ΠΑΝΤΕΙΟ ΠΑΝΕΠΙΣΤΗΜΙΟ ΚΟΙΝΩΝΙΚΩΝ ΚΑΙ ΠΟΛΙΤΙΚΩΝ ΕΠΙΣΤΗΜΩΝ

ΤΜΗΜΑ ΔΙΕΘΝΩΝ, ΕΥΡΩΠΑΪΚΩΝ ΚΑΙ ΠΕΡΙΦΕΡΕΙΑΚΩΝ ΣΠΟΥΔΩΝ

ΠΜΣ ΔΙΕΘΝΕΣ & ΕΥΡΩΠΑΪΚΟ ΔΙΚΑΙΟ ΚΑΙ ΔΙΑΚΥΒΕΡΝΗΣΗ ΕΙΔΙΚΕΥΣΗ:
«ΔΙΕΘΝΕΣ ΔΙΚΑΙΟ ΚΑΙ ΔΙΠΛΩΜΑΤΙΚΕΣ ΣΠΟΥΔΕΣ»

"Protection of Minorities: From Theory to Practice via the Conceptualisation and the Institutional Application of their Rights"

M.A. Dissertation

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Declaration

I Sofia-Eirini Papanikolaou declare that this piece of work is the first of its kind and it is not a photocopy of someone's work. I am the author of this dissertation and any assistance I received in preparation is fully acknowledged and disclosed. Any sources of data, ideas and words either direct or paraphrased have been cited in this piece of work. I certify that this dissertation was prepared by me with the guidance of my supervisor.

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Sofia-Eirini Papanikolaou

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Abbreviations

ACHPR	African Commission on Peoples and Human Rights
CAT/C	Committee Against Torture
CERD/C	Committee on the Elimination of All Forms of Racial Discrimination
CEDAW/C	Committee on the Elimination of Discrimination Against Women
CoE	Council of Europe
CJEU	Court of Justice of the European Union
CSCE	Conference on Security and Cooperation in Europe
ECHR	European Convention on Human Rights
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FCNM	Framework Convention for the Protection of Minorities
FRA	European Union Fundamental Rights Agency
HCNM	High Commissioner on National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IACtHR	Inter-American Court of Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PCJI	Permanent Court of International Justice
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

Abstract

Minority rights has become a buzz-word and their protection a research trend within the legal, political and social scientist circles the past few years. However, minorities have always been at the epicentre of the very existence of nation-states and their protection has been seen as a prerequisite for the peaceful co-existence among states as well as the maintenance of world public order. This paper examines the theoretical, normative and institutional approaches adopted in international law towards the protection of minorities. As the topic is sensitive and complex, the role of international law in addressing this intertemporal challenge, both on a preventive as well as a corrective manner, is of paramount importance. In a nutshell, international law, based on the principles of non-discrimination and equality, has developed a set of techniques to protect minorities by promoting the respect for heterogeneity/otherness of the individual. In a similar vein, providing minority protection through the canon of human rights can expose at least some of the conceptual and legal oscillations between general standards and special protections. These kind of tensions and uncertainties which are explored in the paper, still surround the field and effectively call for creative exercises whereby minority issues are not only the subject of institutional debates but are also comprehended as legal sites of a discourse capable of reinforcing and expanding the content of international human rights law.

Introduction

International law has maintained a long-standing preoccupation with the protection of minorities. Indeed, the concept of minorities is not an emergent one. On the contrary, minorities have always been at the epicentre of the very existence of nation-states, while their protection has been seen as a prerequisite for the peaceful co-existence among states and the maintenance of world public order. The need to address minority issues as a reason that gives rise to ethnic conflicts and civil wars as well as to gross human rights violations, continues to be a challenge for the international community. Hence, the role of international law in addressing this intertemporal challenge, both on a preventive as well as a corrective manner, is of paramount importance.

Minority rights implicate matters going to the heart of a state's existence and could entail the reordering of the internal state structures. For these reasons, the topic is sensitive and complex. This article examines the theoretical, normative and institutional approaches adopted in international law towards the protection of minorities. The first part of this paper focuses on the exploration and identification of the beneficiaries of minority protection; a process that is taking place through the introduction of some key definitional and conceptual problems regarding the notion of minorities. For this purpose, an overview of the current international legal framework

for the protection of minorities will be presented. This brings us to the examination of the nature of minority rights, in essence whether they are individual or collective in nature, as well as their substantive content. The matter is further examined by the introduction of the right to self-determination, given its indeterminate scope and imprecise nature of the category of 'peoples'. The last section of the first part concludes by arguing that a more pragmatic approach needs to be deployed for the concept of minorities to be meaningful.

The second part focuses on the international human rights institutions which can be relevant to minority protection. This part starts with a brief view of the relationship between human rights and minority rights and continues with the examination of those institutions that may be of great value for the protection of minorities, especially in the European context where significant insights into minority protection have been offered. The focus will be primarily on the jurisprudence of the European Court of Human Rights, as the primary guardian of the identity of minority members. Last but not least, an analysis of monitoring mechanisms, employed both in the United Nations and European level, will be presented regarding the implementation of minority-related standards, as legal institutions play a pivotal role for the security and integrity of minorities and their members.

I. The International Legal Framework for the Protection of Minorities. Identifying the Beneficiaries.

1.1 The Question of Definition

Prior to commencing a discussion on the current legal framework and state of minority protection developments, it is useful to provide with an overview of the definition of minorities in order to better understand the complexities surrounding the concept. Interestingly, none of the international bodies have offered an express definition of the concept, as there is not a legally binding international document that contains a definition of a minority which is recognised by the international community as a whole. However, despite the difficulty and complexity of providing a definition capable of being universally accepted, international instruments' attempts to define minorities have concluded to the determination of those characteristics that can

constitute a minority. The combination of factors referred to by the PCIJ in its *Advisory Opinion on the Interpretation of the Greco-Bulgarian Agreement* – namely, objective differences of race, religion, language and traditions from the majority populations plus a subjective sentiment of solidarity, with a view to preserving their traditions – has been retained in most post-1945 attempts to define a minority.[1] It was not until 1979, however, when a study by jurist Francesco Capotorti, concluded under the auspices of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed the Sub-Commission on the Promotion and Protection of Human Rights, 1999; replaced by the Advisory Committee of the UN Human Rights Council, 2007) arrived at the following definition:

"*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*". [2]

While Capotorti specifically limited this definition to the content of Article 27 of the Covenant on Civil and Political Rights (ICCPR), it has remained the model for most of the definitions that followed. In 1984, the Commission on Human Rights requested the Sub-Commission to explore again the issue of defining a minority as part of general process that would eventually lead to the adoption of a declaration by the General Assembly. The proposed definition by Sub-Commission's member, Jules Deschênes, did not differ substantially from Capotorti's definition[3], yet the

[1] *Interpretation of Greco-Bulgarian Agreement* of Dec. 9th, 1927, Advisory Opinion, 1932 P.C.I.J. (ser. A/B), No. 45 (Mar. 8), par. 21-2. In its Advisory Opinion, the Court equated communities with minorities and defined community "*as a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other…*" This definition was cited with approval in the *Minority Schools in Albania* Advisory Opinion of 15 May 1931.

[2] United Nations, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev 1 (1979), para. 568 (republished by the UN as UN Sales No. E/91/XIV/2 (1991).

[3] UN Sub-Commission on the Promotion and Protection of Human Rights, Proposal concerning a definition of the term 'minority' submitted by Mr. Jules Deschênes, UN Doc. E/CN.4/Sub.2/1985/31.

Commission's Working Group on Minorities Declaration decided to postpone further discussion of definitional questions. As a result there is no definition included in the Declaration as it was finally adopted in 1992.

It was not only at the international, but also at the regional level, and specifically in Europe, where regional bodies, such as the Council of Europe (CoE) and the Conference on Security and Cooperation in Europe (CSCE), have undertaken the most substantial efforts for the development of a framework for the protection of minorities. Yet, none of these bodies provide with a 'minority' definition. Only the Parliamentary Assembly of the Council of Europe, in its recommended (but not adopted) additional protocol to the European Convention on Human Rights proposed a definition of national minority. According to this definition:

" *The expression 'national minority' refers to a group of persons in a State who: (a) reside on the territory of that State and are citizens thereof; (b) maintain longstanding, firm and lasting ties with the State; (c) display distinctive ethnic, cultural, religious or linguistic characteristics; (d) are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; (e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language*." [4]

As it is obvious from the proposed definitions, even though they present slight differences, they have as a common what we could call the core of the definition of a minority. According to this, minority is a group historically rooted in the territory of the state, whose specific ethno-cultural features markedly distinguish it from the majority of the population of the State, and thus they need protection, but whose members have permanent political and social links with this state as manifested by citizenship.[5] However, instead of clarifying the notion, it is its core elements which are so controversial and deeply problematical that make it impossible to reach a uniform definition. A conceptualisation of minorities based on these criteria can have profound

[4] Proposal for an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993), 44th Sess., 22nd Sitting, 1 February 1993, Art.1.
[5] Gaetano Pentassuglia, *Defining 'Minority in International Law: A Critical Appraisal* (Rovaniemi: Lapland's University Press 2000).

implications for the identification of the beneficiaries of minority protection. Thus, an examination of the definitions' components seems to be crucial in order to understand the approaches of international law towards identifying minorities.

1.2. The Parameters of Minorities' Definition: Meaning, Potential and Implications for the Beneficiaries of Minority Protection

1.2.1. The Core Elements of a Minority

The function of a legal definition is to establish the range of potential candidates who may claim an entitlement. It determines the possible legal options open to members of a legal category, which bears legal consequences for both right-holders and duty-bearers. Since minority protection is designed to operate within and buttress the state framework, a minority is necessarily relative to the state and thus to its relevant territorial unit. This means that a minority cannot exist outside the context of the particular state and its territory as this is the context within which the concept of a minority has emerged and in which it can only be understood. In addition to the territorial relationship of this cultural group with a given state, it is also essential a temporal relation to be present which showcases the existence of long-lasting ties with the state, a sense of stability and permanent residence in its territory.

Moreover, a substantial feature that characterises a minority is its non-dominance, its inferiority in comparison to the majority population of that state. References to 'numerical inferiority' in the proposed definitions indicate the relevance of the numerical issue. While Deschênes considered the numerical criterion relatively insignificant, Capotorti recognised that minority rights were not absolute but conditioned upon reasonable proportionality between the effort expended on such special measures and the benefit to the minority concerned. However, the numerical factor alone, is proved to be not determinative,[6] as a majority can be smaller in numerical terms than a minority, or there may be no outright ethnic majority group in

[6] The numerical criterion may be relevant insofar as there might be an implicit minimal threshold before minority rights accrues, as in the case of minority language schools in districts with "substantial numbers" of minorities, e.g. art. 14(2) FCNM. Some states proposes numerical thresholds (like Sweden and Netherlands).

a given state with several large minorities which is the case in some states of Africa.[7] Thus, the non-dominance is not exhausted on the numerical basis, but it characterises the status of minorities in the political and social life of a state.

In addition to being non dominant in the sense of lacking political and economic power, minorities must be 'distinct'. This nature of distinction may be ascertained from the qualifying objectives attached to minorities provisions in international treaties and declarations, namely racial, ethnic, linguistic, religious, while many of the documents have identified their beneficiaries as national minorities. Even when these adjectives help narrow the parameters of the understanding of minorities, they are problematical as their meanings are not self-evident, may overlap with one another, change over time, while from time to time they have been used variously by different parties.[8] Terms like state and nation – the former may be understood as a political-legal concept, the source of citizenship, while the latter is understood to be a psycho-cultural entity from which one's nationality is derived – have been used interchangeably.[9] In the modern era of nations-states, nationality has been realised in the context of state so much so that nationality and citizenship have been understood as identical terms. Moreover, notions such as nationality and ethnicity have many times used in ways that can cause great confusion, especially with respects to the identification of minorities. According to Smith, an ethnic community possesses the following attributes: a collective proper name, myth of common ancestry, shared historical memories, differentiating elements of common culture, an association with a specific homeland and sense of solidarity [10] and thus is different from the notion of nationality or citizenship which are being identified with a territory, that of a particular state and which are considered to be constituents parts of a minority.

Last but not least, the identification of minorities is not a strictly factual affair, based only on objective traits, as they have been analysed above, but a subjective criterion is also essential. This criterion requires that a group possesses aspirations

[7] African countries have queried the criteria for defining 'minorities' in certain UN formulations, which include numerical inferiority and non-dominance as there are several large minorities in countries, such as in Ghana, Chad and Nigeria, which with 250 different languages, has been characterised as a 'country of minorities'.
[8] Thio Li-ann, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century*, (Martinus Nijhoff), 2005).
[9] T.K. Oommen, *Citizenship and National Identity: From Colonialism to Globalism*, (SAGE Publications, 1997).
[10] Anthony D. Smith, *National Identity*, (University of Nevada Press, 1991).

towards perpetuating their collective existence, out of communal solidarity. These groups are determined by the subjective will to preserve their distinct characteristics, their identity. It is for the protection of their culture that they demand differential treatment, through the adoption of special measures in order to promote their identity, freedom and equality. As it is noted, there are elements attributed to the determination of a minority whose indefinite and vague content makes the attempt to define what constitutes a minority harder. The ambiguity of national as a qualifying factor for the determination of a minority is paradigmatic of the complexity surrounding the concept.

1.2.2. Problems with Qualifying Minorities on National Terms

Regarding minorities, terms like national minorities, which are employed in various international documents also vary in meaning, causing confusion and having important implications on the identification of the recipients of minority protection.[11] This is because national can either relate to citizenship or ethno-cultural affiliation with another nation (protective kin state). The conceptualisation of national in relation to another nation-state remains highly emotive, connoting a political element going beyond ethnic in denoting the group in question has a kin state and asserts higher level of demands for autonomy.[12] This assumption potentially gives rise to group claims for secessionism, making the state, in which these minorities reside, reluctant in recognising their status or hostile towards them, while the kin state tends to intervene in matters that are within the domestic jurisdiction of that state, having as an ultimate goal the questioning of state's sovereignty.

Where 'national' in 'national minority' is understood as citizen, it brings to light the unsettled issue of whether citizenship is a pre-requisite for attracting minority protection. It is also unclear whether further criteria like the duration of residence or a historic link to territory need to be satisfied for minority protection to operate. The abovementioned concerns are relevant to the issue of whether new minorities such as

[11] The term surfaced in the 1992 UN Minorities Declaration and the 1995 Framework Convention on the Protection of National Minorities (FCNM) although the meaning of a national minority in these documents is unclear.

[12] Roma, who have neither territory nor kin state and generally lack statehood ambitions have been considered a 'national minority' within the OSCE context, albeit one with a 'dispersed settlement pattern'.

immigrants, migrant workers and refugees, should be considered minorities and consequently, to what extent these groups would be entitled to minority-specific rights.

There is certainly nothing in the various instruments themselves that would suggest that the proposed definition is inappropriate or outmoded, but some commentators have suggested that a broader definition is required or desirable. The expansive interpretation by the Human Rights Committee of Article 27 of the ICCPR is one example. In its General Comment No.23 on Article 27, the HRC explicitly denounces not only the nationality requirement with the inclusion of the citizenship waiver paragraph, extrapolating from the general obligation in Article 2(1) of the ICCPR to guarantee Covenant rights to all individuals within a state's territory and subject to its jurisdiction, but also proclaims that the length of residence in the state is irrelevant.[13] However, the inclusion of visitors in the scope of application of Article 27 is unrealistic and difficult to defend, while it seems to undermine the credibility of the entire provision, creating instead elements of confusion and uncertainty. Yet, despite HRC's General Comment 23, Article 27 refers to minorities 'in those states' which was designed to restrict its application to historic or 'old' minorities. Moreover, the 1992 UN Declaration on Minorities, in the absence of agreement on the meaning of national minorities, does not come to grips with the issue of citizenship and whether this is a pre-requisite for enjoying the full range of human and minority rights, leaving a wide margin of appreciation to states to decide whether a minority can be consisted from both non-citizens and citizens.[14]

'National minorities' is the normal term of reference within the perimeter of OSCE activities[15] and was used but not defined in the Council of Europe's Framework Convention on the Protection of Minorities. According to Klebes, however, the FCNM did not refer to the 'nationalness' of the minority in the sense of an objective trait, but the fact that the group is a minority on the 'national territory' of the state where it

[13] HRC, General Comment No.23, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).
[14] However, the Commentary of the Working Group on Minorities regarding the Declaration on Minorities, authored by the group's chairman, Asbjørn Eide, offered the opinion that 'citizenship as such should be not be a distinguishing criterion which excludes some persons or groups from enjoying minority rights under the Declaration'. However, it then goes to suggest that different kinds of minorities might have different rights; in particular, ' those who have been established for a long time on the territory may have stronger rights than those who have recently arrived'. See UN Doc. E/CN.4/Sub.2/AC.5/2005/2 (2005).
[15] Report of the CSCE Meeting of Experts on National Minorities (Geneva, 1991).

resides.[16] From the content and wording of the Framework Convention, one can understand that it was deliberately conceived as a living instrument whose interpretation must evolve and be adjusted regularly to new societal challenges.[17] Given the fact that multiple identities and increasing mobility have become regular features of European societies, one can argue that such features must not limit access to minority rights and therefore a broad concept of national minority could be employed.[18] This approach would also be fully in line with the principle of dynamic interpretation developed by the European Court of Human Rights with respect to the European Convention on Human Rights.

Contrary to the Council of Europe's approach, in the European Union context, there are numerous references to immigrants/migrants and minorities (EC reports) or sometimes immigrants and ethnic minority groups side by side (some FRA documents). The fact that they are often mentioned side by side does indicate the acknowledgement that they are similar in several respects, at least in their disadvantaged position, but still immigrants are not considered minorities at all. It has underscored that the European Commission seemed to take as a base line, albeit almost implicitly that minority groups are supposed to consist of nationals of the country concerned. European practice, unlike more liberal approaches followed by the UN bodies, appears to regard citizenship as a criterion for recognising the existence of a national minority, reading national as citizen and thus it takes a more restrictive approach in extending minority protection to the so called new minorities.[19] Furthermore, states, not only in Europe, but at the global level, are reluctant in extending minority protection to new minorities, whose concerns are

[16] Heinrich Klebes, 'The Council of Europe's Framework Convention for the Protection of National Minorities, [1995], Human Rights Law Journal, pp. 101-108.

[17] The Venice Commission of the Council of Europe takes a more modulated approach in relation to the nationality requirement in its 2006 report on non-citizens and minority rights. While it does not go as far as stating that the starting point should be that nationality is irrelevant for the qualification as minority and the enjoyment of minority rights, implicitly it acknowledges this position: the Commission underscores that while the right to vote and be elected can be limited to nationals, the limitation must be interpreted restrictively. In other words limiting minority rights to nationals of the state of residence is the exception to the rule, as is the case for general human rights. The supervisory practice in terms of the Framework Convention on National Minorities confirms this position, since the Advisory Committee increasingly invites states to extent its protection to non-citizens (at least on an article by article basis).

[18] This is especially relevant to situations in which people, due to their membership on a minority, have been deprived of their citizenship and thus they cannot exercise their rights.

[19] Kristin Henrard., 'An EU Perspective on New versus Traditional Minorities: On Semi-Inclusive Socio-Economic Integration and Expanding Visions of 'European' Culture and Identity', [2011], Columbia Journal of European Law, at p.68.

considered to be addressed by general human rights or through their own countries' good offices.

It is true that while this broad view, namely the inclusion of immigrants to the notion of minorities, is premised on a more dynamic understanding of the minority phenomenon so as to cover categories traditionally excluded, such as foreigners and migrant workers, emphasising the value of human dignity that transcends boundaries, it also creates a great confusion regarding the concrete beneficiaries of minority protection. Besides, many of these other groups like migrant workers, have arrived voluntarily in the country – in contrary to groups that involuntarily have been brought under an authority or government they have not themselves chosen – while they have benefited from international attention and instruments directed at their particular situations.[20] Every individual and group is entitled to benefit from the norms of non-discrimination and equality that are fundamental to modern conceptions of human rights. However, the rights of groups identified as deserving particular protection or consideration for their religious, linguistic or cultural identity will be undermined if all socially disadvantaged groups are lumped together as minorities. Responding to discrimination is necessary, no matter what the grounds are, but confusing the equality of all with the particular (and particularly sensitive) equality needs of certain ethno-cultural-linguistic-religious groups serves no one well.[21]

Concluding, it seems indisputable – especially when there is not a consensus in the inclusion of these newly arrived or voluntary groups – that the category of national minority has acquired a connotation (at least within Europe) of a long-settled group with historical ties to a particular territory. Citizenship of the state in which they live is often considered to be an essential element of this category as well, although this may simply be a different reflection of the need to be a permanent member of the society in which one lives.[22] Linguistic or religious minorities, on the other hand, might be more easily understood as encompassing relevant recent arrivals in a country. Finally, having examined the parameters for the determination of minority and analysed the qualifying

[20] ILO Convention no 143 concerning Migrations in Abusive Conditions and the Promotion of Opportunity and Treatment of Migrant Workers of 1975, the 1977 Convention on the Legal Status of Migrant Workers of the Council of Europe, the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and other general human rights treaties.
[21] Weller, *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, (Oxford University Press, 2007), at p. 73.
[22] Ibid.

traits, it is considered appropriate, for the purposes of identifying the beneficiaries of minority protection to present the international and regional framework for the protection of minorities.

1.3. Determining the Beneficiaries through the Minority Rights Standards Framework

The creation of the United Nations in 1945, following World War II, brought the signing of the UN Charter the same year and the Universal Declaration of Human Rights in 1948. These documents were significant because of their focus on individual rights and the principles of equality and non-discrimination, but neither expressly mentioned minorities. In fact, advocates for collective minority rights would claim that the focus on individual rights lies in conflict with minority aspirations for collective rights and self-determination. Even the European Convention on Human Rights (ECHR), adopted in 1950, only addressed group rights peripherally via a negative individual right to freedom from discrimination based "on association with a national minority". It was the signing of the ICCPR in 1966 that first articulated minority rights protections, while it remains the only legally binding instrument of global application that includes a provision that directly sets forth minority rights. The text of Article 27 reads:

"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.[23]

As it is obvious, Article 27 refers explicitly to minorities, but it frames minority rights in primarily individualistic terms. It suggests that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the broader society in which

[23] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

it is situated. This individualistic thrust of article 27 is underscored by the fact that it can be made the basis of a complaint before the Covenant's monitoring body, the Human Rights Committee, which is empowered to hear only individual, not collective claims. Therefore, according to Article 27 ICCPR, the beneficiaries of minority protection are individuals, who are members of the minority, and not the minorities themselves. The Article was individualistic in referring to persons, although the recognition of an associative or community dimension in the exercise of the rights it protected tempered excessive individualism.[24] It was also minimalist and did not appear to impose any positive obligations on states to safeguard minority interests. To sum up, Article 27 does not include a definition on minorities neither attributes explicitly specific rights to minorities; instead, the rights enshrined in the article, such as the capacity to participate in one's culture, to hold and exercise spiritual beliefs and to speak to others in a shared language, are not only applicable by individuals, but they can be thought to possess universal value as essential features of our common humanity.

Inspired but not confined by the scope of article 27, the adoption of the Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities (the UN Minorities Declaration) embodies the global minimum standards on the human rights of minorities, being the first international instrument of universal reach devoted to minorities.[25] As all the documents that deal with minority protection, the Declaration does not provide a definition of its beneficiaries. Almost all articles of the Declaration are addressed in individualistic terms akin to the Article 27 formulation, while it does not contain collective rights, such as the right to self-determination, neither it grants rights to groups, even though it displays a clearer view of the group dimension than Article 27. Moreover, in contrast to Article 27 and FCNM, the Minorities Declaration does not provide any oversight machinery, although it does not discount the possible supervisory roles of international bodies (article 9) or inter-state cooperation (article 5-7). Nevertheless, minority protection is primarily envisaged as a domestic responsibility. Finally, even though it is the first UN human rights instrument solely devoted to the special rights of minorities, the political sensitivity attending

[24] Patrick Macklem, 'Minority rights in international law', [2008], Oxford University Press, Vol: 6, No. 3 and 4.
[25] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN GA on 18 December 1992, GA Res. 47/135.

minorities' issue is evident in the fact that these norms are contained in a non-binding instrument with no implementation machinery.

At the regional level, and specifically in Europe, the Council of Europe adopted the Framework Convention on the Protection of National Minorities (1995).[26] Despite the term framework in its title, the FCNM is a legally binding treaty on its European signatories, regarded as the most comprehensive international standard in the field of minorities' rights so far. The FCNM is overseen by the Committee of Ministers, which is supported by an implementation mechanism, the Advisory Committee. As a framework agreement, the instrument is not directly applicable in the domestic legal orders of the member states but requires implementation by legislation and appropriate government policies. The drafters of the Convention opted for programmatic provisions that establish principles and objectives that should guide states in protecting their minority populations. For this reason, the Convention is largely constructed as a series of States' obligations rather than as a detailed list of rights of persons belonging to national minorities. Like the ICCPR and the Minority Declaration, the FCNM refers to the rights of persons belonging to minorities, emphasising the individualistic character of minority protection, while it does not define national minorities, which are expected to be the beneficiaries of minority protection. The FCNM, however, is not the only document, at the European level, which provides with minority protection provisions. The 1992 European Charter for Regional or Minority Languages,[27] also a product of the Council of Europe, reaches further into the public sphere than the Framework Convention. However, despite the provocative claim in its preamble that the use of a regional or minority language is an "inalienable right," this 1992 charter seeks to protect regional and minority languages, not linguistic minorities. It does not provide with any individual or collective rights for the speakers of these languages. Its focus is on state duties to protect cultures and preserve linguistic diversity as a facet of European cultural heritage. Its implementation procedure constitutes a reporting system conducted by a committee of experts.

[26] The Framework Convention for the Protection of National Minorities was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and opened for signature by the member States of the Council of Europe on 1 February 1995. Prior to the FCNM, the Parliamentary Assembly of the CoE submitted in 1993 the Draft Protocol on the Rights of Minorities to the European Commission of Human Right, which combined detailed and affirmative standards with a mandatory system of judicial enforcement.

[27] ETS No 148, entered into force 1 March 1998.

Finally, minority issues are also considered under the security mandate of the Organisation for Security and Co-Operation in Europe (OSCE), although minority concerns fall within the OSCE's idiosyncratic notion of the human dimension, which is analogous to human rights. Indeed, the OSCE formulated an advanced catalogue of minority related norms which was embodied in the OSCE Copenhagen-Geneva Concluding Documents of 1990-1991.[28] Although these international standards are non-binding, they have political effect and frame the handling of national minorities issues within the OSCE context. In contrast to the other documents that deal with the protection of minorities from a rights-based approach, the OSCE norms primarily focus on the empowerment of minorities through effective institutional means for the purposes of avoiding ethnic conflicts and building pluralist democracies in Europe. For that reason, in 1992, OSCE members by consensus decided to create a specific institution to address minority concerns, particularly in the Baltic and Balkan states, in the form of the OSCE High Commissioner on National Minorities (HCNM). This office was designed to prevent conflict as an 'early warning' mechanism, further promoting the application of OSCE national minorities' standards to enhance stability, particularly within nascent European democracies.[29] Again, these OSCE standards did not define national minorities neither provided the framework for the protection of minorities. However, they contributed substantially to the development of documents, such as the FCNM, while they have been operated as a baseline for the HCNM action. [30]

Concluding, it is obvious that all legal documents responsible for the protection of minorities at both international and regional level - with the most advanced, sophisticated and comprehensive framework having been developed in the European context - present some common features that have profound implications for the identification of minorities. To begin with, neither of them includes a definition of a minority, irrespectively of the attribute which accompanies the notion. Furthermore, all

[28] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 Une 1990; Report of the CSCE Meeting on Experts on National Minorities, Geneva 19 July 1991 (hereafter Copenhagen and Geneva Documents). This consensus builds and elaborates upon the cursory reference to national minorities in the 1975 Helsinki Final Act.

[29] The greater need to promote respect for CSCE norms 'in areas where democratic institutions are being consolidated and questions relating to national minorities are of special concern' was recognised: Section I, Geneva Document (1991). This is unsurprisingly, as minorities' situations in the transitional societies of the Balkans and Baltic states were the major impetus towards these normative developments and implementation efforts.

[30] The Vienna Summit of Heads of State and Government of the CoE in 1993 decided to transform, to the greatest possible extent, these political commitments of the OSCE into legal obligations.

underline that the individuals only are entitled to rights and not a minority itself, even though the associative dimension of minority existence is recognised. In addition to the individual nature of their rights, these documents highlight that the person's identification as a member of a minority is a matter of personal choice.[31] Therefore, the identification of an individual as a minority member rests on the principle of self-identification, which leaves it to the individual to exercise or not the rights that are enshrined in the abovementioned documents which accrue only on those identifying themselves with minority groups. This would preclude coercive attempts to label an individual a group member in the name of cultural determinism or as an excuse to undermine civil-political rights. In principle, an individual is free to choose whether or not to be a group member. An individual may simultaneously hold membership in various overlapping and competing communities. While an identity label cannot be imposed on an individual, that individual's interests in being identified with a group are not absolute and may be balanced against that community's interests in the matter. The presumption that of internal cohesion, in requiring a community to speak with one voice, might entail privileging a sector of the group as the recognised minority representative, marginalising or ignoring other dissenting segments of that group. A degree of individual autonomy is thus involved in 'identity'.

Last but not least, a common feature that these legal texts share, derived from their nature as soft law instruments, is that they leave a great discretion to states with regards to the protection of minorities. These common features, though, raise the important issue of who determines whether a minority exists. Given the open-ended nature of working definitions, if this was left solely to government discretion, governments could deny that minorities exist within the territory they govern, disadvantaging seriously the position of minority members. In relation to both Article 27 of the ICCPR as well the FCNM, certain states insisted that despite the existence of distinct groups within their territories, since they are all equally treated, no minorities exist. This equates the guarantee of distinct groups with the non-existence of minorities. Other states may not refuse the existence of minorities, but may be selective in their recognition of minorities. However, despite the unilateral determinations by states which have a restrictive, if not excluding, approach towards minorities' protection, the existence of a

[31] CSCE Copenhagen Document para 32; art. 3 FCNM; art. 3(2) UN Declaration. Especially the European instruments expressly state that membership in a group is a function that of individual choice.

minority, in principle, is a matter of fact, as the Permanent Court of International Justice (PCIJ) had established *in Minority Schools in Albania*.[32] Therefore, the existence of a minority or not is a question of fact and it differs from the recognition of minorities' existence by states.

Therefore, the conclusion is reached that even though the existing legal framework does not provide with a definition of minorities, its wording and content has significant implications on the identification of the subjects of minority protection in two ways. It does not only determine by reductio ad absurdu who is entitled to minority protection, but also who is the identifier, who determines whether a minority exists or who are its members. Yet, the recognition that only the members of a minority, who are self-identified as members of that group, can claim protection and not the minority per se, even if it seems to clarify, for the moment, the complexities regarding the status of minorities and their claims in international law, it has also caused practical problems that are more difficult to discern.

1.4 The Nature of Minority Rights and its Implications on Group Claims

1.4.1 Individual v. Collective Rights[33]

Over the years, there has been a long-lasting controversy among members of the international community pertaining to the nature of minority rights. The international framework for the protection of minorities, however, has recognised that minority rights are individual rights, attributed only to the members of a minority and not to the minority as group or a collectivity. That means that minority rights operate within the framework of human rights and thus they are not regarded as special rights over and above the human rights every individual has.[34] Moreover, conceptualising minority

[32] Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J. (ser. A/B).

[33] 'Minority rights' and by implication, minority provisions or instruments), though partly overlapping with the wider notion of minority protection, signifies a separate umbrella category which designates exclusively those rights that have been set forth over the years in a limited number of declarations or treaties regarding such groups.

[34] For example, article 1, FCNM reads: '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'. Article 8, 1992 UN Minorities Declaration notes: 'The exercise of the rights set forth in the present

rights in individualistic terms also means that international community and states are not willing to recognise minority groups as having juridical personality and the standing to enforce the right before an oversight body.

Indeed, minority rights have been regarded as constituting specialist human rights topic and not special rights. It is true that general human rights, such as the prohibition against discrimination where membership in a distinct group is the basis for invidious treatment, do provide protection to minority group members. However, those who advocate for the recognition of collective rights to minorities argue that the individual rights do not sufficiently safeguard group identity because the right to equal treatment is a right to become assimilated into some members of the dominant community. Before elaborating on the implications of conceptualising minority rights as individual rights, it is crucial to provide a definition for group or collective rights. In that way, it will become easier to capture the complicating nature of the notion as well as the claims of their members concerning their status and rights in international law.

The term group rights is sometimes used interchangeably with collective rights and bears no fixed meaning. For our purposes, 'group rights may be understood as the aggregate sum of rights of individual group members sharing interests and jointly holding rights, which has no standing apart from its individual members. In contrast to group rights, collective rights may be understood as imputing a corporate character to an irreducible collective entity. Its status is ultimate, stemming from the group's intrinsic moral worth, distinct from that of its constituent members. In this respect, the right-holder is the group, which possess legal personality, regardless of the rights that its individual members have. The purpose of collective rights is to protect and perpetuate the group's cultural characteristics, to ensure its effective participation in national society or claims for territorial autonomy, even for self-determination.'[35]

Concerning minorities, recognising that they have collective rights means that they have a judicial personality and thus are entitled to self-determination, a right which is attributed only to peoples and recently to indigenous peoples. Thus, collective rights, in the minority context, are perceived as potentially dangerous in fostering divisiveness, encouraging separatism or giving states an apparent legal basis for interfering in the minority or host state's internal affairs, contrary to UN Charter principles contained in

Declaration shall not prejudice the enjoyment by all persons of universally recognised human rights and fundamental freedoms.'

[35] Thio, supra note 8, at p. 17.

Article 2. That is the reason that states have displayed varying attitudes towards minority rights according to their interests. It seems that those with large national groups beyond their frontiers generally support collective minority rights, while states with large minorities within their territory resist them.

In conclusion, the controversy over the nature of minority rights has proved to be intertemporal. The political sensitivity of the notion as well as the inexistence of a comprehensive framework to regulate minorities status have led to the use of minority in an excessive and abusive way, situation that has profound implications for the very survival of the minority's members and the state itself. Yet, even though the international community has recognised the individual character of minority rights, it is essential to present an overview of the right to self-determination, a peoples' right, in order to understand the general debate on the beneficiaries of minority protection and their rights under international law.

1.4.2. Distinguishing between Peoples and Minorities through the Lens of the Right to Self-determination

Self-determination of peoples was first linked with the rights of states and not of individuals, as it had been understood as the rights of the peoples of one state to be protected from interference by other states or governments. Gradually the notion of self-determination was linked with the process of decolonisation and thus it began to be conceptualised as a legal right in this context. The recognition of self-determination as a legal right in relation to decolonisation was confirmed by important General Assembly resolutions[36] and International Court of Justice (ICJ) pronouncements, notably, in the well-known 1971 and 1975, respectively, *Namibia and Western Sahara Advisory Opinions*, recalled by the Court in the case concerning *East Timor*.[37] At the same time, it came to be further accepted that the right of self-determination was

[36] A/RES/1514 (XV), Declaration on the Granting Of Independence to Colonial Countries and Peoples, adopted in 1960; A/RES/1654 (XVI), The Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971; Western Sahara, Advisory Opinion, I.C.J. Reports 1975; East Timor (Portugal* v. *Australia), Judgment, I. C. J. Reports, 1995*. (generally, the ICJ held that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned, while it recognised the erga omnes character of the right of peoples to self-determination).

applicable also outside the specific colonial context. Under the UN Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the UN Declaration on Friendly Relations), adopted by the General Assembly in 1970 (Resolution 2625 (XXV)), which has been widely referred to in this regard as embodying principles of general international law notwithstanding it being contained in a non-binding instrument,[38] self-determination applies not only to situations of colonialism, but also to 'subjection of peoples to alien subjugation, domination and exploitation'.

Of fundamental importance is the recognition of self-determination as a free-standing human right in the UN Covenants on Human Rights of 1966, entailing a duty on the parties to promote and respect this right, formulated as the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development (common Article 1). Other international texts also provide for the right of all peoples to self-determination, such as the 1975 Helsinki Final Act (Principle VIII) and the 1981 African Charter on Human Rights and Peoples' Rights (Article 20), focusing on or reaching out to non-colonial situations. Moreover, the United Nations Declaration on the Rights of Indigenous Peoples has recognised that indigenous peoples have the right of self-determination (article 3). As correctly noted by Higgins in view of the relevant international practice, "self-determination has never simply meant independence. It has meant the free choice of peoples".[39]

In this sense, it has been argued that the concept of self-determination has two dimensions, an external and an internal one. The external dimension relates to claims for independence, while the internal one is concerned with the relationship between a people and its own state or government. Advocates for the expansion of the notion of self-determination in order to accommodate additional group claims take advantage of this distinction supporting that groups such as minorities, which do not have the right of self-determination, could claim a right to internal self-determination, as this right is linked with human rights and broad processes of democratic change. However, those who are opposed to such an interpretation of the concept highlight that the right of self-

[38] See, generally, Antonio Cassese, Self-Determination of Peoples: A Critical Reappraisal (Cambridge, 1995).
[39] Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (Clarendon Press, 1995).

determination can be exercised only as a whole and not partially. It cannot be disintegrated or fragmented, neither limited in some of its aspects.[40]

In this respect and with regards to minorities, some commentators have also supported that a flexible, non-territorial alternative is needed to supplant the divisive aspects of self-determination, namely secessionism. In this sense, they have advocated for a right to autonomy (or cultural autonomy), which views self-determination as a project aimed at promoting flexible forms of group's self-administration of its own cultural affairs.[41] While proponents of the proposal contended that such a right was needed to ensure that minorities were provided equal and safe protection, opponents of this right feared that it would unduly challenge state sovereignty by providing the basis for justifying prima facie the claims of ethnic groups against the state.

All these attempts to reconceptualise the notion of self-determination as having an internal dimension that could lead to the emergence of a right of autonomy are related to the debate regarding minority rights and the fact that minorities do not have the right to self-determination. However, the approach taken by the international community has appeared conceptually and operationally unchallenged with regard to the material identification of the "self". The right of self-determination, as a collective right, attributed to peoples and recently to indigenous peoples, cannot be exercised by minorities or ethnic groups which can only exercise individual rights. Therefore, it cannot be invoked by minorities as a reason that justifies or legitimises a possible secession[42] as it is against the territorial integrity of states which possesses primary position as fundamental principle of international law, while territorial secessions by the illegal use of force are not recognised by international law.[43] However, according to a scholarly view, a right to secede could be recognised on minorities at least as a result of gross human rights abuses committed against them. Scholars have impressed upon the need of a remedial secession for a minority when persistently and egregiously

[40] Διακοφωτάκης, Γ., Περί Μειονοτήτων, Κατά το Διεθνές Δίκαιο, *(*Εκδόσεις Σάκκουλα, 2001).
[41] Roach St., 'Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment, [2004], International Journal on Minority and Group Rights, Vol: 11, pp. 411-432, at p.426.
[42] The European Commission for Democracy through Law or Venice Commission of the Council of Europe, in its Draft Framework for the Protection of Minorities, explicitly excludes minorities from a claim to secession.
[43] UN Charter (1945), Chapter I, article 2 para. 4 and 7; The ICJ in its Advisory Opinion for the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* did not conclude on the legal consequences both of the declaration regarding the existence or not of an independent state, that of Kosovo, and its recognition from other states.

is denied political and social equality and the opportunity to retain its cultural identity.[44] It remains unclear whether the "oppression argument" can potentially reflect an established international standard, given the paramount importance attached by states to territorial integrity and sovereign rights.

Concluding, to understand the evolving content of self-determination, and by implications, of its relation to minorities, one should further clarify the meaning conveyed by the term people first. Conceptually, it is difficult to distinguish between non-state communities recognised by international law, like peoples, indigenous peoples and minorities, owing to the lack of precise distinguishing criteria.[45] Like minorities, other categories of non-state communities are identified through applying an objective traits criterion in conjunction with requiring a subjective aspiration to be identified as a certain form of collective entity. In the absence of a bright line between these legal categories, differentiation is difficult, while, in some occasions, the terms have been used in an abusive way with devastating consequences. The problem is compounded in that these groups are recognised as possessing various entitlements which themselves overlap in content.[46] Therefore, it is a frequent phenomenon that, owing to the lack of definitional bright lines between these categories, a number of minorities as collective entities claim peoples' rights. This is particularly relevant to groups with statehood aspirations. In relation to whether the term peoples can apply to a minority, even though it remains contested among scholars, the existent legal framework does not recognise minorities as peoples. It does so not by defining the terms and determining their characteristics, but by virtue of their entitlement to individual or collective rights as they have been captured by international law. Apart from peoples and minorities, the situation for indigenous peoples is different,[47] as they can qualify as

[44] Most of the scholars who advocate such a secessionist claim base their reasoning on the UN Declaration on Friendly Relations, which seems to implicitly suggest a link between territorial integrity and the existence of a `government representing the whole people belonging to the territory without distinction as to race, creed or color'. This was also incidentally mentioned by the Canadian Supreme Court in its *Opinion in Reference re Secession of Quebec*, when referring to `exceptional circumstances' in which apparently a right of unilateral secession might arise under the international right to self-determination.

[45] According to Perrakis, in international legal system, the term 'peoples' has a social and political content, but not a precise legal one. Στέλιος Περράκης, *Τα δικαιώματα των Λαών και Μειονοτήτων. Μια προβληματική σε εξέλιξη*. (Εκδόσεις Σάκκουλα, 1993), σελ. 33-54.

[46] Thio, supra note 8, at p.3.

[47] 'Minorities' and 'indigenous peoples' have, admittedly, come to represent distinctive tracks in terms of international legal protection. This article recognises the distinctiveness of these tracks and conforms to traditional terminology in the context of relevant international instruments or jurisprudence, particularly in respect of those additional layers of protection that are specific to

peoples due to the right of self-determination, while at the same time, individual members of indigenous populations have successfully invoked Article 27 ICCPR, relating to minorities.[48] It is important to stress that for indigenous peoples the right of self-determination does, most often, not imply a secession from the state,[49] but is understood and practiced in terms of self-governance. Having analysed the nature of minority rights as well as the complexities surrounding the definition of the concept with regards to the identification of the subjects of minority protection, we come to the conclusion that minority protection can be meaningful and truly effective only if the international community follows a pragmatic approach every time that has to deal with the issue of minorities.

1.5 Towards a Pragmatic Approach of the Minorities' Concept

In seeking solutions to minority problems, there is a clear need to identify the subject of protection in order to clarify what that subject requires protection from and the appropriate modes of protection to adopt. Formulating definitions in the abstract without contextualising it by reference to specific group needs, aspirations and abilities to realistically exercise or enjoy their claims is misconceived. Various difficulties have been encountered in the attempts to formulate a definition of minority in international

indigenous groups. However, the international legal differences between the minority and indigenous tracks should not distract us from an increasing sense of (partial) overlap between the respective legal standards. For one thing, indigenous communities do qualify, first and foremost, as minorities under traditional international instruments. Indeed, they have constantly used such instruments to frame at least some of their claims, irrespective of any additional measure of protection they are entitled to under the indigenous track. At the same time, the indigenous concept appears to interact with the core notion of 'minority' within the African and Asian settings: see e.g. W. Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford, 2007), pp. 266–291.

[48] With regards to indigenous peoples, both the African Commission on Human Rights and the Inter-American Court of Human Rights have offered very interesting judgements that without referring to their right of self-determination, they emphasize on the collective dimension of other rights that emerge from their collective identity. (See cases such as The Social and Economic Rights Action Center v. Nigeria brought before the African Commission on Human and Peoples' Rights, as well as the Mayana (Sumo) Awaa Tingni Community v. Nicaragua (2001) and the Kichwa Indigenous Peoples if Sarayaku v. Ecuador (2005) and in the Inter-American Court of Human Rights.

[49] It is interesting to note that the `oppression' argument was used to support the Katangese people's claim for independent statehood in Katangese Peoples Congress v. Zaire, within the context of Article 20, para. 1, of the Banjul Charter. The ACHPR upheld the territorial integrity of Zaire and found that there was no evidence that the Katangese had suffered a violation of Article 13 of the Banjul Charter, regarding political participation. Nevertheless, it did not argue that the Katangese would have had the right to secede from Zaire as being a `people' for purposes of Article 20, para. 1, of the Banjul Charter if evidence had shown actual oppression suffered by them.

law. Not least, one must struggle with the fact that, in practice, the term minority encompasses groups across a wide range of factual situations. While falling within a common rubric, these groups exhibit a wide range of needs, reflected in the varying content of minority protection and rights. Therefore, there are difficulties in crafting a definition general enough to encompass this range of factual situations, yet capable of practical application in specific cases. Furthermore, trying to find clear normative criteria to establish a legal subject makes the problematic assumption that minorities are entities with readily identifiable traits that pre-existed the creation of the legal category of minorities. In so doing, it succumbs to reductionist or essentialist notions of culture and ethnicity, tending to lock minorities into an imagined static past.[50] Minorities, however, are contingent in nature as fluid, dynamic social realities. Therefore, rather than reifying a minority as a fixed monolithic entity, it is more accurate to appreciate it as a continually contested and differentiated political field. Many scholars have highlighted that minorities are not pre-existing entities which can be identified by determinative criteria. They have argued that in a reflecting of the identity-constitutive role of international law, one must recognise that a group can be externally classified by the power-holders in various ways at different times for political purposes, to limit the scope of available legal claims. Thus, they support that the category of minorities in international law is a political construct servicing the ends of those empowered to make international law.[51] In this context, it constitutes the identity of various groups and influences the range of legal techniques and strategies available to address the challenge of nationalist aspirations.

Concluding, it appears that pragmatism is the best way forward to deal with the issue of minorities, given its inherent flexibility. This is crucial in a field where group relations change over time, requiring different responses at various times.[52] Pragmatism balks at the project of constructing an overarching framework to identify minority claimants and assess ethno-nationalist claims. It favours a purposive or functional approach, deriving guidance from historical practice, through which to ascertain, on a case-by-case basis, whether a particular entity should be accorded minority protection. Therefore, rather than be bogged down by theoretical niceties or rigid categorisations,

[50] Annalise Riles, Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture, [1993], Harvard Law Journal.
[51] Thio, supra note 8, at p.5.
[52] Asbjørn Eide, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, E/CN.4/Sub.2/1993/34/Add.4, para 19.

pragmatism advocates a more fluid, ad hoc approach, focusing on proposing policies and frameworks in attempting to accommodate the concerns of all parties.[53] As such, only a working definition of minorities as a source of provisional orientation needs to be crafted, at a fairly abstract level, to avoid the prospect of under-inclusiveness. This would be given more concrete contours when applied to remedy specific problems.

However, despite the lack of consensus on the politically sensitive issue of defining minorities and the inherent complexities in conceptualising the term, practically the absence of an authoritative scientific definition has neither impeded minority standard-setting processes nor hamstrung the work of international bodies with minority-related mandates. Nevertheless, neither of these instruments provide any justiciable rights to persons belonging to minorities or obliges states to promote minority protection. Therefore, as long as minority rights cannot be invoked for the actual protection of minority members, but only, so far, as a means for the development of minority friendly policies, the role of international human rights law has been proved crucial in protecting the rights of these individuals. In the next section, the paper will focus on the various mechanisms, from judicial to monitoring ones, for the protection of minorities; starting from the significant contribution of the courts, and especially of the European Court of Human Rights and concluding to the importance of political mechanisms. As identity is politicised everywhere, it is imperative that human rights law has a thorough understanding of identity. Not only do human rights regulate how institutions engage with identity issues, they also shape public attitudes towards these issues and are themselves a major reference point for people's identities.

[53] With respect of not having a definition of national minorities in the FCNM, the Explanatory Memorandum stated that a pragmatic approach was adopted since it was 'impossible to arrive at a definition' of the term.

II. The Dissemination of Minority Protection through Jurisprudence and Policy-Making. Building though the European Practice

2.1. Minority Protection through the Prism of Human Rights. Non-specific-minority and Specific-minority Standards in Complementarity

The 2000 General Assembly Millennium Declaration,[54] the 2004 Report of the High-level Panel on Threats, Challenges and Change[55] and the 2005 World Summit Outcome,[56] all recognise protection of minorities as a major factor for securing social and political stability, accommodating diversity and enhancing democracy and respect for human rights. Remarkably, the Secretary General in his 2005 report *In Larger Freedom: Towards Development, Security and Human Rights for All*,[57] reaffirms the importance of non-discrimination and the protection of vulnerable groups, and takes the lead in affirming that any meaningful conception of democracy based on human rights standards must safeguard the rights, interests and voice of minorities. It is evident, hence, the interaction and inextricable link of the protection of minorities with the concepts of human rights, rule of law and democracy.

It is generally (albeit non unanimously) accepted that an adequate system of minority protection is constructed on two pillars, the first of which concerns non-discrimination in combination with individual human rights of special relevance for minorities, the second consisting of minority-specific standards aimed at protecting and promoting the right to identity of minorities. More generally these two pillars can be redefined as non-minority-specific and minority specific standards respectively. In light of this, it is not surprising that the prohibition of discrimination is often called the condition sine qua non for an adequate minority protection.[58] At the same time, it should be underlined that substantive or real, full equality is the ultimate goal of minority protection, while the right to identity of minorities is another foundational principle of

[54] General Assembly Resolution 55/2.
[55] A/59/565.
[56] A/RES/60/1, Resolution adopted by the General Assembly.
[57] A/59/2005.
[58] Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, (The Hague, 2000).

minority protection. Hence, it is important to assess to what extent the interpretation of the first pillar achieves substantive equality and protects and promotes the right to identity of minorities. In this respect, the argument can be made that if certain jurisprudential developments in relation to the first pillar in favour of substantive equality and the right to identity can be identified (get stronger and consolidate), this might have an impact on the relative importance of the two pillars in relation to the construction of an adequate system of minority protection. This implies that certain interpretations of general human rights could accommodate a duty to adopt special minority measures, and hence would go a long way in providing minority protection.[59]

Consequently, it matters how these standards, and particularly the non-minority-specific ones, are interpreted in this regard. In short this concerns the degree to which these human rights standards are implemented in a minority conscious way. In this respect, it is important to underscore the argument that the more the interpretation and application of the non-minority-specific norms embraces substantive equality and the right to respect for the minority identity, the more its relative importance in relation to the minority specific rights would grow. In other words, in so far as the non-minority-specific rights would cater for the special needs of minorities in line with the demands of substantive equality and the right to respect for the minority identity, the less it would matter that (at present) there are not justiciable minority specific rights.[60]

Furthermore, promotion and protection of universal human rights is a prime example where international cooperation is required. Minority protection,[61] as an integral part of human rights, is now generally recognised to fall within the scope of international cooperation.[62] But international cooperation requires multilateral institutions to guide, coordinate and implement the commitments of cooperation. To cooperate internationally for such purposes, however, may run counter to short-range

[59] Kristin Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination*, (European Commission, 2007).
[60] Ibid.
[61] We use 'minority protection' as an umbrella term that encompasses a flexible range of matters relating to minority groups, falling within the scope of either general human rights treaties or specialised instruments.
[62] The FCNM art. 1 states that protection of minorities, and of the rights of persons belonging to minorities, forms an integral part of the international protection of human rights, and as such falls within the scope of international cooperation. A similar consideration with universal scope is reflected in the preamble of the UN Declaration on the Rights of Minorities, which emphasises that the promotion and realisation of the rights of persons belonging to minorities would contribute to the strengthening of friendship and cooperation among peoples and states, and that the United Nations has an important role to play regarding the protection of minorities.

interests of many governments, and it takes a long-range perspective on future stability in society to understand and recognise that such cooperation is beneficial to the state. In this respect, it is particularly important to examine the practice of international human rights courts and institutions and their various mechanisms relevant to minority protection, as well as those minority specific mechanisms that have been particularly valuable for the actual protection of minorities. There are different mechanisms, internationally and regionally - especially in Europe but also in the Americas and in Africa where there has been a gradual development towards more binding or constraining mechanism - for the application of human rights, which can also be relevant to minority protection and vary from legal to political and from monitoring/supervising to judicial or quasi-judicial, each of which is useful on its own right.

Prior to the analysis of those institutions and their mechanisms, it is useful to note that there has been a controversy among scholars regarding the relationship between human rights and minority rights and whether minority rights can be considered as a category separate from (and additional to) general human rights or whether they belong to the body of universal human rights as an additional sub-category.[63] However, as Scheinin has stated, minority rights should neither be reduced to the principles of equality and non-discrimination nor seen as a separate or an additional category of human rights.[64] "Rather, minority rights as a sub-category of human rights should be seen as a form of added protection to universal human rights, deemed necessary in order to secure human rights to persons in a minority situation. Addressing minority rights as something separate from general human rights easily leads to the subordination of minority rights to politics." [65] Yet, as the minority in question is not able to take advantage of the existing body of general human rights to a sufficient extent, it is important both human rights courts to interpret human rights provisions in a minority-sensitive way, as well as other human rights bodies, either legal or political to initiate minority-conscious policies. As the current legal framework which is solely devoted to

[63] The HRC's General Comment speaks of individuals' rights in Article 27 which are 'distinct' from, and 'additional' to, all the other rights belonging to every individual under the Covenant.
[64] A state, referring to its sovereignty, could say that, of course, we recognise and respect human rights, but, instead, we do not agree with the category of minority rights, while another state can argue that all citizens are equal with all general human rights and that this is enough.
[65] Martin Scheinin, 'Minority rights: additional or added protection?', in M. Begrsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden: Boston, 2003), pp. 487-504.

minority protection and the rights of minority's members does not provide with justiciable rights or an enforcement mechanism, it is crucial to present and analyse the evolution of minority protection through human rights case law.

2.2. The Evolution of Minority Protection through Jurisprudence. Emphasis on the ECtHR's Practice

2.2.1. Reconceptualisation of Human Rights Provisions in a Minority Conscious Way

A process of reconceptualisation and ultimately subsumption has crucially informed a considerable part of the international jurisprudence, particularly in the context of general human rights standards. Traditional human rights entitlements have been somewhat re-read to accommodate minority needs and demands. Basic layers of protection affecting a minority's way of life and well-being have been progressively construed through wider notions of private life, family life and/or the right to life so to embrace key claims to identity, economic self-sufficiency and even environmental protection.[66] In many ways, 'life' as a human rights concept has come to form a continuum in terms of legal meanings and levels of engagement with the minority experience. Property, participation, education, language, they are all further general categories of human rights protection whose reach has been amplified to varying degrees and in different settings by the distinctive position of ethno-cultural groups or otherwise the reality of cultural diversity.

In the international level, there are four United Nations human rights treaty bodies - the Human Rights Committee (HRC), the Committee on the Elimination of All forms of Racial Discrimination (CERD/C), the Committee on the Elimination of

[66] See e.g. *Chapman v. United Kingdom*, ECtHR, Application No. 27238/95, Judgment of 18 January 2001; *Yakye Axa Indigenous Community v Paraguay*, IACtHR, Judgment of June 17, 2005, para. 167; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, IACtHR Series C 146 (2006), para. 153; *Maya Indigenous Communities of the Toledo District v. Belize*, IACommHR, Report No. 96/03, Case 12.053, October 24, 2003, paras. 153–154; *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, AfrCommHPR, Comm. No. 155/96, 2001, para. 67; *Hopu and Bessert v. France*, HRC Comm. No. 549/1993, Views of 29 July 1997, [1997] II Annual Report, 70.

Discrimination Against Women (CEDAW/C) and the Committee Against Torture (CAT/C) – may, under certain circumstances, consider individual complaints or communications from individuals. The best known, however, and most widely used mechanism, especially with regards to the protection of the rights of persons belonging to a minority, is under the (first) Optional Protocol to the International Covenant on Civil and Political Rights. Under this, there is no doubt that the HRC has been one of the most important institutions with regard to standard-setting in the field of minority rights.[67]

Moreover, as the focus is on the current developments in jurisprudence, the regional human rights judicial bodies have offered promising judgments with regards to the interpretation of individual rights to sustain protection of collectivities through their group-oriented jurisprudence while they have also showed some sensitivity towards cultural diversity.[68] The Inter-American Commission[69] and Court of Human Rights have addressed the concerns of indigenous groups where their human rights to life, liberty, security, property and land[70] protected under the Inter-American Convention, have been violated.[71] Similarly, in the African context, a series of decisions by the African Commission on Human and Peoples Rights indicate that minorities and indigenous communities in Africa could potentially raise concerns with respect to the protection of their lifestyle, political participation and their environment.[72]

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[67] Among the HRC's leading cases regarding minority protection, the following can be mentioned: *Sandra Lovelace v. Canada* (Communication No. 24/1977); *Lubicon Lake Band v. Canada* (Communication No. 167/1984); *Kitok v. Sweden* (Communication No. 197/1985); *Balantyne, Davidson and McIntyre v. Canada* (Communications Nos. 359/1989 and 385/1989); *Ilmari Lzinsman et al. v. Finland* (Communication No. 511/1992);*Apirana Mahuika et al.v. New Zealand* (Communication Co. 547/1993); *Hopu and Bessert v. France* (Communication No. 549/1993); *Waldman v. Canada* (Communication No. 694/1996); *Diergaardtet al. v. Namibia* (Communication No. 760/1997), *Jouni Ldnsman, Eino Linsman and the Muotkatunturi Herdsmen Committee v. Finland* (Communication No. 1023/2001).

[68] See the Cases in the IACtHR, *Aloeboetoe v. Suriname*, Judgment of 10 September 1993

[69] See Report on the *Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito origin*; on the *Situation of Human Rights in Ecuador*.

[70] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Petition No. 11577/1995; *Yatama v. Nicaragua*, Judgement of 23 June 2005.

[71] In the Inter-American as well as African context, there is some overlap between 'minorities' and 'indigenous peoples' and the terms have been used inter-changeably in state reports and before the respective Human Rights Commissions, with the implication that minority groups may enjoy some of the protection afforded indigenous peoples, as both groups related to the problem of accommodating distinct groups within multicultural societies.

[72] ACHPR, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, (2002).

In the European context, apart from the developments taking place under the auspices of the Council of Europe, there is a lack of an express power dealing directly with minority issues in European law. The one and only reference to the word 'minority' in the Treaties of the EU is in Article 2 of the Treaty on the European Union (TEU),[73] where the rights of minorities have been accepted as one of the founding values of the Union but not as a new field of competence to be regulated by the EU, and thus Member States remain sovereign regarding the protection of minorities.[74] The article's mention of peoples refers to the individual dimension of minorities in a human rights context, and hence, if there is an obligation for Member States to respect minority rights, this implies individual and not group rights. Because of a lack of consensus among Member States about minority issues and the absence of a clear competence given to EU, the approach of the Court of Justice of the European Union has been based on the non-discrimination principle.[75] The Article 19 of the Treaty on the Functioning of the European Union (TFEU) refers to the non-discrimination principle, that it could be interpreted to the EU competence in minority protection. This article has been the legal basis for the adoption of two directives, the Race Equality Directive[76] and the Employment Directive. [77] Combating ethnic discrimination and providing equal treatment in employment and occupation on the basis of religious beliefs not only serves the non-discrimination principle but also indirectly the protection of minority rights. Furthermore, the Charter of Fundamental Rights of the EU (the Charter), even though it does not provide with specific provisions directly related to minority rights and their protection in the Charter, contains a general rule on non-discrimination in

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

[74] C.R.M. Versteegh, 'Minority Protection in the European Union': From Economic Rights to the Protection of European values', [2015], Erdelyi Tarsedalom, Vol: 13, No. 3, pp.85-106.

[75] The first time the CJEU explicitly referred to the importance of minority protection was in Bickel & Franz (C-274/96, Judgment of 24 November 1998) and later in the Angonese (C-281/98, Judgment of 6 June 2000) cases. The common denominator in the above cases, in which the CJEU based its decisions, is the principle of non-discrimination.

[76] 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.

[77] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303;

Article 21(1),[78] which is the first time an express reference has been made to 'minority' in a provision in the EU. This article refers to lists of grounds on which discrimination is forbidden, with "membership in a national minority" as one of those grounds. Therefore, individuals and states have to seek help from the EU equality law provisions in order to solve minority problems. Therefore, the Court of Justice of the EU (CJEU) approach towards the protection of minorities has been based on the non-discrimination principle, a principle both in the Charter and the Treaties, in order to interpret EU law in the light of protection of the rights of members belonging to minorities. This position is confirmed in the CHEZ case, [79] where the Court, based on EU Equality Directives and Article 21 of the Charter took a further step in its approach towards minority rights concluding that the Race Directive does not restrict the principle of equal treatment to persons who suffer discrimination based on their own racial or ethnic origin. Yet the focus of this section is on the case law emerged from the most advanced, from a legal perspective, institution for the protection of human rights, that of the European Court of Human Rights.

In the European context, the European Convention on Human Rights (EHCR), perhaps the most significant regional human rights instrument in Europe, does not expressly enshrine minority rights. Its text is thoroughly individualistic in nature and devoted overwhelmingly to the protection of civil and political rights. The one express exception to its focus on civil and political rights lies in its equality guarantee, which refers to minority membership, but the convention enshrines only the right of an individual not to be discriminated against as a member of a minority defined by language, religion, or national origin.[80] The fact that the European Convention on Human Rights does not expressly enshrine minority rights does not mean that it offers no minority protection whatsoever. Several if not all civil and political rights, such as freedom of religion, expression, association, as well as the right to a family life, the equality guarantee, and the right to free elections, are all textually capable of protecting various interests of a minority community.[81] Numerous decisions of the European

[78] It prohibits "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation*"
[79] CJEU, C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, Judgment of 16 July 2015.
[80] European Convention on Human Rights, article 14 (1950).
[81] Macklem, supra note 24, at p. 542.

Court of Human Rights, the primary judicial body responsible for interpreting the Convention, open the jurisprudential door, suggesting that certain civil and political rights also protect interests associated with minority status. The question arises how the Court is addressing the minority members' concerns, whether and to what extent its judicial reasoning may impinge on their fundamental demands, and therefore what role the Court's tendency to a dynamic and actualised reading of the ECHR can be expected to play within the context of the international protection of minorities. Before starting the analysis, however, it is important to clarify that the rights protected by the Court are individual rights that are attributed to individuals who are being self-identified as members of a minority, and thus, due to their disadvantaged position, need additional or special protection. That means that the Court does not recognise any rights to minorities as groups, neither it advocates for the existence of a minority in a given state when it protects the rights of individuals who belong to this minority. The next section will attempt to highlight the development of minority considerations through the jurisprudence of the European Court of Human Rights (ECtHR), as it has proved to be the greatest guardian of the protection of the identity of persons belonging to minorities.

2.2.2. The Pillars of the ECtHR's Dynamic Jurisprudence: Pluralism, Identity and Non-Discrimination

Beginning in the late 1990s, the Court started to receive applications, initially from Turkey[82] and Greece and subsequently from countries of the former Soviet bloc, affecting the assertion and manifestation of minority groups' identity in the public sphere. They variably involved the refusal by state authorities to register associations claiming to represent a national minority group or to be pursuing a pro-minority agenda, the dissolution of political parties having similar objectives, or bans on public meetings. In the vast majority of these cases, the Court rejected the state's argument that the

[82] A group of cases, all involving Turkish political parties with a pro-Kurdish agenda: *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I., *Socialist Party and others v. Turkey*, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998-111, *Freedom and Democracy Party (OZDEP) v. Turkey, Judgment of 8 December 1999*, Reports of Judgments and Decisions 1999-VIII, *Yaza, Karatas, Aksoy and the People's Labour Party (HEP) v. Turkey, Judgment of 9 April 2002*, Applications Nos. 22723/93, 22734/93 and 22725/93.

measures in question served to prevent disorder and/or protect the rights of others. Instead, it found a breach of the right to freedom of association in Article 11 ECHR by making three interrelated general arguments. Firstly, it confirmed that the "*existence of minorities and different cultures in a country is a historical fact that a 'democratic society' has to tolerate and even protect and support according to the principles of international law"*.[83] Secondly, it explained that the dissolution of pro-minority political parties or associations does not meet the requirement of proportionality implicit in the relevant limitations clause if campaigning is conducted through non-violent and democratic means. Thirdly, and more significantly, it broadly endorsed cultural pluralism as a value protected by the ECHR.[84] As the Grand Chamber put it in *Gorzelik* v. *Poland*, "*pluralism is ... built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities*". [85] It is evident, hence, that the Court establishes a fundamental connection between seeking an ethnic identity or asserting a minority consciousness and the quality of the democratic process. For this purpose, in the vast majority of its cases, the Court enhanced scrutiny of states' practice towards minorities and their members. However, with regards to the state's margin of appreciation, the Court's reasoning in Gorzelik, coupled with a wide margin of appreciation conceded to Poland, contrasts with the demanding evidentiary test for justifying interference with freedom of association in Article 11 and the corresponding narrow state's margin of appreciation in Sidiropoulos and other cases.[86] Therefore, the Court may prove reluctant to a minority-friendly decision which might be seen as paving the way for additional rights under domestic law, especially when it comes to sensitive areas, than may be when the case is strictly focused in the impact of the contested measures of the enjoyment of an ECHR right.[87]

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[83] *Sidiropoulos and others* v. *Greece*, Judgment of 10 July 1998, Reports 1998–IV, para. 41; *see also Tourkiki Enosi Xanthis and others* v. *Greece*, Judgment of 27 March 2008, para. 51.

[84] The Court held in *United Communist Party* that in conjunction with freedom of expression (Article 10), freedom of association (Article 11) - enjoyed by political parties along with other entities - is a fundamental pillar of a genuinely pluralistic democratic system as guaranteed by the ECHR, so that any exceptions to such freedom must be construed strictly and made subject to its rigorous supervision, which is consequently paralleled by only a limited margin of appreciation by the State Party.

[85] Application No. 44158/9820, Judgment of 17 February 2004, para. 92.

[86] See: *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* Judgment of 2 October 2001, Applications Nos. 29221/95 and 29225/95.

[87] Gaetano Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?', [2012], International Journal on Minority and Group Rights, Vol: 19, pp. 1-23.

Moreover, the standard of pluralism inevitably pervades a range of other culture-related restrictions considered by the Court, including the denial of registration and legal capacity of minority churches in multi-religious societies or the denial of recognition of the group's internal organisation and religious leadership. While religion as a broader theme may not involve minority groups per se, this jurisprudence unquestionably affords significant protection to religious minorities.[88] When the Court, however, evaluates the legitimacy of limitations to the manifestation of religion, in several respects its traditional jurisprudence reveals a low scrutiny, which is inversely related to the margin of appreciation it leaves to states. This margin of appreciation doctrine was developed by the Court in relation to the proportionality requirement for legitimate limitations and is justified by the understanding that the national authorities would be better placed to evaluate what is needed to respect the demands of the Convention in their specific circumstances.[89] The margin granted is not always equally extensive though, and relevant factors in this respect include the nature of the right and the degree to which there is a common European standard in the matter. It is true that the Court chooses to focus on the fact that there is no common European standard pertaining to the delicate question of relations between church and state in order to grant states a wide margin of appreciation.[90] Nevertheless, the Court's recent jurisprudence reveals its willingness to de facto reduce the margin of appreciation of states.[91] The Court's reasoning confirms that it increasingly adopts an explicit non-discrimination

[88] *See e.g. Canea Catholic Church* v. *Greece*, Judgment of 16 December 1997, Reports 1997–VIII; *Serif* v. *Greece*, Application No. 38178/97, Judgment of 14 December 1999; *Hasan and Chaush* v. *Bulgaria*, Application No. 30985/96, Judgment of 26 October 2000; *Metropolitan Church of Bessarabia and others* v. *Moldova*, Application No.45701/99, Judgment of 13 December 2001; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others* v. *Bulgaria*, Judgment of 22 January 2009.

[89] In *Leyla Sahin v. Turkey* (Appl. No. 44774/08, Judgment of 10 November 2005) '*the Court considers [the] notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey*'. Moreover, as the Court communicated in Lautsi v. Italy (Appl. No. 30814/06, Judgment of 18 March 2011), '*each and every state must find its own path of pluralism…..the governance of religious diversity is a national concern. This is the real meaning of the margin of appreciation*.'

[90] In *Sindicatul Pastonul Cel Bun v. Romania* (Appl. No. 2330/09, Judgment of 9 July 2013), the Court defends the Romanian state's upholding of the Romanian Orthodox Church's ban on a union of its clergy: '*Having regard to the lack of a European consensus on this matter . . . it considers that the State enjoys a wider margin of appreciation in this sphere*'.

[91] In *SAS v. France* regardless of the decision, the judgement combines some welcome positive developments with disconnecting new lines of reasoning that enable the Court to hide behind a wide margin of appreciation for states in controversial matters.

analysis when assessing particular regimes of state-church relations, while linking this to duties of state neutrality under Article 9.[92] Finally, some scholars have argued that the spaces of freedom upheld by the Court are not beneficial for the protection of minority identity, as the issue of minorities and their complexities is not valued per se and, thus, the principle of non-arbitrary interference remains an identity blind one.[93]

Whereas the jurisprudence on freedom of association and freedom of expression has provided forms of essentially indirect protection for the members of minorities, other cases appear to indicate potential for at least some measure of direct protection of minority identity in relation to respect for private and family life in Article 8. It was not until *Chapman* v. *the United Kingdom*[94] in 2001 that the Court not only confirmed the link between private and family life and minority identity but also found an "*emerging international consensus recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle*". As part of a wider set of similar cases, *Chapman* brought to the fore the particular position of Roma members being unable to find accommodation compatible with their lifestyle because of a denial of planning permissions by local authorities, the insufficiency of public caravan sites, or the practical unavailability of private sites. In *Chapman*, the Court conceded that, while there is no immunity from general laws, the way in which such laws are implemented may have an impact on the way of life of the Roma community. It went as far as to argue that given the position of the group as a vulnerable minority "*some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases*", and that to that extent a positive obligation "to facilitate the Gypsy way of life" derived from Article 8.[95] However, a similar line of reasoning was confirmed in *Muñoz Díaz* v. *Spain*,[96] involving the impact of marriages according to Roma rites and traditions on the implementation of marriage laws. Here the Court found in favour of a member of the traditional Roma minority in Spain, though in the context of non-discrimination.

[92] In *Magyar Keresztény Mennonita Egyház and others v. Hungary*, the Courts reasoning merit special consideration as it seems to further restrict the de facto margin of appreciation states regarding the church-state model they opt for.
[93] Pentassuglia, supra note 86.
[94] *Application no. 27238/95*, (2001).
[95] In *Chapman* the concept of vulnerable groups was introduced. For a critical assessment of the concept, see: Peroni L. and Timmer A., 'Vulnerable groups: the promise of an emerging concept in European Human Rights Convention Law', [2013], Oxford University Press, Vol:11, No. 4, pp.1056-1085.
[96] *Application no. 49151/07*, (2009).

This jurisprudence suggests that state discretion under Article 8 is not unlimited. Ethnic identity falls within the scope of the Article,[97] and the impact of state measures on minority groups' traditional practices, particularly their level of participation in the decision-making process, must be reviewed on a case-by-case basis. In essence, they argued for a narrower margin of appreciation on the part of national authorities on planning matters in the context of the measures interfering with the applicants' lifestyle, which they indeed did not consider as reflecting compelling reasons as to make them "necessary in a democratic society" in the sense of Article 8 para. 2; instead, they viewed Article 8 as prescribing a positive duty to ensure that Roma/Gypsies are afforded a practical and effective opportunity to enjoy their rights to home, private and family life. In other words, 'private life' or 'family life' in Article 8 might arguably be read as encompassing most basic minority identity directly to bear on the interpretation of this provision.

Finally, the broader discourse of equality under Article 14 has provided additional substance to the Court's evolving engagement with minority issues, enabling it to determine whether minority protection is necessary in a manner sensitive to the particular circumstances of minority communities. In retrospect, the famous *Belgian Linguistics* decision – the first ECHR case on non-discrimination ever – effectively set the tone for a wider approach to non-discrimination more than three decades later, conceptually and practically.[98] The Court confirmed that differential treatment is permissible if it rests on a reasonable and objective justification (*i.e.* one which pursues a legitimate aim and is proportionate to that aim). In fact, as it was noted, "*Article 14 does not prohibit distinctions which are founded on an objective assessment of essentially different factual circumstances*"; those distinctions may be "called for" to correct factual inequalities. At the same time the Court noted that non-discrimination can be found in relation to the "*aims and effects of the measure under consideration*". In the case of *Thlimmenos v. Greece,*[99] the Court not only confirmed this view, it expanded on it by making the additional point that the right not to be discriminated

[97] Ciubotaru v. Moldova, *Application no. 27138/04,* (2010). The Court concluded that the ethnic identity of an individual constitutes a substantial aspect of their life.
[98] Actually para 10 of the Belgian Linguistics ((App no 1474/62) ECtHR 23 July 1968) judgment states: 'the competent national authorities are frequently confronted with situations and problems, which, on account of differences inherent therein, call for different legal solutions, moreover, certain legal inequalities tend only to correct factual inequalities.' It is the Court itself that adds this paragraph to its references with 'duties to correct factual inequalities' line.
[99] Thlimmenos v Greece (App no 34369/97) ECtHR 6 April 2000, para 47.

against in the enjoyment of the ECHR rights "*is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*". Thlimmenos effectively introduces the concept of indirect discrimination into the Convention's equality jurisprudence, while it suggests that the equality guarantee in Article 14 of the Convention, in certain circumstances, imposes positive obligations on states to treat some members of society differently than others. The underlying question is whether Article 14 ECHR, besides outlawing unreasonable distinctions, can generate a positive duty[100] to achieve equality.

The ECtHR seems to be willing to identify a need for differential treatment of persons belonging to ethnic and religious minorities, in principle at least, but first and foremost in terms of substantive articles and not in terms of the prohibition of discrimination. In cases in which there was a violation of Articles 8 and 9, the Court refused to discuss concerns about the accommodation of different lifestyles in terms of article's 14 prohibition of discrimination.[101] The Court in its judgments explicitly referred to *Thlimmenos* in relation to state duties to correct factual inequalities suffered by socially disadvantaged groups, but only in terms of the substantive articles. [102] In other words, the duties of differential treatment are explicitly linked to the *Thlimmenos* rationale but are still summarily dealt with in terms of the substantive article 8, and not considered in terms of article 14. This is unfortunate, because it treats the discrimination analysis as if it does not have any independent value or does not have a distinct legal framework, which can be differentiated from the substantive rights framework.[103] Moreover, greater emphasis on non-discrimination under Article 14 could generate

[100] The term 'positive duty/positive action' is different from the term 'special measures'. Positive duty does not reflect the integrationist logic or affirmative action treatment as it does serve the specific and sole objective of governing the complexities brought about the existence of a minority as an ethnocultural group.

[101] In *Winterstein et al v. France* (Appl. no. 27013/07, Judgment of 17 October 2013), the Court's evaluation strengthens the extent to which article 8 protects the separate identity and lifestyle of the Roma, as it reduces the state's margin of appreciation. However, the Court, as in *Chapman*, did not conduct an explicit non-discrimination analysis, ostensibly based on the assumption that the non-discrimination analysis covers exactly the same ground as an analysis in terms of article 8. Moreover, in the more recent *S.A.S. v. France* judgment the Court exhibits a good understanding of what 'indirect discrimination' is about. Nevertheless, in the latter case the Court still summarily dismisses the complaint by referring back to the reasoning under articles 8 and 9.

[102] In *Yordanova et al v Bulgaria*, (App no 25446/06, Judgment of 24 April 2012) the Court only addressed the complaint about invidious racial discrimination under article 14 regarding the expulsion modalities.

[103] Kristin Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?', [2016], Nordic Journal of Human Rights, Vol: 34, No. 3, pp. 157-177.

stricter forms of control over state action with regards to positive duties for the actual protection of persons belonging to minorities.

Last but not least, one of the most significant aspects of the reconceptualisation of rights is the extent to which international standards and/or principles are being used to reinforce and explain existing norms in a way that reflects the actual or potential role of minority related international jurisprudence.[104] One way to achieve this is by relying on provisions external to the Treaty. Although the ECtHR – despite its teleological approach to interpretation – has been reluctant to build minority related provisions of the ECHR around external standards, it, too, has implicitly acknowledged the inevitable intrusion of (some) such standards into its interpretive function. In *Sidiropoulos v. Greece*, the ECtHR referred to the (then) CSCE standards to uphold the right to freedom of association of minority members under the treaty. By appealing to a 'strictly supervisory role', the majority in *Chapman v. United Kingdom* refrained from using the Framework Convention for the Protection of National Minorities as a substantive interpretive tool. Still, it relied on an "emerging international consensus recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle" to accept the argument that a minority group's way of life may attract the guarantees of Article 8 ECHR and arguably attempt to limit state discretion in the decision-making process. More positively than in *Chapman*, the ECtHR (Grand Chamber) in *Gorzelik* quoted from the Framework Convention to further articulate the substance of Article 11 ECHR, and by implication, the more general procedural significance of freedom of association within a democratic society. In *DH and others*,[105] the ECtHR openly drew on findings relating to the Framework Convention's monitoring process and upheld the substantive notion of indirect discrimination and its procedural ramifications in the wake of leading domestic, international and European jurisprudence on the subject.

Concluding, it is evident that the ECHR, as interpreted by the Court, may be proven more responsive to minority members' needs than traditionally expected or understood as a result of the absence of specific minority provisions, and the limited reference to a national minority in Article 14. From a forward-looking standpoint, the Convention

[104] Gaetano Pentassuglia, 'Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence', [2009], International Community Law Review, Vol: 11, pp. 185-218.
[105] *D.H. and Others v. the Czech Republic*, Appl. no. 57395/00, Judgment of 13 November 2007.

might usefully benefit minorities on two substantive levels: first, indirect protection against the interference in those elementary spaces of freedom that are vital to the expression of minority demands and the assertion of minority identity; and second, direct but implicit protection of certain aspects of minority identity per se. The former area is where most of the recent developments affecting minorities have occurred. The latter area is instead where such questions might silently creep into the way in which the Court interprets the ECHR and its relation to the issue of ethnocultural diversity. Therefore, for the accommodation of minority's diversity and given the fact that the states have a broad margin of appreciation regarding minority policies, it is of particular significance to examine the role of the existing institutions and their mechanisms, relevant to minority protection, towards the implementation of minority standards. In the next section, the focus is on the potential of these implementation mechanisms for the effective protection of minorities.

2.3. Implementation Mechanisms for the Protection of Minorities

2.3.1. The Potential of Human Rights Monitoring Mechanisms within the UN for Minority Protection

The effectiveness of any (present and future) minority regime remains to be tested through an adequate implementation machinery. The aim of this section is to examine the implementation of minority rights standards through the international monitoring mechanisms which are relevant to minority protection, as a key factor to the quest for effective protection under international law and durable peace between majorities and minorities within states. There has been an intense discussion throughout these years regarding the ideal model of minority. Some have argued in favor of the non-judicial mechanisms, as they may be more productive and more responsive to political circumstances, while others advocate for a mandatory system of judicial enforcement concerning minority rights. In our view, both judicial and non-judicial mechanisms have an important role to play, however they have different functions, each of which is useful on its own right. As we have examined the judicial bodies relating to claims about specific violations of rights of the individuals belonging to a minority, the focus will be on non-judicial mechanisms. In this respect, the monitoring of minority rights

compliance largely consists of varying degrees of resolution- and treaty-based non-judicial supervision, ranging from intense political pressure to independent expert scrutiny to a spectrum of options.

Within the United Nations, there is a plethora of procedures which are relevant to minority protection. In 2007 the Human Rights Council (HRC) established a new Confidential Complaint Procedure, predecessor of the '1503 Procedure' "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."[106] Moreover, it established Special Procedures mechanisms which intervene directly with governments on specific allegations of violations of human rights (that fall within their mandates), following the receipt of a complaint by a concerned individual or group of individuals. The intervention can relate to human rights violations that have already occurred or are on-going, or to situations where there is a high risk that violations may occur. These procedures may lead to the appointment of a special rapporteur / independent expert / working group member / mandate holder - all titles given to individuals working on behalf of the UN within the scope of 'special procedures' mechanisms, who are appointed by the HRC – or a special representative – appointed by the UN Secretary-General – who have a specific country or thematic mandate, according to which they examine, monitor, advice and publicly report the human rights situation in the country. The one rapporteur that should be particularly mentioned is the UN Special Rapporteur on Minority Issues. [107] Among his duties, as these have been determined in the mandate, is to promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, to identify best practices and possibilities for technical cooperation with the Office of the High Commissioner, to guide the work of the Forum on Minority Issues,[108] to submit an annual report on his/her activities to the Human

[106] Human Rights Council Resolution 5/1; A/HRC/RES/5/1; 18 June 2007.

[107] The mandate of the Special Rapporteur on minority issues was established in resolution 2005/79 by the Commission on Human Rights on 21 April 2005. The mandate was subsequently renewed by the Human Rights Council in its resolutions 7/6 of 27 March 2008, 16/6 of 24 March 2011, 25/5 of 28 March 2014 and 34/6 of 23 March 2017. Resolution 34/6 renews the mandate under the same terms as provided by resolution 25/5.

[108] A/HRC/RES/6/15 of 28 September 2007, renewed by A/HRC/RES/19/23 of 23 March 2012; The Forum on Minority Issues replaced the UN Working Group on Minorities. It has been established in order to provide a platform for promoting dialogue and cooperation on issues pertaining to national or ethnic, religious and linguistic minorities, as well as thematic contributions and expertise to the work of the Special Rapporteur on Minority Issues.

Rights Council and to the General Assembly, including recommendations for effective strategies for the better implementation of the rights of persons belonging to national or ethnic, religious and linguistic minorities. The appointment of the Special Rapporteur as well as the establishment of the Forum are important for the protection of minorities, as minority rights problems are directly addressed, contrary to other mechanisms which often address these issues in connection with other human rights issues. Furthermore, both at the UN and European level, there are monitoring/ dialogue procedures which are based on the duty of states to present periodic reports on the implementation of treaties to which they are party, and to submit to an examination of those reports by specifically appointed supervisory bodies.[109] Another treaty-based mechanism is the one of inquiry, according to which committees, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions by a state party.[110] In addition to these monitoring mechanisms, good offices are sometimes undertaken by the Secretary-General or other leading figures within the UN (such as the High Commissioner on Human Rights), while advisory services and technical assistance programmes mainly point to the enhancement of co-operation among and within states. Therefore, it is evident that the UN monitoring mechanisms, even if they are not designed exclusively for minority issues, they may prove to be of great value for the protection of minorities. In the next section, we will focus on the implementation mechanism of minority standards within the European context, as the OSCE and Council of Europe offer major opportunities for the adoption of minority-oriented mechanism.

2.3.2 Monitoring Mechanisms within the European Context and their Focus on Prevention and Diversity Accommodation

At the regional level, monitoring mechanisms have developed within the realm of the Council of Europe and the OSCE. What makes these institutions unique, with

[109] At the UN, state parties have to provide reports under the ICCPR art. 40, the ICESCR art. 16, CERD art. 9, CEDAW art. 18, and CAT art. 19. At the European level, under the FCNM art. 25, the European Charter on Regional and Minority Languages art. 15 and others.
[110] Examples of Committees initiating inquiries are: the UN Committee against Torture and the Committee on the Elimination of Discrimination Against Women.

respect to minority protection is that they expressly address the issues of minorities directly in terms of binding obligations and international supervision. To begin with, in the Council of Europe's context, as it is already mentioned, the FCNM and the Charter for Regional and Minority Languages are those treaties dealing with minority issues. Regarding the FCNM, the Committee of Ministers in entrusted with the task of monitoring the implementation of the FCNM by the State parties. It is assisted by an Advisory Committee, whose members have recognised expertise in the field of the protection of national minorities. The basic mechanism is the reviewing of periodic state reports and conducting some direct dialogue with state parties, thereby assisting states in implementing periodic positive measures designed to benefit national minorities.[111] No binding decision can be adopted by the monitoring body. The programmatic provisions as well as the non-judicial character of the mechanism are indicative of states' reluctance to secure enforcement procedures based on adjudication and redress. However, by providing a minimal degree of external scrutiny, the FCNM does encourage states to comply with their obligations and can promote public consciousness of minorities' issues, helpful to shaping domestic government policy. With regards to the 1992 Charter, the latter provides for an implementation mechanism operating in respect of those paragraphs or subparagraphs that each state party has chosen to apply among the operative articles. Each state party is allowed to have its own 'tailored-made' set of language rights, while at the same time determining the substantive scope of application of the monitoring mechanism.[112] State parties have to submit periodic reports to an expert Committee, while bodies or associations legally established in the party whose report is under consideration may provide the Committee with further information on matters relating to the party undertakings under the Charter. Compared to other procedures, the 'menu-of-options' approach to implementation is innovative, while the fact that it contains guarantees that enable individuals get partly involved in the monitoring process makes it more inclusive and participatory. Moreover, with respect to the admission to the Council of Europe, conditioning access on compliance, not only with human rights generally, but also with the minority rights

[111] For a comprehensive analysis of the mechanism, see Gaetano Pentassuglia, 'Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee', [1999], International Journal of Minority and Group Rights.

[112] Gaetano Pentassuglia, 'Minority Protection in International Law: From Standard-Setting to Implementation', [1999], Nordic Journal of International Law, Vol: 68, pp. 131-160, at p.137.

provisions foreseen in the Draft Additional Protocol on the Rights of Minorities to the ECHR, may turn out to be an institutional incentive operating as an effective implementation mechanism. It is a practice that has been also adopted by the EU, as EU membership is being subjected to, inter alia, respect for the protection of minorities. Last but not least, another monitoring body under the Council of Europe, which is relevant to minority protection, is the European Commission against Racism and Intolerance (ECRI).[113] Its mandate is to review member states' legislation, policies and other measures to combat racism, xenophobia, anti-Semitism and intolerance, and their effectiveness; to propose further action at local, national and European level; to formulate general policy recommendations to member states, which policy makers are invited to use when drawing up national strategies and policies, and to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.

Within the OSCE monitoring system,[114] the most interesting development is the establishment of the Office of the High Commissioner on National Minorities (HCNM).[115] The Commissioner works as an instrument of conflict prevention, by providing early warning and, where appropriate, early action, so as to prevent tension from spilling over into violence. Its role has been part of the general 'peace and security' approach towards the problem of minorities, in which minority protection, as part of promoting 'pluralistic structures of stability' is instrumental to the overriding goal of regional security. Pursuant to its conflict prevention mandate, the HCNM actively mediates and proposes solutions to minorities' situations,[116] invoking international minority standards to frame these solutions, whether from binding legal instruments or non-binding OSCE documents. This pragmatic, solution-oriented approach is also reflected in the HCNM refusal to define national minorities, preferring to identify problem areas, proactively engage the parties and conduct follow-up visits to monitor the implementation of proposed solutions.[117] The HCNM has managed to

[113] It was set up by the first Summit of Heads of State and Government of the CoE. Its statute was adopted by the Committee of Ministers of this Organisation in 2002/

[114] Minority concerns also fall within the OSCE's idiosyncratic notion of the human dimension, which is analogous to human rights.

[115] CSCE Helsinki Document 1992/ The Challenges of Change, 10 July 1992.

[116] The Ljubljana Guidelines on Integration of Diverse Societies (based on the experience of the HCNM) seek to provide guidance to OSCE participating states on how best to integrate diverse societies.

[117] Steven Ratner, 'Does International Matter in Preventing Ethnic Conflict?, [2000], New York University International Law and Policy.

bridge conflict prevention and human rights, in that in discharging the security-oriented functions associated with his office, the HCNM has displayed concern with internal human rights situations and offered recommendations for their improvement.[118] This promotes a political and legal environment that supports respect for human rights norms and promotes co-existence among distinct groups within the state. Thus, the diplomacy and persuasive work of the HCNM which aids on diffusing potentially volatile ethnic conflict constitutes one of the most effective modes of protecting minorities in Europe.

The analysis presented above reveals a variety of mechanisms focused on or relevant to the implementation of minority rights standards. We all know that the ultimate responsibility for standard implementation rests with States at the domestic level. However, an international concern for minority issues is gradually expanding the range of ways and means of committing States to effective participation. It is evident that there is no single approach to implementation, but rather a spectrum of differentiated methods. Thus, the complex of mechanisms to monitor minority rights compliance must be evaluated in terms of complementarity. The challenge is to strike a balance between the need for vertical co-ordination (focusing on the nature of minority problems) and the one for preserving the dynamic and evolutive character of the entire system of monitoring. Flexibility and reasonableness are needed in dealing with the implementation of minority rights, but all the actors of the supervision process should never forget that standard-implementation is a matter of international law and cannot be left to the realm of short term political concessions.[119]

Conclusion

Continued international efforts to deal with the problem of minority protection suggest that the presence of minorities is an enduring feature of human societies. In addressing this problem, international law has developed a set of techniques to protect minorities by promoting their peaceful coexistence on a principled basis with the dominant group within the framework of the existing state. One aspect of managing the problem is to negotiate minority claims within existing state structures and to thereby

[118] Thio, supra note 8, at p. 289.
[119] Pentassuglia, supra note 112.

prevent minority-related conflicts, so to avoid the spectre of secessionism and state fragmentation. This is reflected on the cautious couching of minority rights in individualist terms, even while recognising the communal dimension of minority identity and culture. While multiculturalism and ethno-cultural diversity is presented as good, one that enriches the society at large, it is accompanied by a tension that might sustain separate identity and dilute national unity. In this respect, providing minority protection through the canon of human rights, it can expose at least some of the conceptual and legal oscillations between general standards and special protections, generated in different ways by the mainstream minority rights discourse, that can de facto challenge the ultimate relevance and productiveness of minority rights themselves as effective legal guarantees in interrelation with general human rights norms.

However, insofar as the international law of human rights, of which minority rights is an integral component, points towards the normative moral worth of the individual and the respect of their identity, it has been proved as the ultimate locus for the realisation of minority protection. The analysis of the Court's jurisprudence has revealed that individual rights, being conceptualised in a minority-conscious ways, can actually protect the members of minorities. The tensions and uncertainties that still surround the field effectively call for creative exercises whereby minority issues are not only the subject of institutional debates but are also comprehended as legal sites of a discourse that is capable of reinforcing and expanding the content of international human rights law. International law can be the means for a shift from an assimilationist to an integrationist ethos, an ethos of tolerance and commitment to pluralism. International human rights law, thus, by deliberating and focusing on multiculturalism and respect for diversity, is being transformed into the guardian of minority protection. For the latter to be achieved, a horizontal cooperation based on cross-cultural dialogue among different actors, both internationally, regionally and within the state, is needed for shaping domestic governance and structuring relations between states, non-state communities and individuals. Only then, human rights will fulfil their ultimate purpose, which is not other than the protection of the less advantaged.

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