

INTRODUCTION

MINORITY RIGHTS, HUMAN RIGHTS: A REVIEW OF BASIC CONCEPTS, ENTITLEMENTS AND IMPLEMENTATION PROCEDURES UNDER INTERNATIONAL LAW

Gaetano Pentassuglia*

What do we mean by the concept of international minority rights?

Generally speaking, international minority rights designate a special set of norms regarding numerically inferior and non-dominant groups possessing particular characteristics, most notably a distinctive ethnic, linguistic and/or religious identity which makes them different from the rest of the population of the state where they live.¹

The first system of minority rights protection was set up by the League of Nations in the aftermath of the First World War. It was designed to accommodate nationals who belonged to racial, religious or linguistic minorities living within the newly emerged or enlarged states that resulted from the redrawing of boundaries caused by the disintegration of three multinational empires, that is, Austria-Hungary, Prussia and the Ottoman Empire. The system consisted of special treaty- and declaration-based obligations undertaken by the affected states, whose external “guarantee” was vested in the League of Nations. The Council of the League was indeed made competent to address cases of actual or potential infractions of minority obligations brought to its attention by council members, while the Permanent Court of International Justice (PCIJ) was empowered to deliver impartial decisions over differences of opinion on questions of law or fact arising out of the relevant regimes. Although they did produce a measure of protection, the League of Nations norms came under attack as they were not intended to be for general application nor did they give the minorities concerned *locus standi* vis-à-vis the League Council or the right to appear before it or other competent bodies for oral hearings. The exploitation of the “minority card” by Nazi Germany for the purpose of revising the 1919 Versailles settlement further contributed to the eventual demise of the League of Nations’ experiment along with the League of Nations itself.

The gradual disenchantment with the League system progressively generated the belief that there should be no special guarantees for minorities but only protection of basic human rights for all. Although the League of Nations norms, by referring not only to minorities but also to all inhabitants or citizens in relation to the enjoyment of general freedoms without discrimination, did contain to a large extent the human rights seeds which were to flourish after 1945, their overall rejection paved the way for minority provisions being excluded from major post-Second World War documents, such as the Charter of the United Nations (UN Charter) and the Universal Declaration of Human Rights (UDHR). A study of the UN Secretariat of 1950²

concluded that the post-1919 minorities treaties had generally ceased to exist. At the same time, the issue of minorities was not removed from the post-1945 international agenda. Resolution 217C (III), adopted by the UN General Assembly in 1948, emphasised that the UN could not “remain indifferent” to the fate of minorities and referred the matter to the Economic and Social Council (ECOSOC) with a view to producing a “thorough study” about the problems of minority groups. The mandate of the Commission on Human Rights allowed it to follow up minority issues by submitting proposals, recommendations and reports, while its sub-commission was established with a specific remit to address the protection of minorities, together with the prevention of discrimination.

As a result, the minority rights discourse continued to develop, though at a slow pace. Important progress was made many years after UN General Assembly Resolution 217C (III), culminating in the inclusion of a minority provision in Article 27 of the proposed International Covenant on Civil and Political Rights (ICCPR), finally adopted in 1966. In contrast with the post-1945 hesitation or even neglect, minority issues regularly come up in present-day activities within multilateral forums. The upsurge of ethnic tensions following the break-up of the former Soviet Union and Yugoslavia and in states of other continents, largely fuelled a considerable process of reconsidering the protection of minorities at universal, regional and sub-regional level, which is still under way.

One important theme arising from the continuing presence of the minority question on the agenda of the international institutions which are fundamentally concerned with the protection of human rights in general, is the seemingly problematic relation between the concept of minority rights and that of human rights. Although the basic framework of human rights protection rests on rights held by individuals as such, some group rights, namely rights directly ascribed to collectivities, have unquestionably entered the realm of international law, for instance the right to self-determination and the right to be protected against genocide. Are minority rights individual or collective? Or both? Are minority rights human rights? There is no doubt that minority rights form an integral part of the international protection of human rights. For instance, Article 27 of the ICCPR situates the protection of minorities within a general context of human rights entitlements. The Framework Convention for the Protection of National Minorities (FCNM), opened for signature by the Council of Europe (CoE) in 1995, confirms this by explicitly recognising minority rights as a human rights issue (Article 1). The same notion is reflected in the preamble to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), adopted by the General Assembly in 1992, and paragraph 30 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension, adopted in 1990 by the Conference on Security and Co-operation in Europe (CSCE) (renamed in 1994 the Organisation for Security and Co-operation in Europe – OSCE).

This assumption, though, also reveals that minority rights and human rights are not identical notions. The general concept of human rights is something

qualitatively different in that the rights of all individuals are placed under international protection. In terms of rights supervision, the League system somewhat reflected this approach when distinguishing between internal (constitutional) protection for all inhabitants or citizens of the minority states and international guarantee for members of minorities only.³ Human rights means equal enjoyment of basic rights for everybody, whereas minority rights can be described as special rights recognised to the exclusive benefit of minority groups. Thus, basic rights for all combine with special rights for minorities: these rights are complementary and mutually reinforcing.

But, as has been mentioned, minority rights pose the issue of their individual or collective nature in international law. The international instruments on minority rights invariably refer to persons belonging to minorities, not minorities as collectivities. Therefore, minority rights as such are not construed as group rights. Article 27 of the ICCPR epitomises the hybrid approach to minority rights under human rights law. While referring to “persons belonging to minorities”, Article 27 is clearly designed to protect a collective interest, since minority members have to exercise the rights “in community with the other members of their group”. As recognised by former UN Special Rapporteur Capotorti,⁴ “[it] is the individual as member of a minority group, and not just any individual, who is destined to benefit from the protection granted by Article 27”. In sum, Article 27 recognises individual rights premised on the existence of a distinctive community. The interaction between individual rights and group protection aspects is clearly reflected in the relevant case-law of the Human Rights Committee (HRC) pursuant to the first optional protocol to the ICCPR (see *infra*), and confirmed by the 1992 UNDM, inspired by Article 27, which recognises rights of persons belonging to minorities, while at the same time providing for a state duty to protect the existence and identity of a minority as a whole (see *infra*, Article 1).

While special in nature and scope within the canon of international human rights, minority rights are not privileges. As early as 1935, the PCIJ held in its advisory opinion concerning the Minority Schools in Albania⁵ case that minority rights represented some of the implications of the concept of substantive equality, as opposed to formal equality (equality in fact as distinct from equality in law). They are indeed intended to remedy the structural imbalance between minorities and majorities in areas critical to the preservation of cultural integrity. In that case, the PCIJ insisted on the notion of equality in fact and held that the closing of the minority schools in question by the Albanian government was incompatible with equality of treatment between a majority and a minority. In fact, general or specific anti-discrimination clauses, as contained in a variety of international human rights instruments, may pave the way, to a greater or lesser extent, for this goal to be achieved, by not only outlawing unreasonable distinctions against minorities but also producing, under proper conditions, differential treatment benefiting them. Indeed, it is now established in international human rights law that the principles of equality and non-discrimination do not require identical treatment in every instance but may well justify (and sometimes may even mandate) difference in treatment which is reasonable and objective as well as proportionate to the aim sought to be realised. This approach might therefore

allow the favouring of a distinctive minority group over rights of others, as confirmed by minority rights instruments themselves. In other words, distinctions may well be upheld when they are designed to advance the specific position of a minority and thus to ensure full equality. And yet, as stated by the PCIJ in the *Minority Schools in Albania* case, the protection of minorities falls beyond purely anti-discrimination objectives generated by the purpose of “achieving perfect equality with the other nationals of the State”;⁶ it specifically aims at preserving the characteristics which distinguish the minority from the majority, satisfying the ensuing special needs.

Hence, whereas the prevention of discrimination in general demands equality, including special, temporary measures designed to remove not only legal but also social and/or economic obstacles to the enjoyment of rights and freedoms, the core of the protection of minorities lies in special, essentially permanent measures which are intended to safeguard the identity of certain groups, and must themselves conform to the principles of equality and non-discrimination.⁷ From the angle of the prevention of discrimination, minorities come into play, along with other groups, in terms of the achievement of their full integration into all sectors of society. Integration so understood is, for instance, the objective of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1965. In the field of the protection of minorities, the focus is on what makes minority groups non-assimilated into, and thus different from, the rest of the population, though clearly rejecting a policy of apartheid.

One general implication of the qualitative distinction between the anti-discrimination approach and minority rights is that the issue of respect for minority rights is *au fond* independent of whether minority members are treated in a non-discriminatory way. Indeed, even if they are, these persons are still entitled to special rights regarding their identity. To put it differently: anti-discrimination standards are not “minority rights” but rather set out indispensable starting points to enable their protection.⁸

What is the content and legal status of international minority rights?

At the universal level, Article 27 of the ICCPR and the 1992 UNDM represent the most important instruments embodying minority rights, of a conventional and extra-conventional nature, respectively. Article 27 provides that where ethnic, religious or linguistic minorities exist within the territory of a state party, their members shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The opening phrase, which was intended to meet the concern of Latin American countries that immigrants to these countries might form separate communities claiming minority rights, may in fact prove a tool in the hands of states for denying that they have minorities on their territory. France has indeed entered a declaration in which it is stated that “in the light of Article 2 of the Constitution of the French Republic, Article 27 is not applicable so far as the Republic is concerned”.⁹ Although the HRC has considered such a declaration as being a reservation which releases France from the duties

established by Article 27,¹⁰ it has unambiguously dismissed the notion that the existence of minorities is somehow premised on an admission of discrimination, as implied by the French view that no minority rights can be recognised by a state as long as that state complies with anti-discrimination norms by affording human rights to all individuals under its jurisdiction. The HRC has insisted on the factual nature of existence criteria, not requiring any prior decision by a state party.¹¹

The basic aim of Article 27 is to protect the ethnic, religious and/or linguistic identity of minorities, as indicated in the HRC General Comment No. 23 (50) regarding this provision. The collective dimension to Article 27 rights is reflected in a marked interaction between individual rights and group protection aspects as resulting from the jurisprudence which is being developed by the HRC in the context of the individual communications procedure. The leading cases brought before the HRC reveal such an interaction in terms, for instance, of the: i. identification of minority membership based primarily on "objective ethnic criteria" and exercise of the rights in the place where the community exists; ii. free choice made by the persons concerned as to whether to invoke such rights to be enjoyed in a specific community context; iii. restrictions on individual rights justified by the legitimate aim of minority group survival and well-being, pursued through proportionate means; and iv. protection of the group through the protection of its members.¹²

As shown by *Sandra Lovelace v. Canada*¹³ and *Ivan Kitok v. Sweden*,¹⁴ the area of conflicting interests of a minority and its members raise particularly sensitive issues. In the *Apirana Mahuika et al. v. New Zealand* case,¹⁵ the HRC found the measures impugned, designed to protect the group to which the complainants belonged, to be compatible with Article 27, while at the same time emphasising that, since Article 27 continues to bind the state party in relation to the authors' rights to enjoy their own culture, those measures must be carried out in a way that such rights are respected.

The repercussions of the protection of Article 27 rights on the position of the entire group is indicated, to a greater or lesser extent, by the HRC views in *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*,¹⁶ *I. Länsman v. Finland*,¹⁷ *J. Länsman v. Finland*,¹⁸ *Apirana Mahuika*, and *J.G.A. Diergaardt et al. v. Namibia*.¹⁹ Interestingly, the HRC has also developed the notion that the right to self-determination in Article 1 may be relevant to the interpretation of Article 27. However, on a procedural level, the HRC has firmly rejected the standing of communities or legal entities to lodge an individual communication under the first optional protocol, although, in the *Lubicon Lake Band* case, it made the interesting procedural point (recalled in later cases) that there was no objection to communications submitted by a group of individuals claiming to be similarly affected by alleged breaches of the ICCPR.

Non-forced assimilation, enjoyment of the traditional way of life or aspects of it, including protection against erosion of the sustainability of traditional economic activities as part of minority "culture" as well as consultation with minority members on decisions affecting them, feature among the major themes of HRC case-law at this juncture (some such themes are also

mentioned in the HRC general comment on Article 27). Further developments will, of course, depend on the number and quality of Article 27 cases which will be taken to the HRC.²⁰

According to the language of Article 27, minority members “shall not be denied” certain rights concerning their ethno-cultural identity. Therefore, states appear to undertake the mere negative duty of not interfering in the enjoyment of those rights, rather than an obligation to take positive action to protect them. And yet, active state duties have been construed both in terms of the protection against infringements by “other persons within the State party”²¹ (so-called “horizontal” protection) and in terms of the effective preservation and development of minority identity. In the latter respect, though, a dividing line can be drawn between the interpretation that focuses on direct positive duties under Article 27 and the one that, more cautiously, establishes indirect duties to adopt positive measures as a major constraint on proactive domestic policies affecting minority identity in accordance with the anti-discrimination clauses contained in the ICCPR.²² The HRC has become increasingly assertive with regard to positive measures, notably to address the situation of minority indigenous groups, while it has appeared unclear as to the relation of such measures to typical minority issues such as language use. Although its approach seems primarily to be grounded on indirect anti-discrimination assumptions, that is, on the notion that positive action can be justified as long as it is compatible with the principles of equality and non-discrimination, the HRC view should be considered as part of an evolving incremental understanding of Article 27 rights, whose ramifications are in fact a function of the support from states parties. At this stage, the notion of direct positive duties seems to be favoured by a growing number of states concerned.

The UNDM was adopted by consensus by the General Assembly in Resolution 47/135 of 18 December 1992. As indicated earlier, it is inspired by, not “based on”, Article 27. Therefore, while non-legally binding, this text is essentially intended to further expand the substance of minority rights within the UN system. Indeed, the UNDM uses a more constructive language than Article 27 does. For instance, pursuant to Article 1, paragraph 1, states “shall protect” the existence and identity of minorities and “shall encourage” conditions for the promotion of such an identity. Article 2, paragraph 1, replaces “shall not be denied the right” in Article 27 with the positive “have the right”. Paragraphs 2, 3 and 4 of Article 2 importantly introduce the concept of participation rights, including a specific right to participate effectively in local decisions affecting the minorities concerned, “in a manner not incompatible with national legislation”. The last paragraph of Article 2 importantly elaborates upon contact rights, including transfrontier contacts with “kin-members”. Article 4, paragraph 2, provides that states “shall create favourable conditions” for the expression and development of minority cultures, “except when specific practices are in violation of national law and contrary to international standards”. The next two paragraphs deal with, respectively, “adequate opportunities” to learn the minority language and to receive instruction in that language and minority participation in economic progress. Articles 5, 6 and 7 invite states to ensure that minority interests and

rights are duly taken into account in national planning and international co-operation. The remaining clauses embrace assumptions which are typically reflected in other minority rights instruments, namely that the entitlements in question may not prejudice existing obligations and commitments undertaken by states, that minority rights may not undermine the human rights and fundamental freedoms of others although they are *prima facie* compatible with the anti-discrimination precept, and that the instrument may not be used to ground claims jeopardising the territorial integrity of states.

Flexible wordings or clawback clauses such as “whenever possible” or “where appropriate” expose the respective provisions to a negative reading. Still, the text appears, in general, to be an important contribution to international minority law making. In UN practice, a declaration is indeed a formal and solemn instrument which imparts a strong expectation that members of the international community will abide by the principles it contains.

At the regional level, the OSCE has enshrined minority standards in a variety of instruments, the most significant of which remains the Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990. While lacking legally binding status (like all OSCE standards), such a document has proved so far the most influential elaboration of international minority rights provisions. Indeed, both the UNDM and the FCNM have benefited from the Copenhagen text as one of their main sources of inspiration. Moreover, the instrument has been incorporated as a legal obligation in recent bilateral treaties, such as the 1995 basic treaty between Hungary and Slovakia (*infra*). In terms of substantive entitlements, particular emphasis is laid on the implications of the right of minority members to identity, free of any attempts at assimilation against their will, such as the use of mother tongue in private and in public, association rights, transfrontier rights, mother tongue education, etc. Interestingly, paragraph 35 refers to autonomy arrangements as one possible means of realising the right of persons belonging to national minorities to effective participation in public affairs, in connection with the protection of the identity of such minorities. A report produced by an expert meeting convened in Geneva by OSCE participating states in 1991, further elaborates upon such issues by offering, *inter alia*, a shopping-list of advisable domestic policies.

The CoE has never ceased to be interested in the minority question, though the idea of elaborating specific legal standards in this field regained momentum only following developments in eastern Europe throughout the early 1990s. The European Convention on Human Rights (ECHR) and its recent Protocol No. 12 (not yet in force at the time of writing) do not address minority rights. However, as increasingly suggested by the Strasbourg jurisprudence in such areas as political and religious pluralism, education as well as way of life (the latter aspect, interestingly reflected in the case of *Chapman v. United Kingdom*),²³ such texts and further protocols might generate some form of protection for minorities and their members in relation to their general needs and interests as a result of the functioning of pertinent substantive provisions (most notably Articles 8 to 11 of the ECHR and Articles 2 and

3 of Protocol No. 1) and/or their respective anti-discrimination clauses (notably Article 14 of the ECHR, and Article 1 of Protocol No. 12, once it has entered into force).²⁴ Various proposals have been put forward by either political or specialised bodies or individual countries. The Parliamentary Assembly has long been most active in attempting to develop minority rights standards. In 1993, it adopted Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights. The text further develops previous Assembly proposals, particularly by focusing on individual rights, and complementing the rights framework with a definition of “national minority” (Article 1), a clause regarding restrictions on the rights recognised (Article 14), as well as a far-reaching right to autonomy regimes (Article 11). Its provisions on language and education rights are also noteworthy (Articles 7 and 8).

In the same year of its adoption, this Assembly proposal failed to be endorsed by the CoE member states. Nevertheless, the instrument has since triggered important legal consequences, both as part of “commitments” undertaken by new member states of the Organisation upon admission (in connection with the human rights requirements set forth by the Statute), and through its incorporation by reference in important bilateral treaties. Moreover, the Assembly has recently reaffirmed the need for an additional protocol to the ECHR based on the principles contained in Recommendation 1201 (1993) (Recommendation 1492 on the rights of national minorities, adopted in 2001). However, in its reply of 13 June 2002, the Committee of Ministers considered it “premature” to reopen the debate on this project.²⁵

Apart from possible new standard-setting achievements, the FCNM and the European Charter for Regional or Minority Languages (ECRML) set out norms which are either focused on minorities or impinge upon their situation. Indeed, while the former contains minority rights provisions, the latter is not per se concerned with linguistic minorities, nor does it establish individual or collective rights for the speakers of the languages protected. Rather, the ECRML provides guarantees for the benefit of the historical regional or minority languages of Europe, with a view to promoting and protecting multilingualism in the fields of education, judicial authorities, administrative authorities and public services, the media, cultural activities and facilities, economic and social life and transfrontier exchanges. The ECRML also differs from the FCNM in that, with the exception of a set of fundamental principles and objectives on state policies and practices applicable to all regional or minority languages spoken within the territory of the contracting state (Part II), it allows each party to select a minimum of 35 paragraphs or subparagraphs covering the areas addressed in the operative provisions of its Part III, in respect of each language specified upon adherence to the ECRML (Article 2, paragraph 2, and Article 3, paragraph 1). There is reason to believe that the wide range of options offered to states by such operative provisions, while positively allowing for accommodation of specific circumstances, in practice precludes a great deal of *ipso facto* protection. As yet, this treaty, adopted in 1992 and entered into force on 1 March 1998, has attracted fewer ratifications than one might expect of an eleven-year-old instrument. It

should be noted, however, that the ratifications have doubled over the past few years, and that, in general, time may be needed to assess the legal and political implications of ratifying the ECRML.

The FCNM resulted from the CoE Vienna Summit of 1993, as an alternative to the adoption of a protocol to the ECHR as suggested by the Assembly. Unlike the stringent rights and duties embraced by Recommendation 1201 (1993), the treaty contains programme-type provisions setting out objectives which the parties undertake to pursue. As a result, the provisions are not directly applicable, leaving the parties a measure of discretion in the implementation of the instrument, in view of particular local factors. The FCNM builds upon previous texts. As indicated earlier, the CSCE Copenhagen Document inspired it to a large extent. In fact, the treaty was generated by an attempt to translate the political commitments endorsed by that document into legal obligations. The FCNM came into force on 1 March 1998. So far, it has been ratified by many, though not all, European countries.

In addition to providing a link between minority rights and some rights and freedoms already established under the ECHR, special provisions are meant to directly address the particular needs of minorities. States parties are under a duty to promote the conditions necessary to maintain and develop minority culture, and to preserve the essential elements (that is, religion, language, traditions which are not in violation of national law or international standards, and cultural heritage) of minority identity, as well as to abstain from any attempt to assimilate minority members against their will (Article 5). Articles 10 to 14 are concerned with language and education rights. They well illustrate the flexibility of the treaty mentioned above. They cover such matters as use of minority languages before administrative authorities, use and official recognition of minority names and surnames, display of minority signs and information of a private nature, traditional local names, street names and other topographical indications, access to education, etc. Article 13 provides for the right to set up and manage private educational establishments (paragraph 1), with no financial obligation for the parties (paragraph 2). The right to learn one's own minority language, pursuant to Article 14, paragraph 1, does not imply a positive duty on the parties, notably of a financial nature, while "adequate opportunities" for mother tongue education in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, are recognised only in a very hesitant way (paragraph 2).

Article 15 aims to ensure the effective participation of minority members in the life of the state, along the lines of Article 2 of the UNDM, although without an explicit right to participation in decisions concerning the minority. However, the explanatory memorandum on the FCNM importantly provides a range of advisable modalities of participation to be considered for adoption within the framework of the parties' constitutional systems, ranging from consultation to decentralisation of power, which are not spelled out in Article 2 of the UNDM. Other provisions encompass important aspects of protection, such as access to the media (Article 9), the prohibition of gerrymandering practices (Article 16), cross-border contacts (Article 17, paragraph 1) and

participation in the activities of national and international non-governmental organisations (Article 17, paragraph 2).²⁶

The European Union (EU) has not developed an instrument on minority rights. At the internal level, the emphasis is on equality and non-discrimination rather than minority rights. Article 13 (ex Article 6a) of the Treaty establishing the European Community (EC Treaty), introduced by the Treaty of Amsterdam, enables the European Council, under certain conditions, to take appropriate action to combat discrimination on, *inter alia*, racial or ethnic and religious grounds. Although it does not amount to a directly effective prohibition of discrimination binding member states and Community institutions, a so-called anti-discrimination package has been adopted on the basis of this enabling clause, including the Council directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,²⁷ and the Council decision of 27 November 2000 establishing a Community action programme to combat discrimination.²⁸

Further indication is provided by the Charter of Fundamental Rights of the European Union, adopted at the Nice European Council of December 2000. Despite the fact that proposals had been submitted for including a minority rights provision in the charter,²⁹ the final text, couched in any event in a non-legally binding form,³⁰ limits itself to expanding the anti-discrimination approach (notably through a general clause prohibiting discrimination in Article 21, paragraph 1) endorsed by the Treaty of Amsterdam, and mentioning respect by the Union for cultural diversity – including religious and linguistic diversity pursuant to Article 22 – in accordance with earlier developments (notably under Article 151, ex Article 128, of the EC Treaty). The impact of general human rights provisions enshrined in the Treaty on European Union (TEU) (for example in Article 6) on the protection of minorities within the EU area remains to be seen, as does the role of the European Court of Justice (ECJ) in tackling internal minority issues within the context of its human rights jurisprudence.³¹ Importantly, though, the ECJ recognised in the *Bickel/Franz* case that domestic norms designed to protect minority rights may be “legitimate”, and thus compatible with Community law based on a test of proportionality.³²

At the external level, the core of minority rights activities lies in a range of mechanisms designed to facilitate and/or consolidate transition towards democracy by eastern European countries.³³ They are linked to the admission procedure or to more general policies which pursue the rapprochement of these countries into EC/EU structures. Generally speaking, they are designed to promote the implementation of CoE and OSCE standards rather than establish new norms in the field.

Interestingly, the Stability Pact for Europe of 1995, resulting from a Common Foreign and Security Policy (CFSP) Joint Action approved by the EU Council in 1993, incorporated or spurred on major bilateral treaties between countries from eastern Europe, dealing wholly or partially with minority issues, such as the cited basic treaty between Hungary and Slovakia and the later treaty between Hungary and Romania.³⁴ They importantly incorporate soft law instruments on minority rights (typically, the Copenhagen Document,

Recommendation 1201 and the UNDM), thereby turning them into legally binding regimes. Nevertheless, they normally do not elaborate upon the content of the instruments and their relation to one another (for instance, the minority language and education rights contained in Recommendation 1201 are far more strongly worded than those embodied in the UNDM).

A new wave of bilateral arrangements is being prepared under the umbrella of the Stability Pact for South Eastern Europe, launched by the EU, within the CFSP, in 1999. The Western pressure for such ad hoc regimes somewhat reflects the present difficulties in achieving more stringent and wider systems of protection at the European level. At the same time, co-operation on the promotion and protection of minority rights has increased not only through bilateral treaties but also through sub-regional multilateral instruments. Of particular importance are the Central European Initiative Instrument for the Protection of Minority Rights, and the Framework Convention for the Protection of National Minorities – this latter adopted within the Commonwealth of Independent States – both finalised in 1994. Specific regional minority standards beyond Europe are still virtually lacking, although some minority aspects are creeping into the indigenous rights discourse within the inter-American human rights protection system and attempts have been made recently to advance minority issues within the African human rights protection system as well.³⁵

In terms of the legal status of contemporary minority rights norms, Article 27 of the ICCPR, as the only international global treaty standard on the protection of minorities, seems to be gaining currency as the expression of a norm of international customary law binding all states. In fact, while specific contours of Article 27 rights require further clarification and areas of disagreement persist, at least the right to the equal enjoyment of one's identity, and, in particular, to assert and preserve it free of any attempt at assimilation against one's will, nowadays enjoys wide support from the international community, in view of broadly formulated notions of cultural pluralism and repeatedly stated concerns for stability. It might arguably be viewed as a strong candidate for customary law through state practice and *opinio iuris*.³⁶ The same considerations may partly apply to the UNDM, some provisions of which may indeed be interpreted as either reaffirming customary law (for example Article 1, paragraph 1, in relation to aspects affecting the physical existence of minorities)³⁷ or probably reflecting customary law *in statu nascendi* (for example Article 2, paragraph 1). Overall, the maturing of the declaration into customary law basically depends on whether, and to what extent, states will respond to the above-mentioned expectation of compliance which the adoption of this type of instrument normally carries with it, bridging a recurrent gap between proclaimed principles and their actualisation within domestic systems.

A major source of international minority rights law, and international human rights law in general, is international treaties. In addition to Article 27 of the ICCPR, the treaty approach is in fact gradually recovering from the general disfavour into which it fell (with a few exceptions) following the disenchantment with the treaty-based League system in the 1930s. The FCNM and the

above-mentioned bilateral treaties provide evidence of such a renewal in conventional regimes.³⁸ Unlike customary norms, treaty norms of course apply only to those states which have consented to be bound by them. As revealed by the above brief overview of standards, several instruments on minority rights are of a non-legally binding nature, although this is not to say that they are legally irrelevant. In addition to their important moral and/or political force, they indeed help shape the content of international law standards, as is vividly illustrated, *inter alia*, by the incorporation as legal obligation of major soft law texts in the recent bilateral regimes indicated earlier. In general, they can be used by a variety of state and non-state actors, including national courts and NGOs, as a useful tool for advancing the minority rights discourse in conjunction with norms deriving from traditional sources of international law (as far as they are applicable to a given country), and persuading governments to comply with the relevant standards through appropriate domestic laws and practices.

How can international minority rights be enforced?

Given the well-known absence of a centralised power of enforcement at the international level, the implementation of the relevant international standards must be secured through each country's own legal system. Most domestic systems require that international human rights norms be incorporated into specific national laws in order for them to become applicable within this context. At the same time, international human rights norms, including those regarding minorities, either set out, or imply a duty to do so or, where they are not binding, at least generate expectations that states will take internal action in conformity with them. Effective "domestication" of international norms demands an effective system of remedies for violations of those norms as well; as long as this system is put in place by a country, then international supervisory procedures will normally remain unavailable until internal remedies are exhausted.

Experience shows that if implementation of international norms is entirely left to domestic mechanisms, effective human rights protection is less likely to follow. This explains the widely shared notion that enforcement can also occur, or be facilitated, through international action. In theory, under international law states may call each other to account in relation to their human rights violations. In practice, this rarely happens. In fact, the scene of inter-state enforceability of human rights, far from indicating an excessive human rights "vigilantism", has in most cases shown a remarkable lack of willingness on the part of a state to pick up on human rights violations committed by another state. As a result, international enforcement is mostly pursued through a variety of procedures and mechanisms made available within major international institutions,³⁹ a number of which are discussed at length in this book. The aim of the following is thus not to analyse them in any detail but rather to offer a cursory indication of some major implementation approaches and the purposes they are supposed to serve.

One way of viewing enforcement in relation to minorities is in terms of the various techniques of supervision concerned with the protection of human

rights in general, at universal, regional or sub-regional level. For instance, the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights, essentially employ the so-called "ECOSOC 1503 complaints procedure", set up to identify situations amounting to consistent patterns of gross human rights violations, as well as procedures based on the appointment of special rapporteurs or working groups with country-oriented mandates (that is, authorising to investigate certain human rights violations within a particular state) or thematic mandates (that is, authorising to investigate in general certain human rights matters, such as, for example, religious intolerance). Both special rapporteurs and working groups report annually to the Commission on Human Rights, and their reports are made public. Minorities are frequently victims of a vast range of human rights violations, beyond the specific area of minority rights, whose investigation comes under the scope of many of those procedures. Consequently, pertinent issues, which by and large affect the physical integrity of minority groups and/or the enjoyment by their members of basic human rights on an equal footing with other individuals, have been, or may be brought up by making use of the monitoring opportunities provided by the above procedures, ranging from investigative and/or fact-finding activities to public debate with NGOs. In principle, they might even generate background input leading to a claim under a particular human rights treaty.⁴⁰

Similar examples of human rights global or regional procedures offering avenues to advance the general interests of a minority group, notably in relation to the non-discriminatory exercise of rights and freedoms, include the reporting and complaints procedures before the Committee on the Elimination of Racial Discrimination (CERD) established pursuant to the ICERD, the judicial-like enforcement machinery before the European Court of Human Rights pursuant to the ECHR and its protocols, and the control processes within the inter-American human rights system.⁴¹ It should be noted that the enforcement of human rights may also result from action taken by bodies which have been established with no specific human rights mandate. For instance, such UN bodies as the General Assembly and the Security Council may consider general human rights matters, including those involving minorities, without any formal complaint mechanism, and the latter may authorise enforcement action under Chapter VII of the Charter of the United Nations, encompassing the use of armed force in case of abuses amounting to threats to, or breaches of, international peace and security.

However important these mechanisms may be with regard to minorities, the fundamental way of looking at enforcement benefiting these groups is of course through the supervisory methods that are directly attached to the implementation of minority rights standards. Some such methods are briefly indicated below. As hinted at earlier, the HRC is increasingly effective in securing protection under the ICCPR, especially by providing specific redress for minority rights violations and improving the understanding of Article 27 rights in the context of the complaints procedure set out by the first optional protocol to the ICCPR. The UN Working Group on Minorities, established within the (then) Sub-Commission on Prevention of Discrimination and

Protection of Minorities pursuant to ECOSOC Resolution 1995/31, and partially the High Commissioner for Human Rights, review the implementation of the 1992 UNDM, and consider several related questions affecting the maintenance of peace. The UN working group held eight annual sessions, between 1995 and 2002, in which a wide range of relevant subjects were reviewed. Although this body has been established more as a framework for discussion than as a strict control mechanism, it nevertheless performs de facto an important supervisory work by regularly inviting not only independent experts but also governments, international agencies and minority representatives to offer their perspectives on minority issues. Where NGOs or minority associations make an oral statement or otherwise submit information about the situation of minorities in a specific country, this country is given an opportunity to respond or provide additional information.

At the European level, the Committee of Ministers is entrusted with the task of monitoring the implementation of the 1995 FCNM (Article 24, paragraph 1). To this end, it is assisted by an Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), whose members have recognised expertise in the field of the protection of national minorities (Article 26, paragraph 1). On 17 September 1997, the Committee of Ministers adopted a resolution concerning the rules on the monitoring arrangements under Articles 24 to 26 of the FCNM (Resolution (97) 10). Consistent with Article 26, it determines the role of the ACFC, which is established as a body of experts who are elected by the Committee of Ministers but serve in their individual capacity, and therefore its relation with the latter. The FCNM provides neither an inter-state nor individual complaints procedure. Rather, the supervision is based (primarily) on periodic state reporting (after initial transmission of full information under Article 25, paragraph 1), in order to evaluate “the adequacy of the measures taken” (Article 26, paragraph 1); it is basically aimed at encouraging states parties to implement the FCNM properly, rather than at “sanctioning” those states which breach it. In late 1998, the Committee of Ministers adopted an outline for reports to be submitted pursuant to Article 25, paragraph 1, of the convention, regarding their legal, policy and factual components (the outline will be reviewed in the light of the results generated by the first monitoring cycle).

The ACFC has already adopted several opinions on the implementation of the FCNM, while the Committee of Ministers, to which all of the ACFC’s opinions have to be submitted for final deliberations, had adopted its own resolutions containing conclusions and recommendations.⁴² No binding decision can be adopted by the monitoring body. The non-judicial character of the procedure confirms the little stringency of the treaty as a whole, and clearly reflects states’ reluctance to secure supervision based on adjudication and redress. So far, the ACFC has appeared remarkably active with regard to meetings with not only representatives of states parties but also representatives of non-state actors, such as national institutions, NGOs and minority organisations, whose background input has also been sought through shadow reports.⁴³

In strictly institutional terms, an important development was the establishment of the OSCE High Commissioner on National Minorities (HCNM) at the Helsinki follow-up meeting of 1992. The HCNM has worked since 1993 as an instrument of conflict prevention, by providing – according to the respective mandate – “early warning” and, where appropriate, “early action”, so as to prevent tension from escalating into violence and spreading across national borders. He may collect and receive information from any source (save information from people or organisations involved in terrorism or violence), conduct fact-finding missions in the form of visits subject to the consent of the state concerned, and suggest solutions with a view to fostering dialogue between governments and national minorities. Despite his security rather than humanitarian functions, the high commissioner is also guided by the relevant OSCE and other human rights instruments as a framework of analysis. In fact, he has occasionally reviewed pertinent standards, as, for instance, in the 1999 “Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area”, or facilitated the drafting of special texts, such as the so-called Hague, Oslo and Lund recommendations on, respectively, the education, linguistic and participation rights of persons belonging to national minorities, adopted between 1996 and 1999 by independent experts in support of his efforts, under the auspices of the Foundation on Inter-Ethnic Relations based in The Hague. His essentially mediation strategy, though, remains one characterised by pragmatism and “quiet diplomacy”, designed to reach tailor-made compromises rather than secure a progressive, general implementation of existing standards.

The complex of supervisory techniques, particularly their role in the implementation practice, raises a whole host of questions which will be explored in the following chapters. For the purpose of the present introduction, a few general aspects may be worth briefly mentioning. In terms of the nature of supervision regarding minority rights, judicial review is virtually non-existent, while quasi-judicial review is largely confined to the individual complaints procedure established by the first optional protocol to the ICCPR. Whereas judicial-like approaches are generally still resisted by states, most recent responses rest on the recognition of a linkage between rights protection and preservation of peace and the resulting need for more flexible (non-judicial) models which envisage minority issues and minority rights compliance from a predominantly pragmatic context-specific perspective. The FCNM, the recent eastern bilateral treaties, the OSCE HCNM work, as well as a range of further related measures, all provide examples of policy-driven patterns, namely attempts to inspire domestic policies which are responsive to political circumstances.⁴⁴ For instance, the flexibility of the OSCE HCNM’s mandate, coupled with a number of operational tools he has developed over time, are at the basis of a constructive way of tackling situations of potential inter-state conflict involving minorities, as illustrated by the case of the Hungarian minorities in Romania and Slovakia.⁴⁵ On the other hand, non-judicial responses to enforcement are reaching beyond the typical mediation, “non-hierarchical”⁴⁶ processes reflected in the patterns described above. The CoE and the EU are stepping up the level of minority rights monitoring in connection with their own human rights admission requirements and/or

within the context of a coherent strategy based on the principle of conditionality. Depending on the initiative pursued, a number of sanctions (operating, by contrast, as disincentives) are provided for as a last resort against non-compliant states, ranging from suspension or termination of the relevant trade agreement (under a so-called human rights clause) to other appropriate steps, including suspension of financial assistance and/or trade preferences, to denial of membership. The EU deploys strong political and economic leverage to induce compliance with human rights/minority rights, in line with overall international tendencies to use the financial lever for this aim, which is brought to bear, to a greater or lesser extent, on the prevention of ethnic conflicts.⁴⁷ Generally speaking, the monitoring of the implementation of, *inter alia*, minority rights standards, is being carried out on the basis of internal reporting supplemented by available sources from other international organisations or bodies.

Experience shows that there are certainly advantages in adopting such flexible approaches. First, they are unencumbered by those stringent procedural requirements typically set out by formal complaints mechanisms – they may indeed result in loosely undertaken action on the initiative of the relevant body (for instance, the OSCE HCNM, the CoE Parliamentary Assembly or the EU Commission or Council) and/or in an open dialogue meant to favour constructive solutions (for instance, in the context of the FCNM or the recent eastern bilateral treaties). Second, although the impact of the various models may vary depending on a range of factors, it is safe to say that they generally allow for a degree of representation of the group's interests, particularly by enabling minority organisations or third-party NGOs to provide relevant information and make a case for ameliorating protection by the state concerned. Third, policy-driven responses to minority rights implementation tend to address compliance issues in a comprehensive manner, thereby promoting the sort of policy change which is necessary to tackle those systemic problems that group accommodation may raise (namely, long-standing group disputes linked to social and political factors). As effective in facilitating compliance with minority rights standards as they may appear, theoretically or in practice, they also present downsides which should be properly considered. Indeed, as non-judicial or political processes, they normally do not carry with them enforcement possibilities for victims and their representatives, are often exposed to double standard or realpolitik considerations, and/or the issue of minority rights compliance may not surface unless it is visibly linked to a potential or actual danger of conflict. Even more importantly, their contribution to a legal interpretation of standards is limited or difficult to measure, due to either precisely the diplomatic – rather than juridical – characterisation of the work carried out by the supervisory actors (for instance, the OSCE HCNM) or the low-key legal nature of the monitoring process as a whole (for instance, that of the FCNM). In this regard, the Article 27 jurisprudence of the HRC as well as the ECHR jurisprudence are clearly indicative of the far greater role judicial-like bodies play in expounding the norms, applying them consistently, and providing remedies for limited grievances.

At the same time, judicial-like models are focused on individual cases, which may be brought up only by those (be they individuals, groups of individuals or NGOs) who believe to have been victims of a rights violation. To be sure, the victim requirement is not always a *sine qua non* for petitioning: for instance, the petition procedure before the Inter-American Commission on Human Rights (IACHR) allows for petitions to be filed with the IACHR by a third party on behalf of individual victims, with or without the latter's knowledge or consent; that has occurred so far mostly on behalf of indigenous communities. In the specific context of minority rights supervision, the HRC, though deeming inadmissible complaints submitted by collective entities on their behalf or by third parties on behalf of individual victims, as well as complaints in the form of an *actio popularis*, does allow, as indicated earlier in this chapter, communications from a group of allegedly "similarly affected"⁴⁸ individuals such as minority members. As long as minority rights norms are, and remain of an individual nature, judicial-like approaches, in their most progressive versions, might go as far as to confer a procedural faculty of independent action upon minority associations and third-party NGOs, and therefore permit a higher measure of collective representation. Even so, they could not transcend limitations attached to the nature and reach of adjudicatory or quasi-adjudicatory methods.

A plausible contention seems to be that both judicial-like and policy-driven means of enforcement can usefully address certain minority situations, but not all of them. The former approaches arguably reflect the vision of implementing minority rights as "normal", or universal or generally applicable, human rights law, particularly in the sense of resolving questions relating to the content of the relevant provisions and the way they should be applied in practice, as well as seeking consistency of the respective regime of rights and duties. As hinted at earlier, the latter approaches are prompted by considerations of security and are part of wider efforts at preventing, managing and/or solving ethnic disputes or conflicts. It would thus be advisable to better appreciate the advantages and disadvantages of judicial-like and policy-driven international responses in a way that both of them can appropriately serve the fundamental aim of generating effective minority rights protection at the domestic level. Although no dramatic developments on the judicial-like side can be reasonably expected over the short and medium term in international law,⁴⁹ discussion as to the complementarity – rather than mutual exclusion – of such approaches can and should go on, while at the same time upholding independent and effective supervision as their veritable mantra.