

AN UNFINISHED STORY OF MINORITY RIGHTS

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Introduction

Contemporary interest in identity and ethnicity throughout a range of scholarly disciplines parallels the concern of international law. The 'philosophical' interest has been conditioned by political and legal 'events' and in turn has the capacity to shape them. Threads in the great tapestry of 'events' involve the dismantling of communism in Eastern Europe and the former Soviet Union, accelerated processes of globalisation, the development of an international civil society particularly in the fields of environment and human rights, and the emergence of indigenous peoples' and other subaltern movements. Liberals, communitarians and republicans,¹ cultural relativists and agnostics,² idealists, hegemonists, merchants of astonishment,³ sentimentalists,⁴ postmodernists and religious fundamentalists have all devoted attention in recent years to ethnic and nationality questions.

Some of the ferment has infused the staid institutions of law and government; most of those who deal therein with minority issues are involved or should be in 'a hermeneutical process mediated by international documents'.⁵ It is tolerably clear that international law has been subjected to a considerable process of ethnicity-sensitisation, particularly in the course of the last decade.⁶ As philosophers have turned their attention to identity and self-determination in a battle of the books, organisations have moved, some with all the

¹ For a spectrum of 'philosophy', see: W. Kymlicka (ed.) (1995) *The Rights of Minority Cultures*, Oxford University Press. The term 'Republicans' is employed in: P. Pettit (1997) *Republicanism: A Theory of Freedom and Government*, Oxford University Press.

² A distinction made by Makau wa Mutua (2000) 'Politics and Human Rights: An Essential Symbiosis', in: M. Byers (ed.) *The Role of Law in International Politics*, Oxford University Press, pp. 149-75.

³ C. Geertz (2000) *Available Light*, Princeton University Press—he means anthropologists.

⁴ The implied reference is to that 'sentimental education' which Richard Rorty urges as a non-foundationalist basis of human rights: 'Human Rights, Rationality and Sentimentality', in: S. Shute and S. Hurley (eds.) *On Human Rights: The Oxford Amnesty Lectures 1993*.

⁵ W. Barbieri (1999) 'Group Rights and the Muslim Diaspora', *21 Human Rights Quarterly*, pp. 907-26, 913.

⁶ P. Thornberry (1999) 'In the Strongroom of Vocabulary', in: P. Cumper and S. Wheatley (eds.) *Minority Rights in the 'New' Europe*, The Hague: Martinus Nijhoff Publishers, pp. 1-14.

inertia at their command, to shake out texts on the table. The world of human rights texts is opulent, while categories of resistance to their implementation are legion and the texts are often only paper tigers.⁷

The present chapter is a short guide through the babble of international instruments. Within this compass it is possible to catalogue only the main legal ‘events’, a little ‘philosophy’ and a few reflections. We pick out the leading global and European texts only,⁸ suggesting what they mean and what they import, bearing in mind that this is a personal reading with which others will differ. Within the canon of human rights, minority rights raise difficult issues. It is relatively easy—give or take a few anthropologists—to agree that torture is wrong and interpretation of anti-torture laws is directed to the question of how to stop the torturers plying their trade.⁹ Minority rights are not like that, but raise issues about the kind of society we have and want, the principles which do or should animate it, and the means by which we should achieve it, keeping in mind that means cannot always be detached from ends.

It is not accurate to suggest that the ‘underpinnings’ of human rights are the main or only controversy,¹⁰ that the texts are lucid. Such philosophical disorder as there is infuses the texts, adding to interpretive complexities. We discuss the international law background and context; the spectrum of instruments and processes; four key texts: two ‘global’ and two emanating from the Council of Europe, with the longest analysis reserved to the Framework Convention for the Protection of National Minorities. The leading questions raised by the texts are then set out, with intimations of possible answers. The point of doing it this way is that while general principles can be extracted from the panoply of texts, the application of a human rights instrument starts with that text and may or may not subsume principles from elsewhere.

International Law: Comings and Goings

Minority rights have a long if ambivalent history in European international law. In the twentieth century, the League of Nations protected particular groups through specific instruments, covering the States of Eastern and Central Europe¹¹ and even Iraq¹² with a

⁷ Broad assessments of human rights ‘performance’ are made in: P. Alston and J. Crawford (eds.) (2000) *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press.

⁸ I use the term ‘global’ to indicate geographical scope: I am aware of the distinction between the ‘merely global’ and ‘the universal’. Readers will decide whether the texts underlined contain ‘universal’ principles, timeless truths or simply the latest historical consequences. For an elaboration of the distinction see T. Asad (1997) ‘On Torture, or Cruel, Inhuman and Degrading Treatment’, in: R. A. Wilson (ed.) *Human Rights, Culture and Context*, London and Chicago: Pluto Press, pp. 111-33, 128.

⁹ Asad, *supra*: I do not attribute this view to the author.

¹⁰ Barbieri, *supra*.

¹¹ The States and territories covered were Austria, Poland (including Upper Silesia), the Serb-Croat-Slovene State, Czechoslovakia, Bulgaria, Romania, Hungary, Greece, the Free City of Danzig, the Aaland Islands, Albania, Estonia, Lithuania, Latvia, Turkey and the Memel.

¹² Iraq made a Declaration to the Council of the League of Nations on becoming independent in 1932.

carpet of treaties or declarations to the League Council for the benefit of 'racial, religious or linguistic' minorities. The system described but did not define minorities. A limit on the authority of States to define at will is implied in the Permanent Court of International Justice's observation on the Greco-Bulgarian Convention of 1919 that: 'The existence of communities is a question of fact; it is not a question of law ...'¹³ What this means is that 'minority' carries an autonomous meaning in international law, and claims by States that they have no minorities will be judged on the facts in the light of international standards. The minority regime collapsed with the League itself. In 1945, the 'new world order' embodied in the UN Charter and later in the Universal Declaration of Human Rights (UDHR), omitted reference to minority rights, focusing instead on individual rights coupled with a principle of nondiscrimination. Critical reaction to the League experience was tinted with the wisdom of hindsight and dyed with a new philosophical individualism which superficially opposed individuals to groups.

The political version of Occam's Razor which excised minorities from the *corpus* of international law never completed its cut. The setting up of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in the 1940s,¹⁴ and the drafting of Article 27 of the Covenant on Civil and Political Rights (ICCPR) were pointers to an eventual re-emergence of minority rights on the international agenda. In Europe, bilateral and domestic law arrangements provided codes of minority rights; the European Convention on Human Rights (ECHR) included 'association with a national minority' among prohibited grounds of discrimination. In the UN era, international law gradually moved in the direction of greater complexity, supplementing the simple notion of 'rights for all without discrimination'. The founding concepts of the 'age of rights'¹⁵ have been 'stretched' to recognise the specific claims of refugees, migrant workers, children, women, indigenous peoples, adherents of religions, the stateless and myriad other groups through dedicated international instruments.¹⁶

Principles of nondiscrimination are still axiomatic, but function in the context of a widening range of rights specifically addressed to multiple human groups. In line with the American heritage, early UN era human rights were potentially conducive to a melting-pot of cultures. The total effect of the newer prescriptions is an increased validation of diversity as opposed to sameness; integration as opposed to assimilation of groups; lightness, quickness and multiplicity of communities as the heaviness of state-building lifts off and nations redefine themselves in pluralist terms.

A Range of Instruments and Mechanisms

International organisations have now delivered up basic principles on minority rights which enshrine respect for the complexities of human community and resistance to the

¹³ P.C.I.J. Series B, No. 17, 31 July 1930, 19, 21, 22 and 33.

¹⁴ Now the Sub-Commission on the Promotion and Protection of Human Rights.

¹⁵ N. Bobbio (1996) *The Age of Rights*, London: Polity Press.

¹⁶ For a snapshot, see: I. Brownlie (1992) *Basic Documents on Human Rights*, Oxford: Clarendon Press, 3RD edition.

notion that States are single communities in all important senses. Apart from the ICCPR, most other texts were drafted in late 1980s and in the 1990s, responding at various speeds to the recrudescence of ethnic consciousness in Eastern Europe and elsewhere. At the level of the United Nations, Article 27 of the ICCPR continues to function as the minimum global treaty standard, and the most important non-treaty text specifically devoted to minority rights is the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹⁷ The application of this instrument is now in the hands of a Working Group of the UN Sub-Commission on the Promotion and Protection of Human Rights.

At the specifically European level, the 'politically binding' instruments of the CSCE (now OSCE) contained the earliest set of specific principles in European space. The broadest spectrum of minority rights in the OSCE canon is provided by the Document of the Copenhagen Meeting of the Human Dimension 1990; the OSCE created the office of the High Commissioner on National Minorities in 1992.¹⁸ The Council of the Baltic Sea States followed this by establishing the post of CBSS Commissioner on Democratic Institutions and Human Rights including the Rights of Persons Belonging to National Minorities in 1994. The Council of Europe has produced two treaties which incorporate the term 'minority': the Charter on Regional or Minority Languages, 1992, and the Framework Convention for the Protection of National Minorities in 1995. The former is pro-minority languages and cultural diversity, not explicitly pro-minority rights; the latter is claimed by the Council of Europe to be the first multilateral treaty of its kind. Non-treaty standards from the Council of Europe may also be brought into consideration—notably Recommendation 1201 (1993) of the Parliamentary Assembly,¹⁹ a document which gained an additional 'force' in being part of 'admission requirements' to the Council of Europe in the case of some States.²⁰

In addition to these, the Central European Initiative produced an instrument in 1994,²¹ as did the Commonwealth of Independent States (CIS).²² The CEI text is strong on the international character of minority rights—'issues concerning ... minorities are matters of legitimate international concern and ... do not constitute exclusively an internal affair of the respective State'.²³ It is however restrictive on citizenship, the preamble asserting that 'the protection of national minorities concerns only citizens of the respective State'; this is coupled with a definition in Article 1 referring to members of minorities as 'nationals of the State'. CEI States also recognise the treatment of the Roma as a human rights

¹⁷ General Assembly resolution 47/135, 18 December 1992.

¹⁸ The setting up of the office of High Commissioner on National Minorities (HCNM) at the Helsinki Meeting in 1992 is of major significance to the development of minority rights. A selection of his speeches and recommendations may be obtained from the OSCE site on the internet.

¹⁹ See generally, P. Thornberry and M. Amor Martin Estebanez (1994) *The Council of Europe and Minorities*, Strasbourg: Council of Europe.

²⁰ F. Benoit-Rohmer (1996) *The Minority Question in Europe: Texts and Commentary*, Strasbourg: Council of Europe Publishing.

²¹ Text on CEI website: <http://www.ceinet.org/minority.htm>.

²² 21 October 1994.

²³ Preamble.

issue, promising measures to preserve and develop Roma identity and facilitate their social integration.²⁴ The CIS text describes minorities as both citizens and permanent residents; the document is flawed in purporting to restrict some rights in the name of 'national legislation',²⁵ and by insisting that minorities fulfil unspecified 'obligations' to the State. States of Eastern and Central Europe have also concluded a range of bilateral treaties and declarations among themselves, wholly or partially devoted to minority rights.²⁶ Some of these have the effect of transforming 'soft law' into legally binding standards to be applied within States. The Dayton Agreement²⁷ and the Stability Pact for South-East Europe also incorporate minority rights standards.²⁸

The European Union has not developed an instrument on minority rights, but treaty references to culture and education, to European cultural and linguistic diversity, and principles further reflected in Article 22 of the European Charter on Fundamental Freedoms agreed at the EU Summit at Nice are significant.²⁹ Europe Agreements', and 'Association Agreements' with potential members effectively enshrine minority rights. The European Bureau for Lesser Used Languages, largely financed by the European Commission, watches over the autochthonous linguistic heritage of EU members. Despite the limited attention given to minority questions within the EU, one writer summarises the EU approach as insisting:

... that East European minority nations must be recognised as legitimate groups within their respective societies, and must be accorded group rights ... (whereas) in Western Europe, within the EU, minority nations have self-evidently not been protected through the granting of group rights.³⁰

There is now a wealth of texts relevant to the concerns of minorities in contemporary international law. For pedagogical purposes they can be classified into instruments of 'undifferentiated' human rights (for all persons), and 'differentiated' texts (or parts thereof) for minorities in particular. The United Nations has acted on the concerns expressed at the time of the Universal Declaration of Human Rights in 1948—when the General Assembly declared that the UN could not remain indifferent to the fate of minorities;³¹ other international organisations have also taken up the cry.

²⁴ Article 7.

²⁵ Articles 6 and 8. Such restrictions contradict the basic principle that in the event of conflict between international and domestic law, the former prevails.

²⁶ See: A. Bloed and P. van Dijk (eds.) (1999) *Protection of Minority Rights through Bilateral Treaties: The Case of Central and Eastern Europe*, The Hague: Kluwer Law International.

²⁷ J. Mertus (1999) 'The Dayton Peace Accords: Lessons from the Past and for the Future', in: Wheatley and Cumper, pp. 261-83.

²⁸ Cologne, 10 June 1999; text at: <http://www.seerecon.org/KeyDocuments/>

²⁹ M. Amor Martin Estebanez (1996) *International Organisations and Minority Protection in Europe*, Turku/Abo: Abo Akademi University, Part III, and various references in: P. Alston, M. Bustelo and J. Heenan (eds.) (1999) *The EU and Human Rights*, Oxford University Press.

³⁰ A. Biscoe (1999) 'The European Union and Minority Nations', in: Wheatley and Cumper, *supra*., 89-103, 98.

³¹ Resolution 217C (III).

Key International Texts

The brunt of the analysis below relates to the differentiated minority rights instruments. For comparison, a short account of the European Convention on Human Rights is included: the attraction of that Convention for minority rights activists lies mostly in its implementation mechanism, based on individual applications to the (former Commission and) Court of Human Rights alleging violation of the provisions. In passing, it may be observed that while ‘individualisation’ of implementation mechanisms plays an important role in securing human rights, mechanisms with a systemic and preventive focus also have their place. While an adverse finding by the European Court of Human Rights is intended to deter, the judgment is still only a reaction to a violation which may have given rise to uncompensable harm to individuals. UN treaties tend to combine overview reporting procedures with procedures for individual claims; European instruments usually detach these functions in practice if not in theory. The focus on legal interventions should not lead us to underestimate ‘diplomatic’ approaches to conflict prevention and redress, the potential of intercultural and multicultural education, and the benefits of a complementarity of approaches in attempts to resolve particular cases.

Article 27 of the International Covenant of Civil and Political Rights (ICCPR)

The ICCPR’s implementing body, the Human Rights Committee, has been exercised by this brief, weight-bearing article on many occasions:

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.³²

The right to identity represents in many ways the essence of the case for minorities within the *corpus* of human rights. The elements of that identity can be ethnic, religious or linguistic, or more than one in combination. Article 27 appears tentative in its affirmations. The opening phrase ‘In those States in which ... minorities exist’ almost invites States to declare that they have no minorities., but only France has recorded an ‘official’ statement to that effect, declaring that ‘Article 27 is not applicable so far as the French Republic is concerned’.³³ Following this example, reservations and declarations on Article

³² Cf. Article 30 of the Convention on the Rights of the Child, which adapts Article 27 to provide for rights of minority and indigenous children.

³³ *Human Rights Status of International Instruments* (1987) New York: United Nations, pp. 35. The Federal Republic of Germany has interpreted the declaration by France (*ibid.*, 88) to mean that ‘the Constitution of the French Republic already fully guarantees the individual rights protected by Article 27’. France as reaffirmed this position on many occasions. For its reiteration before a European human rights body, see the European Commission Against Racism and Intolerance (ECRI), *Second Report on France*, Council of Europe Doc. CRI (2000) 31, Adopted 10 December

30 of the UN Convention on the Rights of the Child have been made upon signature confirmed on ratification by France, Venezuela, and upon signature by Turkey.³⁴

However, according to General Comment No. 23 of the Human Rights Committee:³⁵ 'The existence of an ethnic, religious or linguistic minority in a given State party ... requires to be established by objective criteria'.³⁶ In the language of the General Comment and following the line in *Greco-Bulgarian* case of the PCIJ (*supra*) 'existence' 'does not depend upon a decision by (a) State party ...'.³⁷ Article 27 does not contain a definition of 'minority' and the General Comment does not offer one. In *Ballantyne, Davidson and McIntyre v. Canada*,³⁸ a majority of the Committee decided that members of the majority Anglophone community in Canada could not be considered as a minority even when they were a minority in a Province (Quebec): Article 27 'refers to minorities in States; this refers ... to ratifying States ... the minorities ... are minorities within such a State, and not minorities within any Province'.³⁹ Other Members of the Committee dissented.⁴⁰ Confining the meaning of 'minority' to exclude members of a majority in a minority situation in provinces or autonomous areas distances the approach of the Committee from that found in some of the 'European' texts.⁴¹

Minority rights have been 'admitted' into the contemporary canon of human rights as rights of individuals, not as 'collective' or 'group' rights. The terms are ambiguous and conceal two truisms: that 'the individual' is an abstraction as much as 'the group', and that all rights are 'collective' in that they apply to a class of persons.⁴² Of the contested conceptions, we should distinguish between collective rights of individuals in virtue of belonging to or being perceived as member of a particular group (collective as adjective); and rights of a 'collective'—a corporate conception implying rights for the group as such, against the world and even against its 'members'.

Article 27 clearly eschews the corporate conception: rights are for: 'persons belonging to ... minorities'. There is no indication as to how membership ('belonging') is to be defined. In *Lovelace v. Canada*,⁴³ the Human Rights Committee stated, in relation to a

1999. 'Observations' on the report by the French authorities reaffirm the validity of France's 'Republican principles'.

³⁴ UN Doc. CRC/C/2 (22 August 1991) 10, 16, 17.

³⁵ 26 April 1994.

³⁶ General Comment, para. 5.2.

³⁷ Paragraph 5.2.

³⁸ UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (31 March 1993).

³⁹ Paragraph 11.2.

⁴⁰ Individual opinion by Mrs. Elizabeth Evatt, co-signed by Messrs. Ando, Bruni Celli and Dimitrijevic, 23.

⁴¹ For example, Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe (Article 1) defines 'national minority' to include groups 'smaller in number than the rest of the population of that State or of a region of that State'.

⁴² Barbieri, pp. 916-18.

⁴³ Human Rights Committee (1985) *Selected Decisions Under the Optional Protocol* (2nd to 16th sessions), UN Doc. CCPR/C/OP/1, 10 (admissibility); 37 (interlocutory decision); 83 (views of the Human Rights Committee).

woman denied membership in the Tobique Band of Indians through marriage to a non-Indian, that: 'Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority ...'. The general 'membership' criteria to be extracted from this laconic statement are those of fact, intention or desire: the use of 'normally' indicates that these may not always be decisive. So while a certain threshold weight may be accorded to 'self-definition as a member of a minority', that criterion is not absolute. Article 27 exhibits a further collective dimension in that members of minorities 'enjoy the rights in community with the other members of their group'. The Human Rights Committee has also indicated that in the enjoyment of rights under Article 27, the right of individuals to participate in aspects of community life may be restricted, but only if the restricting legislation reflects the legitimate aim of minority group survival and well-being, and the restriction on the right of an individual is not disproportionate to that aim.⁴⁴

Following *Lovelace*, the Human Rights Committee stated in *Kitok v. Sweden*,⁴⁵ that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'. The significance of this is that, despite the 'individualist' phrasing of Article 27, continued group existence and character is assumed to have value in itself, a factor which may be 'weighed' against the desires of individuals.

If the principle of survival of minority cultures and religions in the face of assimilationist pressures is to have meaning, States should take measures to the extent necessary to ensure that the disadvantages of minority status do not result in the denial of the right. Protective State action will be required for as long as minority status persists. Article 27 does not specify the modalities of action to be taken. The General Comment on Article 27 insists on the positive nature of the Article despite its negative language, and on its 'horizontal' effect⁴⁶:

Positive measures of protection are ... required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.⁴⁷

Finally, we may note that within the confines of the ICCPR, minority rights are served by the ensemble of other articles, some of which impact intimately on questions of identity. In cases where for one reason or another Article 27 may not be applied, the Human Rights Committee has been creative in its utilisation of other articles to secure ends analogous to those of Article 27.⁴⁸ The message is that human rights strategies need not be narrowly focused: the full text is there to be quarried for relevant principles, article by article, and interpreted as a whole.

⁴⁴ *Lovelace*, paragraph 17.

⁴⁵ UN Doc. CCPR/C/33/D/197/1985; Views of the Committee adopted on 27 July 1988.

⁴⁶ Where the State is held responsible for violations of rights by other individuals, not just by the State authorities.

⁴⁷ Paragraph 6.1.

⁴⁸ UN Doc. CCPR/C/60/D/549/1993, Views of the Committee adopted on 29 July 1997.

*The UN Minority Rights Declaration*⁴⁹

This non-treaty instrument (the UNDM) was adopted by the consensus of the UN General Assembly in 1992. Despite the paragraph in its preamble claiming ‘inspiration’ from Article 27, the Declaration represents a fresh start and is not simply an ‘expansion’ of the ICCPR. The text took some fourteen years to emerge from the bowels of the UN, in which time ideological and political configurations had changed enormously. The Declaration was the UN’s response to changes which by 1992 had already begun to reveal their dark side in the former Yugoslavia and the former USSR. The drafters were obviously aware of distinctions between individual and collective rights. Rights are consistently for ‘persons belonging to’ minorities. On the other hand, Article 1.1. of the Declaration transcends the tentative phrasing of Article 27 and explicitly describes identity and existence as fundamental attributes of groups. The obligation to protect existence and identity is set out as mandatory.

A meagre diet of rights is set out in article 2, which begins brightly by replacing the ‘shall not be denied the right’ of Article 27 with the positive ‘have the right’. While the textual limitations of Article 27 have not prevented the Human Rights Committee from declaring that ‘positive measures of protection are ... required’.⁵⁰ The explicitly positive approach of the Declaration removes some intellectual doubts about the international community’s reception of minority rights: the Article 27 formulae suggests a kind of ‘aggrieved hospitality’ was at work,⁵¹ but not a welcome. The Declaration makes an important departure from Article 27 in its wide-ranging specification of participation rights—minority rights ‘to participate effectively in cultural, religious, social, economic and public life’, and the right to participate effectively in decisions affecting them. Modalities of participation remain unspecified but the development of mediating organisations to facilitate participation is legitimate since the article sets out a right to establish and maintain minority associations. The own associations right is supplemented by rights to establish and maintain free and peaceful contacts including ‘contacts across frontiers with citizens of other States to whom they (the members of minorities) are related by national or ethnic, religious or linguistic ties’. Article 3 provides for the exercise of rights individually ‘as well as’ collectively—in case States should be tempted to ‘decide’ that culture, religion, etc., are to be carried on only in private.

The measures set out in the qualified language of Article 4 confront important aspects of group life and should, by analogy with measures in the International Covenants, be ‘deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised ...’.⁵² Mandatory language extends to members of minorities the promise that

⁴⁹ Two relevant commentaries (the second is in draft only) are: P. Thornberry (1995) ‘The UN Declaration on the Rights of ... Minorities: Background, Analysis, Observations, and an Update’, in: A. Phillips and A. Rosas (eds.) *Universal Minority Rights*, London and Abo: Minority Rights Group and Abo Akademi University, pp. 13-76; A. Eide, *Commentary to the Declaration ... A Working Paper*, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1.

⁵⁰ UN Doc. CCPR/C/21/Rev.1/Add.5, paragraph 6.1.

⁵¹ Barbieri, pp. 910.

⁵² See General Comment No. 3 of the Committee on Economic, Social and Cultural Rights entitled ‘The Nature of States Parties Obligations’, in UN Doc. HRI/GEN/1, 43.

they may ‘fully and effectively’ exercise all their human rights without discrimination and on a basis of equality. Measures are not defined, but the term is appropriate to cover both legislative and non-legislative measures.⁵³ Article 4.2. indicates that States must facilitate the expression and development of minority culture, traditions and customs, etc., ‘except where specific practices are in violation of national law and international standards.’ The qualification is necessary and meets an objection sometimes placed against minorities and indigenous peoples: that group traditions may incorporate *practices* inconsistent with human rights.

The provisions on learning and instruction in mother tongue are qualified and ambiguous. The intended contrast in the references to ‘learning’ and ‘instruction’ is between learning through the medium of one’s own language, and being taught the rudiments of that language. The words in the text convey this contrast only in dim fashion. The ‘philosophical’ point of Article 4—expressed in its fourth paragraph—is to promote self-knowledge on the part of minorities, and their awareness of the wider world, while informing society at large of the cultural and other contributions of minorities to the nation as a whole. Accordingly, the culture, history, traditions, etc., of minority groups should be the subject of positive valuations and not of the kind of distorted representations which produce low self-esteem in the groups and negative stereotypes in the wider community. Reciprocally, minority doctrines of ethnic exclusiveness are discouraged.

Article 8 sets minority rights in their universal context and ‘balances’ their exercise with the rights of others, implying that measures for minorities are generally compatible with equality, though this also suggests that they should not be pushed too far to the detriment of others. Article 8.4. connects with the fear of some States that minority rights may lead to self-determination. To the extent that a secessionist ‘threat’ exists, it must be in virtue of other principles of international law, and this applies equally to the converse argument that the Declaration ‘protects’ territorial integrity from valid claims to self-determination. The Declaration has nothing to say about self-determination. The General Comment on Article 27 goes to great pains to eliminate any ‘confusion’ between the two rights, and notes in analogous fashion to the Declaration that: ‘enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party’.⁵⁴ Article 9 points to contributions from the United Nations to the realisation of the purposes of the text. The language is such as to implicate all the relevant organs of the UN system. The follow-up to the Declaration proceeded slowly. The Commission on Human Rights adopted, on 3 March 1995, resolution 1995/24 authorising the Sub-Commission to establish a Working Group on Minorities. The Working Group met for the sixth time in 2000, and now enjoys an ‘indefinite’ mandate.⁵⁵

⁵³ Cf. Article 1.

⁵⁴ General Comment, paragraph 3.2. See also paragraphs 2 and 3.1.

⁵⁵ The background to the establishment of the Working Group and its mandate are set out in *Report of the Fifth Session*, UN Doc. E/CN.4/Sub.2/1999/21, 24 June 1999.

European Instruments

Virtually all European States (however we define 'Europe') are parties to the main UN human rights treaties, or have joined in the consensus which validates the UN Declaration. As noted, the standards of the OSCE were 'first in line' to meet the challenge of the melt-down of communism in Europe, on democracy and rule of law questions as well as human rights, minorities, environment—the manifold forms of human security. The OSCE Copenhagen Document is important primarily as a commitment made by States re-validating minority rights in the new *ordo rerum*. It represents an early contemporary 'codification' of minority rights in Europe, setting out the essential standards of group recognition, promotion of culture, participation, etc., recognising also the positive contribution of autonomy to the resolution of ethnic conflicts. The Copenhagen document influenced the drafting of the UN Declaration and subsequent exercises in setting standards at the Council of Europe and elsewhere. The OSCE continues to develop minority rights through the instrumentalisation of Copenhagen principles and the work of the HCNM. Attempts have also been made under the aegis of the HCNM to consolidate minority rights principles in the fields of education, language and participation.⁵⁶

The major treaty-promoting human rights organisation in Europe is the Council of Europe, dedicated to the holy trinity of human rights, democracy and the Rule of Law. The European Convention on Human Rights of 1950 remains the organisation's 'flagship'. The text deals only with human rights for all persons and not minority rights; it is in our terminology 'undifferentiated', although Article 14 forbids discrimination on the grounds of 'association with a national minority'. The ECHR underpins many rights which, while they concern 'all persons', have particular relevance to minorities. Accordingly, the Convention's focus on pluralist democracy,⁵⁷ nondiscrimination, respect for private life, family life and ways of life,⁵⁸ the attention paid to issues of human dignity,⁵⁹ and the protection offered to freedom of expression,⁶⁰ freedom of association,⁶¹ and profession of religion,⁶² all offer vital safeguards to minority groups while not formally visualising minorities through its 'optic'.

⁵⁶ The reference here is to three sets of recommendations on minority rights prepared by the Foundation on Inter-Ethnic Relations under the guidance of the HCNM: the Hague Recommendations regarding the Education Rights of National Minorities 1996; the Oslo Recommendations on the Linguistic Rights of National Minorities 1998; and the Lund Recommendations on the Effective Participation of National Minorities in Public Life 1999.

⁵⁷ Among many cases, see: *Socialist Party and Others v. Turkey*, 20/1997/804/1007, Judgment of 25 May 1998.

⁵⁸ *G. and E. v. Norway*, Application Nos. 9278/81 and 9415/81, D.R. 35 (1983), pp. 30-45.

⁵⁹ *Assenov and Others v. Bulgaria*, Application No. 24760/94, Judgment of 28 October 1998.

⁶⁰ Again, in a plethora of case law, see *Arslan v. Turkey*, Application No. 23462/94, Judgment of 8 July 1999. Judgments on twelve other cases with similar facts were issued against Turkey on the same day.

⁶¹ *Stankov and United Macedonian Association 'ILINDEN' v. Bulgaria*, Application Nos. 29221/95 and 29225/95, admissibility decision 29 June 1998.

⁶² *Serif v. Greece*, Application No. 38178/97, Judgment of 14 December 1999.

There is evidence that, like undifferentiated instruments at the global level, the ECHR is undergoing gradual 'sensitisation' to minority questions in a number of fields, although doubts remain as to whether the bodies of the ECHR always treat 'ethnic' issues with sufficient *gravitas*.⁶³ The prospects for an 'opening out' of the Convention to minority issues are enhanced by the adoption of Protocol 12 on nondiscrimination in general.⁶⁴

The Charter for Regional or Minority Languages of the Council of Europe

The Charter for Regional or Minority Languages is the first treaty essay by the Council of Europe in the field of minorities.⁶⁵ Although it has 'minority' in the title and operative articles, it is not *per se* an instrument on minority rights. The Charter works for the benefit of speakers of minority *languages*. As the *Explanatory Report* makes clear:

The Charter sets out to protect and promote regional or minority languages, not linguistic minorities. For this reason emphasis is placed on the cultural dimension and the use of a regional or minority language in all the aspects of the life of its speakers. The Charter does not establish any individual or collective rights for the speakers ... Nevertheless, the obligations of the parties with regard to the status of these languages and the domestic legislation which will have to be introduced in compliance with the Charter will have an obvious effect on the situation of the communities concerned⁶⁶

Its validation of these languages contributes to the Council of Europe's overall conception of a diversified and culturally pluralist Europe where lesser used languages have enhanced capacity for survival and flourishing. The Charter adopts a 'menu' approach to State undertakings in the area of minority languages. Positively, this allows for flexible accommodation to particular circumstances and is less potentially confrontational than a platform of strongly asserted group rights. The limitation is the perceptible dilution (*infra*,

⁶³ See, for example: *Buckley v. UK*, Judgment of 25 September 1996.

⁶⁴ Protocol No. 12 was adopted by the Committee of Ministers of the Council of Europe on 26 June 2000, and will be opened for signature by member States on 4 November 2000; entry into force requires ten ratifications. Whereas Article 14 of the ECHR forbids discrimination in relation only to the rights set out in the Convention, Protocol 12 provides that 'enjoyment of any right set forth by law shall be secured without discrimination ...' (present author's emphasis). The *Explanatory Report* to the Protocol states (paragraph 24) that 'while ... positive obligations cannot be excluded altogether, the prime objective of Article 1 (of the Protocol) is to embody a negative obligation for the parties: the obligation not to discriminate against individuals'. The *Report* also observes (paragraph 29) that the word 'law' in 'set forth by law' 'may also cover international law, but this does not mean that this provision entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments'.

⁶⁵ Opened for signature on 5 November 1992; in force 1 March 1998. At the time of writing, the Charter has been ratified by nine States: Croatia, Finland, Germany, Hungary, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.

⁶⁶ *Ibid.*, paragraph 11.

concluding lecture) of State obligations through the range of options offered to States. The Charter should not therefore be understood as proposing a complete alternative to standard minority rights but as a project to foster the creation of detailed national regimes for the support of minority languages with points of guidance to States which concentrate and highlight essential areas of action.

The supervision mechanism is essentially a reporting procedure through a Committee of Experts. The major normative limitation is its focus on the 'traditional' languages of Europe and not on the newer arrivals. Migrants are, however, a part of European society, and the Charter's focus on languages traditionally used may alienate. In conceptual terms there are possibilities of 'slippage' between the 'traditional' and the 'new'. Conceptions of languages of European 'tradition' to be safeguarded are subject to change: further exploration of this point by the Committee of Experts over the life of the instrument will be welcome. However, *de minimis*, the Romany language is covered by key provisions.

The stance of the Charter is broadly comparable with that of minority rights texts, in that it seeks an improving relationship between the 'public' and 'official' languages, and the living languages of European minorities. While some States remain resolutely opposed to minority rights, ratification of the Charter may represent an avenue to realise some minority rights objectives. From its own perspective, the Charter goes beyond other instruments in interlacing the 'public' space with a complex of language requirements. Its flexibility is capable of meeting the resource constraints on human rights programmes, though it is important that the application of the Charter should not be unduly 'minimalist'. Perhaps the principal concern for civil society is that the Charter should be worked through in as transparent a manner as possible and not be perceived as only 'intergovernmental'—the relative lack of NGO input into the drafting may be accounted as a loss.⁶⁷

*The Framework Convention for the Protection of National Minorities*⁶⁸

In the drafting of the ECHR, unavailing suggestions were made for the adoption of a specific provision on minority rights; more recently the Council of Europe laboured in vain to produce an additional minority rights (and even cultural rights) protocol to the ECHR.⁶⁹ The lack of a binding 'differentiated' instrument in the Council of Europe was remedied in 1995, when the Framework Convention was opened for signature by the Committee of Ministers. The Convention distils, elaborates, applies—and possibly dilutes—propositions in OSCE and UN texts. The present chapter concentrates on some of the principles therein which give the Convention its particular colour. The strength of the Framework Convention lies in its character as a binding treaty backed up by a standing implementation mechanism.

⁶⁷ Crnic-Grotic and Bucci, 'The View of the Authors of the Charter', in: *Implementation*, pp. 76-77, 77.

⁶⁸ The text was opened for signature by the Committee of Ministers of the Council of Europe on 1 February 1998, entering into force on 1 February 1998. At the time of writing thirty-one States have ratified the Convention. More than half of these States have submitted their initial reports.

⁶⁹ Benoit-Rohmer, *op.cit.*

i) *A Framework*

The incorporation of the notion of a ‘framework’ into the title of a legally binding Convention has attracted critical comment, to the general effect that the terminology represents the softening of an otherwise ‘hard law’ treaty.⁷⁰ The nature of State obligation takes colour from two paragraphs in the preamble, the first of which expresses the resolution of the signatories ‘to define the principles to be respected and the obligations which flow from them, in order to ensure ... the effective protection of national minorities ...’;⁷¹ and the second, describing the signatories as ‘Being determined to implement the principles set out in this Framework Convention through national legislation and appropriate government policies’.⁷² One author considers that the ‘framework’ idea ‘seems to impose upon States only an obligation to endeavour to put ... vague and imprecise descriptions of rights into effect’,⁷³ which, along with other ‘defects’, renders the Convention ‘almost worthless’.⁷⁴

This last remark assumes too much. All human rights instruments are in essence open and developmental, only imprecisely dispositive of disagreements, so that the task of discovering meanings in the human rights canon is a constant in the work of the implementing ‘treaty-bodies’. Irrespective of the precise form, it should not be forgotten that the Convention creates obligations in international law; it cannot be treated as somehow less binding on account of its structure.⁷⁵ The *Explanatory Report* on the Convention observes that it ‘contains mostly programme-type provisions setting out objectives which the parties undertake to pursue’, and that the provisions ‘will not be directly applicable’.⁷⁶ However, certain provisions of the Framework Convention look appropriate for ‘direct application’, including articles which ‘track’ or ‘parallel’ obligations under the ECHR; Article 3 would also be a strong candidate. Some States appear to have committed themselves to a programme of ‘direct application’.⁷⁷

⁷⁰ Strong language emanated from the Parliamentary Assembly of the Council of Europe in their overall assessment that the Convention ‘is weakly worded’ and ‘formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the contracting States but not a right which individuals may invoke. Its implementation machinery is feeble and there is a danger that, in fact, the monitoring procedure will be left entirely to governments’—Recommendation 1255 (1995), text adopted by the Assembly on 31 January 1995.

⁷¹ 12th preambular paragraph.

⁷² 13th preambular paragraph.

⁷³ G. Gilbert (1999) ‘Minority Rights under the Council of Europe’, in: P. Cumper and S. Wheatley (eds.) *Minority Rights in the ‘New’ Europe*, The Hague: Martinus Nijhoff Publishers, pp. 53-70, at 63.

⁷⁴ *Ibid.* For more nuanced views, see the same author’s ‘The Council of Europe and Minority Rights’ (1996) *18 Human Rights Quarterly*, pp. 160-89.

⁷⁵ See A. Spiliopoulou-Akermark (1997) *Justifications of Minority Protection in International Law*, Uppsala: Iustus Forlag, pp. 229, n. 114. Note also her remark that ‘the contracting parties cannot avoid the legal implementation of a treaty by calling it “framework Convention” or “convention specifying principle”’.—*Ibid.*, pp. 227.

⁷⁶ *Explanatory Report*, paragraph 11.

⁷⁷ Consider Article 15 (4) (a) of the Hungarian-Slovak treaty on Good-Neighbourliness, etc., where in the parties declare ‘that as regards the rights and obligations of persons belonging to minori-

ii) *National Minorities*

Section I makes important points on the integration of minority rights with human rights more explicitly than in UN texts, restating the UN and OSCE principles of freedom of choice of every person belonging to a national minority to be treated as such without disadvantage,⁷⁸ and the individual as well as communal exercise of the rights.⁷⁹ The *Explanatory Report* offers the opinion that ‘no collective rights of minorities are envisaged’,⁸⁰ and that ‘choice of belonging’ ‘does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity’.⁸¹ There is no explicit reference in the Convention to State denial of the existence of minorities.

Despite the relative openness of the text, a number of States have provided restrictive definitions of minorities,⁸² while others are more generous, addressing the existence of minorities as a factual situation.⁸³ In cases of exemption of noncitizens from the ‘national minority’, the objection of the Russian Federation, which considers that no State ‘is entitled to include unilaterally in reservations or declarations ... a definition of the term ‘national minority’,⁸⁴ is noteworthy. Further,

... attempts to exclude from the scope of the ... Convention ... persons who permanently reside in the territory of State parties ... and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the ... Convention ...⁸⁵

The Russian declaration raises an issue of the validity of the various readings of the term ‘national minority’, particularly the narrower versions. The statement is close to claiming that the restrictions *ratione personae* contradict, in the language of the Vienna Convention on the Law of Treaties—the ‘object and purpose’ of the Convention.⁸⁶ Such objections raise delicate legal issues on the application of the treaty between objector and reserving States.⁸⁷ The Human Rights Committee offers the helpful advice in such situa-

ties living within their respective territories they shall apply the Framework Convention ... unless their domestic legal systems provide for broader protection of rights of persons belonging to national minorities ...’—treaty in force 6 May 1996, text in: A. Bloed and P. van Dijk (eds.) (1999) *Protection of Minority Rights through Bilateral Treaties*, The Hague: Kluwer Law International, pp. 370-75.

⁷⁸ Article 3.1.

⁷⁹ Article 3.2.

⁸⁰ Paragraph 31.

⁸¹ Paragraph 35.

⁸² See, for example, the statements on signature/ratification and initial reports of Estonia, Denmark, Germany and Slovenia.

⁸³ Finland, *Initial Report*, 5.

⁸⁴ Declaration made on ratification, 21 August 1998—*Council of Europe Information*, 21 January 2000.

⁸⁵ *Ibid.*

⁸⁶ Article 19 (c).

⁸⁷ See, in general: F. G. Jacobs, and R. C. A. White (1996) *The European Convention on Human Rights*, Oxford: Clarendon Press, 2ND edition, chapter 22.

tions that ‘an objection to a reservation made by States may provide some guidance ... in ... interpretation as to ... compatibility with the object and purpose ...’ of the treaty in question.⁸⁸

iii) *Culture and its Limitations*

The preamble to the Convention refers to respecting the ethnic, cultural, etc., identity of each person and to creating conditions for the expression of this identity. The text implies that identity may have multiple aspects, so that the nuances of expressing identity will vary with the person. According to Article 5.1., the parties undertake to promote the conditions necessary for persons belonging to minorities ‘to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage’. The reference to ‘essential elements of their identity’ appears to be a narrower formulation than that in the UNDM, which speaks simply of ‘identity’.⁸⁹ The *Explanatory Report* comments that ‘reference to ‘traditions’ is not an endorsement or acceptance of practices which are contrary to national law or international standards. Traditional practices remain subject to limitations arising from the requirements of public order’.⁹⁰

Thus interpreted, the limits of cultural expression in the Convention are narrower than elsewhere. The UNDM implies—in careful language—that cultural practices must not violate international human rights standards *and* national law. The *Report* would allow wider scope for restrictive national legislation.⁹¹ In this instance, the provisions of Article 19 of the Convention become relevant—allowing only for limitations, etc., ‘which are provided for in international legal instruments’, in particular the ECHR.⁹² The Convention also recognises that culture and identities are mutable through employing terms such as ‘express, preserve and develop’. There is no question within its terms of ‘locking in’ minorities to an unchangeable corpus of traditional lifestyles and practices before allowing access to the norms of international law—this coheres with the case law of the ICCPR.⁹³

iv) *Language and Education*

For many minority groups, the provisions on language and education represent core issues. Language and education are at the centre of ancient and modern exercises in minority rights. The Convention’s provisions are replete with ‘qualifiers’. Their chief innovation is to introduce the concept of a minority ‘area’, within the (indeterminate but protected)⁹⁴ boundaries of which some minority rights are enhanced.⁹⁵ Article 10 recognises the right

⁸⁸ General Comment No. 24 (52), CCPR/C/21/Rev.1/Add.6, 11 November 1994, paragraph 17.

⁸⁹ Article 1.1.

⁹⁰ Paragraph 44.

⁹¹ See remarks in the report of Slovakia on ‘value modification’ in relation to Roma through education: *Initial Report*, p. 27.

⁹² See: *Jacobs and White*, ch. 19—‘Limitations’.

⁹³ *Ilmari Lansman v. Finland*, Views of the Committee in UN Doc. A/50/40, pp. 66-76.

⁹⁴ Article 16 imparts a measure of integrity to minority areas.

⁹⁵ Finland refers to Aland and the Sami Homeland as relevant ‘areas’—*Initial Report*, pp. 19-20.

to use a minority language freely and without interference, in public or in private, ‘perfecting’ the freedom of expression set out in Articles 7 and 9.⁹⁶

Paragraph 2 of Article 10 is directed towards the possibility of using minority languages in dealings with administrative authorities. Not all relations with public authorities are dealt with: the reference is to ‘administrative authorities’, though ‘the latter must be broadly interpreted’ (the *Explanatory Report* specifically mentions Ombudsmen).⁹⁷ The ‘area’ where the right applies is one inhabited by minority members ‘traditionally or in substantial numbers’. For the right to be activated, there must be a request and the minority request should correspond ‘to a real need’. If this is the case, the parties are only committed to the thin obligation ‘to endeavour to ensure, as far as possible, the conditions which would make it possible’ to use the minority language in relations with administrative authorities.

The provision imports a lexicon of qualifiers: traditional or substantial inhabitation, real need, and the various vocabularies of possibility, before the right is activated. The right struggles to escape, gripped even more tightly by the *Explanatory Report* which suggests that the existence of a real need ‘is to be assessed by the State on the basis of objective criteria’,⁹⁸ and that the financial resources of the State must also be taken into consideration in applying the article. The issue of need can hardly be in the exclusive domain of the State—simply to be ‘assessed’ by State agencies. If need is subject to ‘objective criteria’, as the *Report* suggests, the question of a minority input to the assessment cannot be discounted.⁹⁹ The ‘good-faith’ provisions of Article 2 are also relevant. In as far as resources are concerned, all human rights consume resources—even the elimination of official torture requires education (re-education) and training for aberrant officials, as well as continuous vigilance against recurrence.

The first paragraph of Article 11 sets out a right to use names in the minority language ‘and the right to official recognition of them, according to modalities provide for in their legal system’. This is followed by the right to display minority language ‘signs, inscriptions and other information of a private nature visible to the public’;¹⁰⁰ and the second ‘minority area’ provision,¹⁰¹ whereby the State ‘shall endeavour’ ‘to display traditional local names, street names and other topographical indications intended for the public also in the minority language ...’.¹⁰² According to the *Explanatory Report*, the first paragraph

⁹⁶ Paragraph 3 of Article 10—which provides a right to be informed of reasons for arrest, etc.—adds little or nothing to the body of minority rights. The paragraph is satisfied by proceedings in the language understood by a person arrested, etc., not necessarily a minority language. Compare Articles 5 and 6 ECHR, and Article 9 of the Charter on Regional or Minority Languages.

⁹⁷ *Report*, paragraph 64.

⁹⁸ Paragraph 65.

⁹⁹ Article 15 supports this view.

¹⁰⁰ Paragraph 2.

¹⁰¹ In this case dependent on being ‘traditionally inhabited by substantial numbers’ of persons belonging to minorities—unlike Article 10.2., inhabitation and numbers are cumulative requirements.

¹⁰² Paragraph 3.

of Article 11, providing for official recognition of minority names, allows these to be transcribed into the alphabet of the official language in their phonetic forms.¹⁰³ Relying largely on Article 11, the OSCE Oslo Recommendations interpret this requirement to mean additionally that the phonetic rendering ‘must be done in accordance with the language system and tradition of the national minority’.¹⁰⁴ This will be the case even if the minority linguistic system sits uneasily with the forms of the official language.¹⁰⁵ Paragraph 68 of the *Explanatory Report* also states that Article 11 means that persons who have been forced to change their names—perhaps under policies of forced assimilation—should have the right to revert to them. It must be supposed that in such cases any costs incurred in securing a reversion will fall on the authorities and not on the victims.

The question of minority language signs visible to the public draws the comment from the *Explanatory Report* that the right does not prevent the individual being required to use the official language in addition to the minority language.¹⁰⁶ As a blanket proposition, this cannot be right. While particular issues may be raised under health and safety, or signs using offensive language, these can be addressed by specific State legislation. On the other hand, many private signs (the name of a house, a poster in the window) are ‘visible to the public’, and there are clearly cases where there is no conceivable State interest in adding the official or other language. Some States reporting on this article indicate that the freedom to display is not subject to restriction.¹⁰⁷ Different issues are raised by paragraph 3, where the question is the public allocation of street names, etc., if there is sufficient demand. In this case, it is appropriate that the official or State language enters the equation. What is ‘sufficient’ will vary with the case;¹⁰⁸ questions of visibility of the respective language components of any signage will also be raised.¹⁰⁹ Erasing minority ‘footprints’ through changing names of towns, villages and historical sites can be part of a process of assimilation against the will of a minority.

¹⁰³ Paragraph 68. See also R. Hoffman (1999) ‘A Presentation of the Framework Convention ... and its Contribution to the Protection of Minority Languages’, in: *Implementation of the European Charter for Regional or Minority Languages*, Strasbourg: Council of Europe, pp. 21–24, 23.

¹⁰⁴ Oslo Recommendation 1 and Explanatory Report.

¹⁰⁵ This applies for example to non-Slovak female suffixes. Thus, the ‘female surname of a person other than Slovak nationality is written without the grammatical ending of Slovak declination’—in the event of various requests to that effect; *Initial Report of Slovakia*, 23. This is a question relating to ‘linguistic systems’.

¹⁰⁶ Paragraph 69.

¹⁰⁷ See, *Report of Finland*, 22; *Report of Hungary*, 99.

¹⁰⁸ Estonia requires place names in Estonian, unless an exception is ‘justified historically’—*Report*, 50; Finland adopts the lowest percentage rule for a minority population in a municipality to trigger bilingual signage rules—8% minority inhabitation—as well as all municipalities where over 3,000 inhabitants speak the other official language—*Report*, 22–23; Romania opts for 20% habitation—*Report*, 38; Slovakia also operates a 20% minority settlement rule for road signs—*Report*, 24; Ukraine appears to require a majority in a locality of members of a national minority—*Report*, 26; UK rules are generally permissive and devolve to local bodies (in Northern Ireland, adding a language implicates the agreement of ‘the occupiers of a street’)—*Report*, 37.

¹⁰⁹ Among reporting States, Denmark uniquely raises the issue of road safety for bilingual signs; *Report*, 37.

Article 12 provides that parties ‘shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority’. This is the Framework Convention’s account of ‘intercultural education’. Analogous provisions are found in the human rights canon.¹¹⁰ The aim, in the words of the *Explanatory Report* is to ‘create a climate of tolerance and dialogue’.¹¹¹ Provisions on intercultural education require balancing with provisions to strengthen the minority’s sense of itself. Accordingly, the Convention makes provision in Article 13 for the setting up private educational establishments, and learning minority languages—Article 14. Apart from the general right ‘to learn his or her minority language’,¹¹² the parties shall endeavour to ensure, in minority ‘areas’ and within the framework of their education systems, that minorities ‘have adequate opportunities for being taught the minority language or for receiving instruction in this language’, without prejudice to learning or teaching in the official language.¹¹³

The education provisions look tentative and ambiguous. The draconian statement in Article 13.2. that the right to set up private institutions ‘shall not entail any financial obligation’ for the parties may be incorrect for many practical situations. As the *Explanatory Report* notes in respect of para. 1, the principle of nondiscrimination enters the equation when considering minority education.¹¹⁴ It can be argued that, in conformity with this principle, when States subsidise the education of some groups, they would be obliged to consider subsidising others.¹¹⁵ The wording of the language learning provisions appears to visualise (a) being taught the minority language as any language; or (b) being taught through the medium of the minority language’. In which case, like its equivalent in the UNDM, it is inexpertly drafted, since the provision for learning through the minority language comes across as a vague injunction concerning ‘instruction’. Assuming that alternatives (a) and (b) are indicated, there appears to be no obligation to support education through the medium of a minority language. The *Explanatory Report* observes in para-

¹¹⁰ See, for example: Article 4 of the UNDM, paragraph 34 of the OSCE Copenhagen Document, and Articles 27 and 31 of ILO Convention No. 169 on Indigenous and Tribal Peoples.

¹¹¹ Paragraph 71.

¹¹² Article 14.1.

¹¹³ Article 14.2. and 14.3. The *Explanatory Report* (paragraph 78) observes that ‘knowledge of the official language is a factor of social cohesion and integration’.

¹¹⁴ Paragraph 72. For recent experience of the UN Human Rights Committee, see *Waldman v. Canada*, UN Doc. CCPR/C/67/D/694/1996, Views of the Committee on 3 November 1999; and *Tadman et al. v. Canada*, UN Doc. CCPR/C/67/D/816/1998, Views of the Committee on 29 October 1999.

¹¹⁵ Here, the Hague Recommendations make two pertinent points: (i) the setting up of private schools should not be inhibited by unduly burdensome regulations (Recommendation 9); (ii) minority education institutions (or promoters) are entitled to seek funding from the State or elsewhere (Recommendation 10). A number of States report that they subsidise private minority education—Czech Republic, *Report*, 35-36; Denmark, *Report*, 40; Hungary, *Report*, 120-22; Slovakia, *Report*, 29; UK, *Report*, 32. For a broad review, see: *Report on the Linguistic Rights of Persons belonging to National Minorities in the OSCE Area* (1999) The Hague: OSCE High Commissioner on National Minorities.

graph 77 that there is nothing to prevent a State from implementing (a) and (b), perhaps through the medium of bilingual instruction.¹¹⁶

The assumption of the Convention seems to be that minority and official languages stand opposed; that capabilities in one diminish the standards of the other. The Hague Recommendations attempt to countermand this perception by suggesting a scheme whereby being comfortable in the minority language leads to confidence in mastering the State language. The Hague approach is partly grounded in an interpretation of the Framework Convention, but reaches out to 'relevant international norms' interpreted in the light of educational research.¹¹⁷ The Framework Convention makes no comment on levels of education. Nor does it comment on the drafting of curricula which particularly concern minorities—including the general curriculum to the extent that minority cultures are 'represented' therein. However, the participation provisions of Article 15 suggest, *de minimis*, that minorities should have input into curricula, making education more responsive to their interests and concerns.

In minority affairs, education issues are often delicately balanced between integration and separation.¹¹⁸ If integration is pushed too far, the result is assimilation and the disappearance of the minority as a distinct culture; a policy of separation, on the other hand, can lead to a ghetto culture of withdrawal from society.¹¹⁹ Education is a powerful instrument for the achievement of social engineering. The Convention suggests ways and means through which a balance is to be achieved between the 'separate domain' reserved to the flourishing of minority culture, and the 'common domain' of shared rights and responsibilities.¹²⁰ The Convention's premises are that identity is shaped through interaction with others and that identity is multiple or hybrid:¹²¹ that each person may be touched by a

¹¹⁶ The fact that there is a general provision on language learning in paragraph 1 of Article 14 suggests that the provisions in paragraphs 2 and 3 of that article, which are restricted to minority 'areas', must add something significant to the 'basic right' in paragraph 1. This should mean the right to have education (instruction) through the medium of the minority language, subject to the conditions in paragraphs 2 and 3. We may call this the strong conclusion. The distinction between paragraphs cannot imply, as the *Report* appears to suggest (paragraph 74), that the State under paragraph 1 is in effect obliged to nothing. The *Report* does not draw the strong conclusion in respect of paragraphs 2 and 3.

¹¹⁷ Hague Recommendations 11-18 and Explanatory Report.

¹¹⁸ N. Dimitrov (1999) *The Framework Convention*, Skopje and Melbourne: Matica Makedonska, pp. 173.

¹¹⁹ The anxieties of governments—and the need for balance—are reflected in the Romanian Law on Education (1995, as amended in 1995), Article 12 (2) of which provides that the 'organisation and content of education shall not be structured according to exclusivist and discriminatory criteria of an ideological, political, religious or ethnic nature ...'. Such provisions can result in the disablement of institutions of minority education. Accordingly, the provision (necessarily) adds that 'Educational units and institutions established for religious or linguistic reasons in which education is provided in accordance with the choice of pupils' parents or legal guardians shall not be regarded as structured according to exclusivist or discriminatory criteria'—*Initial Report*, 42.

¹²⁰ A. Eide (1993) *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, UN Doc. E/CN.4/Sub.2/1993/34, section II.

¹²¹ C. Taylor (1991) *The Ethics of Authenticity*, Cambridge, MA and London: Harvard University Press.

complex of influences, from family to neighbourhood, through ethnic group, religion and the wider society of the State—as well as the cosmopolitan ideals of human rights.¹²² The education (and other) provisions should be seen as opening up possibilities of individual self-authorship in conjunction with community survival and the aspirations of States to a coherent and functioning democratic polity.

v) *Obligations of Minorities*

While it does not elaborate a special principle to promote the ‘loyalty’ of minority members to their ‘host-State’, the Convention approaches the question of ‘duties’ in Article 20:

In the exercise of the rights and freedoms ... in the present Framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities.

The loyalty of minorities has not been an explicit demand of international human rights law.¹²³ Duties are expressed in general phrases in the Universal Declaration of Human Rights—Article 29 of which states that ‘everyone has duties to the community’, and in general citizenship legislation. Loyalty-type provisions tend to ‘appear’ in instruments on minority rights because of sensitivities about self-determination, secession, etc., despite the often separation of the issues in international discourse.¹²⁴ While no objection may be taken to members of minorities respecting the rights of others, respect for ‘national legislation’ as a treaty demand raises questions. What if the national legislation does not respect the rights of members of minorities? Are minorities placed under an obligation to ‘respect’ when others are not? The rights in the Convention are in no sense ‘conditional’ on respecting the ‘national legislation’.

The *Explanatory Report* offers limited guidance to the application of the provision, noting that ‘this reference to national legislation clearly does not entitle Parties to ignore the provisions of the ... Convention’.¹²⁵ Thus far, few States have reported explicitly on Article 20, which perhaps indicates that they do not perceive any pressing problems. For example, Ukraine reports that its ‘citizens of all nationalities ... are obliged to observe the Constitution and laws of Ukraine, to defend its State sovereignty and territorial integrity, to respect languages, cultures, traditions, customs, religious originality of the Ukrainian people and all national minorities’¹²⁶ a provision not directed specifically at minorities.

¹²² Cf. Article 26 (2) of the Universal Declaration of Human Rights: ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote tolerance and friendship among all nations, racial or religious groups ...’

¹²³ For an appreciation of the issues, see various references in J. Jackson Preece (1998) *National Minorities and the European Nation-States System*, Oxford: Clarendon Press.

¹²⁴ See, for example, the opening paragraphs of General Comment 23 of the Human Rights Committee, *supra*,.

¹²⁵ Paragraph 89.

¹²⁶ *Initial Report*, 35.

vi) *Implementation*¹²⁷

The Convention sketches an outline of an implementation mechanism.¹²⁸ Article 25.1. provides that, within one year from the Convention coming into force for the Contracting Party, State reports are to be transmitted to the Secretary-General of the Council of Europe, who will transmit them to the Committee of Ministers (COM). Further information of relevance to the implementation of the Convention will be transmitted 'on a periodical basis' and 'whenever the Committee of Ministers so requests'.¹²⁹ The COM is assisted by an Advisory Committee (AC), 'the members of which shall have recognised expertise in the field of protection of national minorities'.¹³⁰ *Ex facie*, the supervision of the Convention is entrusted to the political wisdom of the COM, with the AC playing a subordinate role. These heavily criticised arrangements were developed in less ostensibly political directions through a set of rules adopted by the COM in 1997 on the basis of preparatory work by an ad hoc committee (CAHMEC) with a significant input from the Parliamentary Assembly and expert opinion. While the rules augment the transparency and impartiality of the mechanism, its 'success' will be assessed on the basis of its eventual 'track record'.

Essential points in the rules concern publicity and NGO input. The provisions on publicity for reports state that they can be made public on receipt by the Secretary-General of the Council of Europe and that opinions of the AC can be made public at the same time as recommendations of the Committee of Ministers. According to the provisions for consultation with NGOs—the AC may *receive* information from other sources than state reports, and can *invite* information from other sources unless 'otherwise directed' by the COM; however, the AC must obtain a specific mandate if it wishes to *hold meetings* with other sources for purposes of ascertaining information.¹³¹ Additionally, the AC can call on the COM to mandate an ad hoc report, and be involved in monitoring 'follow-up' to the conclusions and recommendations as instructed by the COM. The rules also gave the Advisory Committee the responsibility of drawing up its own rules of procedure¹³² these were adopted by the Committee in October 1998.¹³³ The AC may seek the assistance of outside experts and consultants, and co-operate, etc., with other Council of Europe bodies. The AC is to be kept aware of cases of non-submission of reports, and can propose measures. Outlines for reports have been adopted by the Committee of Ministers;¹³⁴ the Advisory Committee emphasises that these are for initial reports only.¹³⁵

¹²⁷ For a review of the initial working of the Convention mechanism, consult the *First Activity Report of the Advisory Committee, 1 June 1998-31 May 1999*, ACFC/INF (99) 1def., 15 September 1999.

¹²⁸ The Convention and associated documents are brought together in *Framework Convention for the Protection of National Minorities: Collected Texts* (1999) Strasbourg: Council of Europe Publishing.

¹²⁹ Article 25.2.

¹³⁰ Article 26.1.

¹³¹ Rule 32. Such meetings shall be held in closed session.

¹³² Rule 37.

¹³³ *Collected Texts*, 64-71.

¹³⁴ 642ND meeting of Ministers' Deputies, 30 September 1998.

¹³⁵ *First Activity Report*, paragraph 11.

The first year of operation of the Advisory Committee saw the setting up of various procedures and processes. In general, the Committee observes that in almost all cases, additional information has been sought from the country concerned—data which mainly relates to the application of norms in practice.¹³⁶ In-country meetings have been held.¹³⁷ The Committee argues the usefulness of involving NGOs and minority groups in processes leading to State reports, and decided that contacts with independent sources should be a regular feature of its work. Information is sought from nongovernmental sources as well as official reports, and meetings have been held with concerned groups.¹³⁸ The Committee of Ministers is not informed on every occasion about NGO contacts; instead a ‘blanket’ notification to the Committee of Ministers covers the monitoring cycle. ‘Parallel’ reports from various NGOs have been submitted to the Advisory Committee.¹³⁹ Initially at least, and in the interests of consistency, the Committee decided to group together a set of opinions on the country reports, rather than submit separate single opinions.¹⁴⁰ The President of the Advisory Committee has argued that the Committee is under-resourced: a Secretariat of three administrators ‘is clearly inadequate and needs to be augmented as a matter of urgency’.¹⁴¹ He issued the following warning:

‘The recent events in Kosovo and elsewhere demonstrate all too clearly the high costs that result from ignoring minority protection. If we do not provide consistent, vigorous monitoring, a human rights problem may develop into a full-blown crisis, and by then it is already too late for the monitoring mechanism ... to intervene effectively’.

Minority Rights: An Unfinished Story

The above sketch of minority rights is limited in scope. It has not been possible to say enough about the abiding importance of nondiscrimination as an essential first step in protecting minorities. Many practical problems of minority rights can be ‘solved’ (in a technical sense) by the application of non-discrimination without more. But there are cases where groups ask for explicit ‘recognition’ in law and practice, for sensitivity to their voices, and opportunities to promote their character and culture—not merely to be tolerated by others. These demands and desiderata are the stuff of minority rights instruments, symbols of that recognition and care. In a longer work, the relationship between minorities and genocide would be a subject of concern, and the relevance of basic freedoms for all, and of democracy. The reader may also wish to know more about the relationship between minorities and indigenous peoples, and the adaptation of principle that

¹³⁶ *First Activity Report*, paragraph 17.

¹³⁷ *Ibid.*, paragraphs 19-20—in Finland, Hungary and Slovakia.

¹³⁸ *Ibid.*, paragraph 20.

¹³⁹ Speech by the President of the Advisory Committee, Prof. R. Hoffman, to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 6 April 2000.

¹⁴⁰ *Activity Report*, paragraph 21.

¹⁴¹ Hoffman speech.

being indigenous requires, in Europe as elsewhere.¹⁴² The boundaries of any outline of minority rights are contestable. Whether we take it from the angle of lightening oppression or domination of groups, or their right to self-gathering and self-development, the range of human rights which potentially affect minorities is indeterminate.

Despite the range of possibilities, contemporary minority rights texts are broadly similar (a 'family of resemblances'), and work with a limited palette. The texts are very general, addressing the complex taxonomies of minorities with norms of general guidance. They focus on definition, existence and membership in only slightly different ways, while the absence of common definitions is noticeable. There are indeed definitions: 'scientific' and 'official',¹⁴³ but the major instruments avoid them. A possible reason is that governments may be tempted to define narrowly, as if they are not convinced about pluralism, and can more easily manage (or think they can) a 'homogeneous' nation, even if it is only homogeneous in their ideology. Definitions abound at the domestic and community levels. Their absence at the level of international law is partly accounted for by the nature of the system, which remains essentially dynamic and fluid, allowing for development, change and adaptation. Another reason is something to do with people having the capacity to define themselves, to say who they are as persons and collectives. The legal point is that all definitions are open to international scrutiny, and that the 'resolution' of a definition puzzle is conceived as a dialogic exercise. It is also the case that, while self-identification as a private exercise is unassailable, when it engages the responsibilities and resources of the State, the latter is also entitled to a view.

The instruments suggest reflection on individual and collective rights. The question exercises the Liberals, Communitarians, and the rest of the motley crew. 'Differentiated' texts of minority rights employ the formula of individual rights collectively exercised, making it clear that the rights belong to persons. *Ex facie*, they do not deal with group rights in the corporate sense. There are three basic reasons. The first is that the corporate conception challenges State monopoly on power and loyalty, purporting to create an 'entity' with a legal and moral existence, capable of reaching international law directly over the heads of governments. The second is self-determination: it is sensed that reifying the group will contribute to the intensification of its potential for separatism. This also affects perceptions of the legitimacy of autonomy—applauded but not mandated by interna-

¹⁴² The present author is in the course of writing a book on '*International Law and Indigenous Rights*' to be published by Manchester University Press in 2001. European indigenous peoples include the Sami of Fennoscandia and Russia. There are many more such groups, particularly in the area of the former USSR.

¹⁴³ The most famous is by Capotorti, who defined a minority for the purposes of Article 27 of the ICCPR as: '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'—*Study on the Rights of Persons Belonging to ... Minorities* (1991) (New York: United Nations, paragraph 568. The UN Human Rights Committee has not accepted the need for members of a minority to be nationals of the State in order to claim Article 27 rights—General Comment 23, *supra*.

tional law.¹⁴⁴ The third is cultural—the literature is full on ‘cultural relativism’, often and unfairly carrying the assumption that minorities are peculiarly oppressive of women, dissidents, etc. All this washes over minority rights with insinuations of inadmissible practices. There is even a literature on ‘the minority within the minority’—a much theorised oppression, as if no government ever oppressed its people.¹⁴⁵

The formal absence of group rights does not mean that the group goes unregarded. In cases on Article 27 of the ICCPR, the Human Rights Committee has attempted to balance questions of group survival against individual choice. The shade of group rights haunts the text; efforts to exorcise it look doomed to fail. Dealing with minority rights through relentless insistence that they are rights not of minorities but of persons belonging to minorities has its limitations. Other instruments are bolder: UNESCO declares that cultures have a value; treaties and declarations on indigenous peoples address indigenous peoples as holders of rights.

A further point is that minority rights—with difficulty—have penetrated the public realm. The texts are at their most grudging when minority language meets the government office, when minorities challenge for resources, when they claim participation in decision-making, when they claim to mark the landscape with their names and their history. On the other hand, to ‘privatise’ minority rights would be the end. The texts have made small moves in the direction of pluralising the public domain so that it comes to represent the social and cultural pluralism of the people. Minority rights are anti-totalitarian, and against mega-projects of social or other engineering unless the ethnic dimension is seriously addressed, or just against mega-projects. The stress on participation skirts the notion of deliberative democracy, listening to subaltern voices tell the story of the nation.

While in the nature of things, minorities may have more need of the world’s attention than the comfortable, the world’s oppression is not unique to minorities. Derrida paints a dramatic picture:

Never have violence, inequality, exclusion, famine, and ... economic oppression affected as many human beings in the history of the earth and humanity ... let us never neglect this macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated.¹⁴⁶

In this theatre of cruelty, the provisions of minority rights instruments can appear ‘light’, frothy, superficial, dealing with superstructural questions of culture and language. Derrida’s macroscopic drama can be set alongside Eagleton who writes that:

¹⁴⁴ Cf. M. Suksi (ed.) (1998) *Autonomy: Applications and Implications*, The Hague: Kluwer.

¹⁴⁵ Among many contributions, see: L. Green (1994) ‘Internal Minorities and their Rights’, in: J. Baker (ed.), *Group Rights*, Toronto, Buffalo, London: Toronto University Press, pp. 100-17.

¹⁴⁶ J. Derrida (P. Kamuf, trans.) (1994) *Specters of Marx*, p. 85, cited in: S. Marks (1997) ‘The End of History? Reflections on Some International Legal Theses’, 3 *E.J.I.L.*, 449-77, at 457.

Culture is not only what we live by. It is also, in great measure, what we live for. Affection, relationship, memory, kinship, place, community, emotional fulfilment, intellectual enjoyment, a sense of ultimate meaning.¹⁴⁷

There is also the point that ethnicity may not be ‘light’ to others. Ethnicity and the perception of ‘otherness’ are distinctive bases of oppression and underprivilege. Poverty results from cultural disintegration. Subordinate groups need cultural confidence. The Roma are only one such case. Cultural self-determination, in negotiation with the norms of the broader community, is a mode of resistance to the narratives and stereotyping of others and of engaging their respect. We should nevertheless be cautious about overvaluing those like ‘ourselves’—Eagleton again:

Yet culture can also be too close for comfort. This very intimacy is likely to grow morbid and obsessional unless it is set in an enlightened political context, one which can temper these intimacies with more abstract, but also in a way more generous, affiliations.¹⁴⁸

It may be that in time the intensity of contemporary focus on minority rights will lessen. If the forces of nation-building and other totalising ideologies are weaker, then hitherto oppressed cultures will flourish again. Forms of domination vary, and the role of States is ambivalent. If threats to minorities emanate from the State, minority groups and a supportive civil society will appeal and resist. If threats emanate from transnational corporations, the continuing support of the State is vital. In the working through of international standards on minority rights, governments have modified their behaviour, if somewhat unevenly: the glass is half-empty and half-full. Identity politics is not the only politics, is more than merely reactive, and looks set to endure. Identities are strategic, but also primordial: the paradigm of the self-inventing cosmopolitan does not address the sheer quiddity of things, the burden of materiality that presses the lives of many people.

Rights talk is not the only avenue for cultural groups. Rights are necessary now, but can be confrontational, egotistic, a kind of *Kulturkampf*. Other languages—duty, *agape*, virtue—may eventually come to illuminate the politics. The ‘communitarians’ already speak of the need for a Copernican turn to duties; the religious concur. Education is a key, including ‘education of the sentiments’.¹⁴⁹ But it seems that the language of human rights will not easily be discounted. It is effectively the only transnational language for the negotiation of values that we possess. Even in a distorted, imperfect way, a spectrum of nations or ‘civilisations’ has already contributed to its development. If ‘rights’ are to continue to hold emotional sway, it is salutary to remember from where they came: from the sense of right not as weapons but as rightness, right ordering, just states of being. If it is to this justice that we aspire, minority rights are a means to that end, not the end in itself.

¹⁴⁷ T. Eagleton (2000) *The Idea of Culture*, Oxford: Blackwell Publishers, pp. 131.

¹⁴⁸ *Ibid.*

¹⁴⁹ Rorty, *supra*, n. 4.

Further reading

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