(1)(d) of Council Regulation 975/1999/EC of 29 April 1999, OJ 1999 L120/1; and Recommendation 14 and Article 3(1)(d) of Council Regulation 976/1999/EC of 29 April 1999, OJ 1999 L120/8.

[49] See the European Commission webpage: europa.eu.int/comm/europeaid/projects/eidhr.

[50] See Rachel Guglielmo, 'Human rights in the accession process; Roma and Muslims in an enlarging EU', in Toggenburg, *Minority Protection*, pp. 37–58, and De Schutter and Verstichel, 'The Role of the Union'.

standards of EU law, though the Commission continues to monitor the minority protection performance of candidate countries and other states closely associated with the EU in the context of the EU's conditionality relation. Although the quality of assessment has markedly improved in recent years, these Commission reports continue to take the form of policy documents rather than of detailed legal commentaries. The Commission also acts as the general 'guardian of EU law', monitoring member state compliance with EU law obligations. In this capacity, it has, for example, brought infringement proceedings before the European Court of Justice against states that had failed to transpose the Race Directive into domestic law within the allocated time span.[51] But the European Commission does not have a 'minority unit', which takes a comprehensive view of the various strands of minority-related action described above, so that its policy for enforcing compliance with EU obligations is unlikely to produce a distinct and identifiable minority protection dimension.

The yearly reports of the Network of Independent Experts are a large step forward in providing a systematic overview of the human rights performance of both the EU and its member states, and the Network has decided, on its own initiative, to give close attention to minority protection issues in a special thematic report of 2005. However, the legal basis of the Network is very shaky. It is composed of one legal expert (usually an academic scholar) per member state under the active coordination of Olivier De Schutter from the University of Louvain. It operates by virtue of an annual EU budget allocation and is 'hosted' by the Directorate-General for Justice, Freedom and Security of the European Commission. The planned extension of the European Union Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency is a positive general sign,[52] and would allow that Agency to take a global look at minority rights, beyond the prism of racism that has defined its role so far. However, even with the creation of the Agency, which might in any case be

[51] See European Commission, Annual Report on Equality and Non-Discrimination 2005, at 11.

[52] Commission Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and Commission Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM(2005)280 of 30 June 2005. The proposal is currently being discussed in the framework of the Council of Ministers of the EU. For an early discussion of the Agency's potential role, see Philip Alston and Olivier De Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart, 2005).

confined in its role to data collection, minority rights are not likely to move to the limelight. The EU is thus likely to continue to rely on the work of the Council of Europe and the OSCE and, to a lesser extent, on local NGOs for surveys of the situation of minorities on the ground.[53] This state of affairs is not, in and of itself, problematic, but the unique distribution of power (and competences) within the EU, as well as structural particularities (such as policy linkages) make it difficult for anyone not fully conversant in EU-speak to see the full range of functions and responsibilities that may impact on minorities.

3 Conclusion

Due to the variety of legal sources and political resources, the emerging EU minority policy is extremely multi-faceted, but also scattered and indirect, based as it is on a series of commitments to advance cultural diversity, or combat ethnic discrimination, rather than on minority protection per se. Protection comes in endless forms and guises, from case law where identity protection results from free movement principles or European citizenship, to secondary legislation (such as the Race Discrimination Directive), to funding policies (like culture or education), to policies relying on principles enshrined in international instruments (particularly those of the Council of Europe). Even conclusions of the European Council can result in advances, as exemplified by a recent agreement to allow the official EU use of languages with constitutional status in a member state on the basis of special arrangements with that state.[54]

Granted, a focus on specific rights (and the advancement of cultural and linguistic diversity) allows for avoidance of any reference to 'minorities' and the multiplicity of meanings member states attach to the concept, or, alternatively, of the task of establishing a concept of 'minority' for the purposes of EU law, and is politically expedient in light of the likely opposition of certain member states to any policy bearing the 'minority' heading. On the other hand, a hotchpotch of policies that can be united under the 'minority' banner only by the creative reading of well-wishing academic commentators gives the impression that the protection

[53] This was the case during monitoring of the new member states, for the purpose of the yearly progress reports; and continues for present candidate states.

[54] See Press Release of the 2667th Council Meeting (General Affairs) (13 June 2005), at 14–16.

of minorities is not a true priority for the EU. This is especially the case when said banner is supported by the poles of a generally ill-defined commitment to 'diversity'.

The call in 2005 by the above-mentioned Network of Experts for a

> clear message that [the institutions of the Union] will take into account the rights of minorities in the exercise of their competences, that they will seek inspiration in this regard from the Copenhagen Document [of the CSCE], and that they will comply with the Council of Europe Framework Convention[55]

expresses due concern for a more coherent EU approach to minority questions. With similar considerations in mind, the European Parliament – in a rather garrulous recent resolution – protested against the low rank of minority issues on the EU agenda, and called for the development of a Community 'standard for the protection of national minorities', along with the establishment of common and minimum objectives in the EU.[56]

The European Parliament's requests may be over-ambitious and underargued, but it is true that the coherence of the present approach leaves much to be desired. Undoubtedly, it risks lumping together the varied interests of very different kinds of minorities, to the extent that their existence as a legal entity is even recognised (with the notable exception of the Roma, who have emerged as a group of special concern). A comprehensive policy of minority protection (rather than just a policy on minorities) – would (or at least should) constitute a comprehensive set of measures and include matters for which no provision is presently made by the EU. It would, in any case, act as a motor for development, not as a mere mechanism of supervision. In this context, Article 5 of the Race Discrimination Directive and Article 7(1) of the Employment Directive serve as examples, since they already allow for positive action programmes in the areas covered by them – an important step. In an interesting instance of mutual reinforcement, the preambles of both of these directives make reference to the prohibition of discrimination contained in the ECHR, among other instruments; in turn, the European Court of Human Rights has explicitly referred to these directives, as well as to activities by other

[55] Thematic Comment, at 11.

[56] European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, 2005/2008(INI) (adopted 8 June 2005), points 5–8.

entities of the Union when interpreting international measures to combat racism.[57] In light of analogous mutual effects, recent case law at this Court finding an obligation for positive action in ECHR Article 14[58] may provide further impetus for positive state action in EU law.

The advantage of the general policy approach discussed above – namely, avoidance of a need to settle on (at least minimal) common standards of treatment for groups circumscribed by particular criteria and the concurrent focus on individuals as bearers of particular rights, from one situation to the next – is, in final consideration, also its defect. Yes, this approach will result in guarantees to individuals – as members of an ethnic group, as European citizens, as speakers of Catalan, as inhabitants of an accession candidate state. And yes, this policy will have many faces, depending on the 'identity of the right which is at stake'. But it will not articulate standards on minority rights or result in a minority protection policy, properly termed. Instead, norms developed elsewhere – at the Council of Europe and the OSCE, in particular – are likely to continue to inform assorted policy areas with effects on minorities.

As a final matter, should some future version of the Constitutional Treaty come into effect, the reference to the 'rights of persons belonging to minorities' among the basic values of the Union would result in a (slightly) changed context. Although its function would be ambiguous – how can respect for abstract 'values' be judged? – and would not result in actual rights, or even a clear EU competence in minority matters, the very presence of the concept of minority rights in the primary instrument of EU law would result in a more pronounced place for minority matters, properly termed, on the EU agenda.

[57] See *Nachova v Bulgaria* (Grand Chamber), ECtHR 43577/98 and 43579/98 (2005), paras. 80–82. The influence of EU practice was not, finally, enough to prevent the Grand Chamber from overturning the 2004 decision of the First Section shifting the burden of proof to the government on the question of racial motivation in the killing at issue. See Decision of 26 February 2004 in the same case.

[58] See *Thlimmenos v Greece*, ECtHR 34369/97 (2000), paras. 44–47. See also, *Autisme-Europe v France*, European Committee of Social Rights Collective Complaint No. 13/2002 (2003), para. 52.

14

Developments under the African Charter on Human and Peoples' Rights relevant to minorities[1]

TIM MURITHI[2]

Introduction

The issue of minorities in Africa remains controversial and problematic. The notion of who constitutes a minority in countries that were arbitrarily constructed as a result of the colonial imperatives of former European empires remains contested. This historical context does not negate the existing challenge of ensuring minority protection on the continent. This chapter will briefly discuss the signing of the African Charter on Human and Peoples' Rights. It will outline some of the provisions contained in the Charter, particularly with reference to peoples. Even though the African Charter is non-minority-specific in the sense that it refers to 'peoples', this chapter will argue that there are provisions within the Charter that are relevant to minorities. It will then assess the creation of the African Commission on Human and Peoples' Rights, as a supervisory mechanism to implement and monitor the legal provisions of the Charter and its practice. The chapter will evaluate the recent developments in the practice of the African Commission by examining the case of the Ogoni people in Nigeria and the Katanga region of former Zaire (present day Democratic Republic of the Congo). An assessment of the potential synergy between the African Charter and other international minority protection instruments will be discussed throughout the chapter. The creation of the African Court as an institution that will complement the supervisory role of the Commission with a protective mandate will be highlighted. This analysis will provide insights into how pan-African law and international

[1] The author would like to thank Elizabeth Myburg for assistance with the research for this chapter. All interpretations, however, are the responsibility of the author.

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law can in effect be mutually reinforcing in securing and protecting the rights of minority groups in Africa.

1 Situating minorities in Africa

The issue of minorities and their rights in Africa is controversial. Nation-states were arbitrarily carved up by colonialists during the Berlin conference of 1885. The conference was also known as the 'Scramble for Africa' and it divided ethnic groups according to European colonial interests. Following decolonisation, which began in 1956 with the independence of Sudan, post-colonial African nation-states were more an amalgamation of ethnic groups within states rather than coherent nations in the European sense. The seeds of disquiet, dissension and division on the issue of minorities were, therefore, sown with the formation of post-colonial African nation-states. The non-governmental organisation Minority Rights Group International notes that 'the ethnic composition of African states is complex and the question of minority status, especially in terms of the non-dominance of particular groups, is complicated by the way in which political elites have exploited ethnic or religious differences for political ends'.[3] Given the multitude of different groups within these countries, minorities were literally created overnight. Significantly, ethnic groups living in post-colonial border regions were arbitrarily divided by frontiers. Today it is not rare to find instances in which cousins from the same clan are citizens of different countries. As a result, 'many ethnic groups in Africa have traditional economic or social interactions with neighbouring peoples that may be the basis for political rivalries or alliances depending on circumstances'.[4]

Patrick Thornberry, in his seminal text *International Law and the Rights of Minorities*, observes that 'the minorities question has never contained itself entirely within national boundaries. Minorities in some states were majorities in others'.[5] According to Thornberry, minorities can be considered as any ethnic, linguistic or religious group within a

[3] Minority Rights Group International, *Recognizing Minorities in Africa* (London: Minority Rights Group International, 2003), p. 2, available at www.minorityrights.org.

[4] Minority Rights Group, *Recognizing Minorities in Africa*, p. 1.

[5] Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon, 1991), p. 1; see also, S. W. Baron, *Ethnic Minority Rights: Some Older and Newer Trends* (Oxford: Oxford University Press, 1985).

state in a non-dominant position, consisting of individuals who possess a sense of belonging to that group. Such a group would be determined to preserve and develop its distinct ethnic identity and feels discriminated against on the basis of its ethnicity, language or religion.[6] The issue of minority protection and accommodation in Africa has to be context-specific and tailored to the concrete circumstances. What is clear, though, is that Africa needs to adopt a pan-African strategy for minority protection.

Minority groups in Africa suffer discrimination in the form of human rights violations, discrimination, dispossession from their land, and the destruction of their livelihood, culture and identity. These groups have also been denied access to and participation in political decision-making. They are also underrepresented in public service employment, which disadvantages them. There is a need to ensure that a protective framework exists to manage the issues that affect their identity closely such as language, education, cultural traditions and religion. National, ethnic, linguistic or religious minorities, according to established international frameworks, such as the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, have the right to existence, and the respect for and promotion of their own national, cultural, and linguistic heritage in relation to the rest of the population.[7] The perpetual challenge is: how does this translate to policy in practice? Africa is not immune to this challenge. Following the arbitrary colonial construction of nation-states on the continent, most groups within these states would essentially be considered either minorities or majorities depending on which state they are situated in.

2 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights,[8] which was inaugurated on 27 June 1981, in Banjul, Gambia, was a legal instrument established by the Organization of African Unity ('OAU') to promote and protect individual and peoples' human rights.

[6] Thornberry, *International Law and the Rights of Minorities*, p. 2.

[7] See also the International Covenant on Civil and Political Rights, Article 27 concerning the rights of persons belonging to ethnic, religious and linguistic minorities.

[8] African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

2.1 The concept of peoples

Pan-African case law in general, and the African Charter in particular, has no specific reference to minority rights, but refers to the rights of peoples. It is therefore important to examine the extent to which the term 'peoples' encompasses minorities. Makau wa Mutua notes that the African Charter places duties 'on the state to secure for the people within its borders economic, social, and cultural rights'.[9] Mutua further notes that 'the idea of peoples' rights is embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community'.[10] During the drafting of the Charter, the prevailing view was that individual rights could only be justified in the context of the rights of the community. The Preamble of the African Charter recognises that 'fundamental human rights stem from the attributes of human beings which justifies their national and international protection'. The Charter also acknowledges that 'the reality and respect of peoples' rights should necessarily guarantee human rights'.[11] Louis Sohn argues that

> most individuals belong to various units, groups, and communities . . . it is not suprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations.[12] (See Chapters 2 and 5 above.)

The issue of whether the notion of peoples refers to minorities remains contested. The African Charter did not define the concept of 'peoples', therefore one cannot assume that minorities and peoples are equivalent. The African Charter can be considered a 'non-minority-specific instrument'[13] in the sense that it makes a reference to 'peoples' rather than 'minorities'. However, if we accept the working definition of minorities as 'national, ethnic, religious and linguistic' groups within a country, then

[9] Makau wa Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), p. 89.
[10] Wa Mutua, *Human Rights: A Political and Cultural Critique*, p. 91.
[11] African Charter on Human and Peoples' Rights.
[12] Louis Sohn, 'The New International Law: protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 1, 48.
[13] Kristin Henrard, 'Ever-increasing synergy towards a stronger level of minority protection between minority-specific and non-minority-specific instruments' (2003) 3 *European Yearbook of Minority Issues* 15, 41.

there is a degree of convergence and complementarity between the Charter's concept of peoples and the notion of minorities.

2.2 African Charter provisions relevant to minorities

Even though the Charter makes no reference to 'minorities', it does refer to an obligation of non-discrimination which is relevant to members of minority groups. Article 19 of the Charter establishing a non-discrimination obligation states that 'all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another people.' Articles 20–24 set out the rights of peoples as well as duties and obligations of states parties which are also relevant to minorities. Article 20 outlines the 'right to existence' and the 'right to self-determination', including the right to 'determine their political status' and 'pursue their economic and social development'. Article 21 establishes the collective right to 'dispose of their wealth and natural resources', whereas Article 22 provides for the right to 'economic, social, and cultural development'. Articles 23 and 24 outline the collective 'right to national and international peace and security' and the 'right to a general satisfactory environment favourable to development', respectively. These provisions are concomitant with other international legal instruments, such as the United Nations ('UN') Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Therefore, the potential for synergy and complementarity between the African Charter and international instruments exists.

3 The African Commission on Human and Peoples' Rights

In order to ensure that parties adhere to the provisions of the Charter, Articles 30–61 outline the establishment of an African Commission on Human and Peoples' Rights. The Commission is a body 'within the Organization of African Unity to promote human and peoples' rights and ensure their protection'. In terms of its structure, the Commission consists of eleven members who serve in their personal capacity.[14] The OAU Secretary-General appoints the Secretary of the Commission and the

[14] African Charter, Article 31.

Commission is funded by the continental organisation. The mandate of the Commission is essentially to promote the objectives of the African Charter through the formulation of principles and rules to solve 'legal problems relating to human and peoples' rights'.[15] The Commission has a promotional mandate in terms of undertaking studies, conducting research, organising seminars and conferences, disseminating information, and supporting national and local institutions concerned with human and peoples' rights, as well as giving its views or making recommendations to governments. According to Article 45 of the Charter, the Commission is also tasked with establishing synergy and mandated to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. The Commission also has the authority to 'interpret all the provisions' of the 'Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU'.[16]

3.1 Procedure of the Commission

The Commission can utilise the appropriate method of investigation to examine any violation of the provisions of the African Charter. State parties can report other state parties to the Commission for such a breach of Charter provisions, and the accused party has three months in which to produce a written explanation or statement to elucidate the matter. According to Article 48 of the Charter, contentious issues between state parties can be resolved through 'bilateral negotiation'. In the absence of a solution, the Commission can conduct its own investigation and prepare 'a report stating the facts and its findings', which is 'sent to the States concerned and communicated to the OAU Assembly of Heads of State and Government'.[17] Non-governmental organisations also have the ability to make submissions to the Commission, as noted in Article 55, which states that 'before each session, the Secretary of the Commission shall make a list of the communications other than those of State parties to the present Charter and transmit them to the members of the Commission'. Ultimately, the Commission is the supervisory mechanism established by the Charter.

[15] *Ibid.*, Article 45. [16] *Ibid.*, Article 45(3). [17] *Ibid.*, Article 53.

3.2 On the potential synergy with other international instruments

The African Charter notes that the Commission shall draw inspiration from international law on human and peoples' rights. Beyond the injunction to 'cooperate' with other institutions, Article 60 of the Charter clearly stipulates that the Commission shall also make reference to the provisions of the Charter of the United Nations as well as the Universal Declaration of Human Rights and 'other instruments adopted by the United Nations'. In addition, the Charter also states that the Commission shall also make reference to 'the provisions of various instruments adopted within Specialised Agencies of the United Nations'.[18] This illustrates that there is indeed the potential for complementarity between the African Charter and international instruments.

4 Illustrations of the supervisory practice of the Commission

The Commission has rendered decisions on numerous submissions made by both state parties and non-state parties.[19]

4.1 The case of the Ogoni of Nigeria

In March 1996, two non-governmental organisations – the Social and Economic Rights Action Center ('SERAC'), based in Nigeria, and the Centre for Economic and Social Rights ('CESR'), based in New York – submitted a communication to the African Commission under Article 55 of the African Charter.[20] The communication dealt with the violation of the human and peoples' rights of the Ogoni people who live in the oil-rich Niger Delta region of Nigeria. The claim alleged that the then military government of Nigeria, headed by General Sani Abacha was undermining the rights of the Ogoni through its ruthless exploitation of the oil resources on their land. The state corporation, the Nigerian National Petroleum Company ('NNPC') established a joint venture with Shell Petroleum Development Corporation ('SPDC') to drill oil in the Ogoni region.

[18] *Ibid.*, Article 60.

[19] Chidi Odinkalu and C. Christensen, 'The African Commission on Human and Peoples' Rights: the development of its non-state communication procedure' (1998) 20 *Human Rights Quarterly* 235, 280.

[20] Fons Coomans, 'The Ogoni case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749–60.

Irresponsible practices led to environmental degradation, health problems amongst the Ogoni and, paradoxically, the impoverishment of the region. The wealth generated by this oil venture was not being re-invested into the region to improve the standard of living of the Ogoni. Under the African Charter, the allegations included violations of Article 2 (entitlement to the enjoyment of rights and freedoms), Article 4 (the right to life), Article 16 (the right to health), Article 18 (family rights), Article 21 (the right of peoples to freely dispose of their wealth and natural resources) and Article 24 (the right of peoples to a satisfactory environment favourable to their development).[21] The communication also claimed that the right to peace and security had been undermined by the military forces which the state had provided to the oil companies to quell any dissent amongst the Ogoni. In particular, 'the communication complained of Nigerian security forces attacking, burning and destroying several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement for the Survival of the Ogoni People (MOSOP) between 1993 and 1996'.[22] Effectively, the complainants argued that the government had not provided security to the Ogoni and had not tried and judged the perpetrators.

The NGOs SERAC and CESR provided a detailed communication to the African Commission which declared the complaint admissible in October 1996. The Commission first attempted to facilitate an amicable settlement between the parties concerned, which did not yield an outcome. Subsequently, the Nigerian government systematically delayed submitting its responses to the African Commission. In 2000, there was a change of government in Nigeria with the election of a civilian government headed by President Olusegun Obasanjo. The new government was more amenable to admitting to the past errors of the previous government and therefore the delaying tactics adopted by the previous regime were replaced with a more open and transparent relationship. Significantly, in October 2000, the Nigerian government submitted a *Note Verbale* to the African Commission, which stated that 'there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area'.[23] It is evident that the

[21] *Ibid.*, 749. [22] *Ibid.*, 750.

[23] Government of Nigeria, *Note Verbale* 127/2000 submitted to the twenty-eighth session of the African Commission on Human and Peoples Rights, October 2000. See also Coomans, *Ibid.*, 750.

collaborative approach adopted by the Nigerian government enabled the Commission to proceed with discharging its functions.

In 2001, after a thorough investigative process, the African Commission found violations of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter and appealed to the Nigerian government to prevent 'attacks on Ogoni communities, conduct an investigation into the human rights violations and prosecute officials of the security forces and officials of the Nigerian National Petroleum Company'.[24] The Commission also called on the Nigerian government to compensate the victims adequately, clean up the land and rivers polluted by the oil drilling operations, conduct environmental and social impact assessments prior to all future oil drilling initiatives and inform the local population about health and environmental risks.

The Ogoni case was significant in the sense that it was the first time that the Commission was able to deal with the alleged violations of the rights of a coherent minority group within a state.[25] The Ogoni complaint alleged violations of economic, social and cultural rights and has thus established a precedent for other minority groups in Africa. The Commission's ruling can therefore provide the basis for strengthening the protection of minority rights in Africa.

In making its decisions, the African Commission, with reference to the African Charter's provision on the right to food, education and health, is concomitant with the Universal Declaration of Human Rights of 1948 (with its provisions for the right to life, liberty and food), and the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights of 1966 (with their provisions for the right to life, security, health, food and self-determination). In particular, Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 establishes the responsibility of states 'to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity'. The decision rendered in the Ogoni case reveals that the Nigerian government was indeed in contravention of these international provisions. These instruments, which contain a similar typology of obligations to those found in the African Charter, illustrate

[24] Coomans, *ibid.*, 756. [25] *Ibid.*, 746.

that there is indeed an existing synergy between pan-African and international law.[26]

4.2 The Katanga case

Under Article 20 of the Charter, the people of Katanga, in former Zaire and the present day Democratic Republic of the Congo ('DRC'), submitted a communication to the African Commission to state its case for the right to self-determination. This was the first time that a minority group in Africa had submitted a communication to the Commission. The post-colonial Zairian state was an amorphous combination of several hundred minority groups and, since independence, there had been persistent agitation by these groups for control of the state. Failure to achieve control of the state fomented attempts to secede. This pattern continues today in the present day DRC.

The African Commission ruled that

> in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question, and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[27]

In effect, the Commission rejected the claim by the people of Katanga to self-determination to the point of secession and reiterated the sovereignty of Zaire. Article 13(1), which outlines the right to participate freely in the government, is concomitant with similar provisions in the United Nations Charter and the Covenant on Civil and Political Rights. What is clear is that, in a world system of states, minority groups will always face major constraints when attempting to apply the principle of self-determination as a means to eventually secede. Therefore, challenges do

[26] Rhona Smith and Christien van den Anker (eds.), *The Essentials of Human Rights* (London: Hodder Arnold, 2005).

[27] United Nations, *Minority Rights Under the African Charter on Human and Peoples' Rights*, Pamphlet of the United Nations Guide for Minorities: 'Minorities and the United Nations: Human Rights Treaty Bodies and Individual Complaint Mechanisms' (E/CN.4/Sub.2/AC.5/2006/4).

still exist, particularly in Africa, as far as ensuring that the protective mandate of the African Charter is properly responsive to minorities.

5 The prospects for enhancing minority protection in Africa

These illustrations demonstrate that the necessary instruments were in place during the era of the OAU to ensure the effective protection of minorities and the promotion of their social, economic and political rights. Owing to the absence of political will, the OAU did not effectively monitor and implement the recommendations of the Commission.[28] As with many other regions of the world, the rhetoric was not upheld in reality. African governments, which had the monopoly over the means of coercion, did not always respect the provisions of the African Charter to the letter. There were therefore major political hurdles and challenges when it came to the effective implementation of its articles. A coherent pan-African response to the issue of human and minority rights on the continent was largely sidelined.

Throughout the Cold War, the US-Soviet geopolitical matrix of power politics, with its overt and covert interventions in African states, meant that states' stability was systematically undermined. Minorities that were caught in a violent confrontation with states became pawns in this superpower rivalry. The OAU, functioning essentially as a club of heads of state, was unable effectively to take the issue of 'minority groups' against states and address it. Under the shield of the principles of international relations (and law), states were able to prevent other states from interfering in their internal affairs. Specifically, Article 2 of the UN Charter[29] outlines 'the principle of the sovereign authority of all its members' and admonishes member states to refrain from challenging the 'territorial integrity or political independence of any state'. The Charter also states that 'nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. Article 3 of the OAU Charter similarly notes that member states will respect 'the sovereign equality of all Member States'

[28] A. M. Fanana, *Measures of Safeguards Under the Banjul Charter on Human and Peoples' Rights: A Comparative Study*, (Lesotho: Institute of Southern African Studies, 2002).

[29] Charter of the United Nations and Statute of the International Court of Justice (New York: United Nations, 26 June 1945).

and exercise the principle of 'non-interference in the internal affairs of states'.[30] While these provisions were established primarily to protect countries from external interference, they ended up providing a *carte blanche* for member states of the OAU to do as they pleased within their borders. The OAU, in its incarnation as a club of heads of state, was therefore reluctant to raise issues regarding the alienation, deprivation or exploitation of minorities within states because its leaders were unwilling to speak up or act against their peers.

African states, like states elsewhere around the world, have jealously guarded their sovereignty and were for the most part left to do their will within their borders. Given that, during the Cold War, many of the African governments did not have transparent systems of governance, some of which were overtly dictatorships, the issue of minority rights was effectively sidelined or excluded entirely from the list of political priorities. Minorities that may have had any legitimate claims were left to the mercy of governments that did not take too kindly to efforts to challenge the authority of the state. It is the legacy of this reality that has laid the foundation for many of the problems that the continent faces today with regards to minorities within states.

In the post-Cold War world there was renewed hope that the issue of minority protection, an issue related to the prevention of conflict and the promotion of peace, would finally be addressed. These aspirations were short-lived, as the tragedy of the genocide in Rwanda unfolded in 1994, which saw Hutus pitted against Tutsis, with moderate and extremist elements on both sides. The OAU did not have the political will or means to foresee or intervene in the crisis. During this post-Cold War era, issues relating to minorities featured in most of the conflicts that were continuing to take place across the continent. With the onset of the twenty-first century, the situation of minorities within states and their protection remains an issue to be addressed by the African continent and its institutions. The targeting of minority groups in conflict situations has also been witnessed in the Darfur region of Sudan, targeting the Fur, Masalit and Zaghawa groups; in Burundi with tensions between Hutus and Tutsis; Uganda and the Acholi peoples in the north of the country; Côte d'Ivoire and minority Muslim groups in the north of the country; Senegal and the

[30] Charter of the Organization of African Unity (Addis Ababa: Organization of African Unity, 25 May 1963).

minority in the Cassamance region; Morocco and the Sahrawi minorities in the Western Sahara region; and increasingly in parts of Nigeria, where minority groups are engaged in violent confrontation. The ongoing indiscriminate attacks on minority populations are the net effect of a culture of policy blindness on the specific issue of minorities within states. While some of the ongoing conflicts on the African continent do not stem strictly from the issue of minority claims against the state, the majority originate from the grievances that minority groups have against their host states and the inability, or unwillingness, of the state adequately to respond to these grievances. Attaining effective minority protection on the continent is vital to the restoration of social and political wellbeing of African societies. The issue is where to go from here and what can be done to enhance the effective implementation of the provisions for the protection of minorities on the continent.[31]

6 The African Court of Human and Peoples' Rights

The African Charter did not establish any provisions for the establishment of a Court of Human Rights, which is why in June 1998, the Organization of African Unity adopted a Protocol to the African Charter on Human and Peoples' Rights ('the Protocol').[32] The Protocol was finally ratified by a sufficient number of countries on 25 January 2004 and led to the creation of an African Court on Human and Peoples' Rights (the 'Court').[33] The Court has the mandate to uphold the provisions outlined in the Charter. At the annual summit of the AU heads of state and government in Sirte, Libya, in July 2005, the AU Commission was instructed to begin operating the Court. In November 2005, the Commission proposed an initial budget of US$ 6.5 million for the Court for 2006. In January 2006, the AU summit held in Khartoum, Sudan, formalised the budget of the

[31] Timothy Murithi, 'The African Union and the prospects for minority protection', in Alexandra Xanthaki and Nazila Ghanea (eds.), *Minorities, Peoples and Self-Determination*, (Leiden: Martinus Nijhoff, 2005), pp. 299–314.

[32] See I. A. Badawi, 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note' (1997) 9 *African Journal of International and Comparative Law*, 943, 961; and R. Sock, 'The case for an African Court of Human and Peoples' Rights: from a concept to a draft Protocol over 33 years', (March–April 1994) *African Topics*.

[33] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, January 2004.

Court. Of the fifty-three member states of the African Union, only twenty-one had ratified the Protocol as of 2006. On 21 January 2006, the African Union Executive Council of Ministers appointed eleven judges to the African Court.[34] It is anticipated that the Court will further reinforce the pan-African system for the protection of human and minority rights.

The Court is empowered to act both in a judicatory and an advisory capacity. Article 2 of the Protocol states that: 'the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the African Charter on Human and Peoples' Rights.' Article 3 further notes that: 'the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.' This means that AU member states that have ratified the Protocol establishing the Court are subject to its jurisdiction. With regard to the Court's judicatory power, Article 5 (1) states that cases can be submitted by:

- the AU's African Commission on Human and Peoples' Rights;
- the state party which has lodged a complaint to the Commission;
- the state party against which the complaint has been lodged at the Commission;
- the state party whose citizen is a victim of human rights violation;
- African intergovernmental organisations.

Article 5(3) also states that: 'the Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it.'

Given that the Court's mandate covers human and peoples' rights, it empowers minority communities by providing them with an avenue for highlighting any issues to do with the deprivation of their human rights, as recognised by the African Charter.[35] NGOs and individuals can also

[34] The newly appointed judges of the Court are: Fatsah Ouguergouz (Algeria); Jean Emile Somda (Burkina Faso); Gerard Niyungeko (Burundi); Sophia Akuffo (Ghana); Kelello Justica Masafo-Guni (Lesotho); Hamdi Faraj Fanoush (Libya); Modibo Tounty Guindo (Mali); Jean Mutsinzi (Rwanda); El Hadji Guisse (Senegal); Bernard Ngoepe (South Africa) and G. Kanyiehamba (Uganda).

[35] G. Naldi and E. Malgiveras, 'The proposed African Court of Human and Peoples' Rights: evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944, 969.

institute cases with the Court, which provides additional opportunities for raising issues concerning victims of a violation of a right as outlined in the African Charter.[36] The only caveat is that, in order for the Court to be able to receive individual petitions, the state against which the complaint has been lodged must first have recognised the competence of the Court to receive such communications. There are therefore ongoing campaigns to ensure that all African states ratify the Protocol. While this system for the protection of human and peoples' rights has some limitations, the adoption of the Protocol is an important step forward for the continent.[37] As with most institutions the effectiveness, credibility and success of the Court will depend on the will of the states to adhere to the rulings of the Court and to provide it with the necessary resources to carry out its mandate.[38] The credibility of the Court will depend on how the African Union addresses the issues of access to and the submission of cases to the Court.[39] It will be important to ensure that the Court is not undermined by political interference so that it can serve as a genuine arbitrator and mechanism to check excesses of state power. In particular, the Court will only be effective in mainstreaming minority protection in Africa if the member states of the African Union are prepared to support its activities politically and financially.

7 Conclusion

The promise of effective minority protection in Africa clearly lies in the future. Political, economic and social exclusion of minority groups is in contravention of pan-African and international law. This has serious ramifications for the stability of the continent because most of its conflicts have arisen from unresolved or neglected minority issues. The African

[36] R. Murray, *The African Charter on Human and Peoples' Rights: The System at Work* (Cambridge: Cambridge University Press, 2002); see also, U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 1997).

[37] Makau wa Mutua, 'The African Human Rights Court: a two-legged stool?' (1999) 21 *Human Rights Quarterly* 342, 363.

[38] See A. Anthony, 'Beyond the paper tiger: the challenge of a Human Rights Court in Africa' (1997) 32 *Texas International Law Journal* 511, 524; and J. Mubunganzi and A. O'Shea, 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256, 269.

[39] Sheila Muwanga, 'Operationalising the African Court' (January–March 2006) *Do it Right: A Newsletter of the African Court Coalition* 5.

Charter has had a limited success in ensuring minority protection, as demonstrated by the Ogoni case. However, the Katanga case demonstrates that the culture of impunity reinforced by the strictures of sovereignty, and the appeal by states to the principle of non-intervention, means that it will not be easy for pan-African instruments to supervise and ensure the protection of minorities. There is now at least a legal infrastructure in place to enhance minority protection on the continent. The Charter, reinforced by the African Court, which is yet to be tested against states parties and other perpetrators, will continue to have a significant role to play in terms of promoting norms and standards for the protection of minority groups in Africa.

15

Regional cooperation and minority issues in the Asia-Pacific region

ERIK FRIBERG[1]

Introduction

Asia-Pacific is among the most diverse regions of the world. In Papua New Guinea, the population of 4 million use some 700 languages, and some countries officially recognise more than fifty minority groups within their territory, including in the People's Republic of China and Vietnam. Successful practices in the region exist with measures at the national and sub-national levels to protect human rights, including minority rights, of persons belonging to minorities. That policies on minority issues have affected social and political stability is noted in several regions in Indonesia (West Papua, West and Central Kalimantan, Sulawesi and the Malukas), in Myanmar (especially involving the Karen and Shan minorities), in the Mindanao region in the Philippines, and by flows to Cambodia of persons belonging to indigenous groups from the Central Highlands of Vietnam. Other examples include social unrest in the south of Thailand, ethnic tensions in Fiji and the Solomon Islands, and situations in the People's Republic of China (e.g. the Uighurs in Xinjiang).[2] The associated challenges of integrating diversity in states in the Asia-Pacific have to date not resulted in effective sub-regional instruments and institutions tasked to multilaterally address, monitor and assist on minority issues; there are no

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[2] For accounts on some situations of minority communities in the Asia-Pacific, see papers submitted to the sessions of the United Nations Working Group on Minorities, available at www.ohchr.org/english/issues/minorities/index.htm. See also R. Plant, *Indigenous Peoples/ Ethnic Minorities in the Pacific* (Manila: Asian Development Bank, 2002).

regional human rights or conflict-prevention mechanisms similar to those established in Africa, the Americas and Europe. However, while less prone to liberal institutionalism, there are indications of emerging sub-regional normative and procedural frameworks in the Asia-Pacific.

The geographical scope and focus on 'Asia-Pacific', for purposes of this chapter, will be limited to addressing three sub-regional intergovernmental bodies: the Association of Southeast Asian Nations ('ASEAN'), the ASEAN Regional Forum ('ARF'), and the Pacific Islands Forum ('PIF'). These three entities will be considered to identify existing and potentially emerging synergies towards minority protection through minority-specific and non-minority-specific instruments from the prism of two 'entries' of regional cooperation. First, they will be assessed from the 'human rights entry', which encompasses the right to non-discrimination, minority rights, and related strands such as linguistic and cultural rights, on the basis of international human rights law. Secondly, the three entities will be addressed from the 'security entry', by means of sub-regional early warning/early action and conflict-prevention approaches, recognising the need to accommodate diversity to address root and proximate causes of grievances affecting social and political stability. While these 'entries' do not operate in isolation from each other, and while recognising other potential 'entries', it is assumed that they hold complementary and varying degrees of influence, as awareness-raising and/or 'persuading' factors, on domestic policies on minority protection.[3]

Three provisory assumptions are made from the outset. First, while having largely moved beyond the 'Asian values' debate, which is addressed elsewhere,[4] it is submitted that forced assimilative policies on diverse populations could be conceptually rejected by communitarians and liberal multiculturalists alike.[5] Second, the assertion that many countries in the

[3] Cf. H. J. S. Kraft, 'Human Rights in Southeast Asia: The Search for Regional Norms', East-West Center Working Papers No. 4 (Washington, July 2005), p. 22.

[4] For a prominent voice initiating the 'Asian values' debate, see Abdullahi Ahmed An-Na'im, 'Toward a cross-cultural approach to defining international standards of human rights', in An-Na'im (ed.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992). Intellectuals in East Asia have begun to chart a middle ground between the uncompromising ends of the 'Asian Debate', making particular headway in the areas of group rights and economic, social, and cultural rights. See J. R. Bauer, *The East Asian Challenge for Human Rights* (New York: Carnegie Council on Ethics and International Affairs, 1999).

[5] See W. Kymlicka, 'Liberal multiculturalism: western models, global trends and Asian debates', in W. Kymlicka and B. He (eds.), *Multiculturalism in Asia* (Oxford: Oxford University Press, 2005), pp. 22–55.

Asia-Pacific remain in a 'nation-building' stage is on occasion employed as an argument to preclude pluralist policies and as a rationale to avoid deepened cooperation on regional intergovernmental standards and mechanisms. While well-functioning state institutions, consolidated constitutionalism and 'mature' democratic political cultures may be mutually reinforcing, an underlying assumption in this chapter is that the absence thereof neither precludes the utility of pluralistic policies nor diminishes the opportunities of sub-regional mechanisms to develop useful assistance to states on diversity policies, to the benefit of majority and minority groups alike. Third, it is submitted that communities and their members can simultaneously benefit from the respective standards on minority and indigenous rights.[6] This is important, given the definitional and conceptual challenges with the recognition of 'minorities' and 'indigenous' in the Asia-Pacific in light of the varied practice of states and intergovernmental organisations.[7]

1 Sub-regional intergovernmental organisations and minority protection in the Asia-Pacific

1.1 Association of Southeast Asian Nations (ASEAN)

ASEAN was formed in 1967 to accelerate economic growth and promote peace and stability, and has ten member states.[8] Though there is a reluctance to comment on what would traditionally be perceived as internal affairs of states, including minority issues, developments since the 1990s have led to

[6] For a useful account on the distinction between the rights enjoyed by minorities and indigenous peoples, see A. Eide and E-I. Daes, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples', UN Doc. E/CN.4/Sub.2/2000/10, 2000.

[7] For a collection of opinions and approaches on how to apply the term of 'indigenous peoples' in Southeast Asia, including broader and narrower definitions, see R. H. Barnes *et al.* (eds.), *Indigenous Peoples of Asia* (Ann Arbor, MI: Association for Asian Studies Inc, 1995). Examples of state practice on terminology include: 'national minorities' (China); 'ethnic minorities' (Vietnam); 'aborigines' (peninsular Malaysia); 'natives' (Malaysian Borneo); 'aboriginal tribes' (Taiwan); 'cultural minorities' or 'indigenous peoples' (Philippines); and 'hill tribes' (Thailand). Regional intergovernmental institutions also use mixed terminology, with the Asian Development Bank (ADB) noting that 'Other terms relating to the concept of indigenous peoples . . . include "cultural minorities", "ethnic minorities", "indigenous cultural communities", "tribals", "scheduled tribes", "natives", and "aboriginals".' See Asian Development Bank, 'The Bank's Policy on Indigenous People' (Manila, April 1998).

[8] Current ASEAN Members: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. See www.aseansec.org.

an increasingly flexible practice. While ASEAN in itself can be considered successful in stemming bilateral tensions between member states, ASEAN has generally not addressed inter-communal dimensions which could disturb regional peace. It is indicative that ASEAN's cautious approach in addressing the situation in Myanmar has to date appeared not to be framed in terms of accommodation of diversity.

1.1.1 Normative frameworks

The general frameworks for ASEAN cooperation promote the friendly relations and cooperation between states and places strong emphasis on the norm of non-interference in 'internal affairs'.[9] ASEAN was neither founded on the premise of cooperating to promote and protect human rights, nor that of addressing diversity policies of its member states. While the ASEAN Foreign Ministers have 'reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993',[10] it was in the 1998 Hanoi Plan of Action that ASEAN countries for the first time jointly committed to various human rights related activities. The ASEAN Summit in 2005 appointed an official Eminent Persons Group to guide the development of an ASEAN Charter, which was signed on 20 November 2007 and calls for the establishment of an ASEAN human rights body as a new organ of ASEAN. The functions and modalities of such an ASEAN human rights regime, and the terms of reference for this body, remain to be determined.[11]

At the non-governmental level, there have been attempts to advocate for ASEAN human rights arrangements. The 'Working Group towards an ASEAN Human Rights Mechanism', established in 1995 and composed of experts and academics in the region, presented in 2003 a 'Road Map' and suggestion to 'explore the possibility of an ASEAN Commission for the Promotion and Protection of the Rights of Women and Children . . . supported by an ASEAN Convention on Women's Rights and the Rights of

[9] At the first ASEAN Summit in Bali in February 1967, the Treaty of Amity and Cooperation in Southeast Asia ('TAC') and 1971 Zone of Peace, Freedom and Neutrality ('ZOPFAN') Declaration laid down the basic principles for the relations and conduct of ASEAN's cooperation, including mutual respect for territorial integrity, and non-interference in the internal affairs of one other.

[10] Joint Communique of the 26th ASEAN Ministerial Meeting in Singapore 1993.

[11] See www.aseansec.org/21069.pdf and www.aseansec.org/21085.htm.

the Child'.[12] In 2004, the Working Group presented a draft document on a comprehensive regional human rights commission, advocating that such a regime could be established upon its ratification by at least three ASEAN countries. This suggestion would challenge the long-held consensus-based principle in ASEAN of 'moving at a pace comfortable to all'. Such an ASEAN formula of 10-X, where the resistance of one of the ten ASEAN member states would not prevent the other nine from taking forward regional initiatives, could converge the positions of other governments over time, as has been the case on a few other issues.[13] Other NGO-led proposals since the early 1990s were articulated by ASEAN-ISIS, an influential network of research institutes for strategic and international studies in Southeast Asia, and included suggesting the establishment of an Eminent Persons Group on human rights. It was suggested that this group travel on fact-finding missions and consult on major human rights issues in question.[14]

In the absence of comprehensive normative frameworks, single-issue instruments have been developed which could be indirectly relevant to minority protection. Cultural issues have been addressed, with 'cultural diversity' to be respected and 'cultural heritage' to be promoted, including those of 'indigenous and other communities'. The ASEAN Declaration on Cultural Heritage, adopted in 2000, recognises 'culture' as a whole complex of distinctive features that characterise a society or 'social group', and 'cultural heritage' is recognised as including oral or folk heritage, including 'languages'.[15] The preamble of this ASEAN Declaration further includes clear references to the right of non-discrimination by recognising

[12] See C. P. Medina, 'Background of the Working Group for an ASEAN Human Rights Mechanism', at www.rwgmechanism.com. See 'A Roadmap for an ASEAN Human Rights Mechanism', adopted by the Third Workshop for an ASEAN Regional Mechanism on Human Rights held in 2003.

[13] Examples of the practice of 'convergence over time' include the 2004 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, which has been ratified only by Brunei, Malaysia, Singapore and Vietnam. This was also the approach with the 'Anti-Terror Pact' between Indonesia, the Philippines and Malaysia (signed with the US), which Cambodia, Thailand and Vietnam joined at a later stage. ASEAN Secretariat, 'ASEAN Vision 2020', in *Handbook on Selected ASEAN Political Documents* (Jakarta: ASEAN Secretariat, 2003), pp. 76–7.

[14] See S. Jones, 'Regional institutions for protecting human rights in Asia', (1996) 50(3) *Australian Journal of International Affairs* 274. ASEAN-ISIS institutes hold an annual ISIS Colloqium on Human Rights, which already in the 1990s developed proposals including a commission to work out a regional charter on human rights, to serve as an Asian human rights commission. See J. Wanandi, 'Asia, too, should have a Human Rights Forum', *International Herald Tribune* (20 October 1992).

[15] ASEAN Declaration on Cultural Heritage. See www.aseansec.org/641.htm.

the 'deep respect for the diversity of cultures and identities in ASEAN, without distinction as to grounds of nationality, race, ethnicity, sex, language or religion'. The Declaration also gives recognition to the 'living bearers' and their right to their own culture: 'ASEAN Member Countries shall cooperate to sustain and preserve worthy living traditions and folkways and protect their living bearers in recognition of people's right to their own culture.' Some provisions specifically cite 'traditional communities', and the need to recognise their intellectual property rights over their cultural heritage: 'ASEAN Member Countries shall ensure that traditional communities have access, protection and rights of ownership to their own heritage'; and 'ASEAN shall cooperate for the enactment of international laws on intellectual property to recognise indigenous population and traditional groups as the legitimate owners of their own cultural heritage.'[16]

While the ASEAN Declaration on Cultural Heritage remains to be further evaluated, it does raise several aspects relevant for minority communities. First, it notes the important provision that countries shall 'ensure that cultural laws and policies empower all peoples and communities'. The scope to empower *all* communities offers protection for minority communities in the region. Secondly, when qualifying the 'worthiness' of traditions belonging to these communities, the question arises of who would be the arbiter to make this determination and based on which criteria and process. Thirdly, there is a provision that 'ASEAN Member Countries shall cooperate closely to ensure that their *citizens* enjoy the economic, moral and neighbouring rights, resulting from research, creation, performance, recording and/or dissemination of their cultural heritage.' If this reflects a citizenship requirement, it would need to be assessed against how this could affect stateless persons belonging to minority communities, and in light of the fact that very few human rights are contingent on citizenship.[17] Fourthly, while the provisions on 'promotion' of languages could be relevant for linguistic minorities, there are no indications of whether this provision would entail positive

[16] See Fons Coomans on UNESCO, Chapter 11 above.

[17] Exceptions from the fundamental principle that the enjoyment of human rights is not pursuant to citizenship should be narrowly construed and on the basis of a legitimate aim. See the work of the Human Rights Committee ('HRC') and CERD's General Recommendation 22 regarding the distinction between citizens and aliens, as well as the 2003 report of the UN Special Rapporteur on the rights of non-citizens.

obligations on states to provide instruction on, and in, minority languages. While assuming the promotion of languages extends to linguistic diversity within states, i.e. also minority languages, a cautious interpretation could cover merely the official languages of ASEAN member states. Also, despite the provision of protecting the 'living bearers' of culture, it appears as if the protection offered could, similarly to the COE Charter on Regional and Minority Languages, focus on the language itself, rather than linguistic minorities per se.[18]

Other issue-based normative developments in ASEAN include the 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region, the 2001 Declaration on the Commitments for Children in ASEAN and the 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children.[19] It could be noted that these Declarations were adopted by all ASEAN countries, including Brunei, which at the time had yet to accede to the UN Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').[20] However, these instruments do not appear to provide guidance on issues within the nexus of cultural rights, traditional practices and hierarchies, which affect the situation and rights of minority women. Also, the instruments relevant to children do not include references to the rights of minority children similar to Article 30 of the UN Convention on the Rights of the Child. An additional issue-based instrument which could emerge is in the field of the rights of migrant workers, which could relate to issues which in some regions involve so-called 'new minorities'.[21] This raises the question as to whether there could be an emerging receptivity for a minority-specific ASEAN Declaration on minority issues. At the 2006 Asia-Europe Meeting Informal Dialogue on Human Rights, which specifically addressed minority issues, governmental participants from ASEAN countries indicated limited political support for such an initiative at the time.[22]

[18] See Robert Dunbar on the COE Charter on Regional and Minority Languages, Chapter 6 above.

[19] 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children. See www.aseansec.org/16794.htm.

[20] Brunei acceded to CEDAW in May 2006.

[21] Forum Asia reported on 4 May 2006 on a proposed ASEAN multilateral framework on migrant workers' rights. See www.forum-asia.org/news/in_the_news/4May06_migrant_workers.shmtl.

[22] See Conclusions of the seventh ASEM Informal Dialogue on Human Rights, 23–24 February 2006. http://www.aseminfobound.org/contents/documents//humanrightsconclusions.pdf.

1.1.2 Procedural mechanisms on conflict prevention

Whereas the variety of issue-based politically binding declarations above indicate an interest in codifying norms, which would depart from the traditionally non-legalistic experience in ASEAN, these instruments are not complemented by ASEAN monitoring mechanisms or advisory procedures to assist states with implementing the respective provisions. The economic-oriented focus of ASEAN, the variety of political regimes and the disparate levels of economic development among ASEAN member states are often cited as reasons why a so-called 'ASEAN Way' has preferred *ad hoc* and largely informal modes of cooperation. With the largely non-existent institutionalised capacities of ASEAN to address human rights, including minority issues, there have been tentative moves towards capacities to effectively address, in a cooperative fashion, security issues affecting relations between states. Some developments include an 'ASEAN Troika' system with the member states that are the present, past and future Chairs of ASEAN. The ASEAN Troika convenes to enable ASEAN to 'address in a timely manner urgent and important regional political and security issues and situations of common concern likely to disturb regional peace and harmony'.[23] The Declaration of ASEAN Concord II (Bali Concord II) in October 2003 specified an envisioned ASEAN Security Community (ASC) by 2020 with the theme of 'comprehensive security'. The Plan of Action of the ASC, adopted at the ASEAN Summit in November 2004, calls for the carrying out of preventive diplomacy, with objectives including to 'mitigate tensions and prevent disputes from arising between or among member countries as well as between member countries and non-ASEAN countries, and to prevent the escalation of existing disputes'. There are several provisions within the Plan of Action where the issue of conflict prevention could be addressed, and given time, minority protection thus advanced: (1) an early warning system; (2) the enhanced role of the rotating ASEAN Chair; (3) the role of the Eminent Persons Group (EPG); and (4) the strengthened role of the High Council.[24]

[23] The ASEAN Troika system was established following a proposal from Thailand, and occurred in response to the failure of acting and stemming from the violence during the events preceding the independence of Timor Leste. For the terms of reference of the ASEAN Troika, adopted in 2000, see www.aseansec.org/3701.htm.

[24] The EPG is a recently established group of persons whose expertise has yet to be drawn upon to assist in any concrete situation. In 2001, the ASEAN states agreed upon the Rules of Procedures of the 'High Council' which provide a dispute settlement procedure to the Treaty of Amity and Cooperation in Southeast Asia (1976).

Nonetheless, there remains reluctance among several ASEAN member states to agree upon regional multilateral mechanisms, which could have methods of work to include country visits. Some commentators argue that an enhanced role of the ASEAN Secretary-General could open the possibility of developing a mediation role.[25] The ASEAN Charter, signed on 20 November 2007, appears to envision that the ASEAN Chair and the Secretary-General can be requested to provide good offices, conciliation or mediation in a dispute. However, it is illustrative of the mentioned reluctance that Myanmar did not allow, during the 2004 Indonesian Chairmanship of the ASEAN, the former Foreign Minister of Indonesia (Mr Ali Alatas) to visit the country as an 'ASEAN Envoy'. Mr Alatas was, however, later welcomed as an 'Envoy of Indonesia', indicating the preference for bilateral rather than multilateral approaches.[26] Another example has been the position of the previous political leadership in Thailand to avoid discussion at the ASEAN level of the inter-communal situation of the Muslim south in Thailand. In 2005, the then Prime Minister of Thailand gave advance notice that he would leave an ASEAN Summit if this issue was raised by his counterparts.[27] Also, Indonesia has preferred informal arrangements when addressing the inter-communal situation in Aceh, having relied on Geneva or Helsinki-based non-state facilitators.[28] Furthermore, when the European Union took control of the Aceh Monitoring Mission in 2005–6, it proceeded with bilateral support from several ASEAN countries (i.e. not ASEAN as such).

1.2 ASEAN Regional Forum (ARF)

The ASEAN Regional Forum ('ARF') was established in 1994 as the primary Asia-Pacific multilateral forum for political and security dialogue

[25] Ramcharan suggests this possibility that the ASEAN Secretary-General could develop a mediation role in the region's conflicts. See *ibid.*, pp. 105–6.

[26] Demonstrating the utility also of bilateral initiatives, Indonesia played an important role in assisting to address conflicts facing other ASEAN member states, including south Philippines and Cambodia.

[27] Radio Singapore International, 29 November 2004. See www.isis.sg/english/newsline/view/20041129/7137/1/html. One intergovernmental organisation which has been able to hold a dialogue with the government of Thailand on the issue of southern Thailand, is the Organization of Islamic Conference ('OIC'), which was invited to visit the region in 2005. See www.siiaonline.org/home?func=viewSubmission&sid=777&wid=171.

[28] See E. Friberg, 'Regional Conflict Prevention in East and Southeast Asia', (2005) 11(2) *Human Rights Tribune des driots humains*, see www.hri.ca/tribune/onlineissue/25)_05_2005/Erik%20Friberg%202%20article.html.

and has twenty-five participating states, including all ASEAN members, and also China, Japan, North Korea and South Korea, as well as several other countries in the Asia-Pacific region and beyond, including the US, Russia and the EU.[29] The ARF was intended to evolve through three stages, from confidence-building, to preventive diplomacy and ultimately towards conflict-resolution mechanisms. 'Preventive diplomacy' in the ARF context includes to 'help prevent disputes and conflicts from arising between States that potentially pose a threat to regional peace and stability'.[30] The ARF has, to date, largely remained in the first stage of confidence-building measures, progressing (similar to ASEAN) at a 'pace comfortable to members on the basis of consensus'.

As a dialogue forum, the ARF has hardly developed normative standards or mechanisms relevant to the synergetic themes of minority protection considered in this volume. Some modest mechanisms towards preventive diplomacy include the establishment of an ARF register of Eminent and Expert Persons ('EEPs') and the enhancement of the role of the ARF Chair to include a 'good offices' function. Each ARF participating state has nominated between two and five EEPs. However, neither the ARF EEPs nor the enhanced role of the ARF Chair have yet become fully defined in their functions, or operational.[31] It remains to be determined how pro-active EEPs can be in support of the ARF Chair's diplomatic activities. The first official meeting of EEPs was held in Korea in June 2006.[32]

Some commentators have called for further institutionalised prevention capacities such as establishing an ARF Secretariat, the setting up of a Risk Reduction Centre ('RRC'), fact-finding and early warning.[33] Rupesinghe has canvassed the establishment of a Regional Commissioner

[29] The ARF also has the participation of, *inter alia*, India, Pakistan, Papua New Guinea, Timor Leste, Australia and New Zealand. See www.aseanregionalforum.org.

[30] See the Concept and Principles of Preventive Diplomacy, adopted at the eighth ARF meeting in 2001, which provided a general consensus of how preventive diplomacy should be interpreted in the ARF context. See www.aseanregionalforum.org.

[31] Following several years of drafting, facilitated in particular by South Korea, as to whether EEPs would primarily have a 'research' or an 'operative' function, the Guidelines for the Operation of the EEPs were adopted at the eleventh ASEAN Regional Forum summit in June 2004.

[32] Some EEPs from ASEAN member states met in 2005 and informally established an ASEAN EEP Caucus and tasked a regional think-tank to promote information-sharing between them. See www.siiaonline.org/arf_expert_eminent_ persons_from_asean_establish_caucus.

[33] See 'A New Agenda for the ASEAN Regional Forum', IDSS Monograph No. 4 (Singapore: Institute of Defence and Strategic Studies, 2002).

on National Minorities, operating in an impartial, confidential, and cooperative and non-coercive way.[34] A quiet diplomatic, assistance-based approach could resonate well in the Asia-Pacific and complement mechanisms perceived as more intrusive. A related development, given that ARF continues to lack a secretariat, was the formalisation of a small ARF Unit in mid-2004 within the ASEAN Secretariat. The ARF Unit is tasked with providing support to the ARF through the ARF Chair, compiling ARF documentation and by engaging with international organisations and non-governmental organisations.

With regard to attention to human rights and the ARF, this has been limited to taking note of broad concerns at ARF's annual ministerial meetings, for example, in the Chairman's Statement of the Tenth ASEAN Regional Forum, held in Cambodia in June 2003. Yet this statement also demonstrated selectivity: while concerns for 'democracy and human rights' in Myanmar were aired, there was silence about human rights and minority issues in other ARF countries.[35]

1.3 Pacific Islands Forum (PIF)

The South Pacific Forum, established in 1971, was re-named in 2000 as the Pacific Islands Forum ('PIF') and has sixteen member states (or areas).[36] Forum attention has focused primarily on regional trade and economic development, although regional law enforcement cooperation, security and the environment have been increasingly central to its expanding agenda. The then South Pacific Forum showed initial interest in a 1985 initiative to develop an intergovernmental, sub-regional treaty-based body for the protection of human rights in the region, but this idea was eventually abandoned.[37] While resting on the principle of non-intervention, the PIF has taken steps to adopt a regional approach to conflict prevention, resolution

[34] As referred to in G. Evans, 'Conflict prevention with regard to inter-ethnic issues, including the role of third parties: Experiences and challenges from the Asian-Pacific region (2001) 8 *International Journal on Minority and Group Rights* 38.

[35] See Chairman's Statement of the tenth ASEAN Regional Forum Meeting, Phnom Penh, 18 June 2003: www.aseansec.org/14845.

[36] For information on the membership and other facts about Pacific Islands Forum (PIF), see www.forumsec.org.fj.

[37] This idea was promoted by a non-governmental organisation, LAWASIA. S. Jones, 'Regional Institutions for Protecting Human Rights in Asia' (1996) 50(3) *Australian Journal of International Affairs* 271.

and peace-building.[38] The Biketawa and Nasonini Declarations from the 2000 and 2002 Forum meetings emphasised the importance of developing a coordinated regional response to conflicts in a cooperative, consultative manner.

On the basis of the Biketawa Declaration, the Forum Secretary-General can, through consultations with Forum Foreign Ministers, undertake the following actions to assist in the resolution of a crisis: (1) issue a statement representing the view of members regarding the situation; (2) create a Ministerial Action Group; (3) create a fact-finding or similar mission; (4) convene an eminent persons group; (5) instigate third-party mediation; (6) provide support for appropriate institutions or mechanisms that would assist a resolution; (7) convene a special high-level meeting of the Forum Regional Security Committee or an *ad hoc* meeting of Forum Ministers; and (8) convene a special meeting of Forum Leaders to consider other options including, if necessary, targeted measures.[39] Also, notably, the Biketawa Declaration states a number of principles to guide its actions:

> . . .
> (ii) Belief in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief and in the individual's inalienable right to participate by means of free and democratic political process in framing the society in which he or she lives.
> . . .
> (v) Recognising the importance of respecting and protecting indigenous rights and cultural values, traditions and customs.[40]

The Biketawa Declaration further stresses that the Forum must 'constructively address difficult and sensitive issues, including underlying causes of tensions and conflict (including ethnic tensions . . . land disputes, and erosion of ''cultural values'')'. The Forum Regional Security Committee identified in a session in 2000 that 'ethnic differences . . . and a

[38] The Forum's 1992 Honiara Declaration on Law Enforcement Co-operation, for example, provided a regional framework for the development of good governance and higher levels of police cooperation.

[39] Biketawa Declaration, Kiribati, 28 October 2000. See www.forumsec.org.fj/news/2000/Oct06.htm. All PIF documents referred to can be accessed at www.forumsec.org.fj.

[40] For the text of the 'Biketawa Declaration', adopted on 28 October 2000, see www.forumsec.org.fj/news/2000/Oct06.htm.

lack of confidence in governments' ability to resolve these differences fairly', were key factors underlying political instability in the region.[41]

While there could be receptivity for synergies of substantive equality and the right to one's own way of life under these provisions, there are few activities undertaken which could shed light on the potential of these principles and the operationalisation of the Biketawa Declaration to support minority protection. While there have been activities and actions invoked since its adoption, the major application of the Biketawa Declaration to date followed a meeting in June 2003 of the Forum's Foreign Ministers with regard to the Solomon Islands. It was agreed that a multilateral peacekeeping mission (the Regional Assistance Mission to the Solomon Islands – RAMSI) would be sent, a move supported not only by the government of the Solomon Islands but by all Forum states. Also, notably, this was preceded by a first PIF fact-finding mission sent in the form of an Eminent Persons Group on Solomon Islands in June 2002. The resulting mission report included a section on 'ethnic tension' noting the demands of the Guadalcanal Provincial Government, including its urging of the national government to enact tougher laws to 'stop people from other islands coming to Guadalcanal, and stopping the sale of customary land on Guadalcanal to outsiders'. It also recounts part of the conflict, including that the new government created a new ministry called the Ministry for National Unity, Peace and Reconciliation, 'to deal specifically with the ethnic conflict'.[42] While the report's recommendations did not explicitly address inter-communal issues per se, it did urge a fairer distribution of resources and participatory decision-making through the proposals being developed for a new federal government structure.

More recently, in the April 2004 Auckland Declaration, Forum leaders endorsed the Pacific Plan, which outlines a revised mandate for the Forum, and included a minority dimension by stating that 'We treasure the diversity of the Pacific and seek a future in which its cultures, traditions and religious beliefs are valued, honoured and developed'.[43]

[41] The Forum prepared a special report on land issues in the Pacific for its 2001 Forum Economic Ministers Meeting. See Session of the Forum Regional Security Committee, 13–15 July 2000.

[42] Report of the Pacific Islands Forum Eminent Persons Group on Solomon Islands, Carlton Crest Hotel, Brisbane, 28 June 2002.

[43] See the text of the Pacific Plan, at www.forumsec.org.fj/docs/PPlan/Final%20Draft%20Pacific%20Plan-%20Sept%202005.pdf. Pacific Islands Forum Secretariat, 'A Pacific Plan for

Within the section on 'good governance', the Pacific Plan calls for the establishment of a 'regional ombudsman and human rights mechanisms to support implementation of Forum Principles of Good Leadership and Accountability'.[44] Furthermore, a regional support mechanism will be established to cover the drafting, harmonisation and promotion of awareness of rights-based domestic legislation within the Pacific, drawing upon the major UN instruments, and ILO Convention 169.[45] This appears to indicate that, in terms of potential standard-setting on minority protection, this sub-region is leaning more towards implementing the universal instruments than developing regional normative frameworks. However, mechanisms could be developed, and one commentator suggested, in 2004, the consideration of a PIF Ombudsman on Ethnic Equality.[46] In 2005, UNDP, in cooperation with the Pacific Islands Forum and the University of South Pacific, was engaged in a project to consider options to operationalise the Biketawa Declaration as a means of crisis prevention and to address potential sources of conflict in the Pacific region.[47]

2 Synergies of non-minority-specific regional mechanisms in the Asia-Pacific

2.1 'Human rights' entry and regional approaches to minority protection

The previous sections demonstrated limited inroads towards minority protection through sub-regional mechanisms on human rights in ASEAN,

strengthening regional cooperation and integration' (October 2005), p. 3, at www.pacificplan.org/tiki-page.php?pageName=pacific+Plan+Documents.

[44] The nine Forum principles were endorsed by Forum Leaders in 2004. See address by the PIF Secretary-General to the University of the South Pacific, 29 September 2005, at www.forumsec.org.fj/news/Speeches/SG%20Speech%20on%20Leadership.pdf.

[45] Pacific Islands Forum Secretariat, 'A Pacific Plan' (2005), p. 18, at www.pacificplan.org/tiki-page.php?pageName=pacific+Plan+Documents.

[46] See P. Wallensteen, Plenary address, Conference on Securing a Peaceful Pacific, Christchurch, New Zealand, 15–17 October 2004. See www.hotel.uu.se/pcr/publications/Wallensteen_pub/PacificConflictPrevention041213.pdf.

[47] In February 2006, a draft discussion paper was prepared, which introduced an idea of convening a regional network to provide 'the three components of early warning: information, analysis and guidelines for appropriate action'. See C. Collins, 'Operationalization of the Biketawa Declaration: Techniques and Tools', February 2006, http://regional/centrepacific.undp.org.fj/Files/Reports_Knowledge%20Fair%20showcase/Collins_Biketawa_Techniques%20%20Tools_Draft1.pdf. See also C. Collins, 'Indicators, Early Warning and Conflict Prevention in the Pacifc Islands', 2006, http://regionalcentrepacific.undp.org.fj/Files/Reports_Knowledge%20Fair%20showcase/collins_Indicators_FWCP_Draft.

ARF and PIF.[48] However, the Bangkok Declaration of the Asian Intergovernmental Meeting, adopted in preparation for the 1993 World Conference on Human Rights, committed government signatories in the region to 'Emphasise the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons.'[49] Still, regional intergovernmental workshops on human rights, such as that in January 1993 in Jakarta, have exemplified a cautious approach of governments in the Asia-Pacific towards establishing effective regional human rights mechanisms:

> A step-by-step strategy should be adopted in establishing regional machinery . . . a first step could be the setting up of sub-regional machinery for human rights information dissemination. This could be followed, for example, by the establishing of an Asian Forum which could enhance regional exchange of ideas and experiences aimed at promoting human rights activities.[50]

NGOs from the region adopted a Bangkok NGO Declaration in March 1993, which suggested a regional commission mandated to apply without reservations the UN human rights instruments, a regional commission with full investigative powers, and a separate body to adjudicate complaints.[51] Another NGO-led initiative produced an 'Asian Charter on Human Rights' in 1998, which provided further ideas for options within intergovernmental processes.[52] However, several NGOs in the region have not promoted particularly actively regional mechanisms, possibly due to a concern that this could lead to lowering existing standards available at

[48] For an overview of human rights issues in the region, including initiatives towards regional mechanisms, see V. Muntarbhorn, *Asian Perspectives on Human Rights: Perceptions, Programmes and Practices* (Bangkok: Office of the National Human Rights Commission of Thailand, 2002).

[49] The Bangkok Declaration was adopted in 1993 by representatives for Asian states. Reprinted in *Bill of Human Rights Bulletin* (Hong Kong: University of Hong Kong Law Faculty, March/April 1993), p. 78.

[50] Concluding Remarks, Asia-Pacific Workshop on Human Rights Issues, Jakarta, Indonesia, 26–28 January 1993 (sponsored by the United Nations Centre on Human Rights). Over the past decade, the Office of the UN High Commissioner for Human Rights has supported the arrangement of such region-wide consultations.

[51] See Asian Cultural Forum on Development, *Our Voice: Bangkok NGO Declaration on Human Rights* (Bangkok: Edison Press Products, 1993).

[52] The initiative of the 'Asian Human Rights Charter' was driven by the Hong Kong-based Asian Human Rights Commission, and adopted in Seoul in 1998.

the UN level.[53] Also, some intergovernmental forums have provided support through 'cross-regional sharing of experiences' conferences, which could contribute to synergies and stimulate ideas for regional mechanisms in Asia.[54]

While no comprehensive regional human rights framework has evolved in Asia-Pacific to complement and strengthen UN instruments relevant to minority protection, there is an increasing practice of establishing issue-based declarations, as in ASEAN on cultural issues. Such normative developments could, over time, evolve into stronger texts with monitoring and other mechanisms and procedures vested in the respective and appropriate sub-regional intergovernmental organisation. In this regard, it could be conducive to develop a 'non-minority', 'issue-specific' instrument addressing a certain right, such as 'education', 'participation', 'language' or 'culture', and ensuring a minority rights component within this, rather than promoting a comprehensive 'minority' declaration per se.

2.2 'Security' entry and regional approaches to minority protection

While the origin of violent communal conflicts may lie in one country, their effects can be felt in the wider region and beyond. It is clear that effective multilateral cooperation is needed effectively to assist and prevent early expressions of grievances from turning into expressions of violence. Participants at a sub-regional seminar which the UN Working Group on Minorities organised in Thailand in 2002 recommended that the ASEAN member states

> recognise that addressing minority rights is key to the preservation of national stability and security in all the ASEAN countries, and to establish, at the sub-regional or country levels, early warning systems for the prevention of violent conflict, especially as it affects minorities and indigenous communities.[55]

[53] Based on interviews by the author in Jakarta, Indonesia, 2005.

[54] The Second Informal ASEM Seminar on Human Rights took place in Beijing 1999, with a session on minority rights. The Seventh Informal ASEM Seminar on Human Rights specifically addressed minority rights, and was held in February 2006 in Budapest.

[55] Conclusions and Recommendations of the Sub-regional Seminar on Minority Rights: Cultural Diversity and Development in Southeast Asia, 2002, UN Doc. E/CN.4/Sub.2/AC.5/2003/2, paras. 85 and 87.

Conventional approaches to security multilateralism are of limited help in explaining Asian regionalism, which continues to avoid collective security and collective defence. Southeast Asian leaders frequently assert that their non-legalistic and consensus-oriented 'ASEAN Way' is a distinct and workable approach. Similarly, some leaders in the South Pacific advance the particularity of a 'Pacific Way' of addressing conflicts by means of negotiation and consensus-building. Whether the aforementioned 'ways' are so uniquely distinct or not, the trend is clear that ASEAN, ARF and PIF are further refining the *procedures* of addressing in-regional security challenges. Examples of this include the mushrooming of 'Eminent Persons Groups'. However, a common feature of these mechanisms is that they continue to function on an *ad hoc* basis, rather than designating eminent persons for longer-term assignments, and without sufficient financial and political support to initiate and sustain engagement. The temporary nature of the existing mechanisms significantly minimises their effectiveness, as the actor has little or no time to develop confidence among parties, which is critical if it is to relay messages, facilitate dialogue or even mediate between different communities. However, these evolving mechanisms in the Asia-Pacific are more likely to develop their approaches on issues other than diversity issues, such as maritime security, environmental pollution, illegal labour flows or possibly migration. The mechanism with the greatest mandated potential to move towards providing a function of facilitating structured dialogues and mediating claims between communities may to be the PIF Secretary-General, through the Biketawa Declaration. There exists significant scope for useful cross-regional synergies and exchange of issue-based approaches by the approaches developed by the OSCE High Commissioner on National Minorities, the comprehensive early-warning mechanisms developed as ECOWATCH in western Africa, and the good offices unit supporting the Commonwealth Secretary-General in preventive diplomacy.

As to the *normative* developments in this possible 'security' entry to minority protection, international norms which have been particularly influential in the region include non-alignment and non-interference. ASEAN and ARF subscribe to 'comprehensive security', while traditional interpretations of non-interference and sovereignty remain widely held. While this limits action on issues relevant to minorities, there have been

calls for refined interpretations of non-interference to enable 'constructive engagement' or 'enhanced inter-action' in the ASEAN context.[56]

2.3 Overview of domestic experiences of minority protection

While there is a lack of regional approaches to minority protection, this section briefly notes a few policies on minority issues in some of the countries of the region. This serves to demonstrate that minority rights, whether formulated in a minority-specific way or by means of other terminology, are promoted and protected in numerous domestic contexts in the Asia-Pacific. The different options and tools for diversity management, including progressive readings of the prohibition of discrimination, can evolve regardless of the general absence of regional standards and mechanisms. An additional development in this regard is the development of national human rights institutions in Cambodia, Indonesia, Malaysia, the Philippines and Thailand, which provide important steps towards enhanced human rights protection in the region.[57] While certain states are particularly hesitant about the regional layer in norm-building and mechanisms, there are examples where states are simultaneously supportive of human rights protection at the universal and national levels, while resistant at the regional level.[58]

Constitutional protection of relevance for minorities often includes *recognition*, the right to equality and *non-discrimination* and the provision of *special measures*. Cambodia, Vietnam and China specifically mention

[56] The challenging of traditional interpretations of 'non-interference' has been reflected in some of the contributions made in the process of the series of annual UNDPA/UNDP co-hosted 'UN-ASEAN conference on conflict prevention, conflict resolution and peacebuilding in Southeast Asia'. For the proceedings of these conferences, see www.aseansec.org/15452.

[57] For an overview of national human rights institutions in Southeast Asia, see M. Mohamad, 'Towards a human rights regime in Southeast Asia: charting the course of state commitment (2002) 24(2) *Contemporary Southeast Asia* 230–50. The Asia Pacific Forum of National Human Rights Institutions is composed of independent national human rights commission from Afghanistan, Australia, Fiji, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestinian Territories, Philippines, Qatar, Republic of Korea, Sri Lanka, Thailand and Timor Leste.

[58] Kraft 'Human Rights in Southeast Asia', p. 4. For example, the Philippines did not actively support a regional human rights mechanism until 1998. Before this it was an example of a country with policy differences between the domestic and international levels; with strong support evidenced by the number of UN Conventions ratified, but with a more passive approach at the regional level.

'national minorities' in their constitutions.[59] Indonesia's motto is 'unity in diversity', and the Constitution of Laos commits the state to promoting 'unity and equality' among all ethnic groups, who have the right 'to protect, preserve, and promote the fine customs and cultures of their own tribes and of the nation'.[60] The 1998 National Population Census in Cambodia identified seventeen indigenous groups based on language spoken, constituting 1 per cent of the total population.[61] The 2000 official population census in Laos identified forty-nine ethnic groups.[62] In the Philippines, nearly forty-six ethnic groups of Mindanao were collectively classified as 'National Cultural Minorities' by the Commission of National Integration in 1957. These groups were excluded from recognition in 1997 as 'Indigenous Cultural Communities', which were identified as communities which had, *inter alia*, maintained their distinct ethnic, social, economic and cultural identities.[63] As to special measures, wide-ranging affirmative action in Malaysia has resulted in greater equality and also equity: while ethnic Malays in 1970 owned 2.4 per cent of corporate assets, they owned about 20 per cent by 2003.[64] China has a range of special measures vis-à-vis recognised national minorities, and also grants special demographic rights; they are, for example, not subject to the 'one-child' policy applicable to the Han majority.

[59] E.g., the 1993 Constitution of Cambodia granted rights to all Khmer citizens including about forty ethnic minorities, and specific provisions to prevent any form of discrimination.

[60] Y. GH Mulyana, 'Engaging minorities in nation building and national development process', in *RWI Report No. 30 Second Informal ASEM Seminar on Human Rights in Beijing, 27–29 June 1999* (Lund, Sweden: Raoul Wallenberg Institute, 1999), p. 105. See also Article 8, Constitution of Laos 1991.

[61] MRG report, *Good Governance and Indigenous Peoples of Asia* (London: MRG, 2005), p. 24.

[62] Other estimates refer to more than 200 distinct ethnic groups in Laos. See International Labour Organization, *Policy Study on Ethnic Minority Issues in Rural Development* (Geneva: ILO, 2000).

[63] Working Group on Minorities, Sub-regional Seminar in Southeast Asia, December 2002, paras. 16–18, UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.14. The Moro identify themselves as indigenous in Mindanao and minorities in the Philippines. The 1996 Final Peace Agreement signed between the government of Philippines and the Moro Islamic Liberation Front ('MILF') contains provisions which provide cultural autonomy and the recognition of Moro people.

[64] F. Salvosa, 'Matahir stresses economic gains of affirmative action', *Business World* (Manila), 6 October 2004, p. 1. However, Ghai presents a cautionary tale of preferential policies in the region, showing that while improving prospects, the advantages have disproportionately benefited sections of their educated and middle classes. See Y. Ghai, 'Legal Responses to ethnicity in south and southeast Asia', Occasional Paper No. 1, Lansdowne Lecture, University of Victoria, 1993. See www.capi.uvic.ca/pdf/GHAI.pdf.

As regards the right to *effective participation* and adequate representation, some Asian states have quota systems and consultative bodies to enhance the participation of minorities in different areas of state and local governance. Malaysia has a Department of Orang Asli Affairs and the Philippines has a National Commission; both are composed of minorities and tasked with ensuring minority perspectives in national planning and policies. Thailand has identified 'hill tribes' to have representation in Parliament, and the Philippines has included a provision for sectoral representation in the House of Congress, which could enhance the participation of minority communities.[65] There are several autonomy arrangements in the region, including in China, Indonesia (Aceh and Papua) and the Philippines. In the Muslim south in the Philippines, calls for a separate entity appeared to subside once the government introduced a right to self-government under an autonomous region.

With regard to *language* policies, Indonesia, which has more than 500 languages, chose the Malay-influenced Bahasa Indonesia as the official language, including as a means of instruction in schools, rather than Javanese, which is spoken in the capital and main island. In Japan, the passing of the 1997 Ainu Cultural Promotion Act seeks to revive and revitalise the Ainu culture, including the Ainu language. Similarly, as a result of Vietnam's ethnic language revitalisation program, four of its fifty-three minority groups (Cham, Thai, Tay and Lhmer) are increasingly using their traditional scripts, and twenty-one minority groups have Latinised scripts that have been established over the past century. The Ministry of Education in Vietnam has made efforts towards creating a bilingual curriculum for ethnic minority children in elementary schools. In Cambodia, a bilingual education programme run on a pilot basis has led to the revival of five minority languages using the Khmer script.[66]

Citizenship issues remain a significant challenge for minorities within the region. There remain efforts to be undertaken to combat statelessness in Thailand, which is the situation faced by many members of the 'hill

[65] A list of sectors were identified, including indigenous/cultural communities, to ensure that Congress included representatives from non-traditional parties. However, no party representing indigenous peoples has been elected, while two parties vied during the 2003 elections, as most minorities opted to join the farmers' and workers' parties. See Background Reader, Seventh Informal ASEM Seminar on Human Rights: 'Human Rights and Ethnic, Linguistic and Religious Minorities', p. 24 (on file with author).

[66] See *ibid.*, p. 32.

tribes', such as the Akna, Lanu, Lisu, Yao, Hmong and Karen ethnic communities. While recognising some progress in facilitating access to citizenship, some consider outstanding challenges to include providing tangible proof of their duration of residency, the lack of birth registration documents, the lack of knowledge of officials on minority cultures and reported instances of reluctance to take responsibility in determining the status of naturalisation.[67]

In terms of *land rights*, the Philippines has recognised these rights, at least in terms of legislation. In 1987, the Indigenous Peoples Rights Act ('IPRA') was signed into law, recognising ancestral land claims through the issuance of Certificates of Ancestral Land/Domain Claims, and recognising also the communal right to lands.

The formal status of *customary law* varies and often rests on weak constitutional safeguards, as in Sabah and Sarawak in Malaysia. The Philippines has a progressive law which attempts to ensure the state recognises traditional law.[68] In Indonesia, Act No. 22 of 1999 made it possible to reverse a previous change in the developing communities, allowing for the revitalisation of their values and traditions. The mixed results in similar efforts across the region are illustrated by Indonesia, where prior imposed uniformity led to limited interest in restoring traditional structures.[69]

3 Conclusion

This chapter assesses substantive and procedural synergies between non-minority-specific instruments and mechanisms in ASEAN, ARF and PIF, through the 'entries' of 'human rights' and 'security' approaches. While several states in the Asia-Pacific region have elaborate protection and policies on minorities, none of the three sub-regional intergovernmental forums has developed a conceptual understanding of 'minority' within

[67] Working Group on Minorities, Sub-regional Seminar in Southeast Asia, December 2002, para. 10, UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.14. For example, most of the Moken community of approximately 5,000 persons do not have citizenship, with children facing difficulties in accessing public education and health services. *Ibid*., para. 11.

[68] Minority Rights Group, *Traditional Customary Laws and Indigenous Peoples in Asia* (London: MRG, 2005).

[69] Indigenous Peoples/Ethnic Minorities and Poverty Reduction: Indonesia (Manila: Asian Development Bank, 2002) pp. 29–31.

its respective work, while ASEAN and PIF official documents do make reference to ethnicity and promote cultural diversity.

While no comprehensive ASEAN, ARF or PIF *human rights* instrument has thus been elaborated, there is a trend towards issue-based (and non-minority-specific) instruments, including the politically binding ASEAN declarations on cultural, women's and children's issues. One instrument relevant for minorities is the 'cultural diversity' approach to include use of language issues in the ASEAN Declaration on Cultural Heritage. With sub-regional human rights normative developments also likely to remain limited in the near future, this emphasises the continued reliance in the Asia-Pacific on universal norms and procedures on human rights and minority protection.

There appears to be a useful scope for synergies within the *security* sphere, specifically the role of fact-finding missions, facilitation of dialogue and other early warning/conflict prevention modalities, given the organisation's adherence to the concept of comprehensive security. An eminent person or collective group of such individuals, with regional standing and legitimacy, if adopting a quiet, diplomatic, assistance-based approach, could currently resonate well in the sub-regions and complement any explicit rights-based or judicial approach to minority protection. However, any such security-oriented function and approach is likely to be framed and contextualised in a non-minority-specific mandate, such as an Eminent Persons Group tasked to address non-traditional security concerns with cross-border effects. While the emerged 'Eminent Persons Groups' in ASEAN, ARF and PIF largely remain to be operationalised, they constitute an opportunity to develop capacities for such assistance-based preventive diplomacy. The principles of non-interference and consensus are likely to remain features of any such institutional arrangement developed within ASEAN, ARF and PIF. While ASEAN and ARF are progressing at a 'pace comfortable to members on the basis of consensus', regional commentators have suggested adopting an ASEAN-X formula to enable those willing to deepen their cooperation with a view to be joined by others later. As argued by an Indonesian commentator with regard to ASEAN, governments could consider employing the principle of non-interference in a flexible way, including being (1) more open to greater and cooperative involvement of other member states – through agreed mechanisms – in trans-boundary issues (internal issues with clear regional implications); and (2) more open to friendly advice offered by

fellow member states, provided that such advice is regulated and channelled through appropriate mechanisms, including at the sub-regional and regional level.[70] Another Indonesian scholar notes that 'ASEAN needs to have an early warning system that enables it to take early action at the earliest possible stage of a conflict situation, be it an interstate conflict or interethnic or inter-religious conflict.'[71]

The establishment of, for example, sub-regional risk reduction centres and preventive diplomacy capacities would enhance, rather than threaten, the role of the participating states in addressing security concerns. The appropriate actor to engage in such preventive diplomacy, including on minority issues, may then be a Secretary-General, an Eminent Person or a Special Envoy, or a collective thereof, who can benefit from systematic expert advice and focus on issues of judgement, including timing, volume and depth of engagement. While respectful of the significantly different contexts, procedural synergies could benefit from the approaches and experiences of the OSCE High Commissioner on National Minorities, the ECOWATCH early warning system and the Commonwealth Secretary-General 'good offices' function, which may be useful to consider as ASEAN, ARF and PIF develop their context-specific approaches. Scope for synergies could also be drawn from the experiences of other intergovernmental organisations to undertake 'fact-finding missions', also addressing minority dimensions, including the UN and regional organisations. The comprehensive security concept in ASEAN addressing 'relations between states' could perhaps provide a sufficient basis to develop an assistance-based approach and engagement on issues of integrating diversity within states, in the interests of states and minority communities alike .

This indicates the remaining need to deepen, clarify and liberate the concept of 'minority' in the region. Perhaps this could become a very welcome contribution made in the context of a 'development and poverty reduction entry', exploring the concept of 'human security' or democratic and 'good governance', which were not addressed in this chapter and

[70] R. Sukma, 'ASEAN', in R. Sukma *et al.* (eds.), *Operational Conflict Prevention in Asia-Pacific* (forthcoming) (copy with author).

[71] See J. Vermonte, 'Preventing conflicts within ASEAN', *Jakarta Post*, 11 May 2004: see www.csis.or.id/scholars_opinion_view.asp?op_id=182&id=45&tab=2. However, in the short term, it is more likely that any such early-warning mechanism would focus on other non-traditional security issues initially, such as maritime security, environmental pollution, illegal labour flows or migration.

could hold particular advantages.[72] Commentators tend to agree that a major cause of grievances, in the Pacific in particular, is often economic factors such as land accumulation, or access to natural resources or the negative impact of their extraction. It is necessary to foster the realisation that bringing half of a population out of poverty and meeting expectations under the Millennium Development Goals may not be enough to reach those minorities facing exclusion and extreme poverty. ASEAN and PIF could lend experiences from the Asian Development Bank ('ADB') and other international financial institutions and make inroads in addressing social inclusion and minority protection in their respective development cooperation roles when proceeding towards establishing an ASEAN Community and implementing the Pacific Islands Plan.

[72] See D. Anwar Fortuna, 'Human Security', in M. Alagappa (ed.), *Asian Security Order: Instrumental and Normative Features* (Stanford: Stanford University Press, 2003).

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