MINORITY PROTECTION IN POST–APARTHEID SOUTH AFRICA

Kristin Henrard

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Human Rights, Minority Rights, and Self-Determination

Kristin Henrard

Perspectives on the Twentieth Century
Edward Beauchamp, Series Adviser

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Chapter 1 of this book contains a summary of Kristin Henrard's *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague: Kluwer Law International, 2000).

I would like to dedicate this book to all my South African friends who have continuously supported my work, and more specifically to Ross Kriel, Fatima Laher, Mutle Mogase, and Judge Johann Kriegler.

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Series Foreword

Whoever frst coined the phrase, ‘‘When the siècle hit the fin,” described the twentieth century perfectly! The past century was arguably a century of intellectual, physical, and emotional violence unparalleled in world history. As Haynes Johnson of the *Washington Post* has pointed out in his *The Best of Times: The Clinton Years* (2001), “since the first century, 149 million people have died in major wars; 111 million of those deaths occurred in the twentieth century. War deaths per population soared from 3.2 deaths per 1,000 in the sixteenth century to 44.4 per 1,000 in the twentieth.”[1] Giving parameters to the twentieth century, however, is no easy task. Did it begin in 1900 or 1901? Was it, as in historian Eric Hobsbawm’s words, a “short twentieth century,” that did not begin until 1917 and end in 1991?[2] Or was it more accurately the “long twentieth century,” as Giovanni Arrighi argued in *The Long Twentieth Century: Money, Power, and the Origins of Our Times?*[3] Strong cases can be made for all of these constructs and it is each reader’s prerogative to come to his or her own conclusion.

Whatever the conclusion, however, there is a short list of people, events, and intellectual currents found in the period between the nineteenth and twenty-first centuries that is, indeed, impressive in scope. There is little doubt that the hopes represented by the Paris Exhibition of 1900 represented the mood of the time—a time of optimism, even utopian expectations, in much of the so-called civilized world (which was the only world that counted in those days). Many saw the fruits of the Industrial Revolution, the application of science and technology to everyday life, as having the potential to greatly enhance life, at least in the West.

In addition to the theme of progress, the power of nationalism in conflicts—not only over territory, but also economic advantage and intellectual dominance—came to characterize the last century. It was truly a century of war, from

the "little," wars of the Balkans and colonial conflicts of the early 1900s to the "Great," War of 1914–1918 that resulted in unprecedented conflict over the remainder of the century.

Every century has its ''great," as well as "infamous," individuals, most often men, although that too would begin to change as the century drew to a close. Great political figures such as Lenin, Trotsky, Stalin, Hitler, Mussolini, Churchill, the two Roosevelts, de Gaulle, Adenauer, Mahatma Gandhi, Mao Tse-Tung, Ho Chi Minh, and others were joined in the last part of the century by tough competent women like Golda Meir, Indira Gandhi, Margaret Thatcher, and scores of others who took the reigns of power for the first time.

A quick listing of some major events of the century includes World War I, the Russian Revolution, the Rise of Fascism, the Great Depression of the 1930s, the abdication of Edward VIII, Pearl Harbor and World War II, the unleashing of atomic bombs on Hiroshima and Nagasaki, the long Indochina War, the Cold War, the rise of nationalism (with an increase in nation states from about fifty to almost two hundred), the establishment of Israel, the triumph of the free market, an increasingly strident battle between religious fanaticism and secular preferences, and on and on. At the same time that these events occurred, there was a great creative flourishing of mass entertainment (especially television and the Internet), not to mention important literary, dramatic, cinematic, and musical contributions of all kinds.

These elements incorporate some of the subject matter of this new series focusing on "Perspectives on the Twentieth Century," which strives to illuminate the last century. The editor actively seeks out manuscripts that deal with virtually any subject and with any part of our planet, bringing a better understanding of the twentieth century to readers. He is especially interested in subjects on "small," as well as "large," events and trends, including the role of sports in various societies, the impact of popular music on the social fabric, the contribution of film studies to our understanding of the twentieth century, and so on. The success of this series is largely dependent on the creativity and imagination of its authors.

Edward R. Beauchamp

NOTES

1. Haynes Johnson, *The Best of Times: America in the Clinton Years* (New York: A James H. Silberman Book, Harcourt, Inc., 2001), p. 3.
2. Eric Hobsbawm, *The Age of Extremes: A History of the World, 1917–1991* (New York: Pantheon, 1994).
3. Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (London: Verso, 1994).

Preface

Prior to expressing words of gratitude towards several of the persons in South Africa who have helped me with my research for this book, it seems appropriate to thank the Flemish Government for enabling me to take up a six-week internship at the Constitutional Court of South Africa and for financing the months that I monitored the constitutional negotiation process in 1996.

During my numerous and often long research periods in South Africa I have benefited from the valuable support of Judges Kriegler and Sachs of the Constitutional Court of South Africa. I have also had extensive help from several academics at South African Universities and more specifically from Iain Currie, Jonathan Klaaren, John Dugard, Sharack Gutto, and Nazir Carrim at the University of the Witwatersrand; Rassie Malherbe, Deon Geldenhuys, George Barrie, and Ich Rautenbach at Rand Afrikaans University; Johann van der Westhuizen, Christoph Heyns, Johan Beukman, Nic Olivier, and Sarie Berkman at the University of Pretoria; Dawid van Wyk and Johan Potgieter at the Universita of South Africa; Gerhard Erasmus, Willie Breytenbach, Hennie Kotze, and Laurens du Plessis at the University of Stellenbosch; Tom Bennett, Herman Giliomee, Neville Alexander, and Ana Deumert at the University of Cape Town; David Gough, Terry Volbrech, and Zubeida Desei at the University of the Western Cape; Gerhard Mare at Natal University and finally Theo Du Plessis and Hennie Strydom at the University of the Free State.

I also would like to mention the substantial and ongoing assistance that I received from several members of the Department of Education (Markie Lane, Rueben von Rensburgh, Eben Boshoff, and Trevor Coombe), of (Justice and) Constitutional Development (Johan Beukman, Ando Donkers, Marius Steyn, John Meiring, and Nic Olivier); of Arts, Culture, Science and Technology

(Anne-Marie Beukes). Equally valuable have been the numerous contacts and discussions with Gordon Hollamby and Tienie Cronje of the South African Law Commission, John Pampallis of the Centre for Education Policy Development, Advocate Bertelsmans, Paul Muskar, and Carol-Anne Spreen. Last but not least, I want to pay a special tribute to the previous Minister of Justice, Dullah Omar, who has helped me in numerous ways throughout my research for this book.

Penultimately, I want to convey my gratitude to Erik Koppe and Ronald and Janet Bijleveld for helping me out with computer-related problems and also to my English-speaking friends who have proofread the chapters for linguistic corrections, more specifically Adam Watson, Ross Kriel, Fatimah Laher, Gareth Davies, and Ivor Chipkin.

Finally, I want to acknowledge that the research for and writing of this book would not have been possible without the support of the Council for Scientific Research of Flanders, neither without the integration in the Department of Public Law at the Catholic University of Leuven and later in the Department of Constitutional and International Law at the University of Groningen.

Abbreviations

ANC	African National Congress
CA	Constitutional Assembly
CODESA	Congress for a Democratic South Africa
CP	Constitutional Principle
DA	Democratic Alliance
DACST	Department of Arts, Culture, Science and Technology
DP	Democratic Party
ECHR	European Convention on Human Rights
European Language Charter	European Charter for Regional and Minority Languages
Framework Convention	Framework Convention for the Protection of National Minorities
FF	Freedom Front
GNU	Government of National Unity
HSRC	Human Science Research Council
ICCPR	International Covenant on Civil and Political Rights
IFP	Inkatha Freedom Party
KAS	Konrad Adenouer Stiftung
LANGTAG	Language Plan Task Group
MPNP	MultiParty Negotiating Process
NCOP	National Council of Provinces
NNP	New National Party

NP	National Party
PAC	Pan-African Congress
PANSALB	Pan-South African Language Board
SALC	South African Law Commission
UDM	United Democratic Movement
UN Declaration on Minorities	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Introduction

Considering the phenomena of aggravated new forms of discrimination, massive ethnic cleansing, and a resurgence of nationalism, there is ample justification to dwell on issues of minority protection and the closely related issues concerning the accommodation of population diversity within state borders. This book focuses on the South African approach to minority protection against the background of a more theoretical framework that is set out in the first chapter.[1] There are several reasons why South Africa makes an interesting case study in this regard. The country has to deal with the legacy of apartheid, which abused minority rights and identity rhetoric extensively. It is furthermore still going through a massive transformation process geared towards nation building, the realization of real, substantive equality and full democratization, while trying out and developing a diversified set of measures to cope with its population diversity.

The aim of this work is thus to study the development and implementation of these national measures and to evaluate whether and to what extent they contribute to minority protection and the accommodation of the country's population diversity. At the same time, the measures concerned will be set against the theoretical framework and an assessment will be made of the extent to which the developments in post-apartheid South Africa reflect an acknowledgement of the interrelation between individual human rights, minority rights, and the right to self-determination for an adequate minority protection.

The first chapter sets out the broad theoretical framework against which the case of post-apartheid South Africa will be studied. The second chapter then turns to the case study of South Africa and covers several issues. In a first section the choice of South Africa as case study is justified. Secondly, a short description is given of the scope of the minority phenomenon that is studied in this country.

Subsequently, certain aspects are discussed of South African history that are relevant from a minority protection angle. The third chapter goes on to discuss the constitutional negotiations leading up to the 1993 or interim Constitution, while the fourth chapter covers the next and even more important step of the constitutional negotiation process, namely the negotiations preceding the adoption of the 1996 or so-called final Constitution. The substantive analysis of the numerous and diversified constitutional approaches adopted to accommodate South Africa's population diversity is also covered by the latter chapter. The following chapter evaluates the constitutional foundations of post-apartheid South Africa's overall approach to minority protection/accommodation of population diversity. This evaluation is first of all in terms of the right to identity of minorities and subsequently more explicitly in terms of the interrelation between individual human rights, minority rights, and the right to self-determination for an adequate system of minority protection. The final chapter deals with the implementation phase of the several constitutional policies that are relevant from a minority protection angle. Also in this chapter both the analysis and evaluation are in terms of the right to identity of minorities and the interrelation between individual human rights, minority rights, and the right to self-determination. Finally, a conclusion is formulated.

NOTE

1. The theoretical framework is fully developed in K. Henrard, *Devising an Adequate System of Minority Protection*, Kluwer, London, 2000.

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1
Theoretical Framework

INTRODUCTION

This chapter contains the broad theoretical framework regarding minority protection that will form the background of the case study on post-apartheid South Africa.

A concise overview of the historical developments regarding minority protection is followed by an exposition of the two basic principles of a full-blown system of minority protection. Subsequently the right to identity of minorities and the principle of substantive equality are focused upon, the latter not only being the goal but also the basis for restrictions of minority protection measures. A succinct discussion of the meaning of the concept "minority," precedes the analysis of the respective contribution to minority protection of individual human rights, minority rights, and the right to self-determination. Throughout this analysis the theme of the interrelation between the three categories of rights to obtain an adequate system of minority protection is developed. The theme implies that while each of these three categories of rights (to the extent that they concern members of minorities) contributes to minority protection an adequate system of minority protection would require a combination of all three.

CONCISE OVERVIEW OF THE HISTORICAL DEVELOPMENTS REGARDING MINORITY PROTECTION

Documents regarding minority protection can be found dating back from before the League of Nations. They are mainly bilateral treaties that were especially focused on religious minorities and aimed at the protection of freedom of religion of their members.[1] However, it is most of all the network of regulations

at the time of the League of Nations following World War I that brought the issue of minorities to the forefront.[2]

The idea behind the provisions on minority protection in the minority treaties, the peace treaties, and certain unilateral declarations of the League was that the thus established minority protection mechanisms would prevent these population groups from developing into a factor of instability.

There was definitely no attempt to formulate generally binding regulations on minority protection. To the contrary, each of the different instruments regulated the situation of specific states and certain population groups within them.[3] As a minority's right to identity is a central concept in this work, it is relevant to emphasize that whereas the right to identity was only generally protected by article 27 of the International Covenant on Civil and Political Rights (ICCPR), the minority provisions of the League of Nations are regarded as "designed to protect the right to an identity of the minorities concerned."[4]

It is generally acknowledged that the United Nations (UN) at its establishment after World War II took a completely different approach to issues of minority protection than had the League of Nations. The initial point of departure for the UN was that the principles of universal respect for the fundamental human rights and freedoms, in combination with the prohibition of discrimination, would also be the solution for the minorities issue. In this way, the rights of individuals would be protected in a sufficient way to realize all the rights desired by minorities.[5]

However, it was soon realized that the protection of minorities is a delicate matter that deserves special attention. A certain degree of interest in and attention for the minority issue had come to the forefront in the mandate of the UN Commission on Human Rights[6] as well as the establishment of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1947.[7] The further development of the special attention to minorities is reflected in article 27 ICCPR and the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the UN Minorities Declaration).

THE TWO PILLARS OR BASIC PRINCIPLES OF A FULL-BLOWN SYSTEM OF MINORITY PROTECTION AND THE PRINCIPLE OF SUBSTANTIVE EQUALITY

A full-blown system of minority protection is described as a conglomerate of rules and mechanisms enabling an effective integration of the relevant population groups and allowing them at the same time to retain their separate characteristics. Such a system would be based on two pillars or basic principles: the prohibition of discrimination on the one hand and measures designed to protect and promote the separate identity of the minority groups on the other.

The first pillar deals with the rules that are expressions and further elaborations of the prohibition of discrimination. Such rules guarantee formal equality and at the same time are conclusive to substantive equality. They are, consequently,

considered to be a necessary prerequisite of the second pillar referring to rules that are actively geared towards realizing substantive equality. Substantive or real equality can require a differential treatment regarding people in different circumstances. For (members of) minorities these rules would be focused on obtaining or even guaranteeing appropriate means to retain and promote their separate characteristics.[8] The second pillar presupposes the existence of the first one and builds on its *acquis* (essence and achievements) without contradicting it.

The double track of minority protection was clearly expounded the first time by the Permanent Court of International Justice (PCIJ) in its advisory opinion regarding the minority schools of Albania[9] and was also taken up by the UN during the first session of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.[10]

It is currently generally accepted that each system of minority protection should follow this double approach. It is also important to emphasize that both pillars, the nondiscrimination principle in all its manifestations and the special minority measures, can be considered to be implementations of the equality principle.[11] Nevertheless, the second pillar or the special measures for (members of) minorities is not entirely uncontroversial. Certain authors still argue that the protection offered by the equality principle in combination with individual human rights is sufficient for minorities in that no special measures would be needed.[12]

THE RIGHT TO IDENTITY OF MINORITIES AND THE PRINCIPLE OF SUBSTANTIVE EQUALITY AS GOAL AND LIMITATION OF MINORITY PROTECTION MEASURES

As the right to identity and the principle of substantive equality are key concepts in this work, some further considerations in this regard are appropriate.

Article 27 ICCPR,[13] the international law provision on minority rights par excellence, is generally referred to when the right to identity is directly related to minority protection. Although this article does not mention that right explicitly, it is nevertheless generally claimed that ‘‘article 27 is concerned with the right to identity of minorities even if this right is not named.”[14] More recent statements on the rights of minorities contain even explicit affirmations of this right to identity.[15] It can also be pointed out that, more generally, a clear trend can be noticed, inter alia, in the International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), and Organization for Security and Co-operation in Europe (OSCE), to the effect that “the right to identity has secured a prominent place in the discourse of human rights.”[16] The Badinter Arbitration Commission, established in 1991 by the EU in the wake of the breakup of Yugoslavia, explicitly recognized the right to identity of minorities as being part of the “peremptory norms of general international law.”[17]

In view of the sensitivity surrounding “special” measures for (members of) minorities, for the rest of the population of the state, and also for the states themselves, it is the more important to underline that the principle of substantive

equality is not only the basis for measures implementing the right to identity of minorities but at the same time confines the scope of such special measures.[18] Minority protection cannot be used to support claims for measures that would institute certain privileges for (members of) minority groups that cannot be justified by the demands of substantive equality. In this regard, one can think of some of the demands of a section of the Afrikaner minority in post-apartheid South Africa as they (might) reflect a desire to go back to apartheid times or preserve affluence and advantages obtained during apartheid.

DEFINITION OF THE CONCEPT, "MINORITY"

The point of departure in a discussion regarding the definition of the concept, "minority" is that up till now there has been no generally accepted definition at either the international or the European level.[19] There does seem to be a measure of agreement regarding certain elements of such a definition, even though some of these common elements are criticized and are not always interpreted in the same way.

Most of the time a distinction is made between objective and subjective components of such a definition.[20] The objective factors include the following features of minorities: having ethnic, religious, or linguistic characteristics differing from those of the rest of the population/the majority; being a nondominant, numerical minority; and finally, having the nationality of the state concerned. The subjective aspect of the definition demands that there is a sense of community and a collective will to preserve the separate characteristics/identity. The group dimension is an essential feature of the minority reality.

It should be underlined that at the European level, both in the OSCE[21] and the Council of Europe,[22] a transition towards a more pragmatic approach in this regard can be noticed, which also tends to take root at the international level.[23]

Regarding the objective factor of having separate characteristics, it should be pointed out that certain definitional proposals use "the rest of the population" as reference point, whereas others refer to the "majority of the state." The former has the advantage. It is easier to argue that the point of reference need not necessarily be one monolithic bloc but can consist of several ethnic, religious, or linguistic groups.[24] That argument is especially important for plural societies like South Africa, where there is no clear majority group, and all the ethnic, religious, and linguistic groups could be minorities insofar as they satisfy the other relevant conditions.[25]

The numerical minority position can be discussed from two angles: one regarding the suitability of a numerical threshold and one regarding the territorial reference base. It is very difficult to give an absolute number or a percentage[26] that can be used as numerical threshold, and consequently, it is not advisable to include such a threshold in the definition of minority. The size of the population group concerned has a legitimate role to play in the determination of the (extra) demands that can be made from the state: these demands should not be disproportionate to the concomitant benefits for that group.[27]

Furthermore, the reference to the "rest of the population of the state'' raises the interesting question whether a minority, including its numerical minority position, can be determined in comparison with the population of a region, a province, or some other kind of internal political structure within a state. The Human Rights Committee (HRC) adopts a rather restrictive stance in this regard as exemplified by its views in *Ballantyne et al. v Canada*.[28] According to the HRC, the English-speaking persons in the French-speaking province Québec cannot be considered a minority because they constitute the majority nationwide. Article 27 ICCPR would thus only apply to minorities identified at the national level.[29] Such an attitude is especially negative for population groups that are minorities in a certain region but constitute the majority nationwide.

The correct approach regarding the issue of regional minorities is arguably that the internal political entities should be taken as a frame of reference for the definition of minorities, when and insofar as these entities have certain concrete competencies that can influence the population group concerned.[30]

Nondominance is generally considered an essential component of a definition of "minority" and can consequently be found in most definitional proposals. The factor of a numerical minority position is closely related to the fact that the need to protect minorities is the result of their weak, vulnerable, and thus nondominant position.[31] It is exactly in these situations, in which the numerical minority rules the state, that the necessity of a further criterion becomes apparent. The criterion of nondominance denies the qualification "minority" to exactly such groups that obviously do not need special attention.[32] Suppressed majorities, to the contrary, can be argued to have rights going beyond those of minorities, such as the necessity for liberation and the right to rule themselves.[33]

A fourth factor that is often mentioned when discussing the concept of minority is that its members should have the nationality of the state of residence. Traditionally it was argued that the members of a certain population group should satisfy this nationality requirement for the group to be considered a minority. Although this argument is still rather prevalent,[34] it is becoming more and more controversial and has to contend with mounting criticism.[35] Nationality legislation is all too prone to manipulation by the state in that a state could easily exclude certain population groups from the status of minority and the concomitant protection, although these groups would otherwise qualify.[36] A nationality requirement is also difficult to satisfy by nomadic groups which are therefore de facto denied the status of minority.[37]

The Human Rights Committee has in two of its General Comments[38] explicitly opted for a concept of minority that is not limited to persons having the nationality of the state concerned. Although the question of whether or not minorities can also comprise groups of aliens is not yet conclusively answered, the stance of the Human Rights Committee arguably indicates that there is a tendency at the international level to answer it positively. The Committee also takes a very flexible stance regarding the related requirement of having durable ties with the state concerned in that it proclaims that the length of residence in the

state is irrelevant and that therefore immigrants and even visitors could qualify as minorities in the sense of article 27 (depending on the other factors).[39]

Finally, regarding the requirement of a collective will to preserve their own separate characteristics and identity, there should be scope for implicit ways of demonstrating that will, in that the mere continued existence of a group could be considered sufficient.[40] Indeed, several reasons can explain a "silence" of a minority. On the one end of the continuum, there is the possibility that the group accepts the status quo, but a silence can also be the result of certain political circumstances—as in an official policy of forced assimilation.[41]

The following will be used as working definition of the concept, "minority," in this book:

> [A] "minority" is a group numerically smaller than the rest of the population of a state. The members of this nondominant group have ethnic, religious, or linguistic characteristics different from those of the rest of the population and show, even implicitly, a sense of solidarity focused on the preservation of their culture, traditions, religion, or language.

There is ongoing debate about the relation between national minorities and ethnic minorities. It is often claimed that national minorities would have an extra dimension that ethnic minorities would not: national consciousness; group consciousness, often related to a political aspiration for a degree of autonomy: or even independence.[42] However, the official and other proposals of definition of national minority in the Council of Europe seem to reveal that both have more or less the same content, since not a single reference is being made to an additional element that would make ''national minorities" a special subcategory of "ethnic, religious or linguistic minorities."[43] Consequently, the concepts of national minority and ethnic, religious, or linguistic minority will be used as equivalents in this book. This approach can be considered as an additional element of the proposed working definition.

THE CONTRIBUTION OF INDIVIDUAL HUMAN RIGHTS TO MINORITY PROTECTION

Theoretical Considerations

The first pillar of a full-blown system of minority protection is the prohibition of discrimination, which is generally taken together with individual human rights. It has been argued in this respect that individual human rights are the *conditio sine qua non* for a proper system of minority protection.

The focus here will be on those human rights especially relevant for (members of) minorities because of their more or less pronounced connection with their right to identity. Whereas I limit myself here to the rights with a more obvious impact on minority protection, I have studied a broader set of human rights, and in more depth, elsewhere.[44]

A first set of human rights with special significance for minorities contains those that amount to a certain protection of the minority phenomenon, because they protect and enable the group dimension as well as the expression, and thus the continuation of the distinctive and separate convictions and ways of life of the respective minorities.[45] Freedom of expression and the effective protection of the expression of ideas and convictions that diverge from the majority's and also the freedom of association are essential for the protection and promotion of the separate identity of minorities.

Another set of rights is even more obviously related to the need for minorities to protect and promote their own, separate identity. They concern either specific identity characteristics on the basis of which minorities distinguish themselves from the rest of the population or mechanisms and institutions guaranteeing or improving the protection and promotion of their identity.[46] One can think of the right to privacy, the freedom of thought, conscience, and religion, and also all kinds of language rights and cultural rights. Since education is the most important general means for a group to preserve its own, separate identity,[47] the regulation regarding education is in many respects important for minorities.[48] The right to establish and administer private educational institutions, mother-tongue education, and the content of the public curriculum are some of the most relevant ones. Finally, the right to political participation is of special importance as it potentially enables minorities to have a say regarding matters of importance to them.[49]

The Human Rights Standards of the European Convention on Human Rights and the Concomitant Jurisprudence

The European Convention on Human Rights (ECHR) and the corresponding jurisprudence is arguably the most appropriate choice for analysis in view of the strong reputation of its system of protection and its legally binding supervision procedure. The point of departure of an analysis of the jurisprudence of the European Court (and the European Commission)[50] on Human Rights from the angle of minority protection is that the ECHR does not have a specific minority provision. Consequently, the Convention provides only a partial and indirect protection for members of minorities.[51] Whereas the thorough analysis of the relevant articles and concomitant jurisprudence can be found elsewhere,[52] I limit myself here to the conclusion resulting from that analysis.

The importance of human rights for the protection of (members of) minorities cannot be overemphasized.[53] The analysis and discussion of the articles of the Convention as well as the jurisprudence that might be relevant for members of minorities has revealed that approaching the minority issue merely through the prohibition of nondiscrimination and individual human rights is rather unsatisfactory.[54] The prohibition of nondiscrimination in itself does not guarantee the achievement of substantive equality, which is essential for members of minorities. Consequently, the avenue of individual human rights and the prohibition of

discrimination gives little support to the right to identity, which is crucial for minorities.[55] The right to identity of minorities presumably implies a right to the preservation and development of that separate identity, which in turn might require positive state intervention. Such positive measures are justified from the point of view of the prohibition of discrimination and even required by the principle of substantive equality.

The ECHR does not include, contrary to the International Covenant on Civil and Political Rights (ICCPR), an article granting rights to members of minorities, let alone to minorities as such. Furthermore, although the jurisprudence of the Court and the Commission reveals an enhanced awareness of the importance of a firm protection of the individual human rights of members of minorities since the mid '90s,[56] the tendency to be reluctant regarding demands of minorities for the preservation and development of their own identity as well as their specific ethnic, religious, or linguistic characteristics persists.

The protection flowing from article 14's prohibition of discrimination is limited in that the challenged facts have to be part of the field of application of one of the articles of the Convention because of its nonautonomous nature.[57] Furthermore, the analysis of the relevant jurisprudence has demonstrated that the Court rather systematically avoids issues of indirect discrimination,[58] which is related to the kind of supervision it exercises.[59] However, indirect discrimination is as potentially harmful for minorities as direct discrimination.[60] Finally, according to established jurisprudence, it is generally not investigated whether article 14 is violated in combination with an article when the violation of the article *in se* (in itself) is already established.[61] This approach is rather prone to criticism when cases are dealing with members of minorities and the equality challenge is central to the case.[62] In view of the importance of the prohibition of discrimination for minority protection, it is arguable that a thorough assessment under article 14 of the alleged discrimination would be advisable. It is hoped that the coming into force of Additional Protocol 12 with its general equality clause will overcome several of the flaws just pointed out.[63]

The rights with a special connection to identity characteristics distinguishing minorities from the rest of the population—language, religion, education, and rights of political participation—are only in a very narrow way present in the Convention, which is related to the absence of an explicit minority protection focus.[64] Furthermore, these provisions are interpreted very restrictively by the supervisory organ(s). The interests of the contracting states have a tendency to predominate the balancing process, when the Court and the Commission weigh the respective interests to assess whether or not the Convention is violated. The states enjoy a wide margin of appreciation in this respect, which is not conducive to the realization of minority protection goals.

Furthermore, the group dimension of an individual complaint is too often not sufficiently taken into account despite its crucial importance for cases concerning members of minorities.[65] The existing institutional structures are generally respected and treated with deference by the supervising bodies.[66] Nevertheless,

this might be understandable and acceptable in certain circumstances, in view of the need to take all the specific circumstances of a case into account, including the historical development of the state concerned.

The set of cases involving Turkey since the mid '90s can be considered as a turning point in the jurisprudence of the Court (and the Commission) in that they demonstrate an enhanced awareness of the minority problem and the need for a firm protection of the individual human rights of minorities. These cases[67] not only reveal that the Court takes a strong stance regarding the right to life, the prohibition of torture and inhuman or degrading treatment and punishment, and the right to personal security but also regarding the freedom of expression and the freedom of association. The Court and the Commission clearly show that their deference vis-à-vis state interests and established structures does not go as far as allowing state fears to erode the human rights of members of minorities. The review bodies underline more specifically that population groups in a state should be able to associate and pursue alternative state structures, provided they do so in a democratic way.[68] Although the corresponding explicit statements of the Court and the Commission do not imply a vindication of these alternative state structures, the attention for the minority reality and the corresponding firm protection of their fundamental political rights is undoubtedly important.

The supervising bodies are clearly reluctant to recognize group rights (in the sense of rights for a group as such),[69] which may be understandable in view of the Convention's focus on individual rights and freedoms. The minority phenomenon has an intrinsic group dimension that is an argument for a system to be more geared towards this dimension. Still, it remains to be seen how the new Court will approach this (and related) matter.

The Court's and the Commission's jurisprudence regarding the right to education in article 2 of the first additional protocol emphasizes the absence of regulation regarding the language of instruction. Although the Court infers from the need to make the right to education effective that not each and every state decision would be acceptable in this respect, no attention is given to the generally accepted proposition that the language of instruction should preferentially be the mother tongue of the students.[70] Mother-tongue instruction is surely as relevant for the effectiveness of the right to education as receiving an education enabling a person to master (one of) the official language(s) of the state concerned.

Nor is the prohibition of indoctrination enshrined in the second sentence of this article interpreted and applied in a way that would entail an optimal protection to members of minorities, as was obvious in the cases concerning Jehovah's Witnesses.[71] According to a steady line of jurisprudence, the contracting states are not obliged to accord subsidies to private educational institutions.[72] However, state financial support might be necessary to make the right to establish such institutions effective. A right to establish, under certain conditions, private educational institutions in conformity with their own separate culture, values, language, and religion is definitely very important for minorities. They are distinguished from the rest of the population by their separate identity and also feel

the need to preserve their own identity inter alia through the education process of the children of the group. However, it is not always that obvious that a certain minority has the financial means to effectively exercise this right. An evolution of the jurisprudence recognizing a certain right to financial support by the state for private educational institutions would thus be very welcome.

Finally, the Court and the Commission have underlined several times that neither the Convention nor article 3 of the first additional protocol guarantees a right to self-determination, let alone a right to internal self-determination for minorities.[73] It should nevertheless be acknowledged that the minority position was several times taken into consideration in the evaluation of a violation of article 3 of the first additional protocol.[74] A right to internal self-determination for minorities is not limited to issues of elections and representation but would also include attempts to establish the necessary political structures so that minorities can influence the political process. The right to internal self-determination for minorities appears to be a necessary complement to individual human rights, and even to minority rights as currently conceptualized, in order to realize an adequate minority protection by which the right to identity of minorities is optimally protected and promoted.

Despite the increased attention to certain minority concerns in the set of cases against Turkey, it is arguably still valid to conclude that the traditional standards of human rights, as they are currently interpreted by the supervising bodies, simply do not succeed in addressing certain of the most important and controversial questions regarding minorities and minority protection. Examples of these questions are whether each ethnic group has the right to publicly financed education in its mother tongue; whether administrative boundaries should be drawn in such a way that most, if not all, ethnic minorities form the majority in an administrative area, and whether minorities should be represented as such in Parliament. Additional measures thus seem to be called for and can be taken up in the broader framework of the principle of substantive equality.

THE CONTRIBUTION OF THE CURRENT MINORITY RIGHTS STANDARDS TO MINORITY PROTECTION

Article 27 ICCPR

When discussing the current minority rights, the first article that comes to mind is article 27 ICCPR, since that is the international law provision on minority protection par excellence.[75] The agreement on its formulation and inclusion in the ICCPR amounts to an explicit recognition in an international convention of the need for “special” minority rights, which go beyond the prohibition of discrimination and the protection of individual human rights.[76] It is formulated as follows: “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, and to use their own language.”

The provision is rather vague but the rights explicitly enshrined therein are at first sight limited to the cultural sphere and seem to lack a political or economic dimension.[77] However, it should be emphasized that the Human Rights Committee has interpreted the rights guaranteed by article 27 very broadly. The Committee acknowledges, for example, in *Kitok v Sweden* that an economic activity can be protected under that article as an essential part of the enjoyment of an ethnic group's culture.[78] Although such an interpretation appears to amount to an extension of the scope of this article, it can also be related to the right to identity of minorities, which is said to be in line with the (broader) *ratio legis* (reason behind the legal protection) of the article. Analogously, a certain political dimension of the right to identity of minorities could also be argued to be protected by article 27 ICCPR.

Whereas the ambiguity of the explicit rights of article 27 creates the flexibility to take measures that are neatly tailored to the specific circumstances of each situation, it gives a great amount of discretion to the contracting states,[79] which can be used to the disadvantage of minorities. Both the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the General Comment on article 27 ICCPR of the Human Rights Committee contain further guidelines as to the content of the rights enshrined in article 27.[80] It is generally accepted that the prohibition of assimilation[81] and the right to identity for minorities[82] are enshrined in that article.

The question whether positive state obligations flow from article 27, despite its negative formulation, is still undecided, even though it is acknowledged that there is a certain trend in subsequent UN and European documents in that direction.[83] It can be argued that if the right to enjoy one's own culture is meant to be real and effective for members of minorities, it requires states to take positive measures in this regard.[84] Arguments based on considerations of substantive equality further support such a positive reading of article 27 ICCPR.[85] The Human Rights Committee reflects a similar conviction in its General Comment on article 27, which emphasizes not only positive measures of protection but also positive measures that are to be taken in certain circumstances to protect the identity of a minority and "the rights of its members to enjoy and develop their culture and language and to practice their religion in community with the other members of their group."[86]

Most authors underline the hybrid character of article 27 in that it is framed in terms of individual rights but does imply a certain recognition of the group dimension, which results from the protection of the collective exercise of the rights and from the attribution of these rights *qualitate qua* (in the capacity of member of a minority).[87] Neither article 27, nor the current minority rights standards grant a real group right.[88]

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

Although the UN Declaration is significant in that it clarifies the content of article 27 ICCPR,[89] it is also burdened by several deficiencies related to the

reluctance of states to grant significant minority rights.[90] It is definitely positive that the Declaration explicitly grants the right to identity, more specifically in article 1.[91] The right to participation in the cultural, religious, social, economic, and public—even political—life of the state, the right to have even international contacts with other members of the minority and the (albeit qualified) right to mother-tongue education constitute important clarifications to article 27 ICCPR.[92]

Another important feature of the Declaration is that it includes some provisions confirming that states have certain positive obligations regarding their minorities.[93] However, this is apparently mainly a statement of intent in that the combination with the other articles of the Declaration (including their numerous loopholes[94]) shows that the real level of positive state obligations is not that extensive.[95] It is also important for the interrelation thesis that the Declaration recognizes a certain political dimension of the right to identity of minorities through the participatory rights mentioned above.[96]

Nevertheless, it cannot be denied that little or no concrete content is given to the right to enjoy one's own culture. The same can be said about the right to profess and practice one's own religion, but it should be remarked that no mention is made of the right to participate in the religious life of the state. The right of members of minorities to use their own language is also meagerly developed since only a qualified reference is made to mother-tongue education, while nothing is said about the crucial issue of language use in the communication between members of minorities and the public authorities, nor about the right of minorities to use their own language in private and public media.

Other International Instruments Dealing with Rights of Special Relevance for Minorities

Besides article 27 ICCPR and the UN Declaration on Minorities, there are several instruments that are especially relevant for minorities. The international instruments[97] that will be discussed have a more general field of application, whereas the European ones[98] are much more minority specific.

In view of the fact that the right to life is the necessary condition to have and develop a distinctive identity, it seems appropriate to start with the Convention on the Prevention and Punishment of Genocide (hereinafter: Genocide Convention) as it protects the crucial right to existence. Although it is not framed in minority terms, the Convention can nevertheless be considered one of the most important multilateral agreements favorable to minorities.[99] The Genocide Convention ensures the physical existence of certain groups and the group is thus the direct object of protection of this Convention, irrespective of its size and political importance.[100]

A second international treaty relevant to minorities is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Convention uses a very broad definition of "racial discrimination" and ''race" in

that it includes ethnic and national origin,[101] thus making the instrument also relevant for ethnic and national minorities.[102] The broad field of application of the Convention is important in view of the fact that the contracting states are allowed, and in certain circumstances even obliged, to take special measures to support disadvantaged "racial" groups.[103] The extent to which this Convention protects and promotes the minority identity can be deduced from the field of application of the Convention in combination with the positive obligations for the contracting states. The rights enshrined in article 5[104] are also important in this respect since they are arguably the kind of rights that allow everyone to lead his/ her life in conformity with his/her own conviction of "being as one is."[105] Although that statement is framed in individual terms, its relevance for the right to identity of minorities is apparent, especially in view of the explicit recognition of positive obligations for the state to adopt special measures for certain groups.

A third international convention of considerable importance for minorities is the UNESCO Convention on the Elimination of Discrimination in Education.[106] Education is crucial for minorities and their right to identity since education is fundamental to the preservation of a culture, or more broadly, of a group identity.[107]

An article that is especially important for minorities is article 2(b), which stipulates that the establishment or maintenance of separate educational systems or institutions because of religious or linguistic reasons does not amount to discrimination.[108] That provision merely implies that states can allow separate educational institutions in certain circumstances but does not oblige them to allow such institutions. In article 5(1)c the contracting states agree to allow members of national minorities to establish and maintain, under certain conditions, their own educational institutions. Neither provision, though, takes an explicit stance regarding potential positive, including financial, state obligations.

Furthermore, article 5(1)c contains several conditions and restrictions that, all in all, hedge rather heavily in the recognition of the right. Indeed, in practice "they enable each state to frustrate the operation of the clauses referred to by, for example, invoking discretionary considerations of national educational policy or the need to avoid compromising sovereignty."[109]

European Documents on Minority Rights

The only European documents[110] that will be discussed here are the most relevant documents of the OSCE, being the 1990 Concluding Document on the Copenhagen Meeting on the Human Dimension, and the two key documents of the Council of Europe, namely the 1992 European Charter for Regional or Minority Languages and the 1995 Framework Convention for the Protection of National Minorities.

The OSCE. It should be emphasized that the OSCE often takes a progressive stance regarding minority protection[111] and regularly serves as a source of inspiration for the development of standards at other international and European organizations.[112] The Copenhagen Document constitutes an important step

towards an adequate international law system for the protection of minorities.[113] However, it cannot be denied that its provisions are still formulated in a very cautious way, containing several escape clauses and loopholes, leaving the states once again a large margin of appreciation.[114]

The explicit recognition of positive state obligations to protect and promote the minority identity can be highlighted as especially significant.[115] Nevertheless, the provision that is generally recognized as being the most far-reaching and meaningful from a minority protection angle is paragraph 35 with the right of members of national minorities to participate in public affairs, including affairs related to the protection and promotion of their identity.[116] This paragraph enshrines the right of political participation for members of minorities, thus taking up the corresponding human right and further tailoring it to the situation and specific needs of minorities. Paragraph 35 can arguably be considered a step in the direction of the recognition of group rights and more specifically forms of self-determination for minorities.[117] In this regard, that paragraph is relevant for both the interrelation between individual human rights and minority rights and the interrelation between minority rights and the right to self-determination for an adequate minority protection.

Regarding the recognition of the group dimension as an essential feature of the minority phenomenon, it is striking that the rights are attributed to members of national minorities and not to minorities as such. Still, it would be difficult to deny that paragraph 35 of the Copenhagen Document moves closer to the recognition of a group right.[118]

Overall the Copenhagen Document undoubtedly sets important trends that contribute to the realization of an adequate system of minority protection, but the standards are at the same time so vague and shot through with escape clauses that their effectiveness is dubious.[119]

The Council of Europe. The two most important documents at this level are the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities.

Regarding the Language Charter, it is first and foremost remarkable that the Charter does not grant any rights to speakers of certain (minority) languages or to certain linguistic groups but is focused on the languages themselves.[120] A second important feature of the Charter is that, certain general principles in article 7 aside, the contracting states can (under certain minimum conditions) choose their obligations à la carte.[121] A state can even determine to what languages spoken in its territory the Charter will apply, thus taking the state discretion very far.[122]

The states ratifying the Charter commit themselves (to a greater or lesser extent) to protect and promote the use of regional or minority languages in the domains of education (article 8), judicial authorities (article 9), administrative authorities and public services (article 10), and access to the media (article 11) as well as the domains of cultural, economic, and social activities (articles 12 and 13). The Charter focuses in article 7, section 2 on substantive equality as it underlines that "positive measures aimed at bringing about greater equality between the users of regional or minority languages and the rest of the population are not to be considered as discriminatory against the majority."[123]

The actual contribution of the Charter to minority protection is of course modulated and balanced in view of its high flexibility with respect to the content of state obligations. The Charter undoubtedly offers important guidelines to several states for the difficult and sensitive issue of accommodation of linguistic diversity.[124]

The importance of the Framework Convention for the Protection of National Minorities should be highlighted as it represents the first international treaty with a multilateral, general protection regime for minorities.[125] Although the Convention is meant to translate the political commitments at the level of the OSCE into legal obligations,[126] the member states are ostensibly given a wide measure of discretion. The convention consists of vague program declarations and includes several escape clauses.[127]

A more detailed analysis of the Framework Convention reveals that several articles of the Framework Convention take up individual human rights of the ECHR, which are of special relevance for minorities,[128] while adding at times extra requirements because they are essential for the purpose of safeguarding the specific fundamental right for minorities.[129] This tends to support the interrelation between individual human rights and minority rights for an adequate system of minority protection. The explicit recognition of the equality principle in its substantive dimension (article 4, paragraphs 1 and 2) and of the right to identity (article 1) are also important features of the Framework Convention.

The Convention enshrines several minority rights, but these rights are each time suitably circumscribed. Article 10 and the right to use the minority language is, for example, strongly qualified regarding the right to use that language in communications with the public authorities.[130] Not only is the latter right contingent on finding a high geographical concentration of members of the linguistic minority, it is also weakened by discretionary phrases like “where such a request corresponds to a real need’’ and “as far as possible.” Article 14 regarding the right to learn the minority language and being taught or receiving instruction in a minority language is equally cautiously formulated. Moreover, states appear not to have an obligation to take positive measures regarding the right to learn the minority language. Particularly the right to instruction in a minority language is very tentatively phrased in that states are not obliged but merely encouraged to provide this service.[131] Together with the requirement of territorial concentration, article 14, section 2 also contains vague conditions like “as far as possible” and “within the framework of their education system.”

Finally, the meager recognition of the minorities’ group dimension should be acknowledged in that the Framework Convention is carefully drafted so as not to convey group rights to national minorities.[132]

Conclusion Regarding the Contribution of Current Minority Rights to Minority Protection

Although there has been a gradual acceptance and protection of “special” rights for members of minorities since the emergence of article 27 ICCPR in 1966, states remain “reluctant to grant more than the most minimal rights to