State Duty Towards Minorities: Positive or Negative?

How Policies Based on Neutrality and Non-discrimination Fail

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Introduction

The importance of the question of the protection of minorities is today beyond dispute. The currency of the issue is reflected on the international level, where the different types of initiatives (declarations, resolutions, conventions, etc.) designed to improve the protection of minorities have proliferated, as well as on the national level.

The question dealt with in this paper, is whether positive state action is required for developing an efficient policy of minority protection. Is it enough for a state to make sure not to discriminate against minorities in comparison to the majority population, and to adopt a position of neutrality towards minorities? Or should states, on the contrary, try to support minorities in an active way, and even treat minorities in a preferential way? We will argue that the answer to this last question is a positive one, and in doing so we will discuss the shortcomings of a policy of minority protection based on non-discrimination and neutrality of the state.

The first chapter is dedicated to the definition of the concept of "minority", since there is no generally accepted definition of the concept of a "minority" in international law.

The second chapter will basically develop two main approaches to the protection of minorities which have emerged in Europe: enforcement of anti-discrimination norms, and support for "special" rights for minorities. Anti-discrimination measures are designed to ensure that individuals are not treated differently from others for unjustifiable reasons. Special minority rights protections aim to allow individuals and communities to preserve their differences so as to avoid forced assimilation into a majority culture. Anti-discrimination and minority rights are complementary responses to the problems facing minorities, who confront risks of both exclusion and assimilation. They may properly be thought of as aspects of a single comprehensive approach. Therefore, a strategy to protect minorities on the basis of non-discrimination alone, will not be sufficient.

Other topics dealt with in this second chapter, are equality and non-discrimination as general principles of international human rights law, the difference between the anti-discrimination approach and minority rights, affirmative action and other "special" measures for minorities and the concept of institutional equality.

We feel that arguing for "special" rights to be granted to minorities, automatically implies condemnation of a state's policy of neutrality of the state. In the third and final chapter, we will examine whether the state's duty towards minorities, ac-

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cording to article 27 ICCPR, is a positive or a negative one. Does this article oblige states members to act positively, or does the obligation of article 27 ICCPR only amount to a duty of neutrality?

Chapter I: Definition of "Minority"

It is not the intention of this chapter to consider in depth the difficult matter of defining minorities in general or in particular cases[1]. However, in order to be able to develop a clear understanding of the advantages and shortcomings of strategies to protect minorities, it is necessary to cast some light upon the difficulties encountered in trying to find a generally accepted definition of "minority".

The numerous initiatives which have been taken over the years at different international forums in order to clarify the (essence of the) concept of minority have confirmed the legal significance of the matter. In the absence of some kind of definition, it would become practically difficult to attain foreseeability in law since prospective claimants would be unable to rely on the standards as applicable (or not) to them.[2]

The question of how to define the term "minority" was on the agenda of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, established in 1947, from the very first day of its existence. In January 1950, the UN Sub-Commission recommended the adoption of the following definition[3]:

> "a) The term minority includes not only those non-dominant groups in a population which possesses and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
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> b) Such minorities should properly include a number of persons sufficient by themselves to develop such characteristics; and
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> c) The members of such minorities must be loyal to the State of which they are nationals".

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[1] For an in depth analysis of the definition of "minority" see: J. Packer, On the Definition of Minorities, in: J. Packer/K. Myntti (eds.), The Protection of Ethnic and Linguistic Minorities in Europe, 1993, 23-65; J. Packer, Problems in Defining Minorities, in: D. Fottrell/B. Bowring (eds.), Minority and Group Rights in the New Millennium, 1999, 223-274; G. Pentassuglia, Defining "Minority" in International Law: A Critical Appraisal, 2000; G. Pentassuglia, Minorities in International Law. An Introductory Study, 2002, Chapter III, 55-74; M. N. Shaw, The Definition of Minorities in International Law, in: Y. Dinstein/M. Tabory (eds.), The Protection of Minorities and Human Rights, 1992, 1-32.

[2] J. Packer, On the Content of Minority Rights, in: J. Räikkä (ed.), Do We Need Minority Rights? Conceptual Issues, 1996, 123.

[3] UN Doc. E/CN.4/385.

In 1977 in his study on rights of persons belonging to ethnic, religious and linguistic minorities, Francesco Capotorti, Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, gave the following definition[4]:

> "A group numerically inferior to the rest of the population of a state, in a non-dominant position whose members – being nationals of the state – possesses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language".

The Capotorti definition reflects the prevailing general understanding of minority in international law, and consequently mandates minority status for the groups fulfilling the respective criteria without any unreasonable distinctions.[5]

Another attempt to define "minority" was undertaken by the Parliamentary Assembly of the Council of Europe which, in its recommendation 1201 of 1993 on an additional protocol on the rights of national minorities to the European Convention of Human Rights, formulates the following definition:

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

Since the Proposal was not accepted by the Committee of Ministers of the Council of Europe, it did not have any binding effect on states.[6]

Clearly, this definition draws on the definition drafted in 1979 by Professor Capotorti. Even if it is not perfect, the proposal for the protocol at least has the advantage of avoiding too theoretical an approach to the problem and ensures that the potential enforcement of the system for the protection of minorities is not too large. It adopts both objective and subjective criteria. The objective factors concern the existence, within the population of a state, of distinct population groups possessing stable ethnic, religious or linguistic characteristics; the numerical size of the group; and the non-dominant position of that group vis-à-vis the rest of the population. To these criteria has been added a subjective factor, namely the will to preserve the specific identity of the group. It seems logical that only those groups that affirm their differences should benefit from special treatment, unlike those who have voluntarily become assimilated to the national population.[7]

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[4] F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, 1979, 96.

[5] Pentassuglia (note 1), Minorities, 72, emphasis in the original.

[6] F. Benoit-Rohmer, The Minority Question in Europe: Towards a Coherent System of Protection for National Minorities, 1996, 13.

[7] Ibid., 14.

These criteria raise some important issues. With respect to the quantitative criterion, one may ask how many members a group must have before it constitutes a minority. This question is important to states in so far as the recognition of too small a minority may place disproportionate demands on the resources of a state. The subjective criterion is similarly difficult to measure. How does one measure the shared will to contribute to the preservation of a cultural, linguistic or religious identity, given that the intensity of those feelings, which are a product of history, must be assessed in the light of each specific situation?[8]

Although no single definition of all existing definitions of a minority has been universally recognized and not one of the normative instruments dealing with the rights of persons belonging to minorities adopted by the UN or UNESCO contains any formulation in this respect, one can nevertheless observe that draft definitions, despite concrete formulations, repeat certain elements[9]:

a) a group numerically inferior

b) in a non-dominant position

c) having certain characteristics (identity), culture (ethnic, religious, linguistic) which distinguish them from the rest of the population

d) with a sense of solidarity or will to safeguard their characteristics.

However, some of these elements are subjective, and, as such, open to various interpretations and understandings.

In any event, the lack of a general definition does not seem to have been a stumbling block to the application of the relevant international rules in specific cases, provided that it is possible to identify sufficient criteria to establish that a minority exists. Thus the absence of a general definition in Article 27 of the ICCPR and in Article 14 of the ECHR has not prevented either the Human Rights Committee of the UN or the European Court of Human Rights from settling disputes in which minorities were involved. As the PCIJ pertinently pointed out as early as 1930, the existence of a minority is a matter of fact, not a question of law.[10]

Chapter II: Non-discrimination

1. Equality and Non-discrimination as General Principles of International Human Rights Law

Equality and non-discrimination are well-established principles of international human rights law. They are prescribed in the UN Charter[11] and the UDHR (Arti-

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[8] Ibid.

[9] J. Symonides, The Legal Nature of Commitments Related to the Question of Minorities, in: L.A. Sicilianos (ed.), Nouvelles Formes de Discrimination – New Forms of Discrimination. Actes du séminaire international d'experts sur la prévention des discriminations à l'égard des immigrés, des réfugiés et des personnes appartenant à des minorités (organisé par l'UNESCO et la FMDH à Olympie les 13 et 14 mai 1994), 1995, 214.

[10] Benoit-Rhomer (note 6), 15.

cle 2). The ICCPR and the ICESCR contain general and specific clauses to the same effect. Specialised instruments, too, contain anti-discrimination clauses, including the ICERD (1965), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), the UN Convention on the Rights of the Child (1989), ILO Convention N° 11 concerning Discrimination in Respect of Employment and Occupation (1958), the UNESCO Convention against Discrimination in Education (1960). Regional human rights instruments, such as the ECHR (Article 14), include comparable clauses. And Protocol N° 12 to the ECHR embodies a general prohibition of discrimination, which provides a scope of protection broader than that of Article 14 of the ECHR.[12]

The principles of equality and non-discrimination are also widely acknowledged, at least in racial matters, as forming part of customary international law binding all states. Support for this view comes from authoritative instruments such as those just cited, authoritative legal institutions such as the UN International Law Commission and the ICJ (*Barcelona Traction* case (Second Phase)[13] and advisory opinion in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*[14]), pronouncements by worldwide international conferences, and distinguished academic commentators[15].

The HRC, in its General Comment N° 18 on non-discrimination under the ICCPR, stated in 1989 that:

> the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and obligations.[16]

Article 2, paragraph 1 of the covenant obliges each State Party to respect and ensure all persons within its territory and subject to its jurisdiction the rights recognised in the covenant without distinction of any kind, such as race, colour, sex, language, religion, etc.[17] Article 26 not only entitles all persons to equality before the law as well as equal protection of law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, etc.[18]

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[11] Article 1, paragraph 3, and Article 55, sub-paragraph (c).

[12] Pentassuglia (note 1), Minorities, 86.

[13] ICJ Reports, 1970, 32.

[14] ICJ Reports, 1971, 56-57.

[15] See for example I. Brownlie, Principles of Public International Law, 1998, 602.

[16] General Comment N° 18, Non-Discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 26 (1994), paragraph 7.

[17] See for example *Antonina Ignatane v. Latvia*, Communication N° 884/1999, Views of 25 July 2001, CCPR/C/72/D/884/1999.

[18] Pentassuglia (note 1), Minorities, 86-87.

Importantly, the anti-discrimination clauses enshrined in the ICCPR (especially in Article 2, paragraph 1, and Articles 3 and 26), not only prohibit discrimination by state agencies and laws, they also entail a duty on states parties "to ensure" that individuals are protected against discrimination by private actors.[19] That is also clearly prescribed by the ICERD under Article 2, paragraph 1, sub-paragraph d.[20]

Does respect for the equality and non-discrimination precepts consist in affording identical treatment in every instance? The question, which is of general importance, is especially relevant to minorities, considering that, as noted earlier, virtually all anti-discrimination clauses encompass minority traits such as ethnic origin, language or religion. In particular, should it be concluded that a less favourable treatment accorded to non-minority individuals as compared to members of ethnic, linguistic or religious minority groups, based on the fact that the former do not belong to the latter, is *per se* discriminatory and thus contrary to international law? In the cited General Comment N° 18 on non-discrimination, the HRC observed that not every differentiation of treatment will constitute discrimination if the aim is to achieve a purpose which is legitimate under the covenant and if the criteria used are reasonable and objective (paragraph 13). In fact, such requirements for a permitted distinction drew upon those already spelled out by the European Court for Human Rights in relation to Article 14 of the ECHR, in the Case Relating to *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*[21] and later on in, for example, *Abdulaziz Calabes and Balkandali v. United Kingdom* case[22]: the distinction must pursue a legitimate aim; the distinction must have an objective justification; and the measures must be proportionate to the aim sought to be realised.[23] Thus differential treatment only amounts to a prohibited discrimination when there is no reasonable and objective justification for it.[24]

Article 1, paragraph 4, and Article 2, paragraph 2, of the ICERD consider special measures taken "for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals" and "guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms" as not constituting an act of discrimination; these measures must be discontinued "after the objectives for

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[19] See for example, the HRC General Comment N° 18, loc. cit., paragraph 9.

[20] Pentassuglia (note 1), Minorities, 87.

[21] Hereinafter the "*Belgian Linguistics* case", ECHR, Judgment of 23 July 1968, Series A, N° 6.

[22] ECHR, Judgment of 28 May 1985, Series A, N° 94.

[23] Pentassuglia (note 1), Minorities, 88-89.

[24] See also P. Lemmens, Gelijkheid en non-Discriminatie in het Internationale Recht: Synthese, in: A. Alen/P. Lemmens (eds.), Gelijkheid en Non-Discriminatie, 1991, (85) 88-89. See also the jurisprudence of the Human Rights Committee regarding Article 26 ICCPR, for example in *Evan Julian et al. v. New Zealand,* Comm. N° 601/1994, UN Doc. CCPR/C/59/D/601/1994, 3 April 1997, § 8.5. The highest Belgian courts have also aligned themselves to this vision of equality, allowing differential treatment when there is a reasonable and objective justification for it. See *inter alia* Court of Cassation, 5 October 1990 (*Firma Bulcke*), R.W. 1990-1991, 328; Court of Arbitration, N° 1/94, 13 January 1994, B.S., 1 February 1994; Council of State, Lemmens, N° 10.675, 9 June 1964. For a critical evaluation of the jurisprudence of the European Court of Human Rights and of Belgian courts concerning the application of the equality principle, see K. Rimanque, De Paradoxale Werking van het Gelijkheidsbeginsel", R.W. (1992-1993), 6-15.

which they were taken have been achieved". This principle has been broadly formulated in Protocol N° 12 to the ECHR (third recital of the preamble) and, more importantly, can be found in international texts specifically concerning minorities, in connection with basic equality and non-discrimination clauses.[25] Depending on the instrument, the adoption by states of the special measures in question is, or may be, justified, encouraged and/or even framed as a matter of duty.[26]

Therefore, in international human rights law equality and non-discrimination can be said to constitute interlocking, "twin" components of a unitary concept: on the one hand abstention from any kind of differentiation based on arbitrary or unreasonable grounds, which is a negative aspect of equality, and on the other hand differential treatment, or "positive" or "reverse" discrimination, which is intended to achieve positive equality (or equality in fact) in relation to demonstrably unequal situations, in conformity with the above-mentioned requirements.[27]

2. The Difference Between the Anti-discrimination Approach and Minority Rights

Although minorities benefit from the principles of equality and non-discrimination, an important distinction has to be made between the anti-discrimination approach and minority rights. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities gave useful pointers on the matter by explaining the themes of its mandate[28]:

> 1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
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> 2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population ... [if] a minority wishes for assimilation and is debarred, the question is one of discrimination.[29]

The protection of members of minorities against discrimination in essence constitutes a statute of prohibited treatment, but does not systematically embrace minority rights. The protection of minority rights is a wider notion than just anti-dis-

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[25] For example paragraph 31 of the Copenhagen Document; Article 4 of the Framework Convention; and Article 4, paragraph 1, of the UN declaration.

[26] Pentassuglia (note 1), Minorities, 89.

[27] Ibid.

[28] UN Doc. E/CN.4/52, Section V.

[29] See also memorandum UN Secretary General, The Main Types and Causes of Discrimination, UN Sales N° 49.XIV.3, New York 1953, §§ 6-7:
"Thus the prevention of discrimination means the suppression or prevention of any conduct which denies or restricts a person's right to equality.
The protection of minorities, on the other hand, although similarly inspired by the principle of equality of treatment of all peoples, requires positive action: concrete service is rendered to the minority group ... Such measures are of course also inspired by the principle of equality ..."

crimination. Such rights are not privileges, but represent some of the implications of the concept of substantive equality as opposed to purely formal or legal equality. They are intended to remedy the structural imbalance between minorities in areas critical to the preservation of cultural integrity. In *Minority Schools in Albania*[30], the PCIJ insisted on the notion of equality in fact and held that the closing of the minority schools was incompatible with equality of treatment; it indeed pointed out that:

> there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.

As a result, general or specific anti-discrimination clauses 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. And yet, as stated by the PCIJ in that same case[31], minority rights fall beyond purely anti-discrimination objectives generated by the purpose of "achieving perfect equality with the other nationals of the State"; they specifically aim at preserving the characteristics which distinguish the minority from the majority, satisfying the ensuing special needs.[32]

Hence, whereas the prevention of discrimination demands in general 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[33], the core of the "protection of minorities" lies in special, essentially permanent measures which are intended to safeguard the identity of certain groups.[34]

3. The Two Pillars or Basic Principles of a "Fully Fledged" System of Minority Protection and Substantive Equality

According to Henrard[35], a "full blown" system of minority protection should be based on two pillars or basic principles, namely 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 hand. Henrard underlines that the concept "minority protection" used *sensu lato* comprises the two pillars, as where the concept "minority protection" used *sensu stricto* denotes only the second pillar.

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30 PCIJ Series A/B, N° 64, 1935, 17.

31 Ibid.

32 Pentassuglia (note 1), Minorities, 90-91.

33 See generally, for example, the HRC General Comment N° 18 on non-discrimination, paragraph 10; HRC General Comment N° 28 on equality of rights between men and women, paragraph 29; and the declaration adopted by the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, paragraph 108.

34 Pentassuglia (note 1), Minorities, 91.

35 K. Henrard, Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination, 2000, 8-11.

The first pillar deals with rules that are expressions and further elaborations of the prohibition of discrimination. Such rules guarantee formal equality, and are at the same time conducive to achieving substantive equality.[36] They are, consequently, considered to be a necessary prerequisite for the second pillar and its rules, which are actively geared toward realizing substantive equality.[37] The second pillar thus assumes the existence of the first one and builds on its acquis (essence and achievements) without contradicting it. Substantive or real equality can indeed require differential treatment for people in different circumstances. For (members of) minorities these rules would be focused on devising appropriate means to retain and promote their distinctive characteristics.[38]

The double track of minority protection (*sensu lato*) was first expounded by the PCIJ in its advisory opinion regarding the minority schools in Albania. The Court formulates the aim of the minority protection system of the League of Nations[39] as follows:

> "Secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from a majority, and satisfying the ensuing special needs.
>
> In order to attain this object, two things were regarded as particularly necessary ... The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

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36 See ibid., chapter II, at 58-62, where the concept of "equality" and all its (sub) dimensions is elaborated upon.

37 Because the differential measures concerned are geared towards achieving substantial equality, the term "special" (in the expression "special measures") is put between.

38 See *inter alia* G. Alfredsson, Discussion Paper of Workshop I of the Strasbourg Conference on Parliamentary Democracy: Human Rights, Fundamental Freedoms and the Rights of Minorities, Essential Components of Democracy, SXB. Conf (III) 8, 1991, 3 and 12; Benoit-Rohmer (note 6), 16; J. Duffar, La protection internationale des Droits de Minorités Religieuses, R.D.P.S. (1995), 1525; A. Eide, Preliminary Report: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, UN Doc. E/CN.4/Sub.2/1991/43, 24 June 1991, 11-12; H. Hannum, The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples and the Right to Autonomy, in: E. Lutz et al. (eds.), New Directions in Human Rights, 1989 20; P. Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and Update, in: A. Phillips/A. Rosas (eds.), Universal Minority Rights, 1995, 18 and 24.

39 Cf. also *supra* under 2. The difference between the anti-discrimination approach and minority rights. Several of the advisory opinions of the PCIJ are still considered to be valuable. The advisory opinion regarding the minority schools in Albania is indeed often referred to by authors when discussing minority protection. See for example F. Capotorti, The Protection of Minorities Under Multinational Agreements on Human Rights, Italian YB. I.L. 1976, 4; M. Tabory, Language Rights as Human Rights, Israel YB. H.R., 1980, 221; Thornberry (note 39), 16. Contra Packer (note 2), 145, who thinks it inappropriate to use that opinion as point of departure for a discussion of minority rights.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of their own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority."[40]

This double track is also taken up by the United Nations, already as far back as the first session (1947) of the UN Sub-Commission.[41]

Although "special" measures for minorities are not entirely uncontroversial[42], it is currently rather generally accepted that each system of minority protection should follow this double approach.[43] Minority protection *sensu lato* thus encompasses not only non-discrimination measures, but also all kinds of "special" measures designed to protect and promote the separate identity of minorities. It is furthermore important to emphasize that both pillars, the non-discrimination principle in all its manifestations and the measures of minority protection *sensu stricto*, can be considered to be implementations of the equality principle.[44]

Both aspects of minority protection (*sensu lato*) are closely connected and intertwined because of their focus on equality. These aspects need to be considered in combination when assessing whether a certain technique contributes to an adequate minority protection. The ultimate criterion to make such an evaluation is the right to identity of minorities. Although this refers at first sight rather to the second pillar, it is arguably acceptable to use it as a general criterion because the measures related to the right to identity assume and require the prohibition of discrimination as a necessary precondition.[45]

4. "Special" Rights for (Members of) Minorities

In the previous point, we discussed that the prohibition of discrimination has a pivotal function as it is the necessary condition for the (possible) development of "special" measures for (members of) minorities and constitutes the first of the two pillars of a full-blown system of minority protection. However, the specific needs

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[40] Advisory Opinion regarding Minority Schools in Albania, 6 April 1935, PCIJ Reports, Series A/B N° 64, 1935, 17.

[41] Cf. also *supra* under 2. The difference between the anti-discrimination approach and minority rights, for the definitions of prevention of discrimination and protection of minorities.

[42] Cf. the book edited by Räikkä is constructed around the critical question "Do we need minority rights?". See J. Räikkä (ed.), Do We Need Minority Rights? Conceptual Issues, 1996. Certain authors still argue that the protection offered by the equality principle in combination with the individual human rights is sufficient for (members of) minorities and that no "special" measures would be needed (*inter alia* M. Galenkamp, Speciale Rechten voor Minderheden? Een Commentaar op Kymlicka's Multicultural Citizenship, Recht en Kritiek (1996), 202-224; J. Theunis, De Bescherming van Minderheden in het Internationaal en Nationaal Recht. Recente Ontwikkelingen, 1995, 92). In this work, the majority opinion is followed, which will be further argued and clarified *infra* under 4. "Special" rights for (members of) minorities.

[43] Henrard (note 35), 10.

[44] Ibid., 11. Cf. Capotorti, (note 4), 40-41; Theunis (note 42), 9.

[45] Henrard (note 35), 11.

of minorities are not sufficiently addressed or accommodated in that way. It is indeed often postulated that the prohibition of discrimination (especially its restricted version) in combination with individual human rights would not be fully satisfactory in that it would not amount to an adequate system of minority protection. Such a system is meant to guarantee the preservation and promotion of the own, separate identity of minorities to an optimal extent[46] and can be related to the demands of substantive equality.[47]

4.1 Affirmative Action

Affirmative action, also called "preferential treatment", is a notion one encounters as well in internal as in international law, and which is derived from the theory of "compensating inequality" as developed for the first time by the Greek philosopher and scientist Aristotle.[48]

Affirmative action is most often seen and described as a technique to eliminate the enduring effects of past discrimination and amounts thus to a measure of differential treatment aimed at substantive equality.[49]

Several controversies surrounding affirmative action are related to the clear group dimension of this technique, which can be related to the category of group rights and the concomitant problems. A criticism which is often voiced in connection with group rights is for example that to categorize the population among certain identity features would further obstruct the integration of the population groups concerned in society instead of facilitating it. Such categorization would then confirm and maybe even freeze the differences and would furthermore carry the risk of antagonizing the rest of the population.[50] Such a technique can thus be criticized because it uses and therefore reinforces the categorization one tries to eliminate in order to achieve a non-racial society. Affirmative action can neverthe-

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[46] K. Hailbronner, The Legal Status of Population Groups in a Multi-national State Under Public International Law, in: Y. Dinstein/M. Tabory (eds.), The Protection of Minorities and Human Rights, 1992, 134.

[47] Graff states that "non-discrimination is indeed essential to respecting their equal dignity and worth, but it is not sufficient. Within broad limitations set by the moral ideal of respect for the equal human rights and the equal importance of the well-being of individuals, equal respect for those identity-forming, cherished communities whose preservation and flourishing are also elements of their members' well-being is required as well." (J. A. Graff, Human Rights, Peoples and the Right to Self-Determination, in: J. Backer (ed.), Group Rights, 1994, 206.)

[48] A. Brédimas, Les Mesures Spéciales en Faveur des Minorités, in: L.A. Sicilianos (ed.), Nouvelles Formes de Discrimination – New Forms of Discrimination. Actes du séminaire international d'experts sur la prévention des discriminations à l'égard des immigrés, des réfugiés et des personnes appartenant à des minorités (organisé par l'UNESCO et la FMDH à Olympie les 13 et 14 mai 1994), 1995, 287.

[49] Compare with Cohen who seems to reject all other forms of "special" measures: "preference may arise as a moral requirement today only because of wrongful injury yesterday; there is and should be no preference because race or nationality in themselves" (C. Cohen, Affirmative Action and the Rights of the Majority, in: C. Fried (ed.), Minorities: Communities and Identity, 1983, 354).

[50] Galenkamp (note 42), 220.

less be claimed to be necessary because one would otherwise risk not to grasp the ongoing realities of racial discrimination and thus to deny oneself the possibility to remedy its effects efficiently.[51]

In view of the ongoing difficulties with affirmative action measures, it is relevant to underline that in general affirmative action is only allowed on a temporary basis. These measures should be ended as soon as the goal of substantive equality is reached, since affirmative action would otherwise be converted into prohibited discrimination.[52] As the ratio of affirmative action is the rectification of past discrimination, affirmative action does not include separate legal status for certain groups. Differential legal systems and concomitant status would, however, be acceptable as part of the broader category of "special" measures.[53]

Finally, the controversial issue of the use of quotas[54] as form of affirmative action should be mentioned and discussed.[55] The following description of two opposing views captures the contours of the debate quite nicely:

> "According to the one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who had been victims of discrimination but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standard of merit."[56]

Quotas have been argued to be acceptable, in so far as they respect the general qualifications that they "are of strictly temporary nature and are maintained no

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[51] Henrard (note 35), 148.

[52] Cf. Articles 1 (4) and 2 (2) of the International Convention on the Elimination of all forms of Racial Discrimination, about which Mc Kean remarks that "the provisos in both clauses emphasize in similar wording that special measures are for a temporary and limited purpose and are not to result in the maintenance of unequal or separate rights for certain groups after the objectives sought are achieved." (W. Mc Kean, Equality and Discrimination Under International Law, 1985, 159.) Cf. also Moens who argues explicitly that "the UN Convention recognizes the conflict between individual rights and group rights by requiring that special measures 'taken for the sole purpose of securing advancement' of members of groups that have been discriminated against be conceived as temporary." (G. Moens, Affirmative Action. The New Discrimination, 1985, 12).

[53] A. Eide, Minorities and Indigenous Peoples: Equality and Pluralism, in: L.A. Sicilianos (ed.), Nouvelles Formes de Discrmination – New Forms of Discrimination. Actes du séminaire international d'experts sur la prévention des discriminations à l'égard des immigrés, des réfugiés et des personnes appartenant à des minorités (organisé par l'UNESCO et la FMDH à Olympie les 13 et 14 mai 1994), 1995, 238-239.

[54] Regarding the specific issue of the acceptability of quota, the developments in the US are also telling in that they demonstrate how highly sensitive this issue is. It is not clear-cut what the criteria are that make certain quota acceptable while in most cases they are not. See *inter alia* T. Browne-Nagin, A Critique of Instrumental Rationality: Judicial Reasoning about the "Cold Numbers" in *Hopwood v. Texas*, Law and Inequality (1998), 383-391 and 398-401.

[55] For an absolute rejection of quotas, see Cohen (note 49), 356 who dismisses measures designed to reach proportional group representation as "poisonous, because, however well-intended, it enforces group preference in the strict sense and thus imposes that very discriminatory inequality of treatment we now strive to eliminate". He adds that "(i)ronically, the quest for ethnic 'balance' has consequences the very reverse of those ultimately sought. Wanting justice, the advocates of group proportionality do injustice, hoping to eliminate ethnic discrimination, they impose it to attain the numerical ratios they believe ideal; seeking to reduce racial harmony, they exacerbate it". (Ibid., 363).

[56] Mc Kean (note 52), 100.

longer than is necessary to achieve the objectives for which they are imposed".[57] This analysis still implies a negative attitude regarding the use of quotas outside the domain of affirmative action *stricto sensu* for example by way of "special" measure of indefinite duration. A debate about the desirability versus acceptability of quotas underlines the difficulties of developing detailed rules for minority protection in general. The elaboration of a system of minority protection should indeed take all the specific circumstances into account as much as possible, including demographics, relevant historical aspects, concomitant political sensitivities etc. An outright rejection of the use of quotas, either as a form of affirmative action or as a more general form of "special" measure for minorities, would consequently be too radical.[58] A certain reticence and a very careful use of that technique is nevertheless advisable in view of the often strong reactions it can entail.[59]

4.2 Other "Special" Measures for (Members of) Minorities

"Special" measures for (members of) minorities should always be geared towards a situation of substantive equality between the members of the minority and the rest of the population. These measures are mainly concerned with the preservation and promotion of the separate identity of minorities and can appropriately be described as follows: "each of these measures helps reduce the vulnerability of minority communities to decisions of the larger society".[60] In this manner, these measures would not violate the prohibition of discrimination[61] as "inequality in circumstances faced by the members of minority cultures generates legitimate claims.

An ongoing controversial issue is whether or not and if so to what extent the current minority rights imply positive, possibly even financial, obligations for states as regards their respective minorities. In view of the increasing recognition of implicit positive state obligations on the basis of individual human rights and the need to make these rights effective, analogous obligations regarding minority rights would be difficult to deny. The fact that members of minorities do not have the power or ability to protect and promote their distinctive identity sufficiently, arguably enhances the need for their rights (as guaranteed) to be effective and also for genuine positive state obligations. Such obligations could furthermore be justified

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[57] Ibid.

[58] The example of the composition of the Swiss government and its success underscores that certain forms of quota are not necessarily negative in view of the specific historical, political etc. circumstances of the case.

[59] Henrard (note 35), 150.

[60] W. Kymlicka, Individual and Community Rights, in: J. Backer (ed.), Group Rights, 1994, 20.

[61] The HRC states for example in its general comment regarding Article 27 ICCPR and more specifically in § 6.2: "... as long as those (positive) measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria." The last proviso in this paragraph refers to the criteria which are developed in the jurisprudence for the assessment whether a certain difference in treatment is discriminatory.

by the requirement of substantive equality in the sense that active state intervention would be necessary to grant members of the minority substantively equal conditions regarding education, language use in relation to the public authorities, etc.[62]

The category "special" measures includes techniques like granting a separate legal status to linguistic, religious and ethnic groups which might amount to the recognition of certain religious groups' system of personal law, and also rights regarding education as well as language use in relation to the public authorities. More structural, institutional measures would also qualify as such, like forms of the right to internal self-determination[63] (albeit with difference in degree).

The enumeration of possible "special" measures for (members of) minorities reveals that they, unlike affirmative action, are not necessarily temporary. The need for more durable measures can explicitly be related to the demands of real or substantive equality in that mere temporary measures would be insufficient.[64]

4.3 Arguments Supportive of "Special" Measures for (Members of) Minorities

For their arguments pro "special" rights several authors rely on the PCIJ's opinion regarding the minority schools of Albania and more specially its postulate that differential treatment for the members of minorities is necessary to realize substantive or real equality.[65] The goal of effective equality might indeed require that members of minorities be granted equivalent rights that are adjusted to their specific situation. "Special" measures for (members of) minorities are not only for the realization of real and effective equality, but also to satisfy the requirement to respect the separate identity of minorities.

A solid argument in favour of "special" minority rights can be based on the demands of substantive equality in combination with the importance of cultural membership. Starting from the premise that members of a minority culture are disadvantaged compared to the rest of the population as regards the positive value of cultural membership, it can be argued that this inequality could generate legitimate demands for certain forms of minority rights so as to avoid a loss of cultural membership.[66] Since members of minorities are constantly faced with the threat of such a loss, temporary affirmative action programmes would not be sufficient to obtain real or substantive equality in that collective rights of a more permanent nature would be required.[67]

When the right to equality is combined with the right to identity of minorities[68], it can be convincingly argued that a balance between the respective situations of

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[62] P. Thornberry, International Law and the Rights of Minorities, 1991, 179-180.

[63] See *inter alia* Capotorti (note 39), 19-20.

[64] Henrard (note 35), 152.

[65] See *supra* under 3. The two pillars or basic principles of a "fully fledged" system of minority protection and substantive equality for the full quote.

[66] W. Kymlicka, Liberalism, Community and Culture, 1989, 151.

[67] Ibid., 190. Cf. Capotorti (note 4), 37.

the distinctive population groups in a state regarding the preservation of their own identity should be pursued.

Kymlicka considers the distinction between universal and "special" or group specific rights crucial, but he is not an ardent proponent of group rights as such.[69] Group specific rights are rights that are granted to individual members of certain groups, based on their membership[70] and amount thus to collective rights. He is nevertheless in favour of a more explicit recognition of the group dimension of the minority phenomenon than is the case in the current set of minority rights. Rights Kymlicka recommends in this respect include representation rights of minorities in general political institutions and the devolution of competencies to minority communities.[71] However, the latter rights do not form part of positive international law which can be related to the fact that states consider them a quasi-recognition of (real) group rights.

The main argument thus appears to be that individual human rights *in se* cannot provide an adequate minority protection in that the "existing human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities".[72] These questions are situated at the level of concrete implementation of standards and include questions about an appropriate language policy, the method of drawing political borders and the like. Such issues are "left to the usual process of majoritarian decision-making within each state. The result has been to render cultural minorities vulnerable to significant injustice at the hands of the majority, and to exacerbate ethno-cultural conflict".[73] Consequently, one can perceive an increasing acceptance of the need to supplement universal, individual human rights with minority rights.

5. Discussion of the Shortcomings of a Strategy to Protect Minorities on the Basis of Non-discrimination Only

At the end of this second chapter, the conclusion is clear: the principle of non-discrimination is not in itself sufficient to preserve the identity and specific characteristics of minority groups. Various international documents[74] have all stressed the obligation of states to take "positive measures" not only to assure minorities of full and effective equality between their members and those of the majority in all areas

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[68] Kymlicka also uses two other arguments in the debate, namely the one of historical agreements and the one based on the value of diversity, but eventually he argues that neither argument would do in itself and should be combined with the equality argument (W. Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, 1995, 120 and 123).

[69] Kymlicka (note 60), 23.

[70] Ibid., 20.

[71] Kymlicka (note 68), 31-33.

[72] W. Kymlicka, Introduction, in: W. Kymlicka (ed.), The Rights of Minority Cultures, 1995, 18.

[73] Ibid.

[74] Cf. *supra*.

of economic, social, political and cultural life and of society, but also to enable these minorities to develop their identity. On this basis, they must also be granted specific rights, which should not be considered as constituting measures discriminating against the majority.[75]

It is true that in a society based solely on the principle of non-discrimination, the state is indifferent to an individual's affiliation with a particular ethnic group, whether that group constitutes a majority or a minority. This membership remains completely in the private domain of the individuals. Yet, the whole constitutional order of the state, its institutions and rules, reflect the majority's language and culture. There are no institutions which would enable minorities to preserve and develop their different language and culture. Thus, *per omissionem*, the state encourages the assimilation of minorities into the majority. How can members of the minority, for example, foster their language with no real and effective opportunities to learn it, given that the majority's language is the language of the schools in these societies? In the absence of the conditions necessary for the maintenance and promotion of their distinctiveness, members of minorities have no choice but to assimilate into the majority.[76]

This shortcoming of a strategy to protect minorities on the basis of non-discrimination only is, what Joseph Marko[77] calls, the "tyranny of the majority". According to Marko, even if particular interests of ethnic groups can be represented, they – as a rule – can never succeed against the will of the majority insofar as ethnic groups are – in a national state – "structural minorities" without the chance to become a majority one day. Moreover, not only particular, but also general interests will always be decided in favour of the interpretation of the majority group, insofar as the people in office are never "neutral", but raised in a specific culture so that their particular background will always effect their decisions.[78]

Thus, in case of a state conducting a non-discrimination policy only, without conferring "special" rights upon minorities, it will always be the majority which defines what is in the interest of the minority. For Marko, in order to provide minorities with sufficient protection, neither formal, procedural nor substantive equality will do, but there will be need for institutional equality.[79]

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[75] Benoit-Rohmer (note 6), 16.

[76] N. Dimitrov, The Framework Convention for the Protection of National Minorities. Historical Background and Theoretical Implications, 1999, 156-157.

[77] J. Marko, On the Representation and Participation of National Minorities in Decision-Making Processes, in: Council of Europe-Minority Section/Institute of Ethnic Studies (eds.), The Participation of National Minorities in Decision-making Processes, 1999, 14.

[78] Ibid.

[79] Ibid., 14 and 16.

6. An Alternative: Institutional Equality: Autonomy and Integration

It would lead us too far to give an overview of all kinds of "special" rights a state can grant to minorities.[80] It seemed appropriate, though, to end this second chapter with a theory on active minority protection. We chose to develop Marko's theory of "autonomy and integration" by way of alternative to the strategy of non-discrimination only.

Marko believes that the concept of institutional equality can only be implemented by implementing two interrelated functions, which are essential to uphold both group differences and the social as well as political cohesion of the entire society, namely autonomy and integration.[81]

6.1 Forms of Autonomy

First, in order to perform the function of autonomy, various freedoms and human rights must be recognized as the fundamental legal instruments which enable members of ethnic groups to freely express their ethnic affiliation in society and vis-à-vis the state. Individual rights, however, are quite often drafted having in mind the existence of groups in order to form a prerequisite for the guarantee of these rights. The equal protection by the law must no longer be interpreted by the intermediating principle of non-discrimination, but ethnic difference should be treated differently in order to avoid assimilation. Any state action therefore, whether direct or indirect, has to refrain from perpetuating past discrimination by segregation or assimilation.[82]

Secondly, though the right to found organizations is usually guaranteed as an individual right, it can also be provided as a group right.[83] The right to found organizations is further specified by the right to found self-governing bodies and the state's duty to decentralize respective administrative competences of special concern to these minorities as well as to finance their activities. The establishment of a school system, as well as a press and information system on such a self-governing basis, working bilingually or in the language of the minority, is called cultural or personal autonomy, in contrast to territorial autonomy.[84]

Thirdly, the concept of territorial autonomy has been realized, for instance, in Serbia under communist rule by establishing the autonomous provinces of Kosovo

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[80] For such a list of rights to be conferred on minorities, see *inter alia* Benoit-Rohmer, (note 6), 15-18; Henrard (note 35), 243-278.

[81] Marko (note 77), 16-17.

[82] Ibid., 17.

[83] Article 64 of the Slovene constitution provides for a "group right" to found organizations. The autochthonous Italian and Hungarian communities as such, and not only their individual members, are guaranteed the right to found organisations for the preservation of their national identity and to develop activities in the field of public information and publishing.

[84] Marko (note 77), 17-18.

and Vojvodina after 1945.[85] The institutional differentiation between all concepts of territorial autonomy and federalism can be seen from the functional perspective: whereas the former provides for autonomy only with the constant danger of ghettoization and "opposition nationalism", the latter stands for both autonomy and integration by institutionalised participation in the legislative process, usually through a bicameral parliamentary system on the national level.[86]

For Marko, this clearly proves that no form of autonomy can substitute instruments of integration. Autonomy and the instruments of representation are thus not exclusive, but complementary. All forms of autonomy have to be supplemented by legal instruments that provide for the representation of ethnic groups in state bodies and the possibility of their representatives to participate in the decision-making process.[87]

6.2 Integration: Representation and Participation of Ethnic Groups

All the legal instruments which provide for the representation and participation of ethnic groups can be arranged on a normative scale which is formed between two poles, namely the individual right to vote on the one hand, and the equal representation of groups on the other hand.

Marko is one of the adherents of electoral provisions granting so-called "exemptions from thresholds" such as that of Schleswig-Holstein in Germany with its exemption from a 5 % threshold in favour of the party representing the Danish minority. At first sight, an exemption of such a threshold also seems to be an "exemption" from the equality principle, thus granting parties of national minorities a privilege. But, first of all, it should be underlined that the introduction of a "threshold" in itself represents an "exemption" from the strict proportionality principle. A threshold is legitimised by the need for strong governance which might be threatened by party fragmentation because of a proportionate vote system. The logic is thus to prevent so-called "splinter-parties" from parliamentary representation because of their sheer size, in order to secure government stability. This logic, however, does not legitimise the exclusion of parties representing national minorities by a threshold requirement. Hence, comparing the teleology of rules, the exemption from the alleged "exemption" is for Marko not a privilege, but a constitutional must under a proportionate vote system.[88]

Nonetheless, effective representation is in no way guaranteed by such clauses, insofar as parties must get a certain number of votes to meet the requirement of strict proportionality. If they are too small and do not get enough votes, then they will still not be represented. Thus there is a need for provisions that guarantee ef-

[85] For the elaboration of this example, see ibid., 18.
[86] Ibid.
[87] Ibid.
[88] Ibid., 19-20.

fective representation and participation of ethnic groups without taking the number of votes cast into account.[89]

As far as participation in the decision-making process is concerned, one can arrange the instruments on a normative scale which is formed by two poles, that of consultation mechanisms with advisory effects on the one hand, and absolute veto power on the other hand.[90]

Marko concludes that the success of the model of consensus government, where conflicts need not be "resolved" any longer, but can be settled by institutions and procedures, is based on the willingness to compromise: i.e. on a political culture where the majority is aware that the minority is simply the "other" part of the common home and, based on that understanding, avoids the temptation of dominance. "Culture" must not be an instrument of exclusion, but of transcending borders. This is and remains the very concept of a multi-cultural society allowing individuals to live in several cultures at the same time without being locked into one identity through citizenship or ethnic belonging.[91]

Chapter III: Neutrality of the State – State Duty Towards Minorities: Positive or Negative?

The previous chapter clearly illustrates, that non-discrimination alone is not a valid guarantee for minority rights. Since a strategy to protect minorities consisting in complete neutrality of the state is even more passive than a strategy consisting in non-discrimination, it is clear that the same critical remarks from the second chapter *a fortiori* will be applicable here. In order to avoid making the same comments twice, we decided to limit ourselves in this chapter to a comment on article 27 ICCPR, an article which, according to our personal view, does not allow states to restrict themselves to a policy of neutrality, but which calls for positive action.

The first section of this chapter will be dedicated to the discussion in the Human Rights Committee with regard to the draft general comments on article 27 ICCPR.

In the second section, we will develop two possible interpretations of article 27 ICCPR. On the one hand, some authors interpret the negative wording of the article as allowing states to adopt a passive and neutral position, whilst others think that the article calls for active and sustained intervention by states.

The third and last section displays the spectrum of positive state duties in the light of article 27 ICCPR and considers these state duties at two levels: at the horizontal and the vertical level.

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89 Ibid., 20.

90 Ibid., 21. Here, Marko also develops the examples of the Croatian, Belgian and Slovene constitution.

91 Ibid., 22.

1. Discussion in the Human Rights Committee with Regard to the Draft General Comments on Article 27 ICCPR

The Human Rights Committee suspended its deliberations on the draft general comments on article 27, which were prepared by the West German member, Christian Tomuschat, in 1984.[92] The Committee felt not enough information had been provided "to form a sound basis for discussion".[93] Consequently, it is no surprise that the discussion which did take place in the Committee on the words, "persons ... shall not be denied", was anything but useful in shedding light on what the members of the Committee perceived the states' duty should be. Rasjoomer Lallah, the Committee member from Mauritius, pointed out that:

> "Article 27 was drafted in a negative way. Minorities were assumed to have rights, but Article 27 merely called on states to ensure that persons belonging to such minorities should "not be denied" specific rights it mentioned. In that way, article 27 differed from several other articles which called for or implied positive rights of minorities."[94]

The above assertion points to a clear recognition of a negative state duty towards its minorities. Vojin Dimitryevic, the Yugoslav member, however, expressed the view that the negative wording in article 27 could be interpreted so as to strengthen the case for positive minority rights: "The statement that they [minorities] should 'not be denied the right' could mean that they already possessed a right which could not be denied".[95] In other words, the rights of minorities are inherent in that they are not granted by the Covenant itself but only strengthened by article 27. The United Kingdom member, Rosalyn Higgins, took Dimitryevic to mean that the negative wording in article 27 was intended not to cast doubt on the existence of minority rights but meant "that states parties were not under an obligation to provide additional instruction or facilities for minority groups. They should not, however, interfere with rights already held."[96]

Unfortunately, Dimitryevic did not clarify the meaning of this statement, for if minorities have inherent rights then an inherent right to "enjoy their own culture" would, according to forthcoming arguments regarding the nature of such right, necessitate active intervention on behalf of minorities by the state. Consequently, Dimitryevic's statement could be interpreted as recognizing a positive duty on states under article 27. Higgins' remarks, however, would appear to contradict such an interpretation.[97]

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[92] R. Cholewinski, State Duty Towards Ethnic Minorities: Positive or Negative?, Human Rights Quarterly (1988), 346.

[93] Summary Record of the Human Rights Committee, 26th Session, UN Doc. CCPR/C/SR.633 at 7, paragraph 35 (1985).

[94] Summary Record of the Human Rights Committee, 25th Session, UN Doc. CCPR/C/SR.618 at 6, paragraph 33 (1987). Chairman Mavrommatis added: "The Covenant ensured that if a community claimed traditional rights, the enjoyment by members of that community of those rights should not be denied, however, the Covenant did not grant rights." Ibid., at 6, paragraph 36 (emphasis added).

[95] Ibid., at 6, paragraph 40.

[96] Ibid., at 7, paragraph 43.

Cholewinski[98] underlines that the above discussion should not be treated too seriously because it was a short affair consisting largely of ambiguous statements. Further, Tomuschat, the drafter of the general comments on article 27 and one of the members who asked numerous questions in relation to the provision, and the Canadian member, Walter Tarnopolsky, also a passionate advocate of minority rights, were no longer members of the Committee at the time of this discussion.

In spite of some of the statements by Committee members implying a negative duty on states under article 27 and the admission by the Committee that it lacked practical experience in the area, one could argue that during its consideration of the state reports the Committee adopted, or was at least clearly heading for, an interpretation of article 27 which describes the duty of states parties towards minorities as a positive one.[99]

2. Article 27 ICCPR: A Call for Positive Action?

From the previous section, dedicated to the discussion in the Human Rights Committee with regard to the draft general comments on article 27 ICCPR, we cannot clearly tell whether article 27 ICCPR was meant to imply positive state duties. In this section, we will present further differing scholarly interpretations of article 27 ICCPR.

Article 27 of the 1966 International Covenant on Civil and Political Rights reads as follows:

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, 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"

At a minimum, the negative prescription in the imperative "shall not be denied" indicates that article 27 is permissive in nature; it is particularly notable in this regard that the provision contains no limitations, restrictions or "clawback clauses".[100]

While there is general agreement about the permissive nature of article 27, there are different views as to whether or not article 27 requires "positive" action on the part of the state.

De Varennes follows the school which calls for no positive action on the part of the state on the basis of the opinion that "the objective sought by the drafters of article 27 [...] appears to have been one of laissez vivre, of allowing members of these minorities the right to maintain their language or religion freely without any

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97 Cholewinski (note 92), 347.

98 Ibid.

99 Ibid., 348.

100 Packer (note 2), 154.

assistance from the state, but also without any hindrance or oppression that has been the all too frequent burden of minorities throughout human history".[101] Nowak similarly argues that "direct, positive duties to guarantee rights absent specific threats at the horizontal level cannot be inferred from article 27".[102] However, this is an increasingly minority view among scholars.[103]

Indeed most authors argue that – while abstention from interference is of major significance – a mere passive stance by states would not ensure the effective protection of minorities.

The writers who support a positive interpretation of article 27 are led by the UN Special Rapporteur on Minorities, Francesco Capotorti. Despite recognizing that the sole obligation imposed upon states by the drafters was a negative one, Capotorti sees reason to question whether "the implementation of article 27 of the Covenant does not, in fact, call for active intervention by the State"[104] for:

> "At the cultural level, in particular, it is generally agreed that, because of the enormous human and financial resources which would be needed for full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the government concerned was forthcoming."[105]

In support of this argument, Capotorti compares article 27 to articles 13 through 15 of the International Covenant on Economic, Social and Cultural Rights.[106] These provisions, which relate to the rights to education and to participation in cultural life, and which clearly concern both individuals and minorities, have the character of positive obligations in that they can only be fully realized by appropriate state measures.[107] Public funding is an essential component of such

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[101] F. de Varennes, Language, Minorities and Human Rights, 1996, 151.

[102] M. Nowak, The UN Covenant on Civil and Political Rights, Commentary on CCPR, 504; emphasis in the original.

[103] See Cholewinski (note 92), 349 where Cholewinski gives an overview of scholars not willing to allow for a positive interpretation of Article 27 ICCPR, in spite of the fact that most of them accept that genuine equality with the majority for minorities cannot be realized only by the principle of non-discrimination but must be realized also by positive state actions.

[104] Capotorti (note 4), 36, paragraph 213.

[105] Ibid.

[106] International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1996, entered into force 3 January 1976; G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (N° 16) at 49, UN Doc. A/6316 (1966).

[107] Capotorti (note 104), 36, paragraph 213. Capotorti draws further support for this argument from two UNESCO conferences. Ibid., 36, paragraphs 215-216.
For example, the position taken at the Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies was that "all governments should take responsibility for two essential tasks: the adequate financing and the proper planning of cultural institutions and programmes.", in: Final Report on the Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies, Venice 24 August – 2 September 1970, Paris, UNESCO, 1970, SHC/MD/13, at chapter I, paragraph 51.
Further, in documents prepared for the Intergovernmental Conference on Cultural Policies in Europe (Helsinki 1972), it was stated that the right to culture implies a government duty to enable everyone to participate in the cultural life of his community. "For this universal participation to be effective, the State must furnish the necessary means to those who are underprivileged in their access to cultural

measures and Capotorti refers in this regard to the Seminar on the Promotion of the Human Rights of National, Ethnic, and other Minorities held at Ohrid, Yugoslavia in 1974, where, *inter alia*:

> "It was considered the responsibility of the authorities to guarantee in law and in practice the maintenance and preservation of such (minority) traditions and customs and to provide for their autonomous development where necessary by public financing."[108]

In conclusion, Capotorti observed:

> "Only the effective exercise of the rights set forth in article 27 can guarantee observance of the principle of real, and not only formal, equality of persons belonging to minority groups. The implementation of these rights calls for active and sustained intervention by States. A passive attitude on the part of the latter would render such rights inoperative."[109]

Patrick Thornberry also supports the "dynamic" interpretation of article 27 in spite of the seemingly weak obligation imposed upon the state under the provision. Like Capotorti, Thornberry relies on the assessment of similar rights like the rights to work, culture and education under the International Covenant on Economic, Social and Cultural Rights.[110] He also points out that:

> "the principle of effectiveness in the interpretation of treaties indicates that articles should bear their full weight, and article 27 would add little to the provisions on non-discrimination (article 2), equality (article 26), freedom of thought, conscience and religion (article 18), and freedom of opinion and expression (article 19), if it did not attempt to address the reality of minority disadvantage and implicate positive action by states.[111]

For Thornberry, a positive interpretation of article 27 suggests a "programmatic element". This program is to be initiated by the state and would include such cultural provisions as support for minority schools, libraries and museums and facilities for the use of the minority language in legislation, administration and before the courts.[112] However, Thornberry qualifies his statements by observing that article 27 is "at most a framework provision" and "needs to be supplemented by a clearer statement of the rights, and duties, of minorities."[113]

3. Positive State Duties at a Horizontal and Vertical Level

Another way of approaching the question of positive state duties in the light of article 27 ICCPR is to make a distinction between state action at a horizontal level (private actors versus group members) and state action at a vertical level (state ver-

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life.", in: UNESCO documents SHC/EUROCULT/1 at paragraph 7 and SHC/EUROCULT/3 at paragraph 10.

[108] Capotorti (note 104), 37, paragraph 216.

[109] Ibid., 37, paragraph 217.

[110] P. Thornberry, Is There a Phoenix in the Ashes? International Law and Minority Rights, Texas I.L.J. (1980), 449-450.

[111] P. Thornberry, Minority Rights, in: X, Collected Courses of the Academy of European Law, VI-2, 1995, 336.

[112] Thornberry (note 110), 450.

[113] Ibid.

sus group members). Pentassuglia[114] makes this distinction in his handbook *Minorities in International Law*, and we consider it appropriate to end this chapter with these two perspectives.

3.1 The Horizontal Level

At the horizontal level, the protection of article 27 rights must be secured against infringements by private actors. To uphold this approach, Nowak[115] interprets article 27 in conjunction with article 2, paragraph 1, which obliges states parties not only "to respect", but also "to ensure" the covenant rights to all individuals. He contends that horizontal effects can be ruled out only when they conflict with the purpose of the right or when it is clear from the historical background that protection is only against state interference; he goes on to observe that the historical background to article 27 does not reveal that horizontal effects were ruled out. Minority rights can in fact be threatened by the private side too. This also applies to minority indigenous communities, whose cultural integrity has been (or is) more severely threatened by colonial settlers or multinational companies than by the governmental side. These considerations are even relevant to conflicts between a minority and its members. In its recent General Comment N° 28 on equality of rights between men and women under article 3, the HRC interestingly calls upon states parties to report on legislative and administrative practices regarding membership in a minority that might produce an infringement on the equal rights of women under the covenant (including the right to equal protection of law), and:

> "on measures taken to discharge their responsibilities in relation to cultural or religious practices within the minority communities that affect the rights of women."[116]

A positive duty of protection "against the acts of other persons within the state party" has been confirmed in the HRC General Comment N° 23 on article 27.[117]

3.2 The Vertical Level

But positive state action may also be seen from a classic vertical (state – group members) perspective. Special Rapporteur Capotorti argued that the article required "active and sustained measures" on the part of states, including the provision of resources, in order to effectively preserve minority identity.[118] Thornberry supports this interpretation, as noted earlier; in his view, "(s)tates should take measures to the extent necessary to ensure that the disadvantages of minority status do not result in the negation of the right".[119] Tomuschat[120] and Now-

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[114] Pentassuglia (note 1), Minorities, 105-108.
[115] See Nowak (note 102), 502-504.
[116] General Comment N° 28, paragraph 32.
[117] General Comment N° 23, paragraph 6, sub-paragraph 1.
[118] Capotorti (note 104), paragraph 588. Cf. *supra* under Section 2.
[119] Thornberry (note 111), 337.

ak[121] deny the possibility of inferring from article 27 direct positive duties to guarantee rights. Nevertheless, they maintain that derivative claims of performance may result from measures affecting article 27 rights. In Tomuschat's words:

> "(o)nly in an indirect way can an obligation to take positive steps arise. If and when a State provides financial support to members of majority groups in respect of activities coming within the scope of Article 27, is it then required by virtue of the principle of non-discrimination to extend analogous treatment to persons belonging to an ethnic, linguistic or religious minority since non-discrimination applies to each and every right enshrined in the CCPR. In fact, to exclude such persons from benefits granted to all other citizens would amount to a denial of those rights which apparently are effective only if their exercise is being subsidized out of public funds.[122]

Nowak extends this approach to positive measures exclusively concerning minority groups.[123] This perspective is well illustrated by the *Waldman v. Canada* case[124], although the HRC did not rule on article 27, but on article 26 only. The case concerned a differential treatment conferred under Canadian law on Roman Catholic minority schools compared to other minority religious schools in Ontario, since only the former were entitled to public funding. Canada defended its own legislation by referring, among other things, to the protection of the vulnerable Roman Catholic minority and its minority rights. The HRC judged in favour of the complainant, by finding a breach of article 26 on the basis of the "reasonable and objective" test. According to Pentassuglia[125], on a smaller scale, the equality issue addressed in this case indirectly reveals Nowak's and Tomuschat's broader point in relation to article 27 and the ICCPR as a whole: positive measures may work for the prohibition of discrimination triggered by the implementation of proactive domestic policies. The reverse aspect of this argument, however, is that the cessation of all relevant measures (for example in *Waldman*, the funding for Roman Catholic schools, thereby providing funding to none of the minority schools concerned) is well possible as a means of removing discrimination against minorities or some of them, and would not be *per se* objectionable on the grounds of article 27. Therefore, it is not correct to identify the extension of the personal scope of positive treatment so as to include previously discriminated minorities as the only remedial effect that would be attached to the anti-discrimination clauses.[126]

Although Waldman's claim and the HRC's decision were confined to article 26, Mr Scheinin, in a separate concurring opinion, observed[127] that when imple-

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120 C. Tomuschat, Protection of Minorities Under Article 27 of the International Covenant on Civil and Political Rights, in: R. Bernhardt et al. (eds.), Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler, 1983, 970.

121 Nowak (note 102), 504.

122 Tomuschat (note 120), 970.

123 Nowak (note 102), 504.

124 Communication N° 694/1996, views of 3 November 1999, CCPR/C/67/D/694/1996.

125 Pentassuglia (note 1), Minorities, 106.

126 Ibid.

127 Communication N° 694/1996, views of 3 November 1999, CCPR/C/67/D/694/1996, paragraph 5.

menting the HRC's view the State party should bear in mind that article 27 "imposes positive obligations" to promote religious instruction in minority religions, to be fulfilled in a matter of positive action. In its General Comment N° 23 on article 27, the HRC has noted not only that "positive measures of protection are ... required ... against the acts of the State party itself", but also that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members", provided that the latter respect the provisions of article 2, paragraph 1, and article 26 of the covenant both as regards the treatment between different minorities and the treatment between persons belonging to them and the remaining part of the population.[128]

It is probably fair to note that, although, on a closer look, the view taken by the HRC on this kind of positive action has seemed to date mostly of a justificatory nature (namely, based on indirect reasoning), such a view should be considered as part of an incremental approach to article 27 rights, the ramifications of which are in fact a function of the support from states parties. Interestingly, in the *Apirana Mahikuika* case[129], New Zealand, with regard to the author's claim under article 27, accepted that it had positive obligations to protect Maori culture as manifested, *inter alia*, in fishing activities. A positive interpretation of article 27 has been accepted also by the Nordic countries, namely Finland, Sweden, Denmark, Iceland and Norway.[130] Other affected countries are following suit: for instance, in the fourth periodic report submitted by Germany to the HRC under the covenant's reporting procedure, members of traditional groups within the meaning of article 27 are presented as enjoying "essential minority rights" under this article, such as "on certain conditions, the right to use their own language when dealing with the authorities"[131], which clearly entail positive state action.[132]

3.3 Summary

The essential spectrum of positive state obligations which may be construed in connection with article 27 can thus be summarized as follows:

- direct duties at the horizontal level (obligation, mainly due diligence-based, requiring the state to protect minority members against infringements by private parties); and
- duties at the vertical level, namely:

(i) performance in fulfilment of an underlying obligation requiring the state not to discriminate as a result of the adoption of domestic measures in favour of majority and/or minority groups; or, more progressively,

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[128] General Comment N° 23 (50), paragraph 6, sub-paragraphs 1 and 2.

[129] *Apirana Mahikuika et al. v. New Zealand*, Communication N° 547/1993, views of 27 October 2000, CCPR/C/70/D/541/1993.

[130] UN Doc. E/CN.4/992/SR.17, paragraph 69.

[131] UN Doc. CCPR/C/84/Add. 5, paragraphs 242-245.

[132] Pentassuglia (note 1), Minorities, 107-108.

(ii) direct duties to take positive action to protect a minority's identity to the extent necessary, in accordance with the ICCPR as a whole (obligation requiring the state to achieve the above objective through means of its choice, in view of differential factual circumstances).[133]

Although the question of positive measures presents controversial aspects, the notion of "active" state duties may be said to have gained considerable ground in scholarly and jurisprudential assessment, and among states concerned.[134]

4. Conclusion

This third and last chapter has mainly been concerned with the question of whether the duty of state parties under article 27 ICCPR involves a negative approach toward minorities, or a positive action on their behalf. In trying to demonstrate that the latter interpretation should be seen as the correct one, we also revealed at the same time the shortcomings of a strategy of neutrality of the state when it comes to effective minority protection. The state duty to protect minorities is not a passive one. Minority rights cannot be fully satisfied without state assistance, either in the provision of financial aid or in the adoption of special measures.

General Conclusion

Several recent developments have underscored the need for an improved theoretical framework about how to accommodate the population diversity within plural states in the most appropriate way. In this paper, we tried to argue for additional rights for (members of) minorities and a more beneficial interpretation of rights.

In view of the focus of this paper, it was important first to clarify what is understood by the concept "minority". There is up until now no generally accepted definition of the concept "minority". However, a review of the various proposals of definition at international and European level does reveal that several components of a definition of "minority" recur and thus seem to be "essential".[135]

We tried to demonstrate that a policy of minority protection based on non-discrimination only presents many shortcomings. Apart from a policy of non-discrimination, there is also a need for positive measures. Both non-discrimination and "special" measures for (members of) minorities are essential pillars for any full-blown system of minority protection. If only one of both pillars is erected, the whole construction threatens to collapse. On the other hand, substantive equality is not only a crucial goal of minority protection, but also a source of limitations of

[133] Ibid., 108.
[134] Ibid.
[135] Henrard (note 35), 319.

minority protection measures in that such measures should not amount to privileges going beyond the requirements of substantive equality.[136]

Another flawed strategy of minority protection, is the strategy of neutrality of the state. Most authors agree on the fact that article 27 ICCPR should be read as imposing a positive duty on state parties to protect minorities. The purely "hands off approach" originally endorsed in article 27 of the ICCPR has given way to an intensive search for more adequate prescriptions. The precise ramifications of this right are still subject to discussion, but at least education, language and participation can be identified as key areas of "positive" protection.[137] Positive measures of protection are required not only against the acts of the state party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the state party.

But these efforts of positive protection will not be very effective in the case of an inadequate enforcement system. The implementation of human rights is now becoming one of the major preoccupations of different international institutions, demanding serious technical and financial involvement. In the area of minority rights, effective means of control are even more necessary, due to the manifest interrelation of the protection of minorities and internal as well as international stability. Although the growing emphasis on "positive" protection of minority groups is being paralleled by efforts at "positive" supervision in an attempt to assist states in bringing their laws and practices into line with international standards, the enforcement system remains largely inadequate, obviously in connection with the shortcomings of the entire minority rights architecture. Rather than playing off "judicial-like" and "policy-driven" models of supervision against one another, it would be advisable to better appreciate their respective advantages and disadvantages in a way that both of them can appropriately serve the fundamental aim of securing effective minority rights protection.[138]

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136 Ibid.

137 Pentassuglia (note 1), Minorities, 250.

138 Ibid., 253-254.