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MINORITY RIGHTS AND FREEDOM OF EXPRESSION: A DYNAMIC INTERFACE

ACADEMISCH PROEFSCHRIFT

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aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
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ten overstaan van een door het college voor promoties
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MINORITY RIGHTS AND FREEDOM OF EXPRESSION: A DYNAMIC INTERFACE

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Ar deireadh, ba mhaith liom an tráchtas seo a thíolacadh do mo thuismitheoirí, ceannródaithe beirt, a shiúil an bóthar romham, a chas timpeall agus a shiúil an bóthar liom.

List of selected abbreviations

| | |
|--------|--|
| AC | Advisory Committee [on the FCNM] |
| CAHMIN | [CoE] <i>ad hoc</i> Committee of Experts for the Protection of National Minorities |
| CDDH | [CoE] Steering Committee on Human Rights |
| CDMM | [CoE] Steering Committee on the Mass Media |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | [UN] Committee on the Elimination of Racial Discrimination |
| CESCR | [UN] Committee on Economic, Social and Cultural Rights |
| CM | [CoE] Committee of Ministers |
| CoE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| DH-MIN | [CoE] Committee of Experts on Issues Relating to the Protection of National Minorities |
| EBLUL | European Bureau for Lesser Used Languages |
| EBU | European Broadcasting Union |
| ECHR | European Convention on Human Rights |
| ECJ | Court of Justice of the European Communities |
| ECRI | European Commission against Racism and Intolerance |
| ECRML | European Charter for Regional or Minority Languages |
| ECTT | European Convention on Transfrontier Television |
| EPRA | European Platform for Regulatory Authorities |
| EU | European Union |
| EUMC | European Monitoring Centre on Racism and Xenophobia |
| FCNM | Framework Convention for the Protection of National Minorities |
| FRA | [EU] Fundamental Rights Agency |

| | |
|--------|---|
| HCNM | [OSCE] High Commissioner on National Minorities |
| HRC | [UN] Human Rights Committee |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ILO | International Labour Organisation |
| OHCHR | Office of the [UN] High Commissioner for Human Rights |
| OJEC | Official Journal of the European Communities |
| OSCE | Organization for Security and Co-operation in Europe |
| PACE | Parliamentary Assembly of the Council of Europe |
| PCIJ | Permanent Court of International Justice |
| PSB | Public Service Broadcasting |
| RFOM | [OSCE] Representative on Freedom of the Media |
| SAPG | [UN] Special Adviser on the Prevention of Genocide |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |

Chaque génération, sans doute, se croit vouée à refaire le monde. La mienne sait pourtant qu'elle ne le referra pas. Mais sa tâche est peut-être plus grande. Elle consiste à empêcher que le monde se défasse.

- Albert Camus¹

Introduction²

Many journeys are born out of necessity or curiosity or, as in the case of this thesis, both. The necessity was to explore the underdocumented interface between freedom of expression and the rights of persons belonging to minority groups, as well as the impact thereupon of new communications technologies. The curiosity was to determine the potential for synergic interaction between these traditionally distinct areas of international human rights law and new communications technologies.

The concern at the heart of Camus' stark analysis, cited epigraphically, could perhaps be put more temperately in another way: "We must re-imagine liberty in every generation, especially since a certain number of people are always afraid of it".³ Any conception of rights and freedoms – individually or *en bloc* – is doomed to inevitable relativity; to the inescapable contingencies of context, time and place. Every wave of history throws up new navigational perils and priorities. The past century alone has experienced several dramatic changes of *Zeitgeist*: the imperial/colonial excesses at the dawn of the century; the attrition and grinding destruction of the First World War; the short-lived League of Nations which sought to champion the rights of smaller nations; the unprecedented nihilistic horrors of the Second World War; the defiant emergence of a new creed of universal, indivisible human rights; the ideological divisiveness of the Cold War; the thrusts towards (partial) European economic integration; the dismantling of the Soviet Bloc; the internecine mutilation in the Balkans under the watchful eye of the international community; the fits and starts of successive (so-called) generations of human rights...

Most recently, the sea-change in political and broader societal attitudes to human rights and security issues, for which the atrocities of 11 September 2001 were the ultimate catalyst, has been much-documented.⁴ The resultant polarisation of perspectives has, and will continue to have, implications for the three main focuses of this study: freedom of expression, the rights of minorities and the influence of new communications technologies on the interplay between them.

It is important to emphasise the very real danger that hard-won standards of human rights could be/are being sapped of their vitality by invidious practices of politicisation. This trend involves applying the politics of fear and exploiting individual and societal yearning for

¹ Albert Camus, Acceptance speech for the 1957 Nobel Prize for Literature, City Hall, Stockholm, 10 December 1957.

² Research for this thesis was completed on 1 May 2008. Any inclusion of sources post-dating 1 May is therefore merely incidental.

³ Arthur Miller, quoted in Salman Rushdie, 'Arthur Miller at Eighty' in *Step across this line: collected non-fiction 1992-2002* (London, Vintage, 2002), pp. 51-53 at 53.

⁴ See generally, Conor A. Gearty, "Reflections on Civil Liberties in an Age of Counter-Terrorism", 41 *Osgoode Hall Law Journal* (2003), pp. 185-211; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, New Jersey, Princeton University Press, 2004); J.L. Holzgrefe & Robert O. Keohane, Eds., *Humanitarian intervention: ethical, legal and political dilemmas* (Cambridge, Cambridge University Press, 2003).

security. Conor Gearty makes the point both imaginatively and effectively when he describes a “super-virus” that has infected the international human rights movement.⁵ The virus works like a standard computer virus – it has entered the system and is wreaking havoc from within. Like many computer viruses, it is known by its acronym: GWOT. This virus “causes the human rights idea to manifest itself in gross human rights violations and egregious human rights abuses which it presents not as incompatible with but as necessitated by human rights”.⁶ GWOT, of course, stands for Global War on Terror: the emotive reason routinely given by many States authorities for their dismantling of much human rights architecture in recent times.

An increasing number of human rights bodies and mechanisms are proving alert to the grave dangers posed by the GWOT virus. The general thrust of their warnings is that the events of 11 September 2001 and the subsequent (re-)actions of States – individually and collectively – have occasioned a veritable sea-change in international relations and protection of human rights. The revival and re-legitimation of historical forms of discrimination unleashed by GWOT are identified as particularly troubling.⁷ As noted in a recent joint report by the UN Special Rapporteur on freedom of religion or belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

Discrimination is practised based on the two main national issues that Governments consider to be threatened by terrorism: security and identity. In this regard, with the proclaimed motivation of preserving national security, Governments have adopted policies gradually curtailing or disregarding civil and political rights or selecting those rights more fitting to that goal. In the same spirit, on the grounds of protection of national identity, cultural, social and economic rights, particularly those guaranteeing the rights of national minorities, immigrants and foreigners, are deliberately violated or marginalized. Rights related to culture and religion are particularly targeted. [...]⁸

In a similar vein, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently noted that:

[...] the very old trend of States resorting to the notion of “terrorism” to stigmatize political, ethnic, regional or other movements they simply do not like, is also very much a new trend. What is new is that, since September 2001, the international community seems to have become rather indifferent to the abuse of the notion of terrorism. The result is that calls for and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their actions even if they are hostile to human rights. [...]⁹

⁵ Conor Gearty, “Is the idea of human rights now doing more harm than good?”, Lecture at the Centre for the Study of Human Rights, London School of Economics, London, 12 October 2004. The text of the lecture is available at: <http://www.lse.ac.uk/Depts/human-rights/Documents/12.10.04_CG.pdf>. For further insights into Gearty’s reflections on related themes, see: Conor Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press, 2006).

⁶ *Ibid.*, at p. 7 of the transcript of the lecture.

⁷ Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3, para. 7. See also, in this connection, paras. 5-8.

⁸ *Ibid.*

⁹ “Promotion and protection of human rights”, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, E/CN.4/2006/98, para. 56(a).

These considerations of the post-2001 political *Zeitgeist* have considerable bearing on contemporary interpretations of the provisions of international human rights law that are central to freedom of expression and the struggle against racist discrimination.¹⁰ Such considerations also generally serve to harden societal attitudes towards (especially unfamiliar) minorities and to colour relevant controversies, as will be demonstrated below.

Problématique and methodology

This is a study of the right to freedom of expression of persons belonging to minorities, as vouchsafed by international human rights law. Its geographical focus is Europe, which necessarily involves engagement, not only with relevant European standards and approaches, but also with those which apply globally, including in Europe. Various international and European treaties contain provisions on the right to freedom of expression and provisions on the rights of persons belonging to minorities. Treaty provisions on the right to freedom of expression of persons belonging to minorities are, however, fewer in number.

The main objectives of this study are therefore to: (i) identify and group; (ii) contextualise and describe, and (iii) critically evaluate prevailing international and European legal standards concerning the dynamic interface between the right to freedom of expression and the rights of persons belonging to minorities. The critical evaluation will be concerned, above all, with the effectiveness of the right to freedom of expression of persons belonging to minorities in practice. The central research question pursued could therefore be formulated as follows: are the conceptualisation and calibration of relevant international and European legal standards sufficiently nuanced and robust to ensure that persons belonging to minorities are able to exercise their right to freedom of expression in an effective manner?

The international and European legal systems for the protection of human rights are made up of many disparate provisions which are binding on States to varying degrees. The macro picture is forged out of multiple micros. The study's aim to explore the actual content and potential reach of international and European law necessarily entails an examination of *de lege lata* (the law as it is) and *de lege ferenda* (the law as it ought to be or may in the future be).¹¹

The approach taken is primarily that of international and European human rights law, but it is impossible to cordon off those branches of law from other branches of international and European law. Where relevant, the constraining interpretive impact of other areas of international and European law has been taken into consideration.¹²

What is the particularity of the right to freedom of expression of persons belonging to minorities? The ultimate purpose of international human rights law is to ensure that human rights are rendered real, meaningful and effective for everyone. Principles of freedom of

¹⁰ For an NGO perspective, see: "Global 'war on terror' has become a global war on minorities", Minority Rights Group International Press Release, 8 September 2006, available at:

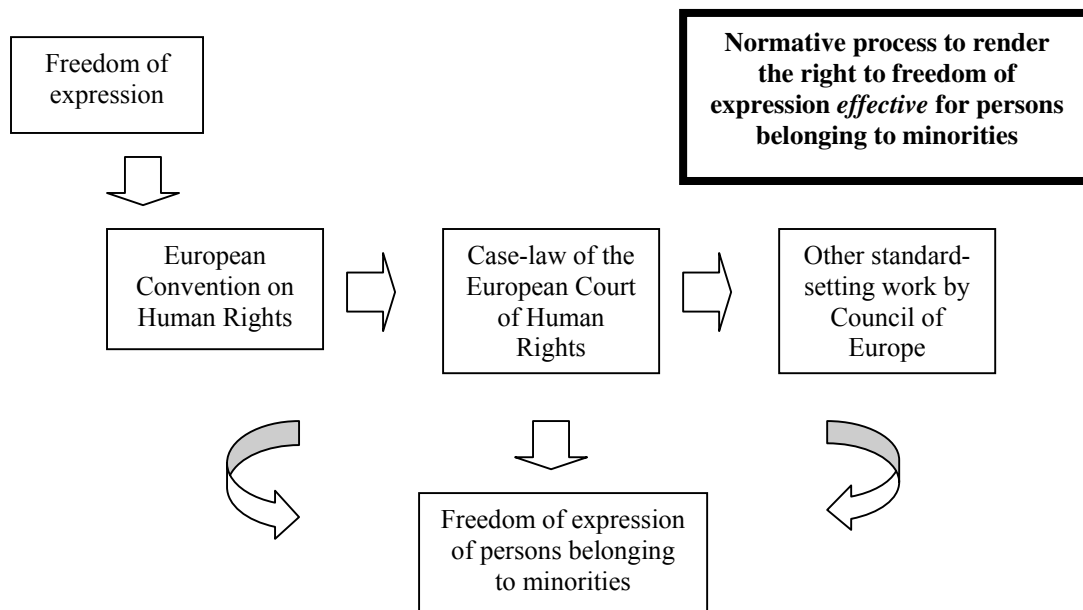
<http://www.minorityrights.org/media_centre/media_press/media_centre_press_sept11.htm>. See also the accompanying table detailing how minorities in different countries have been affected by GWOT:

<http://www.minorityrights.org/media_centre/media_press/sep11table.pdf>.

¹¹ *Oxford Dictionary of Law* (New Edition) (Oxford, Oxford University Press, 1997).

¹² EU media regulation is a good example of supra-national regulation which, although partly grounded in human rights, is largely shaped by regulation targeting other concerns such as the free movement of services within the EU, the consolidation of the Internal Market, the prevention of unfair competition, etc.

expression, as enshrined in international treaties, have to undergo a double translation exercise before they can truly be considered real, meaningful and effective for persons belonging to minorities. First, the (often) lapidary textual provisions articulating relevant principles need to be translated into a vital body of standards. In turn, this vital body of standards needs to be translated into a vital body of standards that concord with the specific needs and interests of persons belonging to minorities. The double translation exercise can be regarded as a normative process to operationalise the first principles, to turn them into something workable. In terms of the Council of Europe, this normative process can be schematised as follows:¹³



By way of further elucidation of this schematisation, it is important to mention that “other standard-setting work” includes relevant treaties (as well as their monitoring processes, which help to give expression to the “organic vitality”¹⁴ of the treaties themselves) and political measures adopted by various organs of the Council of Europe. Whether relevant standard-setting takes place within treaty monitoring structures or whether, driven by other political impulses, it is pursued via processes that are extraneous to treaty law, it can certainly aid evaluations of the effectiveness of existing international law. For instance, standard-setting can facilitate the:

- elucidation of the content of treaty provisions when applied to concrete situations;
- provision of a level of detail that is generally lacking in treaty provisions;
- interpretation of treaty provisions in a way that is in tune with the times;
- identification of good or best practices;
- establishment of appropriate bench-marks.

¹³ A more complex schematization would obviously apply to the normative process operationalising freedom of expression in the context of UN structures and standards, owing to the greater multiplicity of bodies, treaties and standard-setting texts implicated.

¹⁴ Italo Calvino, *Six Memos for the Next Millennium* (Cambridge, Massachusetts, Harvard University Press, 1988) (Trans. Patrick Creagh), p. 110.

Yet even bearing those extra considerations in mind, the schematisation remains incomplete. The entire process is also influenced (to varying degrees) by the application of academic theories and the negotiation of political priorities and sensitivities. As will presently become evident, this study is indebted to the valuable analytical groundwork carried out by other scholars and seeks to build on their endeavours. It aspires to be theoretically informed and politically aware.

“With unfortunate frequency”, writes Frederick Schauer, “particular legal approaches to particular social concerns remain imprisoned in their particularism, ignoring the extent to which specific rules or principles may affect other rules and principles located some doctrinal distance away”.¹⁵ It would be ambitious, one would think, to seek to apply this remark to the right to freedom of expression, given its very firm anchorage at the heart of international human rights law, not to mention its polyvalent character and its importance in facilitating the realisation of numerous other human rights. However, the developing relationship between the right to freedom of expression and the rights of persons belonging to minority groups (i.e., rights which have much looser (and more recent) conceptual moorings) is perhaps the exception that proves the rule. The influence exerted by the traditional mass media and new communications technologies on this relationship cannot possibly be understated.

As a result of the evolution of international legal norms concerning freedom of expression, the mass media have come to benefit from a more robust right to freedom of expression than the ordinary individual. This can be explained by the crucial role of the media as a lynchpin of democracy. The ability of members of minority groups to enjoy unhindered and indeed sometimes even facilitated access to the media is crucial to the exercise of their right to freedom of expression. It is also inextricably linked to the assertion of their identity and the safeguarding of their right to effective participation in public life.

The media’s privileged legal standing and increased freedom are accompanied by the expectation-cum-obligation of heightened social responsibility. Thus, the danger that the media might be used as a mouthpiece for offensive or hateful expression must be vigilantly guarded against. This danger is compounded by the fact that disagreement tends to stymie attempts to fix the outer definitional demarcations of the right to freedom of expression (as opposed to the impregnable inner zone of inoffensive speech, the existence of which is undisputed). As members of minority groups are the most frequent victims of extremist, racist or so-called “hate speech”, its examination is highly warranted. This invites an analysis of the most appropriate balancing of the public’s right to receive information and ideas of all kinds with the wishes of minorities not to be portrayed in a biased, stereotyped or prejudicial manner. Although issues are often treated with reasonable sensitivity by certain sections of the mainstream media, biased and unfair reporting and loaded agenda-setting nevertheless persist.

The protection of minority rights is one of the most burgeoning areas of international law and has yet to be fully consolidated, or indeed, explored. The very notion of minority rights is likely to undergo much development – in both conceptual and practical terms – in the near future. Of the general international treaties that contain provisions on minority rights, only the UN International Covenant on Civil and Political Rights and the Convention on the Rights of the Child lay a convincing claim to being universally applicable.¹⁶ Supplementing those

¹⁵ Frederick Schauer, “Commercial Speech and the Architecture of the First Amendment”, 56 *University of Cincinnati Law Review* (1988) pp. 1181-1203, at p. 1181.

¹⁶ Article 27, ICCPR and Article 30, CRC.

treaties of a more generalist character, an increasing body of international instruments is now treating the issue in a specific manner (eg. the Council of Europe's Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages, the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, etc.) and an acceleration of this trend can reasonably be expected.

As already hinted, freedom of expression is crucial to minorities; both as an individual right and as a collective or associative one. The facets of the right to freedom of expression that are of greatest concern to minorities are not necessarily those which preoccupy members of majority groups within any given society. For instance, linguistic and cultural issues are necessarily uppermost in the priorities of minorities owing to the (often) precarious status of their languages and culture. In short, the enjoyment of freedom of expression is very often the guarantor of the whole panoply of rights (civil and political, economic, social, cultural, linguistic and others) to which members of minority groups lay claim - either individually or collectively.

While the proliferation of media outlets would suggest the existence of increased communicative opportunities for minorities, this implicit promise has not always materialised. Concerns for pluralism and diversity remain because the internationalisation and concentration of ownership, as well as the commercialisation of content, have been very much in step with the aforementioned proliferation of media outlets. When viewed from such a perspective, it is clear that minority rights have yet to extend in a meaningful way to the structural regulation of the mass media. Trends of globalisation in the mass media, with particular emphasis on their implications for minority rights, identities and interests, demand careful scrutiny. Against the background of such trends, the importance of public service, regional/local and community, broadcasting is especially salient. This consideration will be pondered within a broader analysis of attempts to check the ongoing erosion of cultural and linguistic specificities.

The future development of international standards and jurisprudence concerning freedom of expression will not necessarily follow the same curves as in the past. Increased technological convergence in broadcasting and the first, occasionally tentative, steps of broadcasters and the traditional print media into the online world are likely to radically alter the familiar features of the mass media. The heightened levels of individualisation in the media and specialised, niche-interest broadcasting (for example) are engendering greater individualisation and fragmentation in society as a whole. It is inconceivable that the relationship between democracy and the media will remain untouched by the changing nature of the latter. It is therefore timely to examine how the technology-driven modifications of current media regulatory orders, structures and practices are likely to impact on minority rights, both directly and indirectly.

Overview of issues

Chapter 1

The first Chapter of this thesis seeks to establish the conceptual parameters of “minority rights”.¹⁷ This entails an examination of past and projected evolutions of existing legal approaches to persons belonging to minorities and their rights, as well as an examination of the nature of relevant definitions and terminology and of alternatives proposed in other quarters. Among the notions explored here is the observation that minority rights – not least as shaped by current international legal and political standards – have individual and collective dimensions to them, thus rendering them clearly distinguishable from individual human rights *tout court*. A multi-layered argument is also advanced concerning the complementary relationship between the individual and collective dimensions.

There is a real dearth of definitional provisions in the existing corpus of relevant international instruments and where they do exist, they are not always coterminous with one another. In general, these attempts to define minorities tend to pivot on the national/ethnic, religious, linguistic and cultural distinctiveness of minority groups, or various permutations and combinations of the same. In any event, these attributes ought to be enduring and not merely transient and elective. Otherwise, it is often contended, the associative element that is key to group identity would be rendered ancillary or whimsical and the definitional sluice-gates would be thrown open. According to one of the most widely quoted definitions of a minority group, its members should, *inter alia*, “show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.¹⁸ A related – and fascinating – question concerns the extent to which these characteristics can be eclectically chosen by would-be beneficiaries of minority rights. How much scope is there for individual differentiation within any group and what are the absolute identity *sine qua non*s for membership?

Notions of numerical strength and degrees of dominance in society are frequently encountered in (attempted) definitions of minority groups. So, too, is the consideration of territorial concentration/geographical dispersity. As definitions are the bedrock of legal provisions, there is a need to create a more solid conceptual base for minority rights. The clarification of these kinds of notions can have crucial practical implications, such as for the distribution of States’ allocative resources.

Wrangling over definitional minutiae has not prevented the growth of substantive minority rights at the international level. This section will sift through existing international standards and jurisprudence with a view to enhancing the clarity of the panorama of minority rights at the present time. Considerable attention will be paid to the structures and processes giving shape to this area of international human rights law, as well as to the political context in which they are embedded.

Although minority rights are no longer, strictly-speaking, *in statu nascendi* in international law, there is nevertheless a lengthy period of consolidation and growth ahead in this domain. This will assuredly entail a shift of focus from generalities to specifics; not least in respect of the specific issues under consideration here. Any new developments as regards international standards are likely to emanate from the relevant sections of the United Nations, the Council

¹⁷ Although minority rights and the rights of indigenous peoples share certain similarities, they are not one and the same. The latter are subject to a specific regime of protection under international law, central pillars of which include the Indigenous and Tribal Peoples Convention, 1989, and the UN Declaration on the Rights of Indigenous Peoples, 2007. It should be noted that an analysis of this regime of protection is beyond the scope of this thesis.

¹⁸ Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (1979), p. 96, para. 568.

of Europe, the Office of the OSCE High Commissioner on National Minorities and the European Union, thus warranting an assessment of the *modi operandi* of each. The agendas of these hubs of norm-fixing activity have been scanned for indicators of future priorities, without, however, neglecting the importance of ideas and initiatives generated by regional and national bodies and NGOs.

This section will conclude by examining whether some rights which are a fusion of individual and collective elements and generally considered to be “minority” rights proper could be extended to an even broader spectrum of potential beneficiaries (most notably so-called “new” minorities (i.e., immigrant populations), social minorities, etc.). The basis for such an enquiry is that these rights are often the inevitable outcrops of general democratic principles. More concretely, then: the realisation of the right to freedom of expression – as enjoyed by members of minority groups – depends on the existence of effective structural and other practical accommodations. Such facilitation of a particularised form of the right to freedom of expression need not, the present argument runs, be contingent on the traditional definitional constrictions of minority rights. Insofar as a central rationale for following through on the derivative implications of the right to freedom of expression is to redress “historical inequities”¹⁹ or contemporaneous social inequalities of particular groups, it could be argued that definitional attributes such as “national”/“ethnic”, “cultural”, “religious” or “linguistic” should not be considered exhaustive. When seeking to determine the enduring characteristics of potential beneficiary groups, some of the wider-embracing language of extant equality and non-discrimination provisions could usefully be borrowed instead. Such language typically includes references to sex, race, colour, national/social origin, etc.

Chapter 2

The second chapter begins with a critical examination of societal responses to the heterogeneous realities of its composition. It explores, in turn, notions of pluralism and tolerance, both in the sense of ideologies and societal practices. Whereas pluralism is essentially value-neutral and descriptive, tolerance is value-laden and capable of holding any of several meanings (varying in affective intensity). Before embracing tolerance, however, its theoretical basis and outer limits must first be identified. Competing individual and societal interests are at stake here and their problematic interface is very fertile ground for analysis.

That exploration reveals an irresistible tendency of both notions to converge into pluralistic tolerance. That composite notion is then developed into comprehensive pluralistic tolerance: the idea that pluralistic tolerance should be comprehensive in its scope, both by its extension to everyone in society and by its application in all spheres of public life. The realisation of comprehensive pluralistic tolerance depends on a number of infrastructural prerequisites at societal level. The operative public values of any society are best shaped in inclusive dialogical fora. The media are an important forum for such purposes to the extent that they constitute sites for the realisation of expressive opportunities and the mediation of narratives and ideologies. The potential of the media for fostering inter-group dialogue, understanding and tolerance is also dwelt upon.

¹⁹ *Bernard Ominayak and the Lubicon Lake Band v. Canada*, United Nations Human Rights Committee Communication No. 167/1984, adopted on 26 March 1990, para. 33.

Chapter 3

The third chapter of this thesis begins by setting out the conceptual framework for the entire thesis: that of the universality, indivisibility, interdependence and inter-relatedness of all human rights. This choice of conceptual framework facilitates the exploration of interplay between different rights. Its integrated analytical approach helps to avoid particularist readings of issues and situations.

In its General Comment 23, the United Nations Human Rights Committee stresses that the rights conferred on persons belonging to minorities are “distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant”.²⁰ Comprehensive treatment is therefore given here to a selection of rights which are vouchsafed for individuals in international human rights instruments, but which also have added significance for persons belonging to minorities by virtue of their suitability for collective exercise and enjoyment. Each of the selected rights/topics (non-discrimination/equality, participation, education, culture, religion and language) touch on freedom of expression issues too. The analytical approach to each of these rights proceeds from a general introduction to more specific treatment in respect of their exercise by persons belonging to minorities. Various aspects of the rights in question recur and impact upon the right to freedom of expression of persons belonging to minorities.

Chapter 4

Chapter 4 opens with a brief distillation of the main theories of freedom of opinion, expression and information (hereinafter ‘freedom of expression’), with particular emphasis on their importance from the perspective of minorities. The analysis progresses from the more general rationales for freedom of expression to narrower, more specific justifications and purposes of the right.

With its empowering and facilitative qualities, freedom of expression allows for political, social, cultural, economic, legal and other forms of engagement by members of minority groups. Its importance as a cornerstone in the democratic edifice is magnified in the context of minority rights as full enjoyment of the right obviates – or at least diminishes - the risk of disenfranchisement of minority sections of any given society.

This focus leads logically to a careful consideration of the indispensable role played by freedom of expression in the assertion of minority rights: how the effective enjoyment of freedom of expression can ensure the preservation and even promotion of minority cultures, languages, shared religious and political beliefs and other values. This section sifts through pertinent theories before analysing the protection provided for the potentially synergic coupling of freedom of expression and minority rights under international law.

It is then demonstrated that the media’s right to freedom of expression is more vigorous than that of the ordinary individual, owing to the watchdog and corrective political roles played by the media in a democratic society. Such is the importance of these roles that some commentators refer to the media as “the Fourth Estate” – an additional pillar of State to complement the conventional tripartite division of State power (the so-called “separation of

²⁰ *The rights of minorities (Article 27)*, United Nations Human Rights Committee General Comment 23/50, adopted on 8 April 1994, para. 1.

powers” doctrine holds that liberty is best safeguarded by the division of the legislative, executive and judicial functions of government between separate independent organs). Indeed, the media’s role in safeguarding and enhancing democracy and equality constitute a *leitmotif* of the research.

It is important to note that the media cannot fulfil the democratic tasks ascribed to them unless they operate in a suitable “enabling environment”. This notion is unpackaged, demonstrating the importance of media regulation for safeguarding relevant expressive freedoms, but also the limitations of formal, legislative regulation for the achievement of the same.

References to “the media” deceptively suggest a unitary and unified entity. For analytical purposes, it is desirable to examine individual media separately: as they possess different characteristics, they are used for different purposes. Here, the notion of media functionality enters into play. The question of media functionality – the correspondence of media types and formats with the communicative needs and resultant media preferences of the public – is of acute importance for minorities as they are often only able to draw on a more restricted *relevant* range of media types and formats (due to linguistic or other obstacles). Media functionality is therefore also important to the extent that it provides minorities with a “context of choice”²¹ in terms of cultural output.

When analysing the different categories of media (community, public service, commercial and transnational), the touchstone is the extent to which they: (i) carry out their broadcasting missions in a manner that is sensitive to public interests; (ii) accommodate the needs, interests and perspectives of minorities in their various broadcasting activities. As such, they are analysed along the axes of purpose, functionality and reach.

The transformative impact that the advent of new media and communications technologies has had and continues to have on paradigms of media operation and media regulation is then discussed. One of the net results of such technological developments is that the discursive and participatory capacities of the media have been significantly enhanced. On the other hand, the public sphere has become increasingly fragmented and individualised, thereby following changes in the nature of media technologies themselves. These developments have ambiguous consequences for minorities seeking both inter- and intra-group communication. The potential of co-regulatory structures for enhancing minority participation in the area of media policy and regulation is explored.

Chapter 5

The fifth Chapter of this thesis posits that the right to freedom of expression and minority rights have not been coupled in an extensive way in international human rights treaties of generalist scope. It explains why various formal attempts to do so ultimately did not prevail. In that explanation, it draws on various rationales for the particular importance of freedom of expression for minorities, as detailed in Chapter 4. It points up the limitations of international treaty law generally, before examining the extent to which two thematically-specific regional European treaties have managed to offset the apparent neglect of generalist treaties at the international level. The treaties in question are the Council of Europe’s Framework Convention for the Protection of National Minorities and its European Charter for Regional or

²¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York, Oxford University Press, 1995), eg. at pp. 82-84.

Minority Languages. Operative articles of both treaties are introduced, with a view to facilitating a more probing analysis of specific focuses within those articles in subsequent chapters. A final focus is on the extent to which the interstices of international treaty law (general and specific) can be filled by “soft law”, a problematic and much-criticised term, but one which is not – as is shown – devoid of practical usefulness for normative endeavours.

Chapter 6

Chapters 6-8 examine the extent to which international human rights law provides for, or requires, the restriction and facilitation of expression affecting minorities. Chapter 6 deals *mainly* with negative State obligations concerning freedom of expression and minorities, whereas Chapters 7 and 8 deal *mainly* with positive State obligations concerning the same (pluralism and access respectively). This conceptual division follows the writings of Isaiah Berlin and others, but it uses the distinction between positive and negative State obligations as an organizing principle rather than as a distinction between two hermetic categories. In fact, positive and negative State obligations are positioned here on a continuum of State obligations. Moreover, additional conceptual refinements apply.

Chapter 6 provides a meticulous analysis of restrictions on the right to freedom of expression under international law. It does so from the perspective of restrictions that are most relevant to the rights and interests of minorities. It highlights individual inconsistencies which potentially and in practice tend to undermine the presumptive coherence of relevant provisions across treaties. Article 4(a), ICERD, seems to have a particularly frictional relationship with the right to freedom of expression, as enshrined in other international legal conventions. This friction should, however, be seen as less of a conceptual challenge to the conceptualisation of human rights as interdependent and inter-related (see Chapter 3) than a zealous approach to tackle a particular issue which suffers from crucial drafting deficiencies – conceptually and stylistically.

The term “hate speech” is increasingly used to justify restrictions on freedom of expression. The term is neither included in nor defined in relevant international treaties. Although the approximate meaning of the term is reasonably clear, an authoritative legal definition at the international level is required urgently. Law- and policy-makers and international adjudicative bodies rely on this term, without taking adequate account of its origins in critical race theory. Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim’s perspective are given pride of place.²² It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism]. The ramifications of the term, “hate speech”, are therefore potentially more expansive than is commonly realised. In itself, the broad meaning of the term is not problematic, but if it is to continue to be viably employed in any legal sense, it must be suitably defined. It may be that a more circumspect term or definitional approach would be better-suited to describing relevant permissible restrictions on freedom of expression, as recognised by international law.

²² See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2nd Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004).

A selection of current controversies – genocide-denial, “defamation” of religions and the protection of founders of religions (from severe criticism and insult) – are measured against international human rights standards. They are considered from the perspectives of freedom of expression, religion and freedom from discrimination. Each controversy involves a complex interplay of rights and concepts.

Finally, Chapter 6 concludes with an examination of the Council of Europe’s strategies for combating “hate speech” and racism. Those strategies reveal different emphases and they are not centrally coordinated. Nevertheless, their approximate and at times serendipitous coherence is worthy of further contemplation. The approach taken under the Framework Convention for the Protection of National Minorities is particularly interesting: it focuses on the twin goals of facilitating and creating expressive opportunities for minorities and of promoting intercultural dialogue, understanding and tolerance. In doing so, it endorses the often sceptically-received argument that “more speech” or “counter-speech” can be an effective means of combating hate speech.²³ However, its endorsement of that argument rests on a re-conceptualisation of counter-speech as a pre-emptive – and not merely reactionary - force. Such thinking places considerable faith in the empowering and identity-sustaining properties of speech. It also implicitly recognises the importance of egalitarian public debate and dialogical interaction as prerequisites for pluralistic tolerance

Chapter 7

Chapters 7 and 8, with their focus on positive State obligations concerning freedom of expression and minority rights, draw extensively on a number of earlier chapters. They build on the earlier theoretical discussion of State obligations (esp. 5.2.2 and 5.2.3) and affirm that the main generic positive State obligations within this thematic interface involve upholding pluralism and access.

Chapter 7 also takes the general discussion of pluralism in Chapter 2 to a new level of application: the starting point of Chapter 7 is that media- and information-related pluralism is a specific scion of the more generic notion of pluralism. The right to receive information is qualitatively affected by the availability of media pluralism and diversity. These two notions are unpackaged and explained. Structural and substantive aspects of media-related pluralism are considered generally and also in terms of their relevance for qualitatively assessing states of media-related pluralism. Such an assessment necessarily focuses on State obligations and media responsibilities.

To what extent should the public’s right to receive a diverse range of information and ideas (particularly from the media) be trammelled by the right of minorities - and of individual members of minority groups - not to be portrayed in a negative light? What are the limits of each of these rights? Considerations of individual and collective dignity are obviously highly relevant. So, too, is society’s need for diversity of opinion; the starting-point for this very debate. As such, this chapter follows through on the discussion of pluralistic tolerance in Chapter 2 and gives it a new level of application.

²³ See further: Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (Amsterdam/Philadelphia, John Benjamins Publishing Company, 2002).

The chapter assesses the extent to which the various theories and concepts concerning media-related pluralism are actually taken up in international law instruments before assessing the extent to which those provisions are applied in practice.

It concludes with an examination of international instruments promoting the goal of cultural diversity. The examination pays particular attention to the different roles played by the media towards the attainment of this objective, as well as the importance of this objective from the perspective of persons belonging to minorities.

Chapter 8

Chapter 8 then shifts to the other generic component of positive State obligations: rights of access to the media and other expressive opportunities. As such, it draws on underlying theories of access introduced in Chapter 4 and examines the resonance they have achieved in international standards and their actual implementation in practice. This analysis connects in an important way with Chapter 2. This is because access rights are typically not only about freedom of expression, but also non-discrimination/equality and participation (in particular). The interaction with these additional rights strengthen the legal justification of access rights for minorities and the dynamism of relevant synergies is duly noted. As the object of access rights – the media – are undergoing fundamental technological changes, the nature of access rights are also changing. This introduces additional dynamism into rights-dimension of the question.

In practical terms, access can take a number of forms: to content (i.e., information and ideas), as well as the media, structures and processes which ensure the dissemination of content. A selection of the main mechanisms for access are enumerated and evaluated. They include the right of reply and public access channels. Chapter 4's emphasis on community, public service and commercial broadcasting is also relevant here.

Finally, the question of access – as guaranteed by minority-specific treaties – is addressed. This involves analysing a range of factors which affect the access of persons belonging to (national) minorities to the media. The primary vehicle for this analysis is the monitoring experience built up under the FCNM, but it also incorporates the monitoring experience accumulated under the ECRML, as well as relevant academic theories. The engagement of both treaties' monitoring bodies with real-life situations facilitates the task of evaluating whether provisions of international law guaranteeing the right to freedom of expression for persons belonging to minorities are adequate or effective in practice.

The conclusions to this study will comprise a synopsis of the issues examined and the main points of evaluation.

Chapter 1 – Protection of minority rights under international law

- 1.1 Theories of minority rights
- 1.2 Definitional dilemmas
- 1.3 Minority rights under international law: international instruments and jurisprudence
 - 1.3.1 Universal instruments with provisions concerning minority rights
 - 1.3.2 European instruments with provisions concerning minority rights
 - 1.3.2(i) Council of Europe/European Convention on Human Rights
 - 1.3.2(ii) Framework Convention for the Protection of National Minorities
 - 1.3.2(iii) Organization for Security and Co-operation in Europe
 - 1.3.2(iv) European Union
- 1.4 Projected future evolution of minority rights
 - 1.4.1 Troublesome taxonomies

*World is crazier and more of it than we think,
Incorrigibly plural.*

- Louis MacNeice¹

Introduction

The primary function of this chapter is that of scene-setting. It introduces the main rationales for the recognition, protection and promotion of the rights of persons belonging to minorities in international law. It also explains the deep difficulties involved in defining the concept of a minority for the purposes of international law. It then provides an overview and critique of the main international treaty provisions dealing with the rights of persons belonging to minorities. This overview includes elements of historical and political contextualisation. Finally, some tentative predictions about the likely future development of minority rights will be proffered.

1.1 Theories of minority rights

Truly homogenous societies are virtually non-existent in contemporary Europe; any pockets of homogeneity that have managed to survive at all tend to be small and scattered. Pluralism in modern society can therefore be taken as a given. It is also a *sine qua non* of democratic society (see further, *infra*).

The choice of epigraph to introduce this chapter serves to point up the tendency to view pluralism in negative terms, rather than celebrate its enriching properties. To regard pluralism as incorrigible is to liken it to an irreversible phenomenon, an irretrievable situation or an incurable ill. According to such a logic of negativity, unfamiliarity feeds distrust and suspicion, which in turn feed tension and animosity. It is a kind of logic that suggests a slippery slope, but it also testifies to ingrained societal wariness of deviations from dominant

¹ Louis MacNeice, 'Snow', in *Louis MacNeice Poems selected by Michael Longley* (London, Faber & Faber Ltd., 2001), p. 18.

social or cultural norms.² Particularly during periods of heightened societal tension – such as the present and enduring post-9/11 climate, the otherness of minorities is projected as a threat: to human rights; to societal values; to political unity; to national security. The fear of clashes between co-habiting cultures looms large (we are told) and to honour rights of participation and autonomy would invite secession and further splintering of society (we are assured) – is it any wonder that such emotive issues tend to leave politics at sixes and sevens?

This logic is preoccupied with notions of otherness, and the essence of membership of a minority group is, by definition, all about otherness. One of the greatest preliminary challenges facing the international regime for minority rights protection is to counter this logic, and to counter it resoundingly. It is only by countering prevailing attitudes that an environment conducive to the assertion of the positive and inclusive goals of minority rights protection can be created.

While certain sections of the political and media communities would not think twice about lumping minorities and immigrants together into one and the same category (and then meting out the same disparaging treatment to both), the actual definitional picture is much more complex. There is a significant hiatus between prevailing sociological understandings of the term ‘minority’ and its generally accepted meaning in the context of international human rights law. The latter is considerably more restrictive than the former, which includes the ordinary, everyday sense of the term.³ Some line-drawing and qualification are therefore necessary at the very outset.

No hard-and-fast definition of a minority group has yet achieved unanimous acceptance in international human rights law. Of the definitions that have enjoyed widest currency, there is a discernible tendency to stipulate certain objective characteristics pertaining to such groups (especially ethnicity or nationality, language and religion) which would qualify them as minorities. It is also widely accepted that these objective characteristics must co-exist with a subjective criterion, namely that members of the group should share a consciousness of their status as a group (on the basis of the aforementioned objective characteristics) and a desire to preserve/develop that cohesion. The application of such criteria when determining whether a group may have minority status obviously restricts how widely the net of recognition can be cast.

A looser, more open-ended approach to the definition of minorities in sociological circles means that a broader range of social groups could be considered to have minority status. When the distinctiveness of a group does not have to be aligned in terms of shared ethnic, national, linguistic or religious characteristics, there is no shortage of other shared characteristics that could be chosen to replace them. Sexual orientation, age and (dis)ability instantly spring to mind.⁴

² In this connection, it is perhaps of anecdotal interest to note that in various languages, largely synonymous terms denote foreignness and strangeness. In French, *étranger* means foreign(er) and outside(r). In Dutch, *vreemdeling* means foreigner or literally, stranger. In the Irish language, *coimhthíoch* has a variety of meanings, including alien, foreign, unfamiliar, strange, outlandish... it is only rarely used in the more positive-sounding sense of “exotic”. Indeed, an Irish proverb states that the outsider gets the blame for everything: *An mhaith is an t-olc i dtóin an choimhthígh*. This discussion is also ongoing in sociological circles. See, for example, William B. Gudykunst & Young Yun Kim, *Communicating with Strangers: An Approach to Intercultural Communication* (3rd Edition) (McGraw-Hill Companies, Inc., USA, 1997), esp. pp. 24-27.

³ See further: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, p. 491.

⁴ See further: Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990), p. 64.

The range of characteristics deemed to be constitutive of identity for the purposes of international law will be examined in s. 1.2, while the important differences between social minorities and minorities as recognised under international human rights law will be explored in greater detail in s. 1.5.

Another crucial question meriting preliminary treatment is whether there is any need for specific minority rights, given the impressive panoply of individualistic human rights enshrined in international law in the aftermath of the Second World War and fortified ever since. In order to provide an adequate answer to this question, two considerations must be addressed: (i) the purpose of minority rights/protection;⁵ (ii) the added value of minority rights.

Minority rights can, in theory, serve any number of purposes. As will be seen in s. 1.3, international law has tended to root minority rights provisions in objectives of existence/survival and non-discrimination/equality. The right to group or cultural identity is also frequently invoked. Central to the mandate of the OSCE High Commissioner on National Minorities is conflict prevention, another aim of minority rights protection.

Combinations of purposes are also possible, and indeed, all of the goals mentioned above have been braided together by some commentators. Athanasia Spiliopoulou Akermark, for instance,⁶ focuses on peace and security (concepts which “entail not only the absence of war and conflict but also the absence of threat”⁷); human dignity (which she describes as “a right to self-preservation (existence), accompanied by a right to develop one’s own personality according to an own plan of life (self-fulfilment)”⁸); cultural identity and diversity.

The essential reasons for seeking to protect the interests of minority groups can also be extrapolated from a pronouncement of the Permanent Court of International Justice:

[...] to 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 the majority, and satisfying the ensuing special needs.⁹

While the particulars and variables are open to change, depending on circumstances, the basic puzzle/conundrum remains the same: finding optimal ways to reconcile the State’s legitimate interest in integration, on the one hand, with minorities’ interests in “non-exclusion, non-assimilation and non-discrimination”,¹⁰ on the other. Integration “differs fundamentally from assimilation”; rather it “consists in the development and maintenance of a common domain where equal treatment and a common rule of law prevails, while allowing for pluralism” to

⁵ Athanasia Spiliopoulou Akermark has postulated that there is a significant difference between minority rights and minority protection: the latter is preferred by her, on the grounds that it is more expansive, covering the recognition of rights and other methods of protecting minorities.

⁶ Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (The Hague, Kluwer International Law, 1997), p. 68 *et seq.*

⁷ *Ibid.*, p. 71.

⁸ *Ibid.*, p. 78.

⁹ *Minority Schools in Albania*, Permanent Court of International Justice, Advisory Opinion, p.

¹⁰ Asbjorn Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes – Essays in Honour of Erica-Irene A. Daes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 83-97, at 96-97.

thrive in other areas, such as culture, language and religion.¹¹ This is perhaps best qualified as equitable integration, based on the principles of parity of opportunity and parity of esteem for all sections of society.

It is important to frame the conundrum within political parameters such as these because secessionist claims and fears often distract from core minority rights. Misunderstandings of any (putative) secessionist consequences of minority rights and the true import of the right of peoples to self-determination often confound debates on minority rights: these topics (and recurrent misunderstandings of their meanings) will be treated in s. 1.3.

The added value offered by a regime of minority rights to broader human rights protection under international law will now be analysed, but only in conceptual terms. The added *substantive* value of specific minority rights will be scrutinised in s. 1.4. The very notion of minority rights was until recently considered a vexed one in international law circles. It is a close cousin of other equally vexed notions, in particular the so-called “three generations” of human rights (i.e., civil and political rights; social, economic and cultural rights, and so-called solidarity rights (eg. right to development, peace, environmental protection, etc.)¹²) and group rights as human rights.

On one reading, human rights inhere in every individual by virtue of his/her humanity or morality.¹³ As such, the argument runs, there can be something very contrived about trying to ascribe *human* rights to groups *qua* groups.¹⁴ Such a thesis does not in any way deny the existence of group rights; it merely objects to their classification as human rights. The argument is not merely the academic rehearsal of dogmatic nicety. Given the moral and fundamental nature of human rights,¹⁵ and their ability to “trump”¹⁶ other (run-of-the-mill, legal) rights, it is (or at least can be) important to have a clear idea of whether rights are also human rights.

Further refinement can be added to the debate when one begins to examine various conceptions of group rights. If these are conceived as collective rights (i.e., with all group members exercising certain rights jointly as opposed to severally), then a plausible case can be made for describing the group rights “as human rights or as closely akin to human rights”.¹⁷ On the other hand, if group rights are styled as corporate¹⁸ rights (i.e., exercised by a corporate (possibly even representative) body on behalf of all members of the group), then they cannot legitimately be described as human rights *stricto sensu*. Peter Jones furnishes the additional argument that “they are also rights grounded in whatever gives those corporate

¹¹ Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Working paper submitted to the Sub-Commission on Promotion and Protection of Human Rights of the UN commission on Human Rights, 27 April 2000, E/CN.4/Sub.2/AC.5/2000/WP.1.

¹² For a concise overview, see: Cees Flinterman, “Three Generations of Human Rights”, in Jan Berting *et al.*, Eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (USA, UNESCO/Roosevelt Study Center, 1990), pp. 75-81.

¹³ Jack Donnelly, “Human Rights, Individual Rights and Collective Rights” in *ibid.*, pp. 39-62, at 41.

¹⁴ *Ibid.*, p. 43.

¹⁵ Koo van der Wal, “Collective Human Rights: A Western View”, in *ibid.*, pp. 83-98, at 88.

¹⁶ See generally: Ronald Dworkin, *Taking Rights Seriously* (Great Britain, Duckworth & Co. Ltd., 1977).

¹⁷ Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights”, 21 *Human Rights Quarterly* (1999) pp. 81-107, at 88.

¹⁸ “Corporate” is used here in the non-commercial sense of the term.

entities their special moral status rather than rights grounded in the status of humanity or personhood”.¹⁹ This thesis has also been relied on by others.²⁰

The foregoing has documented some theoretical tensions in the abstract debate concerning the competing merits of individual and group rights for assuring minority rights in international law, and indeed concerning the legitimacy of group rights as human rights. Some commentators, however, have sought to play down the importance of theoretical discord, opting instead to formulate the *problématique* – as they see it - in the vocabulary of liberal democratic theory:

Focusing solely on whether the rights are exercised by individuals or groups misses what is really at issue in cases of ethnocultural conflict. The important question is whether the familiar system of common citizenship rights within liberal democracies – the standard set of civil, political and social rights which define citizenship in most democratic countries – is sufficient to accommodate the legitimate interests which people have in virtue of their ethnic identity. Are there legitimate interests which people have, emerging from their ethnocultural group membership, which are not adequately recognized or protected by the familiar set of liberal-democratic civil and political rights...²¹

From a purely purposive point of view, it becomes apparent by returning to Akermark’s collation of justifications for the protection of minorities in international law, *supra*, that these tensions do not carry over into the practice of international law. Each of the three justifications mentioned have a different focus and necessitate different types of protection:

1. Such measures [i.e., “justifications”] may wish to ensure human dignity and the well-being of the individuals belonging to a minority. Rights which have as an underlying interest the good of human dignity, are individual human rights. This is *individual oriented minority protection*.
2. Such measures may wish to ensure the preservation of the minority group and the minority culture as such. Here the purpose of international law is to [/] protect culture, cultural diversity and pluralism. In this case the method of protection may be that of collective processes, including collective rights; This purpose of minority protection is more *group or subject oriented*.
3. Finally, minority protection may aim at preventing inter-state and intra-state conflicts, at the preservation of peace and security, in which case the protection is mainly *state oriented*.²²

These findings, drawn from a debate conducted *in abstracto*, can equally be drawn from a similar debate which is informed by theory as well as a normative consideration of contemporary international law.

Under the modern international human rights regime heralded by the adoption of the United Nations Charter, individuals are typically the beneficiaries, and therefore, the subjects of human rights. Consequently, some commentators would argue that the existing range of individual rights should suffice to cover all the rights to which minorities lay claim (with the possible exception of the right of peoples to self-determination), especially if these rights

¹⁹ *Ibid.*

²⁰ For example, Jack Donnelly writes: “There is no necessary logical incompatibility between the idea of human rights and peoples’ rights (or other group rights) – so long as we see peoples’ rights as the rights of individuals acting as members of a collective group, and not rights of the group against the individual.” - Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, in Jan Berting *et al.*, Eds., *Human Rights in a Pluralist World: Individuals and Collectivities*, *op. cit.*, pp. 39-62, at 48.

²¹ Will Kymlicka & Ian Shapiro (Eds.), “Introduction”, in Ian Shapiro & Will Kymlicka, Eds., *Ethnicity and Group Rights* (New York, New York University Press, 1997), pp. 3-21, at 4.

²² Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law*, *op. cit.*, pp. 83-4.

were to be enforced more effectively than is presently the case.²³ This would appear to be a thesis advanced by Nigel Rodley, who favours the inclusion of such rights under existing legal safeguards for non-discrimination and equality, suggesting that “the notion of minority rights [...] is and should be treated as a conceptual diversion.”²⁴

It is submitted here that there are two fundamental flaws in this line of argumentation. First, it underestimates the collective/group/communitarian/associative dimension to minority lifestyles and ensuing rights. This group element is an important qualitative difference between traditionally-recognised individual rights and the rights enjoyed by minorities. Indeed, all concepts of rights for minority groups are premised on the group dimension to relevant individual rights. The example of discrimination is illustrative of the importance of this group dimension as it “generally takes place because somebody belongs to a racial, political, social or linguistic community”.²⁵ As a result, discrimination usually “presupposes the existence of a minority community and the victim’s membership of that group.”²⁶ Another pertinent example is freedom of association, which is rendered meaningless for members of minority groups if assembly for the purpose of promoting cultural issues is ruled beyond the purview of this freedom.

The importance and pervasiveness of cultural interests within concepts of minority rights tie in with the second criticism of Rodley’s approach: it overestimates the potential of non-discrimination and equality provisions to guarantee all minority rights. To focus exclusively on non-discrimination and equality is to ignore the importance of cultural, educational, autonomy, identity (and other) rights for minorities. Gudmundur Alfredsson has argued that group rights are needed not only to ensure “equal enjoyment” of the aforementioned rights, but also “to otherwise approximate circumstances enjoyed by the majority, to allow individuals to draw on the strength of their groups, and to facilitate interaction of groups with the States in which they live and with international organizations”.²⁷

A shift of focus is therefore required in order to appreciate that one key specificity of minority rights is their dual nature: the collective dimension of a distinct spectrum of individual rights. While the need for a right may be individual (eg. the right to use one’s mother tongue), the exercise of the right can conceivably be collective and therefore dependent on interaction with others (eg. the ability to *effectively* use one’s mother tongue). This is what Gabor Kardos terms “the interdependence of the individual and collective elements”²⁸ of minority rights. Further, Kardos has emphasised that the collective dimension of individual rights (i) “never removes the individual’s right to have recourse to the courts in defence of the given right” and (ii) does not “divide the right into two parts, producing separate rights for the individual and for the collectivity.”²⁹

²³ Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, *op. cit.*, p. 49.

²⁴ Nigel S. Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 17 *HRQ* 1995, p. 71.

²⁵ Gabor Kardos, “Human Rights: A Matter of Individual or Collective Concern?”, in Istvan Pogany, Ed., *Human Rights in Eastern Europe*, pp. 169–183, at 172.

²⁶ *Ibid.*

²⁷ Gudmundur Alfredsson, “A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, 7 *International Journal on Minority and Group Rights* (2000), pp. 291-304, at 295.

²⁸ *Ibid.*, p. 173.

²⁹ *Ibid.*, p.174.

In light of the foregoing observations, it can be said that rights protected as minority rights are often a fusion, or symbiotic co-existence, of individual and collective rights. There is a steadily growing body of opinion that discounts the notion that there is a clear conceptual cleavage between individual and collective rights. We can therefore conclude, along with John Packer, that no such dichotomy exists;³⁰ rather it is often a case of “continuity and complementarity” between them.³¹

1.2 Definitional dilemmas

A precise and universally-acclaimed definition of a minority has eluded the drafters of international instruments to date. This state of affairs is the product of a combination of factors, most notably intractable conceptual differences and the adoption of intensely politicised and unyielding stand-points by State authorities/representatives (see further section 1.3, *infra*).

Undoubtedly, agreement on and the adoption of a legal definition of a minority would greatly enhance legal certainty in this domain, but in the absence of such a definition (and no realistic prospects of achievement of the same), other techniques have been adopted in order to circumvent this potential obstacle to progress.

It has been asserted [in relation to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities] that “a precise definition is not necessary, that the answer is known in 90 percent or more of the possible cases, and that governmental and intergovernmental practice, including the jurisprudence of judicial organs, will eventually bring clarity to any remaining problems.”³² The same confidence in an ability to identify minority groups underlies the now-famous quip by the first OSCE High Commissioner on National Minorities, Max van der Stoel, “I know a minority when I see one”;³³ a remark which set the tone for his tenure of the position.

This prompts two observations. First, particularly in the early years of the Office’s existence, the OSCE HCNM worked the current vagueness as regards definitions to great advantage in the discharge of his mandate. The flexibility of approach that the Office has enjoyed is a direct consequence of the definitional vacuum. It is submitted here that such flexibility is ideally suited to the particular mandate of the HCNM, *viz.* preventive diplomacy (see further, s. 1.3, *infra*). Second, although greater definitional firmness could have helped to raise levels of certainty and predictability, it could also have resulted in a more rigid and therefore restrictive approach to minority issues. The correct definitional balance to be struck remains a significant challenge for international law.³⁴

³⁰ John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell and Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 223-273, at 241 *et seq.*

³¹ Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights”, *op. cit.*, p.

³² Gudmundur Alfredsson & Alfred de Zayas, “Minority Rights: Protection by the United Nations,” 14 *Human Rights Law Journal* 1993, pp. 1 – 9, at p. 3.

³³ (paraphrasing Potter Stewart J. (speaking of pornography), in *Jacobellis v. Ohio*, 378 US 184 (1964)) Max van der Stoel, “Prevention of Minority Conflicts”, in Louis B. Sohn, Ed., *The CSCE and the Turbulent New Europe* (1993).

³⁴ For further discussion of definitional and other relevant criteria, see: Stephen J. Roth, “Toward a Minority Convention: Its Need and Content”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff Publishers, 1992), pp. 83-116, and Richard Bilder, “Can Minorities Treaties Work?”, in *ibid.*, pp. 59-82.

Meanwhile, the elusiveness of clear consensus among academics, activists and States explains why the definition designed for the application of Article 27, ICCPR, first proposed by Francesco Capotorti, then Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1979, is still very much *de rigueur* today. He defines a minority in the following terms:

[A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.³⁵

Despite the proven ability of this definition to endure, it includes a number of features (some of which are potentially problematic) which merit further elucidation:

- Numerical inferiority
- Non-dominance
- Nationality
- Range of distinctive, constitutive characteristics
- Sense of solidarity
- Combination of objective and subjective criteria for recognition

Each of these will be addressed in turn, after briefly dealing with a crucial preliminary consideration.

Despite its well-documented failings (see further, s. 1.3, *infra*), the League of Nations can boast a jurisprudential legacy that is of certain (persuasive) value to the modern international human rights order. Some of the most fundamental principles concerning contemporary international protection for minorities can be traced to this period. Take, for instance, the seminal observation of the Advisory Opinion of the Permanent Court of International Justice (PCIJ) in the *Greco-Bulgarian “Communities”* case: “The existence of communities³⁶ is a question of fact; it is not a question of law”.³⁷ The importance of the principle articulated in the PCIJ’s observation cannot be overstated.³⁸ In effect, it means that the existence of a minority group, and consequently, the international protection to which its members are entitled, are not contingent on the official recognition of such a group by State authorities. Rather the existence of a minority is determined by various criteria, which in practice tend to be both objective and subjective. The most frequently cited criteria crop up in the Capotorti definition and will now be examined.

³⁵ Para. 568, p. 96.

³⁶ Author’s footnote: the vogue term for ‘minority’ at the relevant time was ‘community’.

³⁷ Advisory Opinion No. 17, July 31, 1930, *Series B, No. 17*, pp. 4 – 46, at p. 22. See also the corroborating statement at p. 27: “it is incorrect to regard the “community” as a legal fiction existing solely by the operation of the laws of the country.”

³⁸ Rosalyn Higgins has asserted that the UN Human Rights Committee regards the question of the existence of minorities (under Article 27, ICCPR) to be “an *objective and verifiable fact*” (emphasis added), thereby reinforcing the PCIJ formulation: Rosalyn Higgins, “Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System” in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Vol. III) (Martinus Nijhoff Publishers, Dordrecht, 1994), pp. 195-209, at 200.

Numerical inferiority

The requirement that the group be “numerically inferior to the rest of the population of a State” has given rise to what John Packer has dubbed the “problems of numbers”.³⁹ Athanasia Spiliopoulou Akermark opines that it is necessary, in the interest of legal certainty, to determine the scope of the rights accorded to national minorities.⁴⁰ Geoff Gilbert strikes a similar chord when he writes that “one cannot accord rights to wholly nebulous concepts”.⁴¹ It is worth noting at this juncture that the proposed wording for the article to deal with minorities considered at the first session of the Drafting Committee of the ICCPR included a reference to “a substantial number of persons of a race, language or religion other than those of the majority of the population...”⁴²

The conceptual concretisation of the scope of minority rights is also crucial from an administrative point of view, in order to specify the extent of entitlements arising out of such rights. Gilbert, again, points out that: “while a minority must be numerically smaller than the majority population, it must also constitute a sufficient number for the State to recognise it as a distinct part of the society and to justify the State making an effort to protect and promote it. There must be a group, not simply a few individuals.”⁴³ This observation is an important consideration in respect of the State’s role in ensuring distributive justice throughout its jurisdiction. While it cannot be gainsaid that some sort of proportionality in this regard generally tends towards the achievement of substantive social equality (as opposed to equality which is purely formal), the needs and desires of a group cannot and should not be calculated merely in numerical or quantitative terms. It is widely held that cognizance should also be taken of the kind of “historical inequities” alluded to in the *Lubicon Lake Band* case,⁴⁴ for instance.⁴⁵

Non-dominance

The allusion to “historical inequities” serves as a useful bridge between considerations of numerical strength and non-dominance, as in practice, both usually coincide. In addition, reference should also be made to what Patrick Thornberry has termed the “reverse minority” situation in South Africa that prevailed during the apartheid years.⁴⁶ This was a rare example

³⁹ John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 260.

⁴⁰ Athanasia Spiliopoulou Akermark, *Justifications of Minority Protection in International Law*, *op. cit.*, p.

⁴¹ Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *HRQ* 1996, p. 162.

⁴² The proposal *E/CN.4/21*, annex A (Secretariat) art. 46 [27], as cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, p. 493.

⁴³ Geoff Gilbert, “The Legal Protection Accorded to Minority Groups in Europe”, *XXIII Netherlands Yearbook of International Law* 1992, pp. 67-104, at 72-73.

⁴⁴ United Nations Human Rights Committee, Communication No. 167/1984, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, 10 May 1990, para. 33. Ted R. Gurr considers that discriminatory treatment directed at a minority grouping can be the result of widespread social practice and/or deliberate government policy, or “the residue of historical circumstances” – T. Gurr, *op. cit.*, p. 6. He has also referred to “the enduring heritage” of major historical processes in this connection, *ibid.*, p. 34.

⁴⁵ It is interesting to note that some commentators prefer a *tabula rasa* approach to minorities and the discrimination that has defined their history. See, for example, Cesar Birzea: “The treatment of minorities should not be directed towards the past but towards the future. In so doing, care must be taken to avoid the temptations of nostalgia, the idea of collective culpability or retroactive sanctions,” in *Human rights and minorities in the new European democracies: educational and cultural aspects*, p. 33.

⁴⁶ Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 9; a situation also alluded to by John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 261.

of numerical inferiority not going hand in hand with a position of non-dominance, thus thwarting the applicability of standard definitions of a minority.

It is appropriate to stress the importance of the non-dominant feature of the Capotorti definition because a major current in minority rights seeks to redress positions of societal non-dominance. This feature is therefore inextricably bound up in considerations of non-discrimination and equality, which are explored in concrete terms in section 3, *infra*.

Nationality

The requirement that members of a minority group ought to also be nationals of a State has proved contentious, as it fails to provide for complicated exceptions (eg. the application of restrictive criteria for the acquisition of citizenship; foreign kinship; nomadic lifestyles; patterns of migration and immigration). While these exceptional circumstances may not always be compatible with accepted understandings of a minority under international human rights law, further reflection on the exclusionary potential of the nationality criterion would be welcome. The debate has often veered towards the desirability of the term “national minority” (which is included in many other legal texts – though without necessarily being defined). Attempts to determine the precise meaning of the term have proved particularly problematic. The various arguments that have animated the relevant debate are examined in detail in the context of the analysis of the Council of Europe’s Framework Convention for the Protection of National Minorities in section 3, *infra*.

Range of distinctive, constitutive characteristics

It has been reasoned by one commentator, Ted R. Gurr, that: “In essence, communal groups are psychological communities: groups whose core members share a distinctive and enduring collective identity based on cultural traits and lifeways that matter to them and to others with whom they interact”.⁴⁷ He continues:

People have many possible bases for communal identity: shared historical experiences or myths, religious beliefs, language, ethnicity, region of residence, and, in castelike systems, customary occupations. Communal groups – which also are referred to as ethnic groups, minorities and peoples – usually are distinguished by several reinforcing traits. The key to identifying communal groups is not the presence of a particular trait or combination of traits, but rather the shared perception that the defining traits, whatever they are, set the group apart.

In order to facilitate the task of identifying minorities that are entitled to specific protection under international law, there is a tendency to home in on certain characteristics that collectively give shape to group identity. These characteristics should distinguish group members from the rest of the population. This exercise has revealed a preference for markers such as ethnic, linguistic and religious criteria. The centrality of generic features such as ethnicity, language and religion to minority identity is explored extensively in section 5, *infra*. For the moment, it is sufficient to draw attention to the conviction that such characteristics are so deeply ingrained in minority identity, so immutable, that they provide permanent indicators of the distinctiveness of the group.

⁴⁷ Ted R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, United States Institute of Peace, 2000), p.

This kind of thinking prevailed for a long time, but more recently, it has been subjected to sustained challenges, most notably on the grounds that (group) identity cannot be regarded as a static, unchanging concept. Put simply, groups evolve and adapt and so do their identities. Another argument which has the wind in its sails at the moment is that group identity cannot be regarded as homogenous. It is a composite concept, comprising an array of individual identities. Notwithstanding the important points of commonality among these individual identities, the collective identity must also reflect its inherent variegation and nuances. A third criticism of these constitutive characteristics is that they are too traditional and restrictive. In other words, they exclusively reflect traditional markers of identity and thereby fail to countenance the possibility that groups defined in terms of their sexual orientation might be considered as a minority under international law. The suitability of these constitutive characteristics for application in contemporary times is revisited in detail in s. 1.4, *infra*.

Sense of solidarity

Without wishing to invite any unnecessary semantic quibbling, the sense of solidarity referred to here can be read as being essentially a sense of cohesion. It refers to a consciousness among group members that they constitute a distinct group by virtue of sharing certain characteristics. Moreover, there must be a willingness to preserve the group. Marlies Galenkamp is highly critical of reliance (specifically by Will Kymlicka, but presumably also by others) on (as she puts it) “the wish to preserve one’s own culture”.⁴⁸ However, as a foil to her criticism, it could be argued (as has already been done *supra*) that culture is a defining element of minority identity, thus conferring extra legitimacy on its conception as a right to be honoured by States.

In addition to the symbolic importance of this sense of solidarity, there are very obvious practical considerations at play. In the absence of any internal feeling of cohesion within the group, any attempts to preserve the group as a group would have a presumably external or one-sided dynamic and would consequently be very contrived.

The Capotorti definition notes that the requisite sense of solidarity need not be express or formal. Rather, it can be implicit and even merely inferred from the behaviour of members of the minority group. The acceptance of implicit expressions of cohesive tendencies is to the advantage of groups that do not boast elaborate (or indeed any) internal organisational structures. Nevertheless, from an ultra-practical perspective, as has been posited by Michael Walzer, it remains a truism that “The survival and flourishing of the groups depends largely upon the vitality of their centers”.⁴⁹

Combination of objective and subjective criteria for recognition

As already mentioned *supra*, State recognition is never a prerequisite for determining the existence of a minority. Indeed, the United Nations Human Rights Committee has stated as

⁴⁸ Marlies Galenkamp, “The Rationale of Minority Rights: Wishes Rather Than Needs?”, in Juha Raikka, Ed., *Do We Need Minority Rights? Conceptual Issues* (The Hague, Martinus Nijhoff Publishers, 1996), pp. 41-57, at 47.

⁴⁹ Michael Walzer, “Pluralism: A Political Perspective”, in Will Kymlicka, Ed., *The Rights of Minority Cultures* (New York, Oxford University Press, 1995), pp. 139-154, at 152.

much in its General Comment 23: “The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria”.⁵⁰ If this were not the case, Patrick Thornberry has argued, “the protection afforded by Article 27 would be nullified by simple legislative inaction on the part of States”.⁵¹

However, flowing from the aforementioned requirement that there be some kind of *esprit de groupe* within the group, based on its shared distinctive characteristics, along with the desire to nurture such a sense of cohesion, the definitional criteria for minorities can be described as double-barrelled (i.e., objective and subjective):

Objectively, the group at issue must constitute a non-dominant minority of the population (usually a relatively small percentage of the population, even if a substantial number of people), and its members must share distinctive characteristics such as race, religion or language. Some of those characteristics will be natural, immutable; others (subject to cultural constraints) may be open to change. *Subjectively*, (most) members of this group must hold or evidence a sense of belonging to the group, and evidence the desire to continue as a distinctive group.⁵²

By way of conclusion to this section and in the interests of comprehensiveness, a couple of other significant definitions of a minority ought to be referenced. Among the earlier attempts at a legal distillation of a minority was the aforementioned Advisory Opinion of the PCIJ in the *Greco-Bulgarian “Communities”* case:

By tradition, which plays so important a part in Eastern countries, the “community” is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.⁵³

In 1985, Jules Deschênes submitted a new definition to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities for its consideration. The Deschênes proposal was essentially a refinement of the Capotorti definition, differing only slightly from its forerunner.⁵⁴ The main points of difference were that it would have excluded indigenous populations, non-citizens and majority groups in non-dominant positions. It reads:

A group of citizens of a State, constituting a numerical minority in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differs from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive, and whose aim it is to achieve equality with the majority in fact and in law.⁵⁵

⁵⁰ United Nations Human Rights Committee General Comment 23/50, para. 5.2.

⁵¹ Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 157.

⁵² Henry J. Steiner & Philip Alston, *International Human Rights in Context*, *op. cit.*, p. 988.

⁵³ *Op. cit.*, p. 21.

⁵⁴ For a meticulous comparison of the Capotorti and Deschênes definitions, see: Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 7.

⁵⁵ UN document E/CN.4/Sub.2/1985/31.

This proposed definition failed to win “general approval” by the Sub-Commission, and the Sub-Commission itself stated as much when passing the study containing the proposed definition to the UN Commission on Human Rights.⁵⁶

1.3 Minority rights under international law: international instruments and jurisprudence

Introduction

For present purposes, the focus will be on what can loosely be referred to as the post-World War II era; an era when concerted efforts were made to develop and systemise a modern conception of human rights law at the international and regional levels. Prefaced by a brief exploration of the *status quo ante*, the analysis will comprise the largely UN-dominated standard-setting and enforcement at the international level, as well as various comparable endeavours at the European level.

Throughout the history of international law there are examples of protective treaties concluded for the benefit of specific groups; the treaty is the paradigmatic instrument recognizing the right of minorities to fair treatment. The treaties produce a wilderness of single instances rather than any comprehensive scheme.⁵⁷

The historical pattern thus described by Patrick Thornberry was interrupted, however, by the establishment of the League of Nations.⁵⁸ While it is widely accepted that the protection afforded minorities under the League of Nations constellation of treaties – despite its documented imperfections – represented a major development in international law, the continued direct relevance of the principles and practices it developed is disputed. The better view would appear to be that the legal inheritance in question is merely of persuasive value. This view builds on the argument that the international legal and political order underwent such fundamental upheaval during World War II that the new post-war dispensation was a completely new departure, built on new conceptual foundations and comprising new political architecture. In light of this fundamental change of circumstances,⁵⁹ the principle of *rebus sic stantibus* is taken to apply,⁶⁰ thereby prompting commentators such as Thornberry to refer to the advent of the UN taking place in a *tabula rasa* situation.⁶¹

The absolute baseline for minority rights protection is a guarantee for their existence and first and foremost their physical existence. On the basis of this thinking, “the protection of minorities through individual rights was backstopped by a convention designed [/] to prevent the most egregious violation of minority rights: the Convention on the Prevention and

⁵⁶ Sub-Commission Resolution 1985/6, preambular para. 5. See further, Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, in Philip Alston, Ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992), pp. 211-264, at 222.

⁵⁷ Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 25 (footnotes omitted).

⁵⁸ For the history of the League of Nations, with a special emphasis on its efforts and achievements in the realm of minority rights protection, see: Eduardo Ruiz Vieytez, *The History of Legal Protection of Minorities in Europe (XVIIth – XXth Centuries)*; John Eppstein, *Ten Years’ Life of the League of Nations* (London, May Fair Press, 1929); Natan Lerner; Athanasia Spiliopoulou Akermark; ...

⁵⁹ See further, Article 62 of the Vienna Convention on the Law of Treaties, which deals with the issue.

⁶⁰ This was the contemporaneous approach adopted by the fledgling UN; for background details, see: John P. Humphrey, *Human Rights & the United Nations: a great adventure* (New York, Transnational Publishers, Inc., 1984), pp. 47-48.

⁶¹ Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p.

Punishment of the Crime of Genocide”.⁶² The absolute nature of the prohibition of genocide is underlined by unanimous acceptance that it constitutes a crime under customary international law as well. Indeed, the Convention codifies customary international law in this respect.

In Article I of the Convention,⁶³ the Contracting Parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II sets out the definition of “genocide”:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III lists the acts punishable under the Convention as: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

While the final text of the Genocide Convention focuses on the physical existence of groups, serious consideration was given in the drafting process to the notion of “cultural genocide”, which was defined in one version of the draft Convention as follows:

Destroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical, artistic or religious value and of objects used in religious worship.⁶⁴

In another draft text of the Convention, “cultural genocide” was taken to mean:

[...] any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

- 1 Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
- 2 Destroying or preventing the use of libraries, museums, schools, historical institutions and objects of the group.⁶⁵

Together, these proposed definitions illustrate the approximate scope of the notion. The vagueness of the notion and the interpretative difficulties to which it would lead in practice appear to have been the most persuasive arguments in the intense debates which eventually

⁶² Charles F. Furtado, Jr., “Guess Who’s Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe” 34 *Colum. Hum. Rts. L. Rev.* 333 (2003), at p. 338-339.

⁶³ Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948; entry into force 12 January 1951.

⁶⁴ Article I of the Secretariat’s Draft Convention, as cited in Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 71.

⁶⁵ Article III of the Ad Hoc Committee’s Draft Convention, as cited in *ibid.*, p. 72.

led to a decision to drop the notion of “cultural genocide” from the Convention at a late stage in the drafting process. Thornberry concludes that “the majority opinion [in the relevant debates] seems to have been that genocide is *sui generis*, and must be differentiated from questions of human and minority rights”.⁶⁶

Notwithstanding the narrow definitional focus ultimately prescribed for the Genocide Convention, the right to existence implies more than just physical existence. The right also includes the right to exist on a given territory, especially when a minority group has special (historical, cultural, religious, etc.) attachment to the same. It also includes the right of access of minorities to “the material resources required to continue their existence on those territories”.⁶⁷ In addition to these physical, territorial and basic subsistence rights involved in the right to existence, its “cultural and spiritual dimensions” also merit recognition.⁶⁸ Indeed, a case could even conceivably be built for the inclusion of a right to “permanent sovereignty over natural resources”,⁶⁹ at least insofar as it relates to the territorial-based cultural objectives of minority groups.⁷⁰

1.3.1 Universal instruments with provisions concerning minority rights

An acute awareness of the urgent and perduring nature of minority rights is reflected in the institutional structures of the United Nations. Article 68 of the UN Charter provides for the creation of a Commission on Human Rights under the auspices of the Economic and Social Committee (ECOSOC)⁷¹ to develop and implement the provisions of the Charter relating to human rights and fundamental freedoms. The protection of minorities comes within the remit of the Commission. Under the specific authorisation of ECOSOC, the Commission established its Sub-Commission on Prevention of Discrimination and Protection of Minorities⁷² (later renamed as the Sub-Commission on the Promotion and Protection of Human Rights). Over time, the mandate of the Sub-Commission expanded considerably beyond its dual eponymous objectives.⁷³ In 1995, the UN Working Group on Minorities was

⁶⁶ *Ibid.*, p. 73.

⁶⁷ Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *op. cit.*, p. 5.

⁶⁸ Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, in Alan Phillips and Allan Rosas, Eds., *Universal Minority Rights* (Abo Akademi University Institute for Human Rights/Minority Rights Group, Turku/Abo and London, 1995), pp. 13-76, at 40.

⁶⁹ See further, James Crawford, “The Rights of Peoples: ‘Peoples’ or ‘Governments’?”, in James Crawford, Ed., *The Rights of Peoples* (Great Britain, Oxford University Press, 1988), pp. 55-67, at 63-65.

⁷⁰ See Section 4(iv), *infra*, for citations for relevant UN HRC and ECHR cases.

⁷¹ Article 7 of the UN Charter provides for the establishment of ECOSOC as one of the “principal organs” of the UN. Its functions and powers are set out in Articles 62 *et seq.* of the UN Charter. Of particular importance for present purposes is Article 62(2), which reads: “It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”. Article 62(3) is of similar importance: “It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence”. Also worthy of mention is Article 64, which empowers ECOSOC to obtain reports from specialised UN agencies. Currently, it coordinates the activities of 14 of the UN specialised agencies, 10 functional commissions and five regional commissions.

⁷² See further: Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, in Philip Alston, Ed., *The United Nations and Human Rights* (Clarendon Press, Oxford, 1992), pp. 211-264.

⁷³ See further, *ibid.*, at 213; 222-226.

set up under the auspices of the Sub-Commission.⁷⁴ Relevant responsibilities have now been taken over by the Human Rights Council.

However, this (institutional) consciousness has not always translated into action. To date, no United Nations *convention* specifically addresses minority rights in an exclusive manner. Moreover, neither the United Nations Charter nor the Universal Declaration of Human Rights (UDHR) – the two foundational documents of the post-World War II regime of international human rights law - contains any specific mention of minority rights (as distinct from association with a minority as one of the listed grounds of impermissible discrimination). The initial draft (the so-called “Secretariat Outline”) of the UDHR did, however, include a provision dealing specifically with minority rights,⁷⁵ which read:

In states inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public⁷⁶ funds available for the purpose, their schools and cultural and religious institutions, and to use their own language before the courts and other authorities and organs of the state and in the press and in public assembly.⁷⁷

As will duly be shown, the definitional component of this provision includes some of the main elements of other leading definitions of minority rights. Its purposive component, however, is more far-reaching than similar provisions that were subsequently incorporated into various UN treaties. Its express provision for an equitable portion of available public funding to be ear-marked for minorities to allow them to pursue the text’s stated provisions was particularly far-reaching and proved very controversial. When René Cassin revised the initial draft of the UDHR, he removed the reference to public funding because France did not allocate funds to private educational institutions.⁷⁸ Even without the reference to public funding, the proposed article remained so controversial that the Human Rights Commission dropped it, with the result that the draft text sent to the UN General Assembly did not include any provision focusing specifically on minority rights.

This omission is generally explained by the conceptual complexity and political sensitivity of the issue, as well as the high level of divergence in relevant State practice.⁷⁹ A number of States (including many Latin American States), either with assimilationist policies or particular understandings of the concept of “minorities”, claimed that minorities did not exist on their territories and were therefore opposed to the very idea of an article guaranteeing

⁷⁴ It was established pursuant to ECOSOC Resolution 1995/31 of 25 July 1995. See further: Asbjorn Eide, “Commentary: Global and regional approaches to situations involving minorities”, in *Filling the Frame*, *op. cit.*, pp. 51-58, at 54-55.

⁷⁵ The draft text was prepared by the Division of Human Rights (i.e., John Humphrey and his staff): UN Yearbook on Human Rights for 1947 (Lake Success, United Nations, 1949), p. 484; also reproduced in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, Inc., 2001), at 270-274.

⁷⁶ Note to self: Humphrey, p. 69, omits the word “public”, whereas Glendon, p. 274, includes it.

⁷⁷ Article 46, *ibid.*

⁷⁸ Explanation given subsequently by the French delegate, Mr. Samuel Spanien: Doc. E/CN.4/Sub.2/SR.11, p. 20. See also: Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l’homme* (Louvain, E. Warny, 1964), p. 288; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 69.

⁷⁹ See, for example, Francesco Capotorti, *op. cit.*, p. 27, Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, *op. cit.*, p. 220. The changes introduced by the so-called “Cassin draft” were, in the main, more stylistic than substantive: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, *op. cit.*, at 64. The “Cassin draft” is reproduced in *ibid.* at 274-280.

special rights to minorities.⁸⁰ Also, in keeping with the prevailing legal thinking of the day, some of the drafters of UN Charter and the UDHR presumed that strong non-discrimination and equality provisions would assure adequate protection for the human rights of all and sundry, including minorities.⁸¹ These two reasons go a long way towards explaining the omission of specific provisions for the protection of minority rights from the Charter and UDHR.

Nevertheless, the issue was not erased from the UN agenda, but continued (nominally and initially, at least) to command a high level of priority. On the same day as the UN General Assembly adopted a Resolution proclaiming the Universal Declaration of Human Rights,⁸² it adopted another Resolution entitled “Fate of Minorities”.⁸³ That Resolution stated that the United Nations could not remain indifferent to the fate of minorities, even if the issue was fraught with complications. It called on the Sub-Commission to “make a thorough study of the problem of minorities” with a view to enabling the UN to “take effective measures for the protection of racial, national, religious or linguistic minorities”.⁸⁴ The Resolution was clearly intended as a sop for the non-inclusion of a specific article on minority rights in the Universal Declaration of Human Rights. Although the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities went about its task diligently, it encountered considerable political resistance in the Human Rights Commission and ECOSOC.⁸⁵ In fact, it has been claimed that its commitment to the question of the “fate of minorities” was one of the reasons why ECOSOC sought, unsuccessfully, to abolish the Sub-Commission in 1951.⁸⁶

The ICCPR marks a shift from the line of thinking that prevailed during the drafting of the UDHR, at least insofar as its text and *travaux préparatoires* reveal concerns that the envisaged provisions of non-discrimination and equality would prove insufficient for safeguarding the rights of individuals belonging to minorities. It was clearly felt that supplementary, complementary provisions would be required to redress the envisaged shortcomings of the draft text.⁸⁷ This viewpoint eventually won the day, leading to the drafting and inclusion of what would become Article 27, ICCPR.

Of the existing conventions that do contain provisions treating minority rights, the ICCPR and the Convention on the Rights of the Child (CRC), are the two which lay the strongest claim to being universally applicable. However, in both cases, only one article deals specifically with minorities. Article 27, ICCPR reads:

⁸⁰ Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l'homme*, *op. cit.*, at 289 *et seq.*; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 69.

⁸¹ Natan Lerner, “The Evolution of Minority Rights in International Law,” in Catherine Brölmann *et al.*, Eds., *op. cit.*, pp. 77-101, at 87; John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 20 and 69.

⁸² UN General Assembly Resolution 217 A (III) of 10 December 1948.

⁸³ UN General Assembly Resolution 217 C (III) of 10 December 1948.

⁸⁴ UN General Assembly Resolution 217 C (III) of 10 December 1948, para. 5. For details of how the Sub-Commission went about carrying out this study, see Asbjorn Eide, “The Sub-Commission on Prevention of Discrimination and Protection of Minorities”, *op. cit.*, at 220 *et seq.*

⁸⁵ John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 56 and 69-70. See further, *ibid.*, at 103.

⁸⁶ *Ibid.*, at 70.

⁸⁷ “It was agreed that, while article 2, paragraph 1, and article 24 [26] of the draft Covenant on Civil and Political Rights contained a general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the other elements of the population. It was felt that an article on this question should be included in the draft Covenant on Civil and Political Rights.”: Commission on Human Rights, 5th Session (1949) – A/2929, Chapt. VI, Para. 183, as cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Striking textual similarities reveal the extent to which Article 30, CRC, was modelled on Article 27, ICCPR:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous, shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

While there is broad consensus that Article 27, ICCPR, is the “preeminent”⁸⁸ provision in positive international law vouchsafing minority rights, it is also widely recognised that the provision nevertheless only offers “fairly modest”⁸⁹ protection. The crucial phrase, “shall not be denied” *prima facie* sets the tone for the entire article. The choice of wording seems begrudging and parsimonious. Indeed, one leading commentator went so far as to claim that “A weaker statement than the one in Article 27 could, however, be hard to imagine”.⁹⁰ The emergence of the final wording can be easily traced in the drafting history of the article.⁹¹ An earlier proposal by the USSR for a more positive wording (“the State shall ensure to national minorities the right [...]”) was rejected for fear that “under such a text which imposed a positive obligation on States, minority consciousness could be artificially awakened or stimulated”.⁹² It was generally felt among State delegations that the phrase, “shall not be denied the right [...]”, “seemed to imply that the obligations of States would be limited to permitting the free exercise of the rights of minorities”.⁹³

However, in its General Comment 23, the UN Human Rights Committee has interpreted the phrase as allowing for a more positive reading than its apparent negativity would suggest. The operative paragraphs are phrased as follows:

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, 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.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. [...]⁹⁴

⁸⁸ Henry J. Steiner & Philip Alston, *International Human Rights in Context*, p. 992.

⁸⁹ Manfred Nowak, “The Evolution of Minority Rights in International Law,” *op. cit.*, p. 104

⁹⁰ John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, p. 102.

⁹¹ See further, Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, at 496; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, *op. cit.*, at 500.

⁹² UN Commission on Human Rights, 9th Session (1953), as quoted in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, at 496.

⁹³ *Ibid.*

⁹⁴ See also para. 9, *ibid.*, which refers, *inter alia*, to the “specific obligations” imposed on States by Article 27, and the duty of States “to ensure that the exercise of these rights is fully protected”.

Thus, Article 27, ICCPR, not only sets out positive obligations for States, it even goes so far as to envisage the horizontal application of those obligations, as is clear from the final sentence in para. 6.1. This emphasis on the *specific* (positive) duties of States *vis-à-vis* minority rights is consistent with the *general* duties to which States Parties are bound by virtue of Article 2, ICCPR. It reads (in part)⁹⁵:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

In its General Comment No. 31, the UN Human Rights Committee stresses that the obligation under Article 2(1) to “respect and ensure” Covenant rights has “immediate effect” for all States Parties and that Article 2(2) provides the “overarching framework” within which those rights are to be “promoted and protected”.⁹⁶ The legal obligation enshrined in Article 2(1) “is both negative and positive in nature”, implying that as well as refraining from violating any Covenant rights, States must equally “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.⁹⁷ Furthermore, States’ positive obligations under Article 2(1) “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”.⁹⁸

The foregoing analysis of relevant General Comments establishes that States are under clear and strong positive obligations in the field of minority rights protection. It can therefore be concluded that these positive obligations serve to offset the narrowness and negativity suggested by the actual wording of Article 27, ICCPR. However, such a reading asks profound questions about the importance of the doctrine of original intent, and of the competing merits of literal and teleological/purposive approaches to the interpretation of treaties. It could also be taken as casting certain doubt on the role of *travaux préparatoires* for treaty interpretation generally.⁹⁹

Article 27 offers little in the way of elucidation as to the individual/collective nature of the rights its negative formulation purports to safeguard.¹⁰⁰ As has already been demonstrated, *supra*, minority rights do not necessarily have to be individual rights. A shift of focus is required in order to appreciate the unique nature of minority rights, or, to employ its most

⁹⁵ Article 2.3 concerns the availability of effective remedies and their enforceability by competent authorities.

⁹⁶ General Comment No. 31 [80] – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2187th meeting), para. 5.

⁹⁷ *Ibid.*, paras. 6, 7.

⁹⁸ *Ibid.*, para. 8. It continues: “There may be circumstances in which a failure to ensure Covenant rights permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”. See further: Article 2(3), ICCPR.

⁹⁹ See in this connection: Jan Klabbbers, “International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?”, *Netherlands International Law Review* (2003), pp. 267-288.

¹⁰⁰ For a synthesis of various viewpoints on the question of whether individuals or groups are the relevant right-holders for the purposes of Article 27, see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, p. 498.

frequently-used formulation, “the rights of persons belonging to minorities”. Manfred Nowak points out that this formula was introduced at the drafting stage of the text of the ICCPR by the British delegation because according to the prevailing judicial thinking of the day, groups *qua* groups could not be the holders of rights.¹⁰¹

Whatever about its persuasive power, this conclusion was an inaccurate reading of international law at the time,¹⁰² and even moreso when judged against the standards of today. The concept of right-holding groups was already well-established in the contemporary canon of international human rights law (eg. Genocide Convention) and it was to be reaffirmed in the context, *inter alia*, of the right of peoples to self-determination in the ICCPR and ICESCR, which would imminently be concluded. It would have been more accurate and less disingenuous for the British delegation to have argued that there was limited precedent for the recognition of group rights in international law. In sum, although practice has proven the original assertion to be incorrect, the drafters of the ICCPR rejected an exclusively group-oriented formulation of the provision securing minority rights protection.

As stated in General Comment No. 23, what is at issue in Article 27 is “a right which is conferred on individuals belonging to minority groups” to enjoy their own culture, to profess and practise their own religion, and/or to use their own language.¹⁰³ Francesco Capotorti, however, is at pains to point out that the final choice of phraseology for Article 27 “limits, but certainly does not exclude, the existence of purely individual rights of persons belonging to minorities (e.g., the right to hold opinions without interference).”¹⁰⁴ This interpretation of Article 27 reverberates in General Comment No. 23, which describes the right in question as being “distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they [i.e., individuals belonging to minority groups] are already entitled to enjoy under the Covenant”.¹⁰⁵ This is also consistent with Capotorti’s findings in his seminal report, where he wrote that:

Article 27 does not refer to minority groups as the formal holders of the rights described in it, but rather stresses the need for a collective exercise of such rights. Therefore it seems justified to conclude that a correct construction of this norm must be based on the idea of its double effect – protection of the group and its individual members [...].¹⁰⁶

It has succinctly been pointed out by Patrick Thornberry that the drafters of the ICCPR created “a hybrid between individual and collective rights because of the ‘community’ requirement”, as such an approach “presupposes a community of individuals endowed with similar rights”.¹⁰⁷ This prompts him to describe the rights in question as “benefiting individuals but requiring collective exercise”.¹⁰⁸

The use of the verb “exist” in Article 27 has generated considerable discussion, particularly as regards whether it connotes a particular degree of permanence. Relevant discussions were fuelled by General Comment No. 23, which scotches such notions. The adoption of such an

¹⁰¹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, p. 483.

¹⁰² See further in this connection, Manfred Nowak, *ibid.*, p. 495.

¹⁰³ General Comment 23, para. 1.

¹⁰⁴ Francesco Capotorti, “Are minorities entitled to collective international rights?”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 505-511, at p. 511.

¹⁰⁵ *Ibid.*

¹⁰⁶ Francesco Capotorti, “Are minorities entitled to collective international rights?”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 505-511, at pp. 507/8.

¹⁰⁷ Patrick Thornberry, *International Law and the Rights of Minorities, op. cit.*, p. 173.

¹⁰⁸ *Ibid.*

approach by the Human Rights Committee prompted Hurst Hannum to reason that: “The Committee does not refer to the relevant legislative history to support its conclusions, and the General Comment is perhaps best interpreted as representing the personal views of Committee members than an authoritative interpretation of the text of the Covenant. At the same time, however, the [/] expansive reading is generally consistent with the more detailed principles set forth in the 1992 General Assembly Declaration”.¹⁰⁹

The question of nationality as a criterion for determining an individual’s membership of a minority grouping must be considered in distinct contexts: that of universally applicable legal standards and that of analogous European provisions. As regards UN-sponsored standards, individuals do not have to be nationals of a given State to enjoy the rights to which members of that State’s own minorities can ordinarily lay claim. General Comment 23 is instructive in the matter of the scope of the applicability of Article 27’s provisions: “the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone”.¹¹⁰ Thus, by way of corollary, any consideration of (degrees of) permanence of residence in this connection is redundant.¹¹¹

In practice, reservations and heavy-handed declarations have been entered in respect of Article 27. It is likely that refusals to enter into the spirit of the operative article were prompted by (i) a fear that it would lead to obligations to take affirmative action (including the financial implications which such obligations would incur) in order to improve the lot of minorities, or (ii) a genuine belief that the cause of national unity would be best served by integrationist or assimilationist policies (with the assumption that similar treatment for all persons on a national territory, amounting to formal, legal equality, would be sufficient from a human rights perspective). Thornberry has commented that “some of the disclaimers on the existence of minorities in a State reveal rather tortuous and evasive reasoning”.¹¹²

France is the most eminent European country to have given formal expression to its objections to Article 27. The French Government, upon ratification of the ICCPR, declared, *inter alia*, that Article 27 of the Covenant was not applicable in France, in light of Article 2 of the 1958 French Constitution.¹¹³ A similar declaration was made by the French authorities in respect of Article 30 of the CRC, upon ratification of that Convention. In its consideration of the last Periodic Report submitted by France under Article 40 of the ICCPR, the United Nations Human Rights Committee was critical of France’s continued refusal to endorse the provisions of Article 27:

The Committee has taken note of the avowed commitment of France to respect and ensure that all individuals enjoy equal rights, regardless of their origin. The Committee is, however, unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities. The

¹⁰⁹ Hurst Hannum, “New Minority Rights for the Twenty-First Century”, in Yael Danieli, Elsa Stamatopoulou & Clarence J. Dias, Eds., *The Universal Declaration of Human Rights: Fifty years and beyond* (New York, United Nations Publishing, 1999), pp. 163-173, at 169-170.

¹¹⁰ General Comment 23, para. 5.1.

¹¹¹ *Ibid.*, para. 5.2.

¹¹² Patrick Thornberry, *International Law and the Rights of Minorities*, *op. cit.*, p. 158.

¹¹³ Article 2 of the Constitution of the Fifth French Republic (1958) reads: “La langue de la République est le français. L’emblème national est le drapeau tricolore, bleu, blanc, rouge. L’hymne national est la Marseillaise. La devise de la République est Liberté, Egalité, Fraternité. Son principe est: gouvernement du peuple, par le peuple et pour le peuple »

Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country, and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group.¹¹⁴

The Committee has repeatedly held France's 'declaration' made in respect of Article 27 "to be tantamount to a reservation and [that it] therefore precludes the Committee from considering complaints against France alleging violations of article 27 of the Covenant".¹¹⁵

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

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, has been hailed as being "a document that is more assertive than previous UN instruments".¹¹⁶ This is largely because of its pro-active overall tenor. Article 1 enjoins States to adopt appropriate legislative and other measures with a view towards promoting minority identities; an objective (and concomitant requirement) that reverberates in Article 4.2. The Declaration, although adopted by consensus, does not create any legal obligations on the governments of its States signatories. Nor does it define minority rights or provide an exhaustive enumeration thereof. The Declaration does, however, represent a pronounced shift in the UN's approach to minority rights, moving from a negatively formulated focus on non-discrimination (Article 27, ICCPR) to the more positive-sounding language of protection and promotion. The importance of the 1992 Declaration was affirmed, *inter alia*, by references to it in the 1993 Vienna Declaration (para. 19) and Programme of Action (Section B2, paras. 25-27).¹¹⁷ The substance of its individual provisions are analysed at appropriate junctures in s. 1.4, *infra*.¹¹⁸

UN institutional approaches to minority rights

ECOSOC Resolution 1995/31 provided for the establishment of the UN Working Group on Minorities as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.¹¹⁹ It acted primarily as a forum for dialogue, involving minorities, States representatives and other interested parties, until its functions were subsumed in those of the newly-created Human Rights Council.

¹¹⁴ Concluding observations of the Human Rights Committee: France. 04/08/97. CCPR/C/79/Add.80, para. 24.

¹¹⁵ *C.L.D. v. France*, Communication No. 439/1990, UN Doc. CCPR/C/43D/439/1990 (1991), para. 4.3. See also, *T.K. v. France*, declared inadmissible on 8 November 1989, para. 8.6 and Appendices I and II (Annual Report 1990, A/45/40, Vol. II, Annex. X.A).

¹¹⁶ P. Dunay, "Nationalism and Ethnic Conflicts in Eastern Europe: Imposed, Induced or (Simply) Reemerged," in I. Pogany (Ed.), *Human Rights in Eastern Europe*, pp. 17-45, at p.34.

¹¹⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹¹⁸ See further: Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update", in Alan Phillips and Allan Rosas, Eds., *Universal Minority Rights* (Abo Akademi University Institute for Human Rights/Minority Rights Group (International), Turku/Abo and London, 1995), pp. 13-76; Asbjorn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Working paper submitted to the Working Group on Minorities of the Sub-Commission on Promotion and Protection of Human Rights of the United Nations Commission on Human Rights, 27 April 2000.

¹¹⁹ The Sub-Commission was formerly called the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The position of Independent Expert on Minority Issues was established by Resolution 2005/79 of the UN Human Rights Commission.¹²⁰ The mandate of the Independent Expert reads as follows:

- (a) To promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;
- (b) To identify best practices and possibilities for technical cooperation by the Office of the United Nations High Commissioner for Human Rights at the request of Governments;
- (c) To apply a gender perspective in his or her work;
- (d) To cooperate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates, mechanisms as well as regional organizations;
- (e) To take into account the views of non-governmental organizations on matters pertaining to his or her mandate;

The position was created for a two-year period and its first incumbent was Ms. Gay McDougall. The Resolution establishing the position requests the office-holder to “submit annual reports on his/her activities to the Commission, including recommendations for effective strategies for the better implementation of the rights of persons belonging to minorities”. In her first annual report, the Independent Expert identified “four broad areas of concern relating to minorities around the world, based on the Declaration on the Rights of Minorities and other relevant international standards relating to minority rights”.¹²¹ They are:

- (a) Protecting a minority’s existence, including through protection of their physical integrity and the prevention of genocide;
- (b) Protecting and promoting cultural and social identity, including the right of individuals to choose which ethnic, linguistic or religious groups they wish to be identified with, and the right of those groups to affirm and protect their collective identity and to reject forced assimilation;
- (c) Ensuring effective non-discrimination and equality, including ending structural or systemic discrimination; and
- (d) Ensuring effective participation of members of minorities in public life, especially with regard to decisions that affect them.

Although the holder of the specialised mandate is called an Independent Expert, this official title does not necessarily reflect any distinction of status compared with other specialised UN mechanisms/mandates. The various titles employed to designate such experts (including special rapporteurs, independent experts, representatives of the Secretary-General or representatives of the Commission) “neither reflect a hierarchy, nor are they an indication of the powers entrusted to the expert”.¹²² Rather, the titles of the mandates are the product of political negotiations.¹²³ Part of the thinking behind the establishment of the mandate was the view that “some challenges facing minorities have not been appropriately covered by existing mandates, for structural or functional reasons. As minority issues do not constitute the main focus of the existing mandates, inevitably the mandates are unable to reflect the full range of

¹²⁰ Rights of persons belonging to national or ethnic, religious and linguistic minorities, Resolution 2005/79, Commission on Human Rights (61st session, 2005).

¹²¹ Specific Groups and Individuals: Minorities, Report of the independent expert on minority issues, Gay McDougall, Commission on Human Rights (62nd session, 6 January 2006), E/CN.4/2006/74, para. 22.

¹²² Seventeen frequently asked questions about the United Nations special rapporteurs, UN Human Rights Fact Sheets, No. 27, Geneva, 2001, p. 6.

¹²³ *Ibid.*

concerns relevant to minorities”.¹²⁴ In other words, the need was felt to create a mechanism that would strive to make the piecemeal nature of the system of protection of minorities more coherent and integrated.

1.3.2 European instruments with provisions concerning minority rights

The advantages of “the regional instrument” have been enumerated by Patrick Thornberry as the following:

- Grounding in a coherent political or cultural tradition;
- Greater possibilities of inter-state cooperation through proximity;
- Closer access for members of minority groups to centres of decision-making and enhanced possibilities of participation and redress of grievances.¹²⁵

These observations can hardly be gainsaid, not least because they are the progeny of the sense of shared heritage and destiny that originally led to the drafting of the ECHR. The final preambular paragraph in the ECHR, for instance, refers to (a collectivity of) “European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”. Nevertheless, with the continuing growth of the CoE, the coherence of political and cultural traditions between Member States is being increasingly questioned.¹²⁶ The development of the principle and a culture of subsidiarity in decision-making is also of paramount importance, as will be demonstrated, *infra*. One should, however, additionally point to legal frameworks as another factor that attests to the strengths of regional resolutions of minority issues.

Firstly, geo-political and socio-economic considerations have given great thrust to European integration, through the efforts of various European IGOs. The overarching legal structures of these IGOs are therefore applicable to many – or in some cases, most – European States. While the majority of laws adopted and enforced or monitored by relevant IGOs do not directly concern minority rights issues, they undoubtedly play a formative role in shaping the legal environment in which specific laws are adopted and applied.

Secondly, the inevitable intertwining of destinies of neighbouring States results in broad parallelisms in the development of legal systems at the national level. Put more plainly, geographical proximity leads to shared or similar origins of legal systems; similar rates and triggers of development of those systems, and similar responses to issues with which they are confronted.

Taken together, these considerations are of great contextual importance.

¹²⁴ Report of the High Commissioner for Human Rights on the rights of persons belonging to minorities, E/CN.4/2004/75. para.

¹²⁵ Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update”, *op. cit.*, at 61.

¹²⁶ Such questioning is, of course, much more pronounced in the case of the OSCE, which currently comprises 56 Participating States (as opposed to the Council of Europe’s 47).

1.3.2(i) Council of Europe/European Convention on Human Rights

The (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)¹²⁷ is the veritable bedrock of human rights protection in Europe. In keeping with other international human rights instruments elaborated contemporaneously with it, the ECHR takes a predominantly individualistic approach to human rights protection and contains no provision akin to Article 27, ICCPR. In other words, no *specific* rights are envisaged for minorities as such.¹²⁸ This was stated emphatically by the (now-defunct¹²⁹) European Commission of Human Rights in *G. & E. v. Norway*, although it did also concede that “disrespect of the particular life style of minorities may raise an issue under Article 8”¹³⁰.

Nevertheless, members of minority groups are not debarred from seeking redress for their grievances via the European Court of Human Rights. Procedurally, the Convention Article that is of most relevance in this regard is Article 34, which allows for groups of individuals to petition the Court:

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

In practice, cultural associations,¹³¹ churches,¹³² political parties,¹³³ media outlets,¹³⁴ NGOs¹³⁵ and villages/communities¹³⁶ have all been found to have *locus standi* before the Court.

From a more substantive perspective, it is also possible for individual members of minority groups to make applications to the European Court of Human Rights by virtue of Article 14, ECHR. Like Article 1 (‘Obligation to respect human rights’), ECHR,¹³⁷ this Article is informed by the principle of equal enjoyment of rights by all. However, as stated by the former European Commission for Human Rights in *X. v. Austria*:

¹²⁷ Adopted on 4 November 1950, CETS No. 5.

¹²⁸ [Insert appropriate references to *travaux préparatoires* here]

¹²⁹ The Commission was abolished pursuant to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, CETS No. 155, 11 May 1994 (entry into force: 1 November 1998).

¹³⁰ *G. & E. v. Norway*, Decision of inadmissibility by the European Commission of Human Rights of 3 October 1983, Appn. Nos. 9278/81 & 9415/81, paras. 1 and 7 at pp. 35 and 38, respectively.

¹³¹ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 2 October 2001.

¹³² *Canea Catholic Church v. Greece*, Judgment of the European Court of Human Rights of 16 December 1997, Reports 1997-VIII, paras. 30, 31.

¹³³ *United Communist Party v. Turkey*, Judgment of the European Court of Human Rights (Grand Chamber) of 30 January 1998, Reports 1998-I.

¹³⁴ *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30.

¹³⁵ *Liberty & Others v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 1 July 2008.

¹³⁶ *Noack & others v. Germany*, Judgment of the European Court of Human Rights of ; *Konkama & 38 other Saami villages v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 25 November 1996, Appn. No. 27033/95.

¹³⁷ Article 1, ECHR, reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The Convention does not provide for any rights of a ... minority as such, and the protection of individual members of such minority is limited to the right not to be discriminated in the enjoyment of the Convention rights on the grounds of their belonging to the minority (Article 14 of the Convention).¹³⁸

Article 14, entitled ‘Prohibition of discrimination’,¹³⁹ reads as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It can thus be seen that Article 14 enumerates a non-exhaustive list of impermissible grounds for discrimination. Among the enumerated grounds are, “national or social origin” and “association with a national minority”. The ascertainment of the precise meaning of the latter term has proved highly troublesome, although not so much in the context of the ECHR as the Framework Convention for the Protection of National Minorities (discussed *infra*). The European Court of Human Rights noted, *obiter dictum*, in *Gorzelik and others v. Poland* (see further, *infra*), that the formulation of a definition of “national minority” “would have presented a most difficult task”, given the absence of such a definition in any international treaty (even the FCNM).¹⁴⁰ The Court then balked at the opportunity to discuss what the essence of such a definition might entail (although it did provide a more reasoned explanation for its stance when the case was subsequently referred to the Grand Chamber).¹⁴¹

No free-standing right to non-discrimination was provided for in the original text of the European Convention. Article 14 prohibits discrimination merely in relation to “the rights and freedoms set forth” elsewhere in the Convention. Thus, whenever it is invoked, Article 14 must be pleaded in conjunction with other (substantive) rights guaranteed elsewhere in the ECHR. It can only be said to be autonomous to the extent that its application does not presuppose a breach of one or more of the other substantive provisions of the Convention or its Protocols.¹⁴² However, it has been noted that “there seems to be a degree of uncertainty as to when and why the Court actually proceeds to an examination of Article 14 violations”.¹⁴³ Protocol No. 12 to the Convention was therefore devised in order to address the fact that

¹³⁸ *X. v. Austria*, Application No. 8142/78, 18 DR 88 at 92-92 (1979).

¹³⁹ For a general overview of the application of Article 14, see: Janneke Gerards, “The Application of Article 14 ECHR by the European Court of Human Rights”, in Jan Niessen & Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden/Boston, Martinus Nijhoff Publishers, 2004), pp. 3-60.

¹⁴⁰ *Gorzelik & others v. Poland*, Judgment of the European Court of Human Rights (Fourth Section) of 20 December 2001, Application No. 44158/98, para. 62.

¹⁴¹ *Gorzelik & others v. Poland*, Judgment of the European Court of Human Rights (Grand Chamber) of 17 February 2004.

¹⁴² *Thlimmenos v. Greece*, Judgment of the European Court of Human Rights of 6 April 2000, para. 40. See also, *ibid.*, para. 44, and *Cha'are Ve Tsedek v. France*, Judgment of the European Court of Human Rights of 27 June 2000, para. 86.

¹⁴³ Sia Spiliopoulou Akermark, “The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?”, *Journal on Ethnopolitics and Minority Issues in Europe* (No. 3, 2002), p. 21 of article (note: *JEMIE* is an online journal and the page number cited here refers to the page in the article itself rather than a page number in the journal, as such), available at: <http://www.ecmi.de/jemie/>.

Article 14, ECHR, is essentially accessory in character.¹⁴⁴ The pith of the Protocol is ‘Article 1 – General prohibition of discrimination’, which reads:

- (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Having obtained the requisite 10 ratifications, Protocol No. 12 entered into force on 1 April 2005. It is still too early to tell what its exact impact will be at the European level and also in the domestic legal orders of Member States,¹⁴⁵ but it is likely to eventually prove portentous.

A purely literal reading of Article 14 suggests that the provision is restrictive in scope. However, some commentators have argued that a more teleological reading of the provision belies its apparently limited character.¹⁴⁶ A key argument in this connection is that following the far-reaching precedent set in *Thlimmenos v. Greece*,¹⁴⁷ Article 14 can be activated when the grounds for acts of (direct or indirect) discrimination – and not merely the actual acts of discrimination – are considered to come “within the ambit”¹⁴⁸ of another ECHR right.¹⁴⁹

In *Thlimmenos*, the applicant was refused membership of the Greek Institute of Chartered Accountants (thereby in effect barring him from entry into the accounting profession) because of a previous conviction for a serious crime. The serious crime in question was insubordination for having refused to wear the military uniform at a time of general mobilisation. As a Jehovah’s Witness - and therefore a committed pacifist, the applicant had refused to wear the uniform because of his religious beliefs. He was nonetheless convicted and subsequently served a prison sentence. The European Court of Human Rights was of the view that the “set of facts” involved fell “within the ambit” of a Convention provision (Article 9 - Freedom of thought, conscience and religion), thereby rendering Article 14 applicable.¹⁵⁰ It found the imposition of a further sanction on the applicant as a result of his initial conviction to be disproportionate and that “there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime”.¹⁵¹ The Court concluded that there had been a violation of the Article 14 *juncto* Article 9, because of

¹⁴⁴ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177. For commentary, see: Jeroen Schokkenbroek, “A New European Standard against Discrimination: Negotiating Protocol No. 12 to the European Convention on Human Rights”, in Jan Niessen & Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, *op. cit.*, pp. 61-79.

¹⁴⁵ As regards the Irish situation: Protocol No. 12 is not one of the Protocols to the ECHR listed in the Schedules to the European Convention on Human Rights Act 2003. In consequence, the Irish Act would have to be amended in order to enable further effect to be given to Protocol No. 12 in Ireland. Pending Ireland’s ratification of the Protocol and the relevant amendment of domestic legislation, the Irish courts could – but would not be obliged to - consider the (as yet non-existent) jurisprudence of the European Court of Human Rights dealing specifically with the Protocol.

¹⁴⁶ See, in particular: Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, E.H.R.L.R. 2004, 4, 366-382; Robert Wintemute, “Filling the Article 14 ‘Gap’: Government Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2”, E.H.R.L.R. 2004, 5, 484-499.

¹⁴⁷ *Op. cit.*

¹⁴⁸ *Inze v. Austria*, Judgment of the European Court of Human Rights of 28 October 1987, para. 36.

¹⁴⁹ See further, Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, *op. cit.*, at 372. Wintemute makes this point in terms of the denial of opportunity (as opposed to discrimination *tout court*, as above).

¹⁵⁰ *Thlimmenos v. Greece*, *op. cit.*, para. 42.

¹⁵¹ *Ibid.*, para. 47.

the respondent State's failure to introduce legislation with suitable exceptions to the rule preventing persons convicted of serious crimes from entering the profession of chartered accountants.

Some recent trends in case-law from Strasbourg would appear to bear out such a positive evaluation of Article 14's potential scope. Article 14 is increasingly being relied upon by persons belonging to minority groups seeking "[judicial] adjudication and redress"¹⁵² of their complaints, and the resultant case-law has been described as "burgeoning",¹⁵³ if "equivocal".¹⁵⁴ There is certainly scope for building on existing precedents of members of minority groups seeking redress for their grievances by invoking the non-discrimination provision(s) of the ECHR. For example, the Court has noted that "[W]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group".¹⁵⁵

Within this "burgeoning" jurisprudence, one can observe a growing tendency on the part of the Court to pay attention to the *particular* circumstances of *specific* minority groups, especially the Roma, Gypsies and Travellers. The disproportionately high incidence of discrimination suffered by those groups in most countries offers a plausible explanation as to why cases involving their members are featuring relatively prominently in the Court's minority-oriented case-law. It is noteworthy that "deep concern" at the "ongoing manifestations of racism, racial discrimination, xenophobia and related intolerance, including violence" against members of the aforementioned groups and the Sinti, has also been expressed in other contexts, such as the Durban Declaration.¹⁵⁶

In its Chamber judgment in *Nachova v. Bulgaria*,¹⁵⁷ in particular, the Court showed its resolve to take a tough stance against racism. It found a violation of Article 14 *juncto* Article 2 (Right to life), ECHR,¹⁵⁸ in its substantive and procedural respects, for the failure of the State Party

¹⁵² Gaetano Pentassuglia, "Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee", 6 *International Journal on Minority and Group Rights* (1999), pp. 417-461, at 422.

¹⁵³ Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights" 24 *Human Rights Quarterly* (2002) 736-780.

¹⁵⁴ Patrick Thornberry, "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 137-167, at 167.

¹⁵⁵ *Hugh Jordan v. the United Kingdom*, Judgment of the European Court of Human Rights (Third Section) of 4 May 2001, para. 154.

¹⁵⁶ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Declaration, Durban, 2001, para. 68. See also the corresponding Programme of Action, paras. 39-44. By way of aside, it should be noted that it is very important to distinguish between each of the groups mentioned as, first, they are not one and the same, and second, the principle of self-identification or choosing one's own designation, is crucial, not only for members of those groups, but also for persons belonging to minorities generally. Such distinctions and the principles on which they rest are consistent with best international practice; see further: CERD General Recommendation 27 ("Discrimination against Roma") (2000), para. 3; ECRI General Policy Recommendation No. 3 ("On Combating Racism and Intolerance against Roma/Gypsies") (1998), indent 2.

¹⁵⁷ *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 26 February 2004.

¹⁵⁸ "Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;

to adequately investigate inferences of discrimination and racism on the part of its officials: (i) in the death - at their hands - of a member of the Roma community, and (ii) in the subsequent inquiry into his death. The Court referred to “the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”.¹⁵⁹ It then continued by trenchantly declaring that to treat “racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of human rights”.¹⁶⁰ The Chamber judgment in *Nachova* represented the culmination of a string of cases with similar facts, but which had less favourable results as regards the consideration of the ethnicity component.¹⁶¹

The Grand Chamber of the European Court of Human Rights – to which the case was subsequently referred by the Bulgarian Government – affirmed that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment”.¹⁶² However, unlike the Chamber, a majority of the Grand Chamber found no violation of Article 14 in conjunction with Article 2 in its substantive respect, i.e., in respect of allegations that the events leading to the fatal shootings under examination constituted an act of racial violence.¹⁶³ The Chamber had shifted the burden of proof - to establish “beyond reasonable doubt” whether racism was a causal factor in the shootings - to the respondent Government. The Grand Chamber dealt with this point at length:

The Grand Chamber reiterates that in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.”

¹⁵⁹ *Ibid.*, para. 157.

¹⁶⁰ *Ibid.*, para. 158.

¹⁶¹ In the earlier case of *Velikova v. Bulgaria*, the Court had also considered whether the ethnic origin of the victim’s death, coupled with allegations of popular societal prejudice and the prevalence of racially-motivated violence against the Roma community (of which he had been a member), were relevant to the case. On that occasion, the Court held that on the basis of the evidence before it, it was unable “to conclude beyond reasonable doubt that Mr Tsonchev’s death and the lack of a meaningful investigation into it were motivated by racial prejudice, as claimed by the applicant.” – para. 94, *Velikova v. Bulgaria*, Judgment of the European Court of Human Rights (Fourth Section) of 18 May 2000. See also: *Anguelova v. Bulgaria*, Judgment of the European Court of Human Rights of 2002-IV. In *Nachova*, the Court again adduced the seriousness of the arguments of racial motivation in the killing of two Roma in police custody in the *Velikova* and *Anguelova* cases: see para. 173.

¹⁶² *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145. See also: *Timishev v. Russia*, Judgment of the European Court of Human Rights (Second Section) of 13 December 2005, para. 56; *D.H. and Others v. the Czech Republic*, Judgment of the European Court of Human Rights (Grand Chamber) of 13 November 2007, para. 176.

¹⁶³ See also in this connection the Joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielmann, annexed to *ibid.*

approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber's approach, does not consider that the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 2 of the Convention. [...] ¹⁶⁴

Although it did not find a violation of Article 14 *juncto* Article 2 in its substantive effect, the Grand Chamber did find a violation of its procedural effect. It thus endorsed the Chamber's finding that the State authorities had failed in their duty to "take all possible steps to investigate whether or not discrimination may have played a role in the events" ¹⁶⁵.

The Court's classification of racism as "a particularly invidious kind of discrimination", which "in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction" ¹⁶⁶ was further developed in its judgment in the *Timishev* case. The case involved a restriction on the applicant's right to liberty of movement solely on the ground of his ethnic origin and thus constituted racial discrimination. The Court observed that:

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds. ¹⁶⁷

The Court's judgment in *Timishev* iron-plated its earlier findings by adding that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures" ¹⁶⁸.

In another string of cases, the Court has gradually become more sensitive to the plight of Gypsies in the UK. In *Buckley*, the Court held that "[T]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases" ¹⁶⁹. Building on this statement in *Chapman*, the Court ruled that there is consequently "a positive obligation imposed on the Contracting States by virtue of Article 8 ¹⁷⁰ to facilitate the gypsy way of life" ¹⁷¹. The Court also acknowledged "an emerging

¹⁶⁴ *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 157.

¹⁶⁵ *Ibid.*, para. 168.

¹⁶⁶ *Nachova*, para. 145. See also *Timishev*, para. 56 and *D.H. and others*, para. 176.

¹⁶⁷ *Timishev v. Russia*, *op. cit.*, para. 55.

¹⁶⁸ *Timishev*, para. 56. See also, *D.H. and others*, para. 176.

¹⁶⁹ *Buckley v. United Kingdom*, Judgment of the European Court of Human Rights of 26 August 1996, para. 76, 80, 84. See also, *Chapman v. United Kingdom*, para. 96; *Connors v. United Kingdom*, Judgment of the European Court of Human Rights of 27 May 2004, para. 84.

¹⁷⁰ [author's footnote] Article 8 (Right to respect for private and family life), ECHR, reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

¹⁷¹ *Chapman v. United Kingdom*, Judgment of the European Court of Human Rights of 18 January 2001, para. 96. See also, *Connors v. United Kingdom*, *op. cit.*, para. 84.

international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle ([...] in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community”.¹⁷²

Nevertheless, neither *Buckley* nor *Chapman* led to the finding of a violation of the Convention.¹⁷³ In *Connors*, however, the Court went one step further and - in its application of the same principles to the facts of the case at hand - did find a violation of Article 8, ECHR. According to Kristin Henrard, “this gradual emergence of a sub-class of more specific minority standards for a certain type of minorities confirms that the field of minority rights is maturing and becoming more refined”.¹⁷⁴ This statement has been borne out by subsequent case-law. In *D.H. and others v. Czech Republic*, a case involving procedures which led to disproportionately high numbers of Roma children being placed in segregated schools for children with mental disabilities, the Grand Chamber found a violation of Article 14 in conjunction with Article 2 of Protocol 1. The importance of the *D.H. and others* case derives both from the judgment itself and the manner in which it was reached. The Court placed considerable store by relevant findings of the Advisory Committee on the FCNM, ECRI and the Council of Europe Commissioner for Human Rights, as well as sources extraneous to the Council of Europe, such as data or conclusions from the European Monitoring Centre on Racism and Xenophobia and CERD. Its reliance on such sources demonstrated its willingness to engage with a growing body of standard-setting and monitoring texts concerning minority rights. This development is further evidence of the importance of non-binding standard-setting and monitoring work beyond its immediate focus. This kind of cross-fertilisation, or better, cross-corroboration, is conducive to overall consistency across the approaches adopted by various international (and especially Council of Europe) organs to specific themes.

Over the years, the Council of Europe has witnessed a number of abortive attempts to mainstream minority rights, either by grafting a special protocol onto the ECHR, or by elaborating a separate, multilateral convention. Many of these attempts to push the minority rights agenda within the Council of Europe have originated in the Parliamentary Assembly of the Council of Europe (PACE). Table 1 provides an overview of PACE Recommendations dealing with minority rights in general and summarises their main proposals.¹⁷⁵ It should be noted in passing that most of these Recommendations also urged (the Committee of Ministers to press) Member States to sign and ratify various relevant CoE instruments (eg. the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities, the European Charter of Local Self-Government, Protocol No. 12 to the ECHR).¹⁷⁶

¹⁷² *Chapman v. United Kingdom*, para. 93. As discussed, *infra*, this impact of this statement was weakened by the Court’s refusal to accept that the “emerging international consensus” was concrete enough to offer jurisprudential guidance, *ibid.*, para. 94.

¹⁷³ See, however, the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fischbach and Casadevall in *Chapman*.

¹⁷⁴ Kristin Henrard, “Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union”, *22 Netherlands Quarterly of Human Rights* (Issue No. 4, 2004), 559-584, at 574.

¹⁷⁵ For comprehensive treatment, see Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg, Council of Europe, 2004), Chapter 8 – ‘The evolution of the work of the Parliamentary Assembly in relation to minority protection’, pp. 387-458.

¹⁷⁶ Rec. 1201 (1993), para. 4; (1231 (1994), para. 8(i)); Rec. 1255 (1995), paras. 6, 12a; Rec. 1285 (1996), para. 16; (Rec 1300 (1996), paras. 7, 10, 11) ; Rec. 1345 (1997), paras. (4), 11; Rec. 1492 (2001), paras. (6, 9) 12; Rec. 1623 (2003), paras. 5, 11, 12; Rec. 1773 (2006), para. 13.1.

Table 1

| Recommendation | Title | Main points |
|-----------------------|--|--|
| 213 (1959) | Position of national minorities in Europe | <ul style="list-style-type: none"> Encourages negotiations and peaceful settlements of disputes between States concerning the status of national minorities |
| 285 (1961) | Rights of national minorities | <ul style="list-style-type: none"> Recommends CM initiative for inclusion in 2nd Protocol to ECHR of article securing cultural, linguistic, educational and religious rights of persons belonging to national minorities |
| 1134 (1990) | Rights of minorities | <ul style="list-style-type: none"> Full implementation of relevant OSCE commitments CM to draft new Protocol to ECHR on protection of minority rights |
| 1177 (1992) | Rights of minorities | <ul style="list-style-type: none"> Proposed convention on protection of minorities – deficient supervisory machinery; additional protocol to ECHR preferable In addition, CM to adopt declaration on principles of minority rights protection CM to set up new mediation body to: observe and record; advise and forestall; discuss and mediate |
| 1201 (1993) | Additional protocol on the rights of minorities to the European Convention on Human Rights | <ul style="list-style-type: none"> Text of proposed additional protocol to ECHR Definition of “national minority” |
| 1231 (1994) | Follow-up to the Council of Europe Vienna Summit | <ul style="list-style-type: none"> CM should revise decision on additional protocol to ECHR Failing that, CSCE commitments should be reflected in draft framework convention and draft ECHR protocol on cultural rights |
| 1255 (1995) | Protection of rights of national minorities | <ul style="list-style-type: none"> Assessment of text of FCNM Recommendations for strengthening AC Provisions of Rec. 1201 for inclusion in additional protocol to ECHR on cultural rights |
| 1285 (1996) | Rights of national minorities | <ul style="list-style-type: none"> Recommendations for making AC more independent, effective and transparent Resume and conclude drafting of additional protocol to ECHR on cultural matters |
| 1300 (1996) | Protection of rights of minorities | <ul style="list-style-type: none"> Completion and revision of Rec. 1285’s proposals for the AC |
| 1345 (1997) | Protection of national minorities | <ul style="list-style-type: none"> Regret that PACE proposals for election of AC not followed CM to resume work on draft protocol to ECHR on cultural matters Increase cooperation with EU to ensure CoE monitoring relied on |

| | | |
|-------------|--|--|
| | | more systematically by EU |
| 1492 (2001) | Rights of national minorities | <ul style="list-style-type: none"> • CM to draft additional protocol to FCNM empowering ECtHRs or other CoE general judicial authority to give advisory opinions on interpretation of FCNM • CM to draft additional protocol to ECHR on rights of national minorities, drawing on Rec. 1201 and incl. the definition therein • Attach to CoE Commissioner on Human Rights officer with special responsibility for minority rights |
| 1623 (2003) | Rights of national minorities | <ul style="list-style-type: none"> • CM to draft additional protocol to FCNM empowering ECtHRs to give advisory opinions on interpretation of FCNM • Revision of certain monitoring procedures under FCNM • Encourage AC to adopt thematic approach to issues |
| 1773 (2006) | The 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance cooperation and synergy with the OSCE | <ul style="list-style-type: none"> • CM to increase signatures and ratifications (without reservations and restrictive declarations) of ECRML, FCNM and ECTT • CM invite States to ensure improved access to broadcast media in own languages, in accordance with leading CoE standards and 2003 Guidelines • CM to regularly take 2003 Guidelines into account in monitoring of implementation of ECRML and FCNM • CM to instruct that relevant concerns be considered in any revision of ECTT • Encourage further synergies between CoE and OSCE HCNM, also involving civil society |

The most noteworthy of the ultimately unsuccessful CoE initiatives to ensure greater prominence and protection for minority rights were:

- Proposal for a European Convention for the Protection of Minorities by the European Commission for Democracy through Law¹⁷⁷
- PACE Recommendation 1201

The Proposal for a European Convention for the Protection of Minorities by the European Commission for Democracy through Law (hereinafter “the Venice Commission”) contains a number of noteworthy features. In substantive terms, it includes an explicit safeguard against

¹⁷⁷ Adopted by ECommDL on 8 February 1991. See further: Giorgio Malinverni, “The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law”, 12 *Human Rights Law Journal* (No. 6-7, 1991) pp. 265-273. It is interesting to note that this draft instrument was originally designed for application not only within CoE States, but also in States which had yet to join the CoE.

“any activity capable of threatening their existence” (Article 3(1)). It also guards against attempts at forced assimilation of minorities on the part of State authorities (Article 6). The particular circumstances of internal minorities (or minorities within minorities, i.e., “any region where those who belong to a minority represent the majority of the population”) is also countenanced (Article 16 *juncto* Article 15(2)). Concern for such minorities is often merely implied or derived rather than explicitly set forth in international instruments.

One cause for concern, however, is the inclusion of a so-called “loyalty clause” (Article 15). The operative provision would require “Any person who belongs to a minority shall loyally fulfil the obligations deriving from his status as a national of his State”.¹⁷⁸ At first glance, this provision may appear innocuous, or even a reasonable expectation of *quid-pro-quo* for those wishing to benefit from minority rights. Nevertheless, one must not overlook the failure of the reasonable theory behind such a provision to be matched with similar reasonableness in practice. Such clauses have frequently attracted criticism for providing States with a convenient excuse for denying minority rights to certain minority groups whose political objectives do not coincide with their own (see further, *infra*). More often than not, calls for the introduction of loyalty clauses for persons belonging to national minorities, or non-nationals generally, are inherently discriminatory and are coated in only the thinnest veneer of objectivity. The topicality of such measures is affirmed by the ongoing controversy in the Netherlands arising from a brace of parliamentary motions calling for legislative reform to make it impermissible for an individual to become a member of the Dutch Cabinet unless s/he solely holds the Dutch nationality (i.e., imposing the condition that dual nationality be relinquished)¹⁷⁹ and calling for dual nationality to cease to be legally recognised in the Netherlands generally.

The observance of States’ undertakings in respect of the Convention would have been entrusted to a new body, the European Committee for the Protection of Minorities (Article 18). The Committee would have comprised “a number of members equal to that of the Parties” (Article 19(1)), known for their “competence” (not expertise or experience!) in human rights and “in particular the fields covered by” the draft Convention (Article 19). Members would have been elected by the CoE Committee of Ministers (making the election procedure a highly political exercise); the Committee would have held its meetings in camera, gathering “as the circumstances require, at least once a year” (Articles 20-22). The highlighted provisions, if they had ever been implemented, would have amounted to serious procedural deficiencies and would have greatly hampered the efficiency of the Committee in carrying out its mandate. The proposition that it could devise its own Rules of Procedure (Article 22) would have been cold comfort in an already restricted zone of operational autonomy: (i) “[States] Parties shall provide the Committee with the facilities necessary to carry out its tasks” (Article 23); (ii) the Committee would forward States reports (see *infra*) to the CoE Committee of Ministers with its observations (Article 24(2)), and (iii) a majority of two-thirds of all Committee members would have been required before the Committee could make “any necessary recommendations to a Party” (Article 24(3)).

In adjectival terms, the proposal envisaged a separate Convention¹⁸⁰ which would rely on its own protection machinery (rather than relying upon the existing adjudicative organs of the

¹⁷⁸ Article 15(1).

¹⁷⁹ K.S.30 166 (R 1795), Nr. 24, 15 February 2007, and K.S. 30 166 (R 1795), Nr. 21, 15 February 2007, respectively.

¹⁸⁰ See further: Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on

European Convention on Human Rights). The draft Convention foresaw three means of control: obligatory periodic State reporting (Article 24); optional State petitions (Article 25) and optional individual petitions (Article 26). As signalled in the previous paragraph, a two-thirds majority of Committee members was required before the Committee could “make any necessary recommendations to a [State] Party”, which appears quite a demanding minimum requirement for engaging with a State. The use of the term “necessary” also suggests that only very serious matters could be addressed in this context, and not matters that are not quite so extreme, yet nevertheless of considerable importance.¹⁸¹ No provision is made for sanctions arising out of the State reporting mechanism, nor is it set out what role the CoE Committee of Ministers should play subsequent to its receipt of State reports and the Committee’s observations, apart from the vague formulation “may take any follow-up action it thinks fit in order to ensure respect of the Convention” (Article 29(3)).

The provision for inter-State complaints was styled as optional owing to the political sensitivities involved in minority issues: it was submitted that if this provision were to be compulsory, it would dissuade States from ratifying the Convention. In a confusing and self-contradictory logic, it was equally submitted that “contrary to the experience found in the framework of the ECHR, in such a politically sensitive area as minorities, a large number of State petitions would be brought”.¹⁸² Similarly, the right of individual petition was rendered contingent on the State targeted by a complaint having first accepted the competence of the Committee to receive such petitions; another factor likely to limit the effectiveness of the control machinery.

PACE Recommendation 1201 proved to be a very hot political potato, for two main reasons. First, by setting out a catalogue of rights for national minorities in the form of a proposed additional protocol to the ECHR, the clear intention was to *ipso facto* render those rights justiciable. The consequences of such an approach, had it been endorsed at the highest level, would have been very far-reaching. Second, Recommendation strode boldly into territory where no other IGO-angels had ever dared to tread: it sought to bring the highly contested concept of “national minority” within firm definitional parameters. According to Article 1 of the proposed additional protocol:

the expression “national minority” refers to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.

Any possible disputes about the substantive content of the proposed additional protocol were eclipsed by the controversy surrounding the aforementioned points of justiciability and definitional scope. As it happens, the substantive articles in the draft text were largely

Human Rights concerning the rights of minorities (AS/Jur (44) 23 and AS/Jur (44) 41) drawn up by Giorgio Malinverni, 7 January 1993. This document compares the PACE and Venice Commission approaches, albeit from a partisan perspective.

¹⁸¹ Note in this connection the gradation in language (reflecting differing degrees of seriousness) used in the Opinions of the Advisory Committee to the FCNM, *infra*.

¹⁸² Giorgio Malinverni, “The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law”, *op. cit.*, p. 269.

uncontroversial, with the possible exception of Article 11, which provided, *inter alia*, for “appropriate local or autonomous authorities” for minorities.¹⁸³ It did so in the following terms, which some considered to have the potential to lead to territorial destabilisation:

In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.

The draft additional Protocol put forward in PACE Recommendation 1201 was rejected by the heads of State and Government of the Member States of the Council of Europe at the Vienna Summit in 1993. Instead, the heads of States and Governments instructed the Committee of Ministers to: (i) “draft with minimum delay a framework convention specifying the principles which contracting states commit themselves to respect, in order to assure the protection of national minorities [...]”; (ii) begin drafting a protocol complementing the ECHR “in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities”. The first instruction led to the adoption of the Framework Convention for the Protection of National Minorities in 1995, but the second led only to fitful periods of work, and the project is currently in abeyance, with little evidence of intentions to reactivate it.¹⁸⁴

Nevertheless, despite the set-back at the Vienna Summit, PACE Recommendation 1201 continues to hold some relevance as a point of reference.¹⁸⁵ Since the Summit, the PACE has consistently argued - in the face of considerable political adversity - for the adoption of Recommendation 1201.¹⁸⁶ In its Recommendation 1231, the PACE expressed its deep regret¹⁸⁷ that the Summit had not followed its Recommendation 1201, and did not hesitate to call on the Committee of Ministers to revise that decision.¹⁸⁸ The PACE stuck to its guns in Recommendation 1255, reaffirming its commitment to the principles and definition contained in Recommendation 1201; pointing out shortcomings of the FCNM; insisting on the urgency of an additional protocol to the ECHR on cultural matters and specifying the principles from Rec. 1201 which could most usefully be incorporated into the same. There is little doubt that Rec. 1201 has become an important text of reference. As noted by the PACE itself, “the political undertakings and standards” set out in the draft additional protocol contained in Rec. 1201 “have been raised to the status of legal obligations in friendship treaties drawn up between various member states of the Council of Europe”.¹⁸⁹ It even went on to speculate that “These treaty obligations might eventually acquire customary status at regional level”.¹⁹⁰

¹⁸³ It is worth noting in passing that although the draft additional Protocol provided for freedom of association for minorities, as well as certain autonomous measures, it lacked any express general provision for their effective participation in public life. See generally: Opinion on the interpretation of Article 11 of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, Venice Commission, 22 March 1996.

¹⁸⁴ For an overview of the process, see: Patrick Thornberry & Maria Amor Martin Estebanez, *Minority Rights in Europe* (Germany, Council of Europe, 2004), p. 205.

¹⁸⁵ See, for example, European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), 8 June 2005, OJ C 124 E/405 of 25 May 2006, para. 7.

¹⁸⁶ See, for example, Rec. 1285 (1996), para. 15; Rec. 1300 (1996), para. 2; Rec. 1492 (2000), para. 7 and 12 (xi).

¹⁸⁷ PACE Recommendation 1231 (1994) on the follow-up to the Council of Europe Vienna Summit, para. 5. See also, Rec. 1255, para. 4; Rec. 1285, para. 12;

¹⁸⁸ *Ibid.*, para. 8(ii).

¹⁸⁹ Rec. 1492 (2000), para. 8.

¹⁹⁰ *Ibid.*

Under PACE Order 484, the PACE's Legal Affairs Committee is required to have regard to the draft Protocol in its assessment of applicant States' suitability for admission to the CoE.¹⁹¹ It has been pointed out that this requirement means that in practice, applicant States are expected to meet standards of minority rights protection that were deemed politically unpalatable (read: too far-reaching) by existing Member States.¹⁹² In this context, it is difficult to refute accusations of double standards or a two-tiered approach, or perceptions of an "East-West divide".¹⁹³

Accusations of double standards within the Council of Europe as regards minority rights protection have been propagated in various quarters and at various stages. These accusations can be explained (but that is not to say excused) by the specific historical context in which the Council of Europe's interest in minority rights was re-ignited. The catalyst was certainly the drawing back of the Iron Curtain at the very beginning of the 1990s. The CSCE played a trail-blazing role in the recognition of acute minority-related issues in the former Soviet Bloc, and the Council of Europe found itself obliged to gear up to follow that trail. Despite the fact that its own house was not in order, the Council was beginning to square up to States in Central and Eastern Europe to confront them on their track record regarding minority rights protection.¹⁹⁴ The predicament arising from this state of affairs is described by André Liebich in the following manner:

Looking eastward, the Council's mandate clearly encompassed norm setting, supervision and enforcement of minority rights. However, this mandate could only be defined in universal legal terms which, *no lens volens*, encompassed the Western States as well. There was little point in simply affirming that West Europe did not have a minority problem whereas East Europe did.¹⁹⁵

1.3.2(ii) Framework Convention for the Protection of National Minorities (FCNM)¹⁹⁶

The Preamble to the Framework Convention states that it was conceived of pursuant to the Declaration of the Heads of State and Government of the Member States of the Council of Europe adopted in Vienna on 9 October 1993. It goes on to list – “in a non-exhaustive way” – “three further sources of inspiration for the content” of the Framework Convention, i.e., the ECHR and various relevant United Nations (UN) and C/OSCE instruments containing

¹⁹¹ More specifically, the PACE “instructs its Committee on Legal Affairs and Human Rights [...] to make scrupulously sure when examining requests for accession to the Council of Europe that the rights included in this protocol [set out in Recommendation 1201] are respected by the applicant countries”: Point 2(ii) of Order No. 484 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, adopted by the PACE on 1 February 1993.

¹⁹² See, for example, Geoff Gilbert, “Minority Rights Under the Council of Europe”, in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the 'New' Europe* (Kluwer Law International, Great Britain, 1999), pp. 53-70, at 62-63.

¹⁹³ See further, *ibid.*, and also, Heinrich Klebes, “The Council of Europe's Framework Convention for the Protection of National Minorities”, 16 *Human Rights Law Journal* (No. 1-3, 1995) pp. 92-98, at 92.

¹⁹⁴ There was a certain feeling of *déjà vu* in the recent accessions to the European Union as regards the attention paid to minority rights in the Copenhagen criteria (see further elsewhere in this chapter).

¹⁹⁵ André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *Helsinki Monitor* (No. 1, 1999), pp. 7-17, at 12 (see also p. 11).

¹⁹⁶ For recent, academic commentaries of the FCNM, see: Marc Weller, Ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford and New York, Oxford University Press, 2005); Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe* (Strasbourg, Council of Europe, 2004), Chapter 2.

commitments for the protection of national minorities.¹⁹⁷ The relevant documentary corpus within the UN and OSCE systems is by no means negligible (notwithstanding the fact that some documents are more political than legal in their coloration). But, as already mentioned, the crucible of inspiration has a broader circumference than merely the span of the UN and OSCE systems.

This point is of cardinal importance for the organic growth of the FCNM, as it anticipates (however implicitly) the practice of explicitly referring to international standards in the monitoring process (see further, *infra*). In this practice, pertinence should be the guiding principle, thereby inviting the invocation (where appropriate) of other types of hard and “soft law”, where appropriate. This point is further reinforced when considered in light of Article 22, which reads:

Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

The potential of Article 22 for the future development of minority rights protection is rather understated. Most States Parties to the FCNM are also subject to the ICCPR and other international treaties. In instances where Article 27, ICCPR, for example, is more generous than the FCNM in the protection it guarantees for particular minority rights, one could conceivably argue – on the basis of Article 22, FCNM - that the particular protection provided under the FCNM ought to be raised to match that of the ICCPR. Whatever about the resistance it would be likely to meet from States Parties if it were to be translated into practice, this argument does boast certain theoretical appeal.

Any analysis of the FCNM must necessarily begin with its name, which points to the type of convention it actually is: a framework; lexically, a support structure to be built upon, a structural plan or basis of a project. Key to this conception is the leeway accorded States Parties in their honouring of the commitments entered into under the Convention. This is rendered explicit by para. 11 of the Explanatory Report to the FCNM:

In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.

The discretion conferred on States as a matter of principle is compounded firstly in the consistently cautious language used throughout the FCNM and secondly in the choice of monitoring structures and processes (see further, *infra*). As noted by the PACE, the FCNM “formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the contracting states but not a right which individuals may invoke”.¹⁹⁸ Conversely, apologists for the “framework” approach underline the situational diversity among States, and the consequent need for reliance on the margin of appreciation doctrine rather than a stricter, more normative type of approach.¹⁹⁹ This view favours placing the onus on States Parties to secure appropriate legislation and other measures in order to give

¹⁹⁷ Explanatory Report to the Framework Convention, *op. cit.*, para. 23.

¹⁹⁸ Para. 7, PACE Recommendation 1255 (1995) on the protection of the rights of national minorities.

¹⁹⁹ Frank Steketee, “The Framework Convention: A Piece of Art or a Tool for Action?”, 8 *International Journal on Minority and Group Rights* (2001), pp. 1-15, at 4.

domestic effect to the provisions of the FCNM. These two opposing schools of thought could perhaps be classed as centripetal and centrifugal, respectively.

It should be noted that to read potential for flexibility into the “vaguely defined objectives and principles” of the FCNM might well constitute no more than misplaced optimism. While one swallow does not make a summer, such a reading of the Convention backfired in *Chapman v. United Kingdom*. Significantly, the European Court of Human Rights observed that:

there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyles ([...] in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.²⁰⁰

Nevertheless, in a somewhat disingenuous *non-sequitur*, the Court then went on to state that it was not persuaded that:

the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court’s view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court’s role a strictly supervisory one.²⁰¹

Thus, the Court spurned the opportunity at hand to engage with substantive rights envisaged by the FCNM by interpreting the vague and general wording as evidence of a lack of consensus among Contracting States. This reasoning is unsatisfactory, as the large number of ratifications (notwithstanding a certain number of interpretative declarations/reservations), must surely be persuasive evidence of a certain commonality of understanding and purpose. Whereas the Court has not repeated its apparent doubts about the solidity of the nascent consensus in certain subsequent considerations of the question,²⁰² its reluctance to engage with the implications of the consensus is a source of concern. In the past, the Court has been slow to acknowledge swells of similar practice across growing numbers of States in respect of other rights too. The Court’s judgment in *Sirbu v. Moldova*²⁰³ (a case concerning, *inter alia*, Article 10, ECHR and public access to official governmental information) has been criticised for failing to give due cognisance to the fact that “[A]t the present time, most if not all Member States of the Council of Europe have put in place laws and structures allowing for varying levels of access to official documents”.²⁰⁴ As such, the Court’s judgment “did not give any in-depth exploration to the developing nature of the right to information at the national level”.²⁰⁵ However, the more recent decision by the Court in *Matky v. Czech*

²⁰⁰ *Chapman v. United Kingdom*, *op. cit.*, para. 93. See also, *D.H. and Others v. Czech Republic*, *op. cit.*, para. 181.

²⁰¹ *Ibid.*, para. 94.

²⁰² See, for example, *D.H. & others v. Czech Republic*, *op. cit.*, para. 181, and *Sampanis & others v. Greece*, Judgment of the European Court of Human Rights (First Section) of 5 June 2008, para. 73.

²⁰³ *Sirbu and others v. Moldova*, Judgment of the European Court of Human Rights (Fourth Section) of 15 June 2004.

²⁰⁴ Tarlach McGonagle, “Workshop Report: the Changing Hues of Political Expression in the Media”, in Susanne Nikoltchev, Ed., *IRIS Special: Political Debate and the Role of the Media – The Fragility of Free Speech* (European Audiovisual Observatory, Strasbourg, 2005), pp. 1-30, at 8.

²⁰⁵ *Ibid.*

Republic,²⁰⁶ augurs better for its willingness to give legal recognition to a right of access to information.²⁰⁷

Definitional uncertainty dogs the FCNM, just as it does other leading international instruments dealing with minority rights protection. The drafters of the FCNM deliberately eschewed the opportunity to fashion a definition of (national) minority, opting for a “pragmatic approach” as it was evident to them that it would have been impossible at that point in time “to arrive at a definition capable of mustering general support of all Council of Europe member States”.²⁰⁸ One of the prevailing currents of thought amongst the drafters was that it would be better to forge ahead even without the desired ballast of a definition.

In other words, progress on minority rights protection should not be held hostage to reaching (political) consensus on an apposite definition, especially given the fear that any such definition “would most likely be based on the lowest common denominator and would, by definition, exclude any evolution”.²⁰⁹ A closely related – if somewhat starker – argument is that any progress on minority rights protection should not be jeopardised by insistence on the prior resolution of definitional disagreements.²¹⁰

Given the insoluble nature of the definitional question, this example of *realpolitik* is understandable. Furthermore, it will be recalled that many commentators subscribe to the view that minorities are generally recognisable and that borderline cases can be determined on an *ad hoc* basis (*supra*).

It is widely accepted that there is no consensus as to the meaning of the term “national minority”,²¹¹ and as has already been noted, the term is particularly troublesome. Geoff Gilbert has usefully explored the essential distinction between the two “discrete meanings” of the term “national minority”.²¹² The first, “nationality as a precondition”, insists that the recognition of minority status within a given State is contingent on members of the group being nationals of that State. In the second sense, the adjective is used rather to designate a particular type of minority in the context of a broader classification scheme. So understood, a national minority “is one that can be distinguished due to its ethnicity, religion, language, culture, or traditions, but which might also have either autonomist aspirations or, more likely, a kin-state”.²¹³

²⁰⁶ *Sdružení Jihočeské v. Czech Republic*, Admissibility Decision of the European Court of Human Rights (Fifth Section) of 10 July 2006, Application No. 19101/03.

²⁰⁷ For commentary on the Decision and an exploration of its likely implications, see: Wouter Hins & Dirk Voorhoof, “Access to State-Held Information as a Fundamental Right under the European Convention of Human Rights”, *EuConst* 3 (2007), pp. 114-126. See, additionally on this topic: Thorsten Ader & Max Schoenthal, “Access to Information on Government Action, especially from the Media Point of View”, *IRIS plus* (Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*), 2005-2; Dirk Voorhoof in Mediaforum.

²⁰⁸ Para. 12, Explanatory Report to the FCNM.

²⁰⁹ Frank Steketee, “The Framework Convention: A Piece of Art or a Tool for Action?”, *op. cit.*, at 6.

²¹⁰ Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 93.

²¹¹ This was a conclusion of the Steering Committee for Human Rights (CDDH) which played an instrumental role in the drafting of the FCNM: see para. 4, Explanatory Report to the FCNM.

²¹² Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *Human Rights Quarterly* (1996) pp. 160-189, at 165-166, 169-170.

²¹³ *Ibid.*, p. 169.

Heinrich Klebes, in his commentary on the Convention, argues that ‘national minority’ “refers to a minority on the national territory (the territory of the State)”.²¹⁴ He continues by discounting the suggestion that the notion involves an ethnic link with another nation. Gilbert, on the other hand, posits that the term, when used in a European context, has traditionally “referred to those minorities with a kin-state”.²¹⁵

Another attempt to decipher the meaning of the term “national minority” could be built on extrapolation from contiguous debates waged in the United Nations. Such an approach, however, is a hopeless *cul-de-sac*. Rosalyn Higgins has posited that the UN Human Rights Committee interprets “ethnic” as subsuming “national”, but the inclusion of the latter adjective in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities suggests that the terms tend towards synonymy, or at the very least have a high degree of conceptual/semantic congruence.

Given that Higgins understands “national” as being narrower than “ethnic”, she is concerned that this could lead to a more restrictive reading of relevant provisions.²¹⁶ In this vein of logic, such concerns could equally arise, *mutatis mutandis*, from the wording employed in the FCNM. However, it has conversely been argued that on the basis of contextual analysis that “national” can only be taken in the UN Declaration as intended for the purposes of classification.²¹⁷

CECI N’EST PAS UNE MINORITE!

The definitional vacuum and the introduction of the notoriously unclear term “national” minority have together given rise to a phenomenon which could be termed, after the famous painter René Magritte, “*ceci n’est pas une minorité*”.²¹⁸ This involves a notable tendency among States to enter (interpretative) declarations of the term (national) minority upon ratification of the FCNM. Austria, Belgium, Denmark, Estonia, Germany, Luxembourg, Poland, Russia, Sweden, Switzerland and the former Yugoslav Republic of Macedonia. All but one of these declarations are similar in tenor, explaining how the FCNM will apply *ratione personae* on their respective territories.

The exception is the Russian declaration, which has been called an “anti-declaration” by one commentator²¹⁹ because it categorically opposes the unilateral determination of which national minorities should be entitled to protection under the FCNM. This declaration would appear to have been motivated by concern for the fate of Russian minorities in a number of ex-Soviet States. Its integral text is as follows:

The Russian Federation considers that none [*sic*] is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of

²¹⁴ Heinrich Klebes, “The Council of Europe’s Framework Convention on National Minorities”, *op. cit.*, p. 93.

²¹⁵ Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, p. 169.

²¹⁶ Rosalyn Higgins, “Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System”, in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers (Vol. III)* (Martinus Nijhoff Publishers, Dordrecht, 1994), pp. 195-209, at 202.

²¹⁷ Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, p. 166.

²¹⁸ For a discussion of Magritte’s famous series of paintings, *La trahison des images* (1928/9), *Ceci n’est pas une pomme* (1964) and *Les deux mystères* (1966), see: Jacques Meuris, *Magritte* (Taschen GmbH, Cologne, 2004), pp. 128-132.

²¹⁹ Stefan Troebst, “From paper to practice: The Council of Europe’s Framework Convention for the protection of national minorities”, 10 *Helsinki Monitor* (No. 1, 1999), pp. 19-26, at 24.

National Minorities, a definition of the term "national minority", which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.²²⁰

Some controversy has surrounded the question of whether these declarations should be regarded as (interpretative) declarations *stricto sensu*, or reservations from the perspective of international law.²²¹ Given the silence of the FCNM on declarations and reservations thereto, recourse must be had to the Vienna Convention on the Law of Treaties.²²² The Vienna Convention does not provide a definition of the term 'declaration', but it does set out that a 'reservation' is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".²²³ It would appear (*inter alia* from the *jurisprudence constante* of the International Court of Justice) that a declaration is non-binding and only aims to interpret a treaty and not to modify its legal effect. According to Maria Telalian:

It is obvious that the decisive element for making a distinction between an interpretative declaration and a reservation is to be found in the intention of the states that have made the declaration. If that intention is to simply clarify the meaning of the treaty and not to exclude or modify its legal effect in its application to that state, then the said declaration is an interpretative one.²²⁴

Telalian concludes – on the basis of an analysis of the wording of the (interpretative) statements in light of the underlying objectives of the FCNM – that one can best speak of "declarations" here, as the proposed interpretations do not go against the grain of the Convention. Declarations entered to date have tended to reinforce certain aspects of the FCNM, deny the existence of national minorities on their territories, list the various national minorities within their jurisdiction to be protected under the HCNM and link definitions of national minorities to citizenship.²²⁵ As pointed out by Alan Phillips, the last-named qualification is not referred to in either the FCNM or its Explanatory Report.²²⁶ Such linkage is a source of concern for this reason alone, not to mention the general controversy surrounding attempts to premise the recognition of minority groups on the criterion of citizenship.²²⁷

²²⁰ Declaration contained in the instrument of ratification deposited by the Russian Federation on 21 August 1998 - Or. Rus./Engl./Fr.

²²¹ For a detailed discussion of this question, see: Maria Telalian, "European Framework Convention for the Protection of National Minorities and its Personal Scope of Application", in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (Martinus Nijhoff Publishers, The Hague, 2002), pp. 117-135, esp. 125-134.

²²² United Nations Treaty Series, Vol. 1155, p. 331, adopted on 22 May 1969; entry into force on 27 January 1980.

²²³ Article 2(1)(d), *ibid.*

²²⁴ Maria Telalian, "European Framework Convention for the Protection of National Minorities and its Personal Scope", *op. cit.*, at 129.

²²⁵ Provide break-down for each of these categories and refer to: Alan Phillips, *The Framework Convention for the Protection of National Minorities: A Policy Analysis* (Minority Rights Group International, London, 2002), p. 4.

²²⁶ *Ibid.*, p. 4.

²²⁷ Of relevance in this connection is the likely motivation behind Russia's Declaration, *supra*, i.e. the fate of Russians in Baltic countries, where the denial of citizenship has proved a *de facto* means of exclusion.

The controversy pits polarised viewpoints against one another. Some argue vehemently that human rights are not about citizenship, whereas others consider the criterion of citizenship to be “a foundational thesis”²²⁸ of minority rights protection. As to the former, John Packer has argued:

[...] human rights are the entitlements of human beings, and exactly not (as a general matter) to be conditioned on citizenship. Indeed, this is one of the great achievements of the post-second world war order – that it is a matter of international concern that the State respect, protect and ensure the inherent and inalienable rights of all *human beings* within its jurisdiction, no longer leaving citizens at the mercy of their governments or aliens to depend upon the possibility (not entitlement) of diplomatic protection. Still, citizenship may be relevant for certain rights [...]²²⁹

The conflicting stance is summed up by André Liebich as: “[...] a foundational thesis, implicitly or explicitly accepted in international instruments, has been that minorities can only be composed of citizens of the state in question”.²³⁰ The present analysis favours and follows Packer’s stance.

Without a definition of the foggy term ‘national minority’, there was a certain inevitability about the subsequent uncoordinated spate of unilateral interpretations by States Parties. It should be noted that the expression of such interpretations is not limited to those statements made by States Parties upon signature or ratification of the FCNM. A number of States Reports also contain further stipulations on the ambit of application of the FCNM in their countries. However, the trend towards unilateral interpretations must give rise to concerns for the consistent interpretation and application of the FCNM at the national level, particularly given the lack of scope within the monitoring structures and processes for standard-setting (see further *infra*). Another cause of concern is that States are left with too much freedom to determine the minorities to be covered under the FCNM, thereby deviating from the crucial principle established by the PCIJ in the *Minority Schools in Albania* case, namely that a minority is a question of fact (see *supra*).

The device of (interpretative) declarations is a very useful means for States to set themselves up as the ultimate arbiters of which minorities would enjoy the benefits of the FCNM within their own State boundaries. In particular, it offers them a less heavy-handed way of seeking to restrict the scope of application of the treaty to their own jurisdiction than a reservation (which involves a series of procedural formalities,²³¹ as well as carrying greater import). The usefulness of such declarations must not, however, be abused by States authorities. By employing “different labels” or “additional criteria”, declarations must not be allowed to insidiously serve as smoke-screens for the real exclusionary intent of States Parties.²³²

One would, however, naturally expect any excesses to be checked by the monitoring procedures. According to Frank Steketee, notwithstanding States’ margin of appreciation in such matters, “it is incumbent on the monitoring mechanism at international level, and notably the Committee of Ministers, when ‘evaluating the adequacy of the measures taken by the

²²⁸ André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *op. cit.*, at 14.

²²⁹ John Packer, “Situating the Framework Convention in a wider context”, in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), pp. 43-51, at 45.

²³⁰ André Liebich, “Janus at Strasbourg: The Council of Europe between East and West”, *op. cit.*, at 14.

²³¹ See further, Articles 19-23 of the Vienna Convention on the Law of Treaties.

²³² See further, Gudmundur Alfredsson, “A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, *op. cit.*, at 296.

Parties to give effect to the principles set out in the framework Convention', also to assess the proper application *ratione personae* and to guard against any discriminatory or arbitrary exclusions".²³³ The Committee of Ministers has yet to pronounce its disapproval of any of the declarations submitted by States Parties to the FCNM and it would conceivably be loath to do so, given its highly political and politicised nature (see further *infra*). Nevertheless, it has urged States to exercise caution when considering whether to submit reservations and declarations, and to do so sparingly.²³⁴ The Advisory Committee also scrutinises Declarations, with a view to verifying that they do not involve either arbitrary or unjustified distinctions between groups.²³⁵ To date, it has "noted" a number of Declarations.²³⁶ Vigilance has also been called for on the part of civil society in the policing of State declarations.²³⁷

A few words about the nature of the rights set forth in the FCNM. First of all, the phraseology broadly follows trends established by other relevant international instruments. Article 3(2), for instance, reads: "Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others". While Article 3(2) does give a favourable nod in the direction of the collective exercise of individual rights, the Explanatory Report to the FCNM curtly states that group rights as such are not countenanced.²³⁸

Gudmundur Alfredsson laments the terseness of the Explanatory Report's elaboration on the FCNM's exclusive recognition of individual rights.²³⁹ It merely states: "In this respect, the framework Convention follows the approach of texts adopted by other international organisations".²⁴⁰ Terseness is never an obvious bedfellow of accuracy, and Alfredsson would appear to be suggesting – correctly, it must be added - that this explanation is disingenuously short. The "texts" (a very vague term) referred to are not identified, nor are the relevant international organisations specified either. Even if one were to take the explanation at face value or on a very general plane, it is not totally accurate. Collective rights are envisaged in the legal and political standards of a number of organisations.²⁴¹

*WATER IN THE WINE AND HOLES IN THE CHEESE*²⁴²

The programmatic character of the FCNM has resulted in the language chosen prioritising progress and performance over end-results. State obligations are not styled as imperatives, but usually as undertakings and endeavours. This undeniably weakens the force of the commitments.

²³³ Frank Steketee, "The Framework Convention: A Piece of Art or a Tool for Action?", 8 *International Journal on Minority and Group Rights* (2001), pp. 1-15, at 6.

²³⁴ See further: Para. 6, Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*

²³⁵ Rainer Hofmann, "Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities", *op. cit.*, at 254-256.

²³⁶ See further, Kristin Henrard, "Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union", *op. cit.*, at 567 *et seq.*

²³⁷ Alan Phillips, *op. cit.*, at 4.

²³⁸ Para. 13. "It [the FCNM] does not imply the recognition of collective rights".

²³⁹ Gudmundur Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures", 7 *International Journal on Minority and Group Rights* (2000), pp. 291-304, at 295 (footnote no. 10).

²⁴⁰ *Ibid.*

²⁴¹ See, by way of example: the African Charter on Human and Peoples' Rights; ILO Convention 169; ICERD; provisions for self-determination in the ICCPR and ICESCR.

²⁴² Frank Steketee concedes that the "tortuous phraseology" of some provisions in the FCNM could be said to "read like a Swiss cheese", "The Framework Convention: A Piece of Art or a Tool for Action", *op. cit.*, at 4.

Moreover, the potential of many substantive provisions in the FCNM is considerably diluted (see Table 2 for examples), thereby attesting to the fact that it was begotten of political compromise.²⁴³

Table 2²⁴⁴

| <u>Qualification</u> | <u>Articles</u> |
|--|----------------------|
| substantial numbers | 10(2), 11(3) & 14(2) |
| sufficient demand | 11(3) & 14(2) |
| if those persons so request | 10(2) |
| a real need | 10(2) |
| where necessary | 4(2), 18(1) & 19 |
| where appropriate | 11(3) & 12(1) |
| as far as possible | 9(3), 10(2) & 14(2) |
| where relevant/in so far as [...] relevant | 18(2)/19 |

Such dilutions typically water down the possible content of the rights provided for by a series of qualifications.²⁴⁵ Article 11(3) is an old chestnut for the purposes of making this point. Containing seven qualifications or escape clauses, the basic right envisaged, *viz.* to display traditional names on public signposts, etc., is qualified and conditionalised almost into insipidity. It reads:

In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications.

Another example is Article 10(2). It reads:

In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

The basic right in Article 10(2) is to use a minority language in dealings with administrative authorities. The basic limitation is the commonsensical realisation that assuring such a right in practice could involve significant financial and logistical expense for States authorities, and that factors such as demand, geographical concentration and available means will all be *relevant* to States' attempts to guarantee the core right. However, all rights – civil and political as well as social and economic – imply financial commitments by States. It is beyond dispute that a lack of means can never be accepted as justification for failing to strive to implement human rights obligations at the domestic level.²⁴⁶ As pointed out by the UN

²⁴³ See further, Rainer Hofmann, “Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities”, 44 *German Yearbook of International Law/Jahrbuch für Internationales Recht* (2001), pp. 237-269, at 240.

²⁴⁴ This table amends and supplements information provided in Alan Phillips, *The Framework Convention for the Protection of National Minorities: A Policy Analysis* (Minority Rights Group International, London, 2002), p. 3.

²⁴⁵ See, for example, Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 94.

²⁴⁶ See, for example, CESCR General Comment No. 3 The nature of States parties obligations (Art.2, para. 1 of the Covenant), adopted on 14 December 1990, para. 11 of which reads: “[...] even where the available resources

Human Rights Committee in the context of the ICCPR, “failure to comply with [the obligation under Article 2(2) to give effect to the Covenant rights] cannot be justified by reference to political, social, cultural or economic considerations within the State”.²⁴⁷ This is a well-established principle of international human rights law and in practice, treaty-monitoring bodies, as well as independent human rights organisations, are increasingly relying on human rights indicators and various bench-marks to monitor governmental performance as regards the (progressive) implementation of (economic, social and cultural) rights. This approach involves measuring the willingness of a government to implement human rights against its capacity to do so; the dissociation of a lack of moral or political commitment from financial or technical incapacity reveals any real progress or regression.²⁴⁸

The excessively diffident tone of Article 10(2) is unhelpful as it simply invites States to excuse their failure by pointing towards inadequate means at their disposal or subjective assessments of the need for such a right to be facilitated. A further aggravating textual shortcoming is highlighted by Mark Lattimer in his critical dissection of this provision: “[...] the obligation is not to ensure that the minority language can be used; it is to ‘endeavour to ensure [...] the conditions which would make it possible to use’ the language, and all this only ‘as far as possible’”.²⁴⁹ The ineffectual consequences of such wording can be measured by applying it analogously (as Lattimer does) to personal tax returns:

If you were not strictly required to submit a tax return, but only required to endeavour to ensure the conditions which would make it possible, if in your opinion there was a real need, and only as far as was possible, would you do it? Life is busy, and you might just not get round to it...²⁵⁰

Obviously, the more limiting clauses that govern a specific right or obligation, the more severe its emasculation will be. These two examples admittedly contain more limiting clauses than most other provisions of the FCNM, but they nevertheless constitute the best illustration of the point that limitations on a right or obligation can seriously curtail the faithfulness of its realisation to its intended purpose.

The traditional conceptual tug-of-war between advocates of the flexibility of formulations and those who would favour firmer phraseology is well-documented. While both stances undoubtedly boast competing merits, the approach adopted here proceeds from the *lex lata*, arguing that the effectiveness of the flexible wording of relevant provisions is contingent on the firmness with which they are applied.

are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints [...]”. See also, paras. 1, 10, *ibid.*

²⁴⁷ Para. 14, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 26 May 2004.

²⁴⁸ See further, Katarina Tomasevski, “Indicators”, in Asbjorn Eide, Catarina Krause & Allan Rosas, Eds., *Economic, Social and Cultural Rights: A Textbook (Second Revised Edition)* (Kluwer Law International, the Netherlands, 2001), pp. 531-543; Asbjorn Eide, “The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights”, in *ibid.*, pp. 545-551.

²⁴⁹ Mark Lattimer, “The Framework Convention as a catalyst for action at domestic level: the NGO perspective”, in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), pp. 58-61, at 58.

²⁵⁰ *Ibid.*, at 59.

Section III of the FCNM (Articles 20-23)²⁵¹ deals with the interpretation and application of the Convention. In particular, it seeks to situate the FCNM in a broader international law context. The section opens with the requirement that persons belonging to a national minority and relying on the FCNM respect “the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities” (Article 20). However, it stops short of requiring that members of national minorities pledge or demonstrate loyalty to the State. According to the Explanatory Report to the FCNM, it is clearly the intention of Article 20 to draw attention to situations in which national minorities constitute a majority within specific geographical areas (so-called “internal minorities”).²⁵² Article 21 was designed to allay the fears of States Parties as regards possible “doomsday” scenarios resulting from minority rights, i.e., the undermining of “the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States”.

Article 23 asserts the primacy of the ECHR by stating that in the event of “the rights and freedoms flowing from the principles enshrined in” the FCNM being the subject of corresponding provisions in the ECHR, the former will be understood as conforming to the latter. Some of the positive obligations envisaged for State Parties under the FCNM go further than those set out in the ECHR, as interpreted by the European Court of Human Rights in its case-law (see section 4, *infra*). Article 23 therefore contributes to the interpretative grey area created by the non-justiciability of the provisions of the FCNM. If the FCNM’s provisions could be examined by the European Court of Human Rights, straightforward balancing tests could be engaged in. However, to date, the Court has exhibited a clear reluctance to do so - as demonstrated by the discussion of the *Chapman* case, *supra*.

PROOF OF THE PUDDING

The absence in Council of Europe instruments of any express provision for the justiciability of minority rights is widely criticised as being one of the great failings of efforts towards minority rights protection in Europe today.²⁵³ Such criticism is without prejudice to the usefulness of other international legal and political mechanisms for the enforcement of minority rights.²⁵⁴ The failure of the FCNM to render minority rights justiciable is particularly disappointing. The PACE did not mince its words when giving its view on the same: “Its implementation machinery is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to the governments”.²⁵⁵ Given his insights into the drafting process and relevant behind-the-scenes politics, Heinrich Klebes’ fear that the PACE’s assessment could turn out to be an “understatement”²⁵⁶ is an even more serious indictment.

The monitoring procedures of the FCNM are set out in Articles 24-26. Article 24 assigns responsibility for monitoring the implementation of the FCNM exclusively to the Committee

²⁵¹ Note: Article 22 has already been considered *supra*.

²⁵² Para. 89, Explanatory Report to the FCNM, *op. cit.*

²⁵³ Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers, The Hague, 2000).

²⁵⁴ For a comprehensive overview of those mechanisms, see generally: *Mechanisms for the implementation of minority rights* (Council of Europe Publishing/European Centre for Minority Issues, Germany, 2004).

²⁵⁵ Para. 7, PACE Recommendation 1255 (1995) on the protection of the rights of national minorities.

²⁵⁶ Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 94.

of Ministers and Article 26 outlines the Advisory Committee's role of assistance in this regard.²⁵⁷ Article 25 concerns the mechanics of the reporting system.

Thus, as far as the monitoring of the FCNM is concerned, ultimate control and responsibility rests with the Committee of Ministers,²⁵⁸ thereby prompting descriptions of the relationship between the two committees as one of "tutelage".²⁵⁹ However, notwithstanding its officially ascribed role of "assistance" in the monitoring process, the Advisory Committee remains the *de facto* power-house for the monitoring activities. This is true by virtue of the extent of its procedural/administrative involvement; its sheer hard graft and its engagement with substantive matters. It is therefore imperative that the Committee of Ministers makes greater efforts to harness the full potential for involving the Advisory Committee "in the monitoring of the follow-up to the conclusions and recommendations on an *ad hoc* basis, as instructed by the Committee of Ministers".²⁶⁰

The lack of a strong enforcement mechanism for the FCNM is often identified as its Achilles heel.²⁶¹ The question of legal enforceability is of crucial importance here. While justiciable rights generally tend to enjoy more robust protection than non-justiciable rights, it is widely recognised that justiciability, too, has its limitations and that other supplementary means of monitoring and protection are often required to shore up judicial solutions.²⁶² The drafters of the FCNM eschewed the opportunity to render the rights to be contained therein justiciable, opting instead to rely on other forms of control. As such, it continued in the vein of earlier CoE initiatives. The Venice Commission, for instance, has consistently subscribed to the view that "flexible, diplomatic solutions applied by a non-judicial body may prove more effective in this tricky field".²⁶³ This stance is based on the argument that the political dimension to minority rights impinges to quite an extent on State sovereignty and is therefore less suited to traditional adjudication before the courts. The Commission has also posited that not all minority rights are justiciable, eg. statements of principle or hortatory goals and those rights that are formulated as State obligations rather than minority rights as such.²⁶⁴

²⁵⁷ Article 26 is quoted here for the sake of convenience:

"1. In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities.
2. The composition of this advisory committee and its procedure shall be determined by the Committee of Ministers within a period of one year following the entry into force of this framework Convention."

²⁵⁸ See Articles 24-26, FCNM.

²⁵⁹ Stefan Troebst, "From paper to practice: The Council of Europe's Framework Convention for the Protection of National Minorities", *op. cit.*, at 25.

²⁶⁰ Committee of Ministers Resolution (97) 10, *op. cit.*, para. 36. See also in this connection, paras. 18-20, AR4.

²⁶¹ Charles F. Furtado, p. 352. Also ECHR non-discrimination norms weak, compared with ICERD (pp. 352/3).

²⁶² Geoff Gilbert, *op. cit.*, p.

²⁶³ Section II, para. 4 bb), Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on Human Rights, *op. cit.*

²⁶⁴ However, as already mentioned, optimal protection for minority rights is best guaranteed by complementary judicial and non-judicial approaches, and it is worth noting that such complementarity was not ruled out by the Venice Commission either. "An 'intermediate' solution may eventually lie in recourse to the advisory competence of the [European] Court [of Human Rights], as provided for in additional Protocol No. 2 to the ECHR [...]. [...] for example, [...] either the European Committee for the Protection of Minorities (Art. 18 of the draft) or the Committee of Ministers of the Council of Europe could request an advisory opinion from the Court on a question of law concerning interpretation of the Convention." Giorgio Malinverni, "The draft Convention for the Protection of Minorities – The Proposal of the European Commission for Democracy through Law", *op. cit.*, at 268. On the topic of advisory opinions from the ECtHRs, see: Para. 12(i), Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*; Boriss Cilevics, "The Framework Convention within the context of the Council of Europe", in *Filling the Frame*, *op. cit.*, pp. 28-37, at 33.

Not only is the monitoring system constructed by the text of the FCNM overtly political in character, the *modus operandi* of the Advisory Committee – agreed upon by the Committee of Ministers even before the Advisory Committee was constituted – also turned out to be highly political. At the time of its inception, it is little wonder that scepticism abounded about the Advisory Committee’s ability to overcome what seemed on paper to be formidable restrictions on the latitude within which it would have to operate.²⁶⁵ There was a general – and well-founded – fear that the baby might be strangled at birth. Some of the anxiety stemmed from the following provisions:

29. The Advisory Committee may request additional information from the Party whose report is under consideration.

30. The Advisory Committee may receive information from sources other than state reports.

31. Unless otherwise directed by the Committee of Ministers, the Advisory Committee may invite information from other sources after notifying the Committee of Ministers of its intention to do so.

32. The Advisory Committee may hold meetings with representatives of the government whose report is being considered and shall hold a meeting if the government concerned so requests.

A specific mandate shall be obtained from the Committee of Ministers if the Advisory Committee wishes to hold meetings for the purpose of seeking information from other sources.

These meetings shall be held in closed session.

Since then, the Advisory Committee – through its own pro-activeness and the support of the Committee of Ministers – has managed to carve out increased operational autonomy for itself. Follow-up questionnaires to States Parties have become a standard feature of its work, thereby maximising the potential of Rule 29. Without the support of the Committee of Ministers, Rule 31 would have been a dead-letter. The Advisory Committee has reported its satisfaction with the backing it has received from the Committee of Ministers in this regard. Meetings with State and non-State representatives have increasingly been relied upon by the Advisory Committee in its monitoring work to great effect. Again, the support of the Committee of Ministers was needed for the Advisory Committee to breathe life into Rule 32: it gave the Advisory Committee blanket authorisation for the entire initial monitoring cycle to hold meetings with representatives of non-governmental organisations and representatives of civil society in the context of its country visits conducted upon the invitation of States Parties. This relieved the Advisory Committee of “the obligation to request a separate mandate for each such meeting as normally required under Rule 32, paragraph 2”²⁶⁶.

The individual State reports constitute the lynchpin of the monitoring system, thus enhancing the importance of ensuring that the reporting guidelines are clear²⁶⁷ and that the content of the

²⁶⁵ See, for example, the Council of Europe Committee of Ministers Resolution (97) 10: Rules adopted by the Committee of Ministers on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, 17 September 1997 (especially paras. 29-32; 35-37).

²⁶⁶ See further, para. 25 of Activity Report 2, which refers to the relevant decision adopted by the Committee of Ministers on 3 May 2000.

²⁶⁷ The original outline for State reports for the first monitoring cycle of the FCNM was set out in Appendix 3 to CM Resolution (97) 10 and adopted by the Committee of Ministers on 30 September 1998, at the 642nd meeting of the Ministers’ Deputies: paras. 10, 11 (mentioning the possible need to modify them later – para. 15, Activity Report 3), Activity Report 1). The outline for State reports for the second cycle of monitoring (para. 15, Activity Report 3) was adopted by the Committee of Ministers on 15 January 2003 at the 824th meeting of the Ministers’ Deputies. See also, paras. 21, 22, Activity Report 4. Reports for the second cycle should build on those

reports themselves is both accurate and comprehensive.²⁶⁸ While the Advisory Committee has made a point of commending the level of detail generally included in State reports,²⁶⁹ it has nevertheless deemed it necessary to stress the need for even greater attention to detail. This has come about in two ways. First, it has now become a standard feature of the reporting process for the Advisory Committee to issue States Parties with questionnaires requiring more specific information concerning various aspects of their original reports.²⁷⁰ The Advisory Committee has, however, been quick to point out that such requests for additional information do not have any undertones of criticism, and should rather be viewed as part of the broader process of “constructive dialogue between the Advisory Committee and the States Parties”.²⁷¹ Indeed, it has saluted the quality and quantity of information contained in States’ responses to these follow-up questionnaires,²⁷² noting that “in some cases, such responses have constituted a source of information comparable to the state report itself”.²⁷³

Second, in its Activity Reports, the Advisory Committee has consistently urged States Parties to make particular efforts to provide information on the implementation of the various rights vouchsafed by the Framework Convention²⁷⁴ and “pertinent statistical data”.²⁷⁵ As mentioned *supra*, such information is expressly required by the outlines for State reports. These requests were born of an over-reliance in State reports on legislative frameworks and a concomitant neglect of the relevant practice.

The Advisory Committee also realised at a very early stage that “in order to carry out its task effectively and in a balanced and consistent way, it may also need to seek information from sources other than the reporting States”.²⁷⁶ It recognised the vital role which information from independent sources could play in complementing and clarifying information contained in initial State reports and thereby helping it to form a “comprehensive picture of country situations”.²⁷⁷ The procedural decisions taken by the Committee of Ministers which have enabled the Advisory Committee “to establish and maintain free and frequent contacts”²⁷⁸ with independent sources of information paid instant dividends, as was acknowledged by the Advisory Committee in its three most recent Activity Reports.²⁷⁹ The Advisory Committee continues to benefit from “excellent cooperation” with NGOs, minority associations and civil society generally, which it acknowledges as being indispensable for effective monitoring.²⁸⁰

All of the foregoing demonstrates that there are at least four junctures at which greater attention could be paid to detail: in the State reports themselves; in the follow-up

submitted in the course of the first cycle and thereby avoid any unnecessary repetition; States should give details of their efforts to apply the conclusions of the Committee of Ministers on the first cycle of monitoring and on the extent to which they have taken appropriate account of the various comments in the Advisory Committee’s Opinion on an article-by-article basis. The reports should also provide responses to specific questions addressed separately to States Parties by the Advisory Committee in the framework of continuing dialogue between them.

²⁶⁸ para. 12, Activity Report 2.

²⁶⁹ para. 12, Activity Report 2; para. 12, Activity Report 3.

²⁷⁰ (para. 17, Activity Report 1); para. 18, Activity Report 2; para. 15, Activity Report 3.

²⁷¹ para. 17, Activity Report 1; para. 19, Activity Report 2; para. 15, Activity Report 3.

²⁷² para. 19, Activity Report 2.

²⁷³ *Ibid.*

²⁷⁴ para. 17, Activity Report 1; para. 13, Activity Report 2; para. 12, Activity Report 3.

²⁷⁵ para. 12, Activity Report 3.

²⁷⁶ para. 18, Activity Report 1.

²⁷⁷ para. 23, Activity Report 2.

²⁷⁸ para. 23, Activity Report 2.

²⁷⁹ para. 24, Activity Report 2 and para. 16, Activity Report 3.

²⁸⁰ Para. 37, Activity Report 4.

questionnaires addressed by the Advisory Committee to the States Parties; in the inward information flow from independent sources; in meetings with State and non-State actors. Each of these stages offers opportunities to prise open the very centre of pressing questions and situations. Three of them offer the Advisory Committee the opportunity to play a pro-active role in eliciting key information from States Parties, i.e., in the State reports, questionnaires and meetings with State representatives. Any reliable information received from independent sources would obviously feed into the formulation of questions for submission in writing to the States Parties or for raising in meetings with State representatives. Reliable information is therefore the lifeblood of the Advisory Committee, irrespective of whether it is received from the States themselves or from independent third parties. It is of cardinal importance that the Advisory Committee not be restricted in any way in seeking out and using information that is relevant to its work.

In a case of insult having been added to injury, one other problem trammelling the operational potential of the Advisory Committee is the problem of parsimonious funding, which has led to it being severely under-resourced. Currently, the monitoring of the FCNM is allocated less than 0.5% of the Council of Europe's budget.²⁸¹ This is a paltry sum and political efforts should be redoubled to ensure that this allocation is significantly increased at the earliest opportunity. The Advisory Committee has consistently been stressing – and quite rightly with increasing urgency – its dire need for greater financial and human resources. It has warned that greater financial *largesse* would be required in order to preclude the danger that the quality of its work would be further compromised due to under-resourcing, thereby jeopardising the effectiveness of the entire monitoring process.²⁸² The spiralling workload has not been matched by adequate additional resources and the situation was described as “increasingly acute” just before the commencement of the second monitoring cycle.²⁸³ Calls for greater funding have also emanated from a variety of other sources.²⁸⁴

To sum up, granted much can and has been achieved despite textual and procedural limitations and “despite” is the key word here. This is a testament to the commitment and resourcefulness of those at the coal-face of the monitoring exercise and not an exoneration of the substantive and structural weaknesses of the FCNM. As pointed out by John Packer on the occasion of the fifth anniversary of the entry into force of the FCNM, this is not a time for resting on laurels.²⁸⁵ Much more could be achieved:

- Consolidation of one of the AC's ongoing achievements, *viz.*, the *de facto* provision of interpretive guidance on the content of the FCNM's (largely) programmatic provisions,²⁸⁶ thereby facilitating their implementation. This could be achieved, for example, by providing for a mechanism whereby general comments could be adopted in order to offer authoritative interpretations of the text of the FCNM.

²⁸¹ Rainer Hofmann, “The Framework Convention at the end of the first cycle of monitoring (Opening plenary)”, *Filling the Frame*, *op. cit.*, p. 5.

²⁸² Paras. 30, (36), Activity Report 1; paras. 42, (44), Activity Report 2; Section 3 ii) Resources of the Advisory Committee and delays in the submission of Opinions (paras. 48-54), para. 58, Activity Report 3.

²⁸³ Para. 43, Activity Report 4. See also para. 44, *ibid.*

²⁸⁴ Para. 12(v), Rights of national minorities, PACE Recommendation 1623(2003), *op. cit.*,

²⁸⁵ John Packer, “Situating the Framework Convention in a wider context: achievements and challenges”, *op. cit.*, at 51.

²⁸⁶ See further, on this observation, Rianne M. Letschert, *The Impact of Minority Rights Mechanisms*, *op. cit.*, at p. 218.

- A distillation of principles from the “soft jurisprudence” of the Advisory Committee
- Greater attention to the preambular affirmation of the FCNM’s sources of inspiration and more frequent invocation of same
- Greater attention to conceptual precision and linguistic consistency in Opinions
- Increased openness and transparency of procedures
- More interaction with interested parties, especially representatives of minority groups
- Timeliness of reporting and measures for dealing with persistent delays²⁸⁷

In 2003, the PACE continued its criticism of certain CoE States for failing to ratify,²⁸⁸ or sign and ratify,²⁸⁹ the FCNM without debilitating reservations, and exhorted them to do so “swiftly”.²⁹⁰ Other recommendations have gone a step further. Boriss Cilevics, for instance, has argued that “not only ratification, but also fair implementation of the Framework Convention must become a necessary precondition for membership in [*sic*] the Council of Europe, as is the case today with the European Convention of [*sic*] Human Rights and its Protocol No. 6”.²⁹¹ A useful appendix to this recommendation would be that States Parties’ adherence to the FCNM should be kept under continuous and vigilant scrutiny by the PACE and CoE Secretary General’s monitoring mechanisms.²⁹² Such scrutiny serves as an extra source of pressure for States to comply with their obligations under the Convention. While States are under a presumptive commitment to implement their obligations under international law in good faith – in accordance with the principle of *pacta sunt servanda*, as enshrined, *inter alia*, in Article 26 of the Vienna Convention on the Law of Treaties²⁹³ - measures adopted to give effect to specific conventional provisions do not always live up to the expectations generated by the act of ratification. In this sense, in the absence of effective enforcement/monitoring mechanisms, there is a danger that States will, in practice, be no more than “international street angels and domestic house devils”.²⁹⁴

1.3.2(iii) Organization for Security and Co-operation in Europe

The Organization for Security and Co-operation in Europe (OSCE), which currently comprises 56 Participating States, has also been in the vanguard of minority rights protection. After an earlier emphasis on standard-setting initiatives at IGO summits, OSCE activities in the domain of minority rights protection have in recent years tended to be channelled through the Office of the OSCE High Commissioner on National Minorities (HCNM) (see further, *infra*).

²⁸⁷ See, in this connection, Decision of the Committee of Ministers of 19 March 2003 authorising the Advisory Committee to “submit a proposal regarding the commencement of the monitoring of the Framework Convention without a state report when a state is more than 24 months behind in submitting a state report [...]”. [Note to self: para. 7, Activity Report 4, gives 15 March as date of decision].

²⁸⁸ In this respect, it named: Belgium, Georgia, Greece, Iceland, Latvia, Luxembourg and the Netherlands). See further: PACE Resolution 1301 (2002) on the protection of minorities in Belgium.

²⁸⁹ In this respect, it named: Andorra, France and Turkey.

²⁹⁰ Para. 11, Rights of national minorities, PACE Recommendation 1623 (2003), *op. cit.*

²⁹¹ Boriss Cilevics, “The Framework Convention within the context of the Council of Europe”, in *Filling the Frame*, *op. cit.*, pp. 28-37, at 33. See also, p. 32, *ibid.*

²⁹² This is already routinely taking place.

²⁹³ Article 26 (*Pacta sunt servanda*) reads in its entirety: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

²⁹⁴ Donncha O’Connell, “Beyond rights – towards interests”, *Céide – A Review from the Margins* p. 17 (January/February 1999), at pp. 17-18.

The seeds of OSCE protection for minority rights were sown in the Final Act of the CSCE Summit held in Helsinki in 1975. The Helsinki Final Act is divided into four main categories or “Baskets”,²⁹⁵ the first of which is entitled ‘Questions relating to Security in Europe’. This Basket includes a Declaration on Principles Guiding Relations between Participating States. Principle VII of this Declaration, entitled “Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief”, and Principle VIII, entitled “Equal rights and self-determination of peoples” are the Principles most directly concerned with human – and specifically minority – rights. Principle VII, para. 4, contains the most explicit reference to minority rights:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The wording employed is clearly redolent of Article 27, ICCPR, but boasts greater suppleness. In the first place, Principle VII, para. 4, is not couched in the same negative terms as Article 27, ICCPR. The extreme caution of the “shall not be denied” formula in Article 27, ICCPR, was not considered to be necessary, given that the resultant text would be political in character, and without legal consequences for Participating States.²⁹⁶ The importance of this shift is more symbolic than semantic. As already noted, *supra*, the negative wording of Article 27, ICCPR, belies its positive import.²⁹⁷ Moreover, it was important to send out positive signals of intent as regards minority rights protection.

The wording of Principle VII, para. 4, is also more supple by its refusal to follow the precedent of Article 27, ICCPR, of particularising certain categories of minority and earmarking them for special protection, to the possible exclusion of other categories. The references to “full opportunity for the actual enjoyment” and “their legitimate interests” are preferable on this score. “Full opportunity for the actual enjoyment...” implies a broad conception of equality that embraces the possibility of affirmative action in order to achieve equality in fact. “Legitimate interests” creates a broader base of possible associative motivations of members of minority groups than the restrictive platform of ethnic, linguistic and religious features/interests/objectives.

Follow-up to the Helsinki Final Act (and subsequent meetings) was assured by a number of intergovernmental procedures which were progressively strengthened, notably by the Vienna and Moscow Mechanisms.

The next real milestone for minority rights protection within the OSCE system was the Copenhagen Document, 1990. As would later be the case in the UN system, a catalogue of differentiated rights grew from the seed of a solitary article planted in a more general text. The fact that this was the first standard-setting exercise for minority rights to prove successful

²⁹⁵ Basket I is “Questions relating to Security in Europe”; Basket II is “Co-operation in the fields of Economics, of Science and Technology and of the Environment”; Basket III is “Co-operation in humanitarian and other fields” and Basket IV is “Follow-up to the Conference”. See further: Jane Wright, “The OSCE and the Protection of Minority Rights”, 18 *Human Rights Quarterly* (1996), pp. 190-205; Jane Wright, “The Protection of Minority Rights in Europe: From Conference to Implementation”, 2 *The International Journal of Human Rights* (No. 1, Spring 1998), pp. 1-31; [Essex papers].

²⁹⁶ This is perhaps also the reason why the drafters did not become sucked into the debate on the competing merits of individual and group-oriented rights and protection.

²⁹⁷ Capotorti, and subsequently, General Comment 23.

at the international level undoubtedly lent it extra importance and influence.²⁹⁸ One of the five sections in the Document, Section IV, is devoted partly to the rights of persons belonging to national minorities (as they were now called) (paras. 30-39), and partly to the adjacent objective of combating “totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds” (para. 40).

Para. 30 positions the rights of persons belonging to national minorities firmly within respect for human rights, democracy, rule of law, pluralism, tolerance and other laudable societal values. Para. 31 deals with non-discrimination and factual equality for persons belonging to national minorities, and envisages special measures being adopted by States where necessary in order to achieve these ends. Para. 32 begins with the assurance that membership of a national minority is a matter of individual choice and shall not lead to adverse consequences for individuals exercising that choice. The sub-paragraphs in para. 32 then proceed to list specific rights intended for enjoyment by persons belonging to national minorities, such as: to use their mother tongue in public and in private; to establish and maintain educational, cultural and religious organisations; to profess and practise their religion; the pursuit of unimpeded national and transfrontier connections; to receive and impart information in their mother tongue; organisational participation, both nationally and internationally. This paragraph concludes with the reminder that the rights of persons belonging to national minorities may be exercised individually or in community with other group members.

Para. 33 provides for the promotion of national minority identities and Para. 34 sets out a number of linguistic rights, such as the right to education of or in one’s mother tongue (alongside learning of official State languages) and the right to use one’s mother tongue in dealings with public authorities. The right of minorities to participate in public affairs is underscored in para. 35. The following paragraph, 36, emphasises the importance of inter-State cooperation regarding issues relating to national minorities. Para. 37 is a pretty standard “prohibition of abuse of rights” provision; Para. 38 calls on States to honour commitments towards minorities arising out of relevant treaties to which they are already party and to accede to others to which they are not, “including those providing for a right of complaint by individuals”. It is particularly noteworthy that the Document should expressly draw attention to the question of the justiciability of minority rights and, more specifically, the possibility of individual petition. Para. 39 mentions, *inter alia*, the need for cooperation between States within various international fora.

The foregoing brief bird’s-eye view of the extent of relevant provisions in the Copenhagen Document should suffice to explain the impact it has had on the drafting of subsequent international instruments (eg. UN Declaration, Council of Europe texts, including PACE Recommendation 1201 and the FCNM itself). Obviously, the fact that it was a forerunner of other major texts contributed to its impact, but it is too easy to explain impact merely in terms of happenstance. The provisions themselves are phrased in relatively straightforward language, not the stodgy, arch-conservative bureaucratic legalese that tends to rob legal texts of much of their potential. Nor was it bound by legal or other historical baggage, as could be argued about comparable UN efforts: it was pretty much a self-propelled initiative, without complicated ties to precedent. Nor were there complex administrative impediments to the realisation of the drafting exercise: instead of sub-committees interminably exchanging draft documents over periods of years, this was a text adopted by heads of States.

²⁹⁸ See, in this connection, its influence on the UN Declaration and the FCNM.

The Office of the OSCE HCNM was established in 1992, pursuant to the mandate set out in the CSCE Helsinki Document (“The Challenges of Change”) of that year.²⁹⁹ The first incumbent of the Office was the former Dutch Foreign Minister, Max van der Stoep (January 1993-June 2001)³⁰⁰ and he was succeeded by Rolf Ekeus. The Mandate sets out that the HCNM should be “an instrument of conflict prevention at the earliest possible stage”,³⁰¹ and charges the incumbent with the task of providing “‘early warning’ and, as appropriate, ‘early action’ at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage”, but in his/her judgment have the potential to do so.³⁰²

The HCNM’s mandate has therefore designed an Office with a very specific remit. In formal terms, this remit is strictly one of conflict prevention, in contradistinction to the earlier, overarching OSCE principles (or contiguous Council of Europe mission statements) discussed *supra*, which are grounded in democratic values of pluralism, tolerance, etc., and thereby leave greater scope for the promotion of minority rights. Such typical democracy-enhancing goals might *prima facie* seem broader than the goal of conflict prevention. However, in practice, the HCNM has tended to interpret his mandate in a pro-active manner, tracing potential for conflict to its source in States authorities’ denial of, inadequate provision for, or insufficient accommodation of, minority rights and interests (as the case may be). The deliberately purposive interpretation of the HCNM’s mandate has contributed in large measure to the achievements of the Office to date.

The HCNM is required to “work in confidence” and to “act independently of *all* parties directly involved in the tensions”.³⁰³ The impartiality with which the HCNM’s duties must be discharged would seem to rule out the possibility of interventions on behalf of minority groups, hence the importance of the choice of preposition in the HCNM’s title. “On” was preferred to “for”, in order to reflect the objectives of the mandate, *viz.*, impartial conflict prevention. In practice, though, the HCNM’s interventions very often favour national minorities, but this results from the HCNM’s assessment of the specific facts of given situations, rather than a pre-determined mandate to advance the minority cause.

The HCNM is answerable to the Chairman-in-Office of the OSCE and the Committee of Senior Officials (CSO),³⁰⁴ but enjoys considerable operational autonomy. There are three main limitations to the permissibility of the HCNM’s engagement. First, without the express consent of all parties involved (including the State), the HCNM is prevented from considering national minority issues in a State “of which the High Commissioner is a national or a resident, or involving a national minority to which the High Commissioner belongs”.³⁰⁵ Second, the HCNM may not “consider national minority issues in situations involving

²⁹⁹ Section II – CSCE High Commissioner on National Minorities, “The Challenges of Change”, CSCE Helsinki Document 1992 (adopted on 9-10 July 1992).

³⁰⁰ For an overview of his activities in this capacity, see *inter alia*: Walter A. Kemp, Ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague/London/Boston, Kluwer Law International, 2001); Wolfgang Zellner and Falk Lange, Eds., *Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities* (Baden-Baden, Nomos, 1999). A more extensive bibliography is available at: <http://www.osce.org/hcnm/documents/bibliography/#1>.

³⁰¹ Section II – CSCE High Commissioner on National Minorities, “The Challenges of Change”, CSCE Helsinki Document 1992, *op. cit.*, para. (2).

³⁰² *Ibid.*, para. (3).

³⁰³ (emphasis added) *ibid.*, para. (4).

³⁰⁴ Note: as a result of the Budapest Summit (“Towards a Genuine Partnership in a New Era”), 5-6 December 1994, the CSO was succeeded by the Senior Council. See further, *ibid.*, paras. (13)-(22).

³⁰⁵ *Ibid.*, para. (5a).

organized acts of terrorism”.³⁰⁶ This reinforces the overall preoccupation of the HCNM’s mandate with conflict *prevention*. Third, the HCNM is precluded from considering “violations of CSCE commitments with regard to an individual person belonging to a national minority”.³⁰⁷ The purpose of this restriction is presumably to ensure that the HCNM’s duties are discharged in a non-partisan and non-particularised manner. The concern for conflict prevention is generally more acute where group situations are implicated, rather than single individuals belonging to groups.

The HCNM is relatively unhampered in its ability to draw on a wide range of information sources,³⁰⁸ to consult a wide range of parties directly concerned in tensions,³⁰⁹ to conduct country visits,³¹⁰ and to involve experts in relevant work and/or country visits.³¹¹ Information about a situation involving a national minority or about any of the parties directly involved in such a situation can be collected or received by the HCNM “from any source, including the media and non-governmental organizations”.³¹² Parties directly involved in such situations may draw up and submit specific reports on relevant matters.³¹³ The only across-the-board restriction in respect of the HCNM’s communications is set out in para. (25) of the Mandate:

The High Commissioner will not communicate with and will not acknowledge communications from any person or organization which practises or publicly condones terrorism or violence.

Para. 26 of the Mandate stipulates the parties directly concerned in tensions who can provide specific reports to the HCNM and with whom the HCNM will endeavour to communicate during visits to a participating State. The parties can be bracketed into two main categories: State governments (including, where appropriate, regional and local ramifications of government in areas of residence of national minorities);³¹⁴ authorised representatives of associations, NGOs, religious and other groups of national minorities directly concerned and in the area of tension.³¹⁵

The HCNM is required to submit specific information about the purpose of any proposed visit to an OSCE Participating State before it is due to take place. The State authorities are then given two weeks to liaise with the HCNM in connection with the same.³¹⁶ Para. 25 governs all of the various activities of the HCNM during visits to Participating States.³¹⁷ Once *sur place*, the State authorities are to facilitate the HCNM’s travel and communications.³¹⁸ The HCNM may consult the parties involved and receive information in confidence from any individual, group or organisation directly concerned about the questions under immediate scrutiny. When information provided is confidential in character, the HCNM will respect its confidentiality.³¹⁹ States authorities may not take any measures against persons or organisations on the grounds

³⁰⁶ *Ibid.*, para. (5b).

³⁰⁷ *Ibid.*, para. (5c).

³⁰⁸ *Ibid.*, paras. (23)-(25).

³⁰⁹ *Ibid.*, paras. (26), (26a) & (26b).

³¹⁰ *Ibid.*, paras. (27)-(30).

³¹¹ *Ibid.*, paras. (31)-(36).

³¹² *Ibid.*, para. (23a).

³¹³ *Ibid.*, para. (23b).

³¹⁴ *Ibid.*, para. (26a).

³¹⁵ *Ibid.*, para (26b).

³¹⁶ *Ibid.*, para. (27).

³¹⁷ *Ibid.*, paras. (27) & (29).

³¹⁸ *Ibid.*, para. (27). Failure to allow the HCNM entry into a State or to assure free travel and communication, will lead to the HCNM informing the CSO of the same: para. (28).

³¹⁹ *Ibid.*, para. (29).

that they have had contact with the HCNM.³²⁰ Finally, as regards the HCNM's operational autonomy, up to three experts may be engaged by the HCNM in order to provide specific advice.³²¹ Criteria and circumstances governing the selection of experts are quite lenient, but the HCNM is required to "set a clearly defined mandate and time-frame for the activities of the experts".³²² The possibility of experts visiting a Participating State (only) at the same time as the HCNM is also provided for.³²³

Since its inception, the HCNM has been an effective agent of discreet, behind-the-scenes diplomacy. Not being hide-bound by a restrictive mandate, definitional rigidity or legal formulae certainly facilitated the adoption of a case-by-case approach. It also ensured tactical flexibility for the achievement of the HCNM's wider goals. The OSCE HCNM has also taken standard-setting initiatives concerning specific (aspects of) minority rights, thereby adding another important string to its bow.

The initiatives in question have led to the elaboration of the Recommendations on Policing in Multi-Ethnic Societies (February 2006); the Guidelines on the use of Minority Languages in the Broadcast Media (October 2003); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999);³²⁴ the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February 1998) and The Hague Recommendations on the Education Rights of National Minorities (October 1996). In addition, the HCNM has also issued recommendations for the Roma and Sinti communities. The so-called "Roma Recommendations" comprise a miscellany of reports and other statements developed over the years, rather than a single set of recommendations.

A point often made about OSCE minority rights standards is that they are an important source of soft law, of *de lege feranda*. The point is supported by the example of the cross-fertilisation that has taken place in the drafting of relevant standards by various international organisations. OSCE commitments have in the past been a source of inspiration and influence for other (legal) texts and a reference point for international and national courts.³²⁵ OSCE commitments have also penetrated sub-regional, bilateral treaties to very good effect, and they have been incorporated into a number of national constitutions and legislation. This tendency is sometimes referred to as the "upgrading" of political commitments.

This last statement taps into a wider discussion revolving around the competing advantages of political and legal standards. Obviously, this is a case of "horses for courses": each set of standards is designed differently to achieve different aims. Political commitments certainly have the potential to be more far-reaching than legal standards, and this potential often manifests itself in their wording. Nevertheless, it has persuasively been argued that in

³²⁰ *Ibid.*, para. (30).

³²¹ *Ibid.*, para. (31).

³²² *Ibid.*, para. (32).

³²³ *Ibid.*, para. (33).

³²⁴ It is worth noting in this connection that the OSCE Office for Democratic Institutions and Human Rights (ODIHR), in conjunction with the International Institute for Democracy and Electoral Assistance and the Office of the OSCE HCNM, has developed the Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (January 2001). These Guidelines focus on the implementation of the Lund Recommendations that specifically "relate to the work of the ODIHR in respect of elections" – *ibid.*, p. 1.

³²⁵ See, for example, *Sidiropoulos v. Greece*, *infra*, para. 44.

practice, politically binding standards can prove just as effective as their legally binding counterparts.³²⁶

The OSCE has provided an extra dimension to minority rights protection in Europe and hitherto, it has proved a dynamic one. It remains to be seen, however, whether the initial vigour and momentum will be maintained in a rapidly evolving and thus markedly different political environment. It is too early to evaluate the extent to which OSCE commitments such as those contained in the Copenhagen Document are a product of their times, a reaction to the collapse of the Soviet Block in Central and Eastern Europe. Another relevant question concerns the evolutionary curve that is likely to be traced by the Office of the HCNM itself and whether its erstwhile pro-active approach can be maintained under different stewardship.

At one juncture the suggestion that the OSCE could “loan” the European human rights organs of the Council of Europe was mooted.³²⁷ This suggestion drew on the concept of “*Organleihe*”, or organ-sharing, which has been developed in German administrative law. The central idea was that under a proposed additional protocol to the ECHR, the standards for minority rights protection being developed by the OSCE would become reviewable by the judicial organs of the ECHR in Strasbourg. The proposal was procedurally complicated and would have led to a potentially messy, tiered approach to minority rights protection (some CSCE States were not parties to the ECHR, and the protocol would have had to provide for such States to incorporate the entire ECHR...).³²⁸ It ought to be stressed, however, that this proposal was floated while the OSCE standards were very much in their infancy, even predating the establishment of the Office of the OSCE HCNM.

Perhaps, then, the only element of the proposal that is worth retaining for more general contemporary debate is the possibility or desirability of organ-sharing *per se*. The main *forte* of any prospective organ-sharing arrangement between different IGOs would be its ability to maximise the experience and potential of existing bodies, thereby avoiding any unnecessary duplication of their efforts to achieve similar objectives. While it is always desirable to avoid pointless overlapping between institutions, this is usually achieved through the encouragement of complementary and synergic approaches between institutions. Indeed, a forthcoming Recommendation from the CoE PACE stresses the importance of synergic cooperation between the CoE and the HCNM in the domain of minority rights protection.³²⁹

As the approaches of the CoE and the HCNM to minority rights protection have – since the heady and formative days of the early 1990s – become rather consolidated, essential differences of substance and process are now more easily identifiable. By now, the relevant limbs of both IGOs have managed to carve out their own institutional space. This makes it easier to distinguish between the respective approaches and, by way of corollary, to determine areas of potential cooperation. Furthermore, given that no additional protocol to the ECHR has ever materialised, the possibility of the OSCE “organ-loaning” the Strasbourg judicial

³²⁶ Arie Bloed, Ed., *The Conference on Cooperation and Security in Europe: Analysis and Basic Documents*, 1972-1993 (Dordrecht, Martinus Nijhoff Publishers, 1993), pp. 22-25.

³²⁷ Stephan Breitenmoser and Dagmar Richter, “Proposal for an Additional Protocol to the European Convention on Human Rights Concerning the Protection of Minorities in the Participating States of the CSCE”, 12 *Human Rights Law Journal* (No. 6-7, 1991), pp. 262-265.

³²⁸ Note however, that the complexity of the mechanism proposed by Breitenmoser and Richter has made a more positive impression on other commentators. See, for example, Geoff Gilbert,

³²⁹ *The OSCE guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance co-operation and synergy*, Motion for a recommendation presented by Mr Cilevics and others, Doc. 10362, 26 November 2004.

arms of the ECHR remains fanciful. Indeed, it is no longer desirable: the *modus operandi* of the HCNM has been developed along clear lines; it plays to its strengths and the aim of rendering OSCE commitments justiciable does not seem to inform relevant policy at all. As stressed by John Packer:

[...] the HCNM is not a supervisory mechanism and does not concern himself with the protection of minority rights *in general*. The HCNM is limited to acting in situations where, to use the analysis of Gurr, there is ‘the mobilization of grievance’ through the ‘coherent expression by leaders of political movements’ causing tensions which threaten international peace and stability.³³⁰

In sum, the OSCE commitments relating to minority rights protection remain primarily political in character (despite instances of their “upgrading” to legal status), as do the channels for their enforcement. They continue to wield considerable influence among policy and law-makers throughout Europe. The various sets of principles elaborated by the HCNM further edify earlier OSCE commitments. Applied and programmatic approaches to such principles have been instrumental in promoting their implementation. The overall OSCE contribution to minority rights protection must, however, also be viewed in terms of its limitations. The standards it promotes are not – of themselves – enforceable rights; their adoption is entirely contingent on the goodwill of States authorities.

1.3.2(iv) European Union

The erstwhile goals of the European Economic Communities (as the European Union (EU) was then known) were primarily economic cooperation and the consolidation of peace through trade. However, as consistently held by the Court of Justice of the European Communities³³¹ and as laid down explicitly in the Treaty of Amsterdam, 1997, the EU is bound by the fundamental rights regime of the ECHR.³³² This growing commitment to the upholding of human rights was further consolidated by the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000.³³³ Since then, the abortive Draft Constitution for the European Union³³⁴ had incorporated the Charter of Fundamental Rights of the European Union as its Part II; had provided for the accession of the EU to the ECHR, and had affirmed that fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States, “shall constitute general principles of the Union’s law”.³³⁵ Most recently, certain provisions of the Treaty of Lisbon seek to strengthen the EU’s commitments to human rights (including the

³³⁰ (footnotes omitted) John Packer, “Problems in Defining Minorities”, *op. cit.*, at 238.

³³¹ See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89, *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.

³³² Article 6.2 (ex Article F.2) of the EU Treaty now reads: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Article 6.1 sets out that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Article 29 (ex. Article K1) provides, *inter alia*, a specific legal basis for “preventing and combating racism and xenophobia”.

³³³ Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

³³⁴ OJ C 310 of 16 December 2004.

³³⁵ Article I-9 of the Treaty. See further, Rick Lawson, “Human Rights: The Best is Yet to Come”, 1 *European Constitutional Law Review* (2005), pp. 27-37.

rights of persons belonging to minorities) considerably. For instance, the proposed new Article 1a to the Treaty on European Union reads:

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

Relatedly, the reworked Article 2 states that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”. Very significantly, the new Article 6.1 accords the Charter of Fundamental Rights of the European Union “the same legal value as the Treaties”.³³⁶ Under the new Article 6.2, the EU “shall accede” to the ECHR.³³⁷ Article 6.3 affirms that fundamental rights, as guaranteed by the ECHR and resulting from the constitutional traditions of Member States, “shall constitute general principles of the Union’s law”.

The express recognition of the rights of persons belonging to minorities as one of the founding values of the EU will give them firm constitutional grounding, which will greatly facilitate their development in the fullness of time. The provision for the Charter to acquire legally-binding force will advance the mainstreaming and consolidation of human rights within the EU and in its activities. Although the Charter does not contain provisions dealing explicitly with the rights of persons belonging to minorities, a number of its provisions are indirectly relevant, as discussed at different points in Chapter 2, *infra*.³³⁸ Finally, the envisaged accession of the EU to the ECHR ought to make for the more consistent interpretation of human rights norms at the European level. The general upshot of these pending developments is that the EU’s approach to human rights and the rights of persons belonging to minorities will move no longer be largely confined to the political realm.³³⁹ A more legal approach will be facilitated and necessitated.

In recent years, the EU’s main focus on minority rights had been their inclusion as one of the so-called Copenhagen criteria³⁴⁰ governing EU enlargement. The European Council’s conclusions adopted in Copenhagen in 1993 set out that membership of the EU “requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule

³³⁶ See further in this connection: Declaration concerning the Charter of Fundamental Rights of the European Union, OJ C 306/249 of 17 December 2007.

³³⁷ See further in this connection: Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 306/155 of 17 December 2007; Declaration on Article 6(2) of the Treaty on European Union, OJ C 306/249 of 17 December 2007.

³³⁸ See also in this connection: Guido Schweltnus, “‘Much ado about nothing?’ Minority Protection and the EU Charter of Fundamental Rights”, *Constitutionalism Web-Papers*, ConWEB No. 5/2001.

³³⁹ See further: Bruno De Witte, “Politics versus law in the EU’s approach to ethnic minorities”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 137-160; Bruno De Witte, *Politics Versus Law in the EU’s Approach to Ethnic Minorities*, EUI Working Paper RSC No. 2000/4; Kyriaki Topidi, “European Union standards and mechanisms for the protection of minorities and the prevention of discrimination”, in Council of Europe, *Mechanisms for the implementation of minority rights* (Strasbourg, Council of Europe Publishing, 2004), pp. 183-202.

³⁴⁰ For further commentary on relevant issues, see: Manfred Nowak, “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (New York, Oxford University Press, Inc., 1999), pp. 687-698; Bruno De Witte & Gabriel N. Toggenburg, “Human Rights and Membership of the European Union”, in Steve Peers & Angela Ward, Eds., *The European Union Charter of Fundamental Rights* (Oxford and Portland Oregon, Hart Publishing, 2004), pp. 59-82; Christophe Hillion, “Enlargement of the European Union: A Legal Analysis”, in Anthony Arnall & Daniel Wincott, Eds., *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), pp. 401-418.

of law, human rights and respect for and protection of minorities”.³⁴¹ It has been noted that whereas the other criteria had already been recognised “as fundamental values in the European Union’s internal development *and* for the purpose of its enlargement”, “minority protection is *only* mentioned in the latter context”.³⁴² This discrepancy has been criticised for imposing on aspirant Member States additional standards to those actually recognised within the EU by existing Member States.³⁴³ Nevertheless, the inclusion of minority protection in the Copenhagen Criteria had a longer-term effect of publicising and institutionalising the issue.³⁴⁴ As the EU did not have its own standards on minority protection, the process of pre-accession monitoring of candidate States, necessarily drew on relevant standards, reporting and monitoring, carried out in other fora. There was particular reliance on the work of the Council of Europe, especially its work relating to the FCNM. As such, the EU enlargement process proved an important catalyst for aspirant Member States to develop their laws, policies and practices concerning minority protection and bring them into line with FCNM standards.³⁴⁵

Of the various EU institutions, it is the European Parliament that has traditionally been the most sympathetic and sensitive to the objective of advancing minority rights protection within and by the EU. The need to develop a coherent EU policy on minority rights is one of the central emphases of its 2005 Resolution entitled “Protection of minorities and anti-discrimination policies in an enlarged Europe”.³⁴⁶ In the Resolution, it urges the European Commission to “establish a policy standard for the protection of national minorities”, based on the FCNM.³⁴⁷ It also provides a detailed list of international texts which could usefully inform the exercise of developing “some common and minimum objectives for public authorities in the EU” concerning the protection of minority rights.³⁴⁸

Recent developments concerning human rights protection in and by the EU include the establishment of the European Union Agency for Fundamental Rights³⁴⁹ and the adoption of a Multi-annual Framework (MAF) for the Agency.³⁵⁰ The MAF for the Agency is sure to

³⁴¹ Conclusions of the Copenhagen European Council, *Bulletin of the European Communities* 6-1993, Point I.13.

³⁴² (emphasis per original). Bruno De Witte, “Politics versus law in the EU’s approach to ethnic minorities”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 137-160, at 140.

³⁴³ See, *inter alia*, *ibid.*

³⁴⁴ See further: Christophe Hillion, “Enlargement of the European Union: A Legal Analysis”, *op. cit.*, at 408-409.

³⁴⁵ See further: James Hughes & Gwendolyn Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs”, *Journal on Ethnopolitics and Minority Issues in Europe (JEMIE)* (No. 1, 2003); André Liebich, “Ethnic minorities and long-term implications of EU enlargement”, in Jan Zielonka, Ed., *Europe Unbound: Enlarging and reshaping the boundaries of the European Union* (London & New York, Routledge, 2002), pp. 117-136; Gabriel N. Toggenburg, Ed., *Minority Protection and the Enlarged European Union: The Way Forward* (Hungary, Open Society Institute, 2004); Antje Wiener & Guido Schweltnus, “Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights”, Constitutionalism Web-Papers, ConWEB No. 2/2004; Gwendolyn Sasse, “The Political Rights of National Minorities: Lessons from Central and Eastern Europe”, in Wojciech Sadurski, Ed., *Political Rights under Stress in 21st Century Europe* (New York, Oxford University Press Inc., 2006), pp. 239-281.

³⁴⁶ European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), 8 June 2005, OJ C 124 E/405 of 25 May 2006.

³⁴⁷ *Ibid.*, para. 6.

³⁴⁸ *Ibid.*, para. 8.

³⁴⁹ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1, 22 February 2007. See generally: Philip Alston & Olivier De Schutter, Eds., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford & Portland Oregon, Hart Publishing, 2005).

³⁵⁰ Council Decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, 23 January 2008, Interinstitutional File: 2007/0189 (CNS).

disappoint persons belonging to minorities. The thematic areas covered by the MAF do not include the rights of persons belonging to minorities as a separate item.³⁵¹ Discrimination against persons belonging to minorities is included in a wide-ranging, general focus on discrimination, but the further relevance of other focuses for persons belonging to minorities is, at best, no more than implicit. The failure to prioritise the rights of persons belonging to minorities cannot be dismissed as mere oversight, because the importance of those rights was raised at several junctures during the drafting process. First, in the proposal for the Council Decision initially put forward by the European Commission, it was acknowledged that, *inter alia*, the “protection of national minorities, minority rights and Roma issues” and “respect for cultural, religious and linguistic diversity” had been dealt with in recent European Parliament Resolutions and Council conclusions concerning fundamental rights.³⁵² The Commission’s document also acknowledged that during the public consultation on future thematic priorities for the Agency, “minority rights” was one of the issues that had been mentioned “in particular”.³⁵³ Notwithstanding those acknowledgements, the Commission did not include minority rights (or specific aspects thereof) in its initial list of ten thematic areas to be included in the MAF, as set out in that very same document.³⁵⁴ In its “Detailed explanation of the proposal”, the Commission only explained the relevance of the proposed focuses; no explanation was given as to why other focuses (eg. minority rights) had been omitted.³⁵⁵

In its response to the Commission’s proposal, the European Parliament suggested an amendment to Recital 2 of the draft Council Decision in order to explicitly refer to the protection of minority rights, as follows:

(2) The Framework should include the fight against racism, xenophobia and related intolerance amongst the thematic areas of the Agency’s activity ***and the protection of the rights of persons belonging to ethnic or national minorities.***³⁵⁶

The European Parliament’s proposed amendment was not included in the text ultimately adopted as the Council Decision, even though it had justified its proposal by referring to Recital 10 of the Council Regulation establishing the Agency, which requires that the protection of the rights of persons belonging to minorities be included in the permanent programme of the Agency.³⁵⁷

Finally, it should be noted that the EU Network of Independent Experts on Fundamental Rights’ Thematic Comment No. 3, *The Protection of Minorities in the European Union*,

³⁵¹ Article 2, Council Decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, *op. cit.*

³⁵² European Commission, Proposal for a Council Decision implementing Regulation (EC) No 168(2007 [sic] as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012, 12 September 2007, COM(2007) 515 final, p. 3.

³⁵³ *Ibid.*, p. 4.

³⁵⁴ *Ibid.*, pp. 5-6.

³⁵⁵ *Ibid.*, pp. 6-7.

³⁵⁶ (The text in bold italics is the amendment proposed by the European Parliament) European Parliament legislative resolution of 17 January 2008 on the proposal for a Council decision implementing Regulation (EC) No 168/2007 as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012, Amendment 2. This text was based on an identically-titled report adopted by the Parliament’s Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Michael Cashman) on 20 December 2007 (‘Cashman Report’).

³⁵⁷ Cashman Report, *op. cit.*, p. 6.

comprised major research and performed a very important mapping function concerning relevant standards within the EU.³⁵⁸

1.4 Projected future evolutions of minority rights

Traditionally, one of the greatest obstacles to the furtherance of minority rights protection has been the fear persistently held by States that according minority groups enhanced rights would – through the empowerment of their subjects – stimulate secession (or in the event of the minority group in question having links with a so-called kin-state, irredentism). This fear is captured in the allusion to “the spiral ‘cultural autonomy, administrative autonomy, secession’”.³⁵⁹ These fears have persisted in the face of the development of a corpus of international law³⁶⁰ and a large volume of cogent academic legal writings that clearly distinguish between relevant aspects of minority rights and the right of peoples to self-determination. The refractory nature of these fears confirms their deep-rooted nature and the still all-too-frequent perception of minority rights as a bogeyman of international law and politics. Having at this stage examined relevant theory and practice, it is timely to re-emphasise the importance of crafting a suitable definition of a minority group:

It may be observed that international standard-setting has out-paced articulation of, and consensus on, basic concepts. In other words, the international community has established ‘rights’ and even procedures through which to pursue respect for these rights without fully or clearly delimiting either the subjects/beneficiaries of the rights or the specific content of the rights. This opens the door to possibly unfounded or ‘unjust’ invocations of the stipulated rights and raises the prospect of social conflicts concerning the legitimacy of claimants and the full content of their rights. The lack of clarity has also led to tremendous uncertainty, unfounded assumptions and fear on the part of several interested parties, especially governments who worry that according ‘minority rights’ may be a precursor to political disintegration threatening the territorial integrity of the State. It is, therefore, imperative to clarify the matter not only for theoretical cleanliness, but also for practical reasons of the general interest – to avoid conflicts (especially armed ones).³⁶¹

1.4.1 Troublesome taxonomies

The system of classification for different types of minorities (viz. in terms of specific characteristics, eg. ethnicity, language, religion, culture) routinely employed is broad-brush. While it may be useful for indicating more salient distinctions at the macro level, it fails to deliver on the necessary detail and precision at the micro level. This is largely a result of the blurring of definitional distinctions and the prevalence of intersectionality in practice. Identity is forged from a composition of numerous different characteristics and preferences, various permutations and combinations of which are possible. As Geoff Gilbert has argued:

Classification, in the end, is irrelevant. Minorities often straddle these classes and need guarantees about linguistic rights, religious freedom, and the protection of their culture. To categorize them adds nothing to the fact that they are a minority and minority rights should attach in general. The

³⁵⁸ EU Network of Independent Experts on Fundamental Rights’ Thematic Comment No. 3, The Protection of Minorities in the European Union, 25 April 2005.

³⁵⁹ Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, *op. cit.*, at 96.

³⁶⁰ For illustrative purposes, see paras. 2, 3.1 and 3.2 of General Comment No. 23 – The rights of minorities, and also by way of contrast, General Comment No. 12 – The right to self-determination of peoples.

³⁶¹ (footnotes omitted) John Packer, “Problems in Defining Minorities”, *op. cit.*, p. 226.

adjectives go to the areas of protection and guarantees, rather than to the definition of those accorded that protection and those guarantees.³⁶²

This cluster of arguments has a number of corollaries. One preliminary remark is that categorisation should not be confused with definition. The purpose of categorisation is to identify the characteristics which distinguish categories – in their own right and in respect of adjacent categories; to enhance understanding of what each entails. Definition, on the other hand, is the prior and more generic exercise of seeking to trace the full circumference of a notion, of all categories taken together.

In abstracto, the difference between definition and categorisation can appear very fine, but *in concreto*, in the particular example of minority rights, once one recognises that minority rights are at issue, the enquiry must turn to the particular type of minority rights that are involved. This is where categorisation comes into its own and its purpose is more clearly illustrated, not at the earlier definitional stage. As will be argued, *infra*, depending on the category of minority involved, the expectations of the bearers of the rights, as well as the duties of the addressees of the rights, will be qualitatively different. Linguistic minorities do not necessarily share the same objectives and needs as religious minorities, for instance (apart from both being subject to the levelling effect of discrimination, of course).

Another of the aforementioned corollaries also helps to scotch the argument that categorisation can play an effective definitional role in this context. It centres on the question of determining which characteristic(s) should be deemed the most salient and therefore the most appropriate for definitional purposes when more than one fundamental characteristic or set of characteristics distinguishes a minority from the remainder of the population. First, in individual cases, it can be very difficult to decide - for the purposes of categorisation - which set of characteristics should prevail, or how the necessary balancing exercise should be performed.

There may not even be unanimity among group members on the question of its distinctive characteristic(s). In the event of group consensus, however, there is no guarantee whatever that State authorities would agree with that consensual collective opinion.³⁶³ Endless and ultimately futile debates on sensitive-*cum*-explosive divergences of opinion could result, such as: language/dialect, religion/(cultural) practice, freedom-fighter/terrorist. It is, as Gilbert correctly concludes, much more helpful to use categorisation as a tool to point towards the specific nature of “protection” and “guarantees” required in specific circumstances (see further, *infra*). Categorisation is thus a necessary component of a broader approach of “graduated differentiation” to minority rights protection advocated by Asbjorn Eide. An approach of “graduated differentiation”³⁶⁴ should be able to respond to “different categories of groups which might be entitled to different sets of rights ‘depending on objective criteria justifying reasonable distinctions’”.³⁶⁵

The very idea of group identity comprising fixed, constitutive elements is itself flawed. It is not possible to reduce individual identity (never mind group identity) to any one of its many

³⁶² Geoff Gilbert, “The Council of Europe and Minority Rights”, *op. cit.*, at 169.

³⁶³ See further: Asbjorn Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, Report submitted to the UN Commission on Human Rights - Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/34/Add.4, 11 August 1993, para.

³⁶⁴ Asbjorn Eide, *Classification of minorities and differentiation in minority rights*, E/CN.4/Sub.2/AC.5/1996/WP.2.

³⁶⁵ Quoted in Packer, “Problems in Defining Minorities”, *op. cit.*, p. 245.

facets.³⁶⁶ This is widely recognised in international human rights instruments. As stated in the Preamble to the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: “Considering that religion or belief, for anyone who professes either, *is one of the fundamental elements in his conception of life* and that freedom of religion or belief should be fully respected and guaranteed”.³⁶⁷ Instances of such “overspill” are frequent: a religious minority can simultaneously be an ethnic or linguistic minority; with religious and cultural practices/rights being particularly seamless.³⁶⁸

Furthermore, the traditional range of perceived fixed features (ethnicity (or nationality), language, religion or culture) is highly restricted. It fails to take account of other crucial dimensions to identity. In other words, the emphasis has tended to be placed on a certain number of innate or inherited characteristics, to the exclusion, or at least significant neglect of those that are voluntarily acquired. As stated in the Lund Recommendations on the Effective Participation of National Minorities in Public Life, “Individuals identify themselves in numerous ways in addition to their identity as members of a national minority”.³⁶⁹ The corresponding section of the Explanatory Report to the Lund Recommendations elaborates:

In open societies with increasing movements of persons and ideas, many individuals have multiple identities which are coinciding, coexisting or layered (in an hierarchical or non-hierarchical fashion), reflecting their various associations. Certainly, identities are not based solely on ethnicity, nor are they uniform within the same community; they may be held by different members in varying shades and degrees. Depending on the specific matters at issue, different identities may be more or less salient. As a consequence, the same person might identify herself or himself in different ways, depending upon the salience of the identification and arrangement for her or him.³⁷⁰

The argumentation of others continues in the same vein: identity is anything but static or “immutable”; it is constructed, de-constructed and re-constructed constantly throughout the course of our lives; “We constantly define and redefine our identity through contact, dialogue and exchange, and sometimes also through conflict with others”.³⁷¹ There is a kind of Brownian motion of characteristics in each of us, and which particular characteristics are the most salient at any given time is determined – at least in part – by extraneous situational factors.

In sociological circles, the notion of the fluidity of individual and group identities has been developed rather extensively.³⁷² According to the theory of “liquid modernity” expounded by Zygmunt Bauman,³⁷³ the “melting powers” of modernity³⁷⁴ have caused previous

³⁶⁶ Peter Leuprecht, “Minority Rights Revisited: New Glimpses of an Old Issue”, in Philip Alston, Ed., *People’s Rights* (United Kingdom, Oxford University Press, 2001), pp. 111-126, at 124.

³⁶⁷ (emphasis added) Fourth preambular paragraph, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

³⁶⁸ See further, Yoram Dinstein, “Freedom of Religion and the Protection of Religious Minorities”, in Yoram Dinstein and Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 145-169, at 159.

³⁶⁹ Para. 4, Section I – General Principles, The Lund Recommendations, *op. cit.*

³⁷⁰ Para. 4, Explanatory Note to the Lund Recommendations, *op. cit.*

³⁷¹ Peter Leuprecht, “Minority Rights Revisited: New Glimpses of an Old Issue”, *op. cit.*, at 124.

³⁷² See further: Billig, quoted in Packer, “Problems in Defining Minorities”, *op. cit.*, p.

³⁷³ See further: Zygmunt Bauman, *Liquid Modernity* (United Kingdom, Polity Press, 2000), pp. 7-8; 83-84.

³⁷⁴ For Bauman, the crucial attribute of modernity is “the changing relationship between space and time” – *ibid.*, p. 8.

“configurations, constellations, patterns of dependency and interaction” to be “recast and refashioned”.³⁷⁵ He continues:

It is such patterns, codes and rules to which one could conform, which one could select as stable orientation points and by which one could subsequently let oneself be guided, that are nowadays in increasingly short supply. It does not mean that our contemporaries are guided solely by their own imagination and resolve and are free to construct their mode of life from scratch and at will, or that they are no longer dependent on society for the building materials and design blueprints. But it does mean that we are presently moving from the era of pre-allocated ‘reference groups’ into the epoch of ‘universal comparison’, in which the destination of individual self-constructing labours is endemically and incurably underdetermined, is not given in advance, and tends to undergo numerous and profound changes before such labours reach their only genuine end: that is, the end of the individual’s life.³⁷⁶

This fluidity can even be identified in distinctive characteristics traditionally ascribed to minorities – grouped in somewhat generic terms as ethnicity/nationality, language, religion and culture - and traditionally also thought to be unchanging. It might, for instance, be expected that one’s mother tongue would be one of the most stable and constant features of a person’s life, but such an assumption is predicated on a somewhat restrictive definitional and analytical paradigm. Tove Skutnabb-Kangas and Sertac Bucak identify four different definitions of the “mother tongue” concept: origin (the language(s) one learned first); identification (internal and external); competence (the language(s) one knows best) and function (the language(s) one uses most).³⁷⁷ From the perspective of linguistic human rights, they stress that “*mother tongue(s) is/are the language(s) one has learned first and identifies with*”.³⁷⁸ However, they submit that under any of these definitions, a person can have two or more mother tongues, and with the exception of the “origin” definition, all definitions allow for the possibility that a person’s mother tongue might change – “even several times”.³⁷⁹ Needless to say, such switches would almost invariably constitute gradual, protracted responses to profound changes in one’s personal circumstances or one’s social environment. For present purposes, though, the essential point is that such changes are not *per se* precluded.

Similar argumentation can be developed as regards a person’s religious affiliation. As will be demonstrated in Chapter 3, changes of religion are a fact that has to be reckoned with. While the right to renounce one’s religion, to adhere to an alternative religious faith, or to cease to profess any faith whatever are all encompassed by the right to freedom of thought, conscience and belief, as guaranteed by international law, such legal recognition has proved difficult to achieve on the international plane. Certain religious denominations consider apostasy to be a crime and vehemently dispute assertions that it is an integral element of the right to freedom of religion. Be that as it may, the European legal experience does entertain the possibility of changing one’s religion, as will be convincingly shown in Chapter 3. This mounts a further challenge to the assumption that minority groups are undifferentiated entities. They are not. They are composite entities which must necessarily admit freedom of individual choice. As such, generalist assumptions about shared or constitutive characteristics should be made with utmost caution.

³⁷⁵ *Ibid.*, p. 6.

³⁷⁶ *Ibid.*, p. 7.

³⁷⁷ Tove Skutnabb-Kangas & Sertac Bucak, “Killing a mother tongue – how the Kurds are deprived of linguistic human rights”, in Tove Skutnabb-Kangas & Robert Phillipson (in collaboration with Mart Rannut), Eds., *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Germany, Mouton de Gruyter, 1994), pp. 347-370, at 360.

³⁷⁸ (emphasis per original), *ibid.*, at 361.

³⁷⁹ *Ibid.*, at 361.

At the group level, the subjective element of membership is also revealed to have a “fluid and changeable nature”: “The criteria by which ethnic groups choose to identify themselves, moreover, may vary not only from group to group, but also within one group over a period of time”.³⁸⁰ The apparent presumption of ossified group traits is challenged in societal terms by Jack Donnelly:

Human nature is thus a social project as much as it is a given. Just as an individual’s “nature” or character emerges out of a wide range of given possibilities through the interaction of natural endowment, individual action and social institutions, so the species (through the instrument of society) creates its essential nature out of itself.³⁸¹

Individuals and groups can have several potential identities,³⁸² the strength of which are influenced by societal and situational factors. These identities can be real or strived after, thereby contributing to the concept of “imagined communities”:³⁸³ communities or nations that are imagined and created, or, to put a more negative spin on it, fabricated.³⁸⁴ This concept is famously - and probably also customarily - applied by theorists to nations. However, Benedict Anderson, unravelling his own theories, has extrapolated that “all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined”.³⁸⁵ This postulation is premised on the subjectivity of group cohesion, its tenuous and often ineffable nature, and its innate resistance to qualification and quantification. Finally, it should by no means be ruled out that the virtual dimension to group identity will gain in importance in the future, given the increasing role being played in contemporary society by communications technologies that rely on and promote interaction in virtual, online fora (see further, Chapter 4.5, *infra*).

Marlies Galenkamp, while recognising that “people’s preferences are ever shifting and endogenous to political processes rather than fixed and exogenous”,³⁸⁶ has nevertheless cautioned against any inclination to elevate mere desires to the level of rights. Her word of warning – on the grounds that it would be theoretically inconsistent to do so – merits attention.³⁸⁷ Not every desire warrants protection by the law, much less human rights law. It is worth recalling the propelling rationales of human – and minority – rights protection: peace and security; human dignity (premised on the right to existence and the right to non-discrimination and equality); cultural identity and diversity. Mere whims should not be mistakenly dressed up as interests or desires that exert a crucial influence on the formation of one’s identity. Minority rights protection should not be stretched beyond its elastic limit to include interests of insufficient weight and substance. This is an important consideration when

³⁸⁰ “Definitions of the Term ‘People’”, in *Self-Determination and National Minorities*, p. 164.

³⁸¹ Jack Donnelly, “Human Rights, Individual Rights and Collective Rights”, *op. cit.*, p. 42.

³⁸² Crispin Jones, “Educational Rights and the Definition of Minorities”, in Deirdre Fottrell & Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 205-222, at 211.

³⁸³ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised Edition) (London, Verso Books, 1991).

³⁸⁴ *Ibid.*, p. 6.

³⁸⁵ *Ibid.*, p. 6.

³⁸⁶ Marlies Galenkamp, “The Rationale of Minority Rights: Wishes Rather Than Needs?”, *op. cit.*, p. 48.

³⁸⁷ An argument grounded in political pragmatism could also be advanced in this connection, *viz.* that minority groups themselves ought to be mindful of the tactical risks involved in overstating their demands. Obviously, there is a greater chance that reasonable or realistic demands would be granted by (mildly) sympathetic authorities. Minorities are counselled in the Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities to: “give due consideration to such legitimate factors as their own numerical strength, their demographic density in any given region (or regions), as well as their capacity to contribute to the durability of these services and facilities over time” (section entitled “General Introduction”).

it comes to legitimising special access for minority groups to limited media resources and airtime, as discussed at length in Chapter 8.

Yet this last assertion does not fully lay the matter to rest. How should distinctions be drawn between features or interests that contribute to the formation of identity? Who should be vested with the responsibility for such an important evaluation exercise – and which criteria should apply? Or should the determination of identity-forming characteristics be a purely subjective exercise, left entirely to groups themselves? What implications would such a solution have for minorities within groups and for questions of adequate representation and agency in groups which lack organisational structures?

Once one dispenses with the “fixed features” approach, it becomes very difficult to replace it with an alternative set of criteria for identifying minorities. To stick with identity-formation as the central consideration (in light of earlier comments on the fluidity of identity), determining the appropriate threshold for relevance remains problematic. One of the classical arguments for seeking to limit the criteria for recognising minorities is that doing so helps to avoid an overabundance of claims for special status and enjoyment of accruing rights. To abandon the identity criterion could result in a move towards more open-ended associational rights and lose the specific minority dimension. If the middle-ground were to be taken, the identity criterion would have to be applied in conjunction with other criteria, but there would nevertheless still have to be some cut-off point between features and points of cohesion that are serious-minded and those that are frivolous. This would have to be determined in a non-discriminatory manner.

Conclusions

Under international human rights law, the concept of minority is at far remove from its straightforward signification in everyday language. The concept rests on a complex of quantitative, qualitative and political criteria. There is no authoritative, legally-binding definition of minority in international law, but various definitional indicia can be gleaned from a number of non-binding sources, most notably the Capotorti report, and these are widely regarded as setting the conceptual parameters for relevant discussions.

According to those definitional elements, it is necessary but not sufficient for a group to be in a position of numerical inferiority *vis-à-vis* the rest of the population in order for it to be considered a minority. It must also be in a position of non-dominance. These definitional requirements are uncontentious, unlike the further requirement that members of the group must be nationals of the State in question. That requirement is highly politicised and it is at odds with the transversal obligation on States to ensure the effective exercise of human rights for everyone without discrimination. Insistence on a nationality criterion holds considerable exclusionary potential and is open to abuse by States which are reluctant to guarantee the full panoply of human rights for immigrants or so-called “new” minorities. This criterion is sometimes packaged as a group’s traditional or historical presence in the State, which again is open to abuse by States authorities in the absence of clear criteria for determining when such a presence can be considered “traditional” or “historical” or “long-standing”. The recognition of minorities and their rights should not be contingent on such criteria, although it is conceivable that they could legitimately influence the nature and extent of State obligations that are correlative to minority rights. However, they should not be used as definitional criteria for the recognition of minorities as such.

As already mentioned, some of the definitional criteria are qualitative in nature: minority groups must display a range of constitutive characteristics that distinguish them from majority sections of the population. In practice, these characteristics are primarily ethnic, religious, cultural or linguistic. A definitional focus on constitutive group characteristics can be explained by some of the main underlying rationales for recognising the specificity of minority rights over and above human rights *simpliciter*. According to those rationales, minority rights go beyond mere guarantees of non-discrimination and equality (indeed, for those rights to be secured for persons belonging to minorities, additional (temporary) restitutive measures are often required by States) to embrace concerns for the preservation of specific, fundamental features of the collective identities of minorities. References to “fundamental” features should not be confused with “fixed” features: the fact that features are fundamental does not preclude their natural evolution or concerted development. Rather, the term points to their deep-seated character: typically, ethnic, religious, cultural or linguistic characteristics.

The focus on those particular characteristics is further explained by another definitional criterion, i.e., a sense of cohesiveness or associative purpose that is shared by group members and that is directed at the preservation of their constitutive characteristics. It could therefore be argued that other constitutive characteristics excluded from the present selection are not powerful enough in terms of their ability to sustain a distinct group identity to merit inclusion. The chosen characteristics must be seen as having unifying propensities, but without having homogenising effects. The sense of cohesiveness does not have to be explicit – it can also be implicit. This brings welcome flexibility to the definitional exercise as it cannot be assumed that groups are composed of formal, representative structures that would be mandated to issue explicit statements of cohesive purpose.

The definition outlined above manages to strike a complicated and precarious balance between a number of criteria that are difficult to reconcile. The combination of subjective and objective elements for definitional purposes represents an important safeguard against arbitrariness on the side of minorities and on the side of State authorities. Its insistence on objective criteria seeks to prevent subjective attempts by groups to inflate the concept of minority rights beyond its intended scope, while also seeking to prevent States from subjectively denying minority rights. Conversely, the inclusion of a subjective sense of belonging is designed to ensure that the existence of a minority group *qua* group is grounded in realism and not based on the subjective perceptions of some group members or of non-group members.

This Chapter – and thesis – recognises the conceptual complexities and overt politicisation involved in the definitional challenge. In most of its important respects, it follows the approximate definition outlined above, with the notable exception of the nationality criterion. The existence of minorities is a question of fact, not of law or politics. If a group satisfies all the other proposed definitional elements, then the length of time it has been present in a given State should not preclude its recognition as a minority or its ability to exercise minority rights. The question of classification of minorities (for the purpose of ascertaining their needs and the extent of State duties towards them) is a separate and subsequent question to the questions of definition and recognition. The question of the inclusion of “new” minorities under the protection of minority rights guarantees in international treaty law is very divisive. This Chapter and thesis favour their inclusion under relevant standards of protection. The highly politicised nature of the question should not detract from the imperative of securing human

rights for everyone. The importance of an effective right to freedom of expression is very often most acute for “new” minorities, recent immigrants and non-citizens, who are otherwise politically disenfranchised and are generally excluded from expressive fora and participatory structures and processes in public life. On such a view, the ability of “new” minorities to exercise their right to freedom of expression in an effective manner is a litmus test for the vigour of the right generally.

This Chapter also conducts an exploration of legal and institutional frameworks guaranteeing the rights of persons belonging to minorities internationally. Those frameworks exert a determinant influence on the shaping of legal and institutional frameworks at national and sub-national levels and are thereby of crucial importance for the realisation of the rights of persons belonging to minorities in practice.

Chapter 2 – Comprehensive pluralistic tolerance

2.1 Overview of selected theories of pluralism and tolerance

2.1.1 Pluralism

2.1.2 Tolerance

2.1.2(i) Notions of tolerance

2.1.2(ii) Normative articulations of tolerance

2.2 Towards a notion of comprehensive pluralistic tolerance

2.3.1 Minimum moral and ideological commonality

2.3.2 Pluralistic tolerance, democracy and freedom of expression

2.3 Comprehensive pluralistic tolerance in practice

Introduction

The notion of pluralism was introduced at the beginning of Chapter 1 and it will now be appropriately revisited at the core of this thesis. Pluralism, as already noted, is a very amorphous concept. Its precise interpretation differs between ideologies, disciplines and, inevitably, individual texts and commentators. For instant purposes, the focus will primarily be on two distinct, but inextricably linked, types of pluralism: societal pluralism and value-pluralism. It will also note and seek to explain the inexorable gravitation of these kinds of pluralism towards notions of tolerance. Later, in Chapter 7.1, the analysis will turn to an applied pluralism which specifically concerns the media.

2.1 Overview of selected theories of pluralism and tolerance

2.1.1 Pluralism

Pluralism has been variously described. Incurrigible and a “messy reality”¹ are two of the more imaginative descriptors it has attracted. Its incurrigibility has already been commented on at the very beginning of Chapter 1, but it is useful to reiterate here that despite the negative connotations of the term, it does serve to adequately describe the inherent, permanent and indelible nature of pluralism. Its incurrigibility is underscored by the ease of individual and group movement, most saliently illustrated by migration and mobility patterns, in contemporary, post-modern times. The familial and parochial anchorage of individual lifestyles, so typical in the past, is increasingly on the wane. Societal propensities towards individualisation are (at least) facilitated by developments in communications technologies.

The “messy reality of pluralism” has similarly negative connotations. It must be pointed out, however, that the messiness is not inevitable, which means that this choice of adjective is not entirely justified. It is not the reality of pluralism as such that is messy. Pluralism makes no pretensions toward coherence or orderliness; it does not purport or aspire to be unitary or systematic. Thus, any putative messiness would more accurately describe failure to adequately accommodate pluralism, thereby leading to messy (societal) consequences.

Michael Walzer resorts to a musical metaphor in his attempt to describe what pluralism entails: “The voices are loud, the accents various, and the result is not harmony – as in the old

¹ Nancy L. Rosenblum, “Pluralism and Self-Defense”, in Nancy L. Rosenblum, Ed., *Liberalism and the Moral Life* (Massachusetts, Harvard University Press, 1989), pp. 207-226.

image of pluralism as a symphony, with each group playing its own instrument (but who wrote the music?); the result is a jangling discord [...]”² Benjamin Barber also employs a similar musical metaphor, but one that reveals a different interpretive approach to pluralism:

Noise is of course a concomitant of democratic politics, and the citizen has nothing to fear from a little high decibel cacophony. But the aim is harmony: the discovery of a common voice. Not unity, not voices disciplined into unison, but musical harmony in its technical meaning. [...] in music, harmony is not a matter of a single voice but of several voices, of distinct notes, which complement and support one another, creating not the ennui of unison but a pleasing plurality.³

It is futile to get caught up in metaphorical entanglement here. Both interpretive approaches can validly be upheld on their own terms. Indeed, in practice, pluralism can be more or less harmonious or acrimonious, depending on the structures that are in place to accommodate its different voices and notes. It is in that accommodation that societal and value-pluralism converge. It is also where the notion of tolerance begins to come into its own.

2.1.2 Tolerance

Tolerance/toleration operates at several levels – individual, group and State (at least).⁴ Tolerance is a child of historical struggles for freedom of religion, but it has matured to outgrow its childhood features.⁵ While still retaining great relevance for religious issues, it is nowadays readily related to a broader range of beliefs, ideas, expressions and (cultural) practices. The focus here will be less on tolerance in interpersonal relations than on tolerance between different societal groups, and especially between the State and different societal groups.

2.1.2(i) Notions of tolerance

Tolerance is a concept of complex, composite coloration: at least seven different shades of tolerance can be identified. These reflect, to a greater or lesser extent, the different intensities of meaning which the term conjures up for different people. Tolerance must begin with awareness; a consciousness of the other (person or opinion); but it must also go further than that. Mere awareness does not imply any degree of engagement with the other; it is still possible to damn him/her with indifference. The next shade of tolerance could therefore be said to be forbearance, which in turn leads on to a form of acceptance in the guise of non-discrimination. From this passivity, a more active form of acceptance – entailing affirmative efforts or measures - can emerge. Its manifestation is as equality. In its turn, equality is a precursor to full respect for the dignity of the other and full respect for the difference of the other.

² Michael Walzer, *On Toleration* (USA, Yale University Press, 1997), p. 96.

³ Benjamin R. Barber, “Liberal Democracy and the Costs of Consent”, in Nancy L. Rosenblum, Ed., *Liberalism and the Moral Life* (Massachusetts, Harvard Uni. Press, 1989), pp. 54-68, at 65.

⁴ In this text, the terms are used interchangeably, although Jürgen Habermas has argued that “in English the word ‘tolerance’ as a form of behavior is distinguished from ‘toleration,’ the legal act with which a government grants more or less unrestricted permission to persons to practice their particular religion.” - Jürgen Habermas, “Intolerance and discrimination”, 1 *I.CON* (No. 1, 2003), pp. 2-12, at pp. 2-3.

⁵ See further, *ibid.*, and Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, in Aernout Nieuwenhuis and Wouter Hins, Eds., *Van ontvanger naar zender: opstellen aangeboden aan prof. mr. J.M. de Meij* (Amsterdam, Cramwinckel, 2003), pp. 89-108.

Michael Walzer has also conceptualised a continuum of toleration, which can be summarised as: “any attitude on the continuum of resignation, indifference, stoicism, curiosity, and enthusiasm”,⁶ but which is preferable to cite more amply:

Understood as an attitude or state of mind, toleration describes a number of possibilities. The first of these, which reflects the origins for religious toleration in the sixteenth and seventeenth centuries, is simply a resigned acceptance of difference for the sake of peace. People kill one another for years and years, and then, mercifully, exhaustion sets in, and we call this toleration. But we can trace a continuum of more substantive acceptances. A second possible attitude is passive, relaxed, benignly indifferent to difference: ‘It takes all kinds to make a world.’ A third follows from a kind of moral stoicism: a principled recognition that the ‘others’ have rights even if they exercise those rights in unattractive ways. A fourth expresses openness to the others; curiosity; perhaps even respect, a willingness to listen and learn. And, furthest along the continuum, there is the enthusiastic endorsement of difference [...].⁷

Even from these two attempts to articulate the full span of tolerance/toleration, it is very clear that the exercise is firmly rooted in subjectivity. It can be taken as a given that all definitions of tolerance would have to comprise the notion of enduring practices or ideas to which one is personally opposed. It is extolled because of the perceived (libertarian) values of self-restraint and of deference to the autonomy of others. But tolerance must be contained within certain limits, for everything that is tolerated contributes to the shaping of the society in which we live.⁸ Otherwise, there would be a danger that what Karl Popper has termed the “paradox of tolerance” would materialise.⁹ According to that paradox, unlimited tolerance leads inexorably to the disappearance of tolerance. Popper explains: “If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them”.¹⁰ Thus, as noted by Umberto Eco, “to be tolerant, one must set the boundaries of the intolerable”,¹¹ an apparently intractable challenge. What is required to meet this challenge is a certain measure of “rational intolerance”.¹²

It is important at this juncture to recall the allusion at the beginning of this section to beliefs, ideas, expression and (cultural) practices as various objects of tolerance. The delineation of tolerable *expression* is centrally important for minorities. Unanimity tends to prove elusive whenever efforts are made to trace the conceptual contours of the right to freedom of expression. While the existence of an impregnable inner zone of inoffensive speech is undisputed, disagreement tends to stymie attempts to fix the outer definitional demarcations of the right. Yet, as Ronald Dworkin has observed, “[I]t is the central, defining, premise of freedom of speech that the offensiveness of the ideas, or the challenge they offer to traditional ideas, cannot be a valid reason for censorship; once that premise is abandoned it is difficult to see what free speech means”.¹³ Thus, this intellectual gauntlet will have to be taken up before any attempts are made to accurately delineate the scope of the right to freedom of

⁶ *Ibid.*, p. 92.

⁷ *Ibid.*, pp. 10-11.

⁸ Alexander Bickel, *The Morality of Consent* (USA, Yale University Press, 1975), p. 74.

⁹ Karl Popper, *The Open Society and Its Enemies (Volume I: The Spell of Plato)* (New York & London, Routledge, 2005), p. 293.

¹⁰ *Ibid.*

¹¹ Umberto Eco, “Tolerance and the Intolerable”, *23 (I&2) Index on Censorship* 47 (1995), at p. 53.

¹² Author’s translation of “rationele intolerantie [van meningen]” - Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, *op. cit.*, at p. 98.

¹³ Ronald Dworkin, *Freedom’s Law* (New York, Oxford University Press, 1996), p. 206.

expression.¹⁴ It has also been observed that: “[E]xtremist speech is the anvil on which our basic conception of free speech has been hammered out”.¹⁵

Leaving aside definitional complexities and controversies for the moment,¹⁶ it can be said that “hate speech” is generally regarded as the cut-off point between permissible and impermissible types of expression. Why should “hate speech” be tolerated? What factors should determine the level of our tolerance? “Is there”, as Ursula Owen asks, “a moment where the *quantitative* consequences of hate speech change *qualitatively* the arguments about how we must deal with it?”¹⁷ How tolerant should society be of extremist speech? The underlying concerns are reminiscent of Popper’s “paradox of tolerance”. Alexander Bickel picks up on these concerns in a stark manner when he warns against excessive tolerance because in an environment “[W]here nothing is unspeakable, nothing is undoable.”¹⁸

2.1.2(ii) Normative articulations of tolerance

Whereas the attainment of tolerance is central goal common to all IGOs active in the realm of human rights protection, it is usually styled in relevant international instruments as a guiding principle rather than as an operative provision. This has much to do with the difficulty of defining such a vague concept. A notable exception in this regard is the Council of Europe’s Framework Convention for the Protection of National Minorities (discussed in detail in Chapter 6.5.1, where it is presented as a case-study of a comprehensive approach to “hate speech”). Article 6, FCNM, places States Parties under a programmatic obligation to promote tolerance and has led to the application of the notion in a variety of practical ways. Nevertheless, the general trend is for international conventions to refer to tolerance merely as a preambular principle, with attempts to explore its actual meaning more likely to arise in instruments that are not legally binding on States. The upshot of all of this is that in practical terms, attempts by IGO texts to explore the substance of the concept are of limited value for the advancement of legal understandings of the meaning of tolerance. UNESCO’s Declaration of Principles on Tolerance (1995), is a case in point.

The Declaration comprises a Preamble and six Articles (“Meaning of tolerance”; “State level”; “Social dimensions”; “Education”, “Commitment to action” and “International Day for Tolerance”). The Preamble merits little critical analysis: as is the wont of preambular sections, it grounds the Declaration proper in relevant principles, international standards and relevant issues. As the Declaration was not drafted as a document purporting to create legal obligations for States, it is somewhat predictable that the language used in its operative part lacks the kind of clinical or technical precision that could legitimately be demanded of a legalistic text. As such, examples of loose usage of terminology will not be subjected to the rigorous analysis applied to legal texts elsewhere in this study. Rather, attention will focus on the spirit of the document and on some of its more useful aspirations and observations.

¹⁴ See T.I. Emerson, *The System of Freedom of Expression* (New York, Random House Publishing Company, 1970), p. 9: “In constructing and maintaining a system of freedom of expression the major controversies have arisen not over acceptance of the basic theory, but in attempting to fit its values and functions into a more comprehensive scheme of social goals. These issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society.”

¹⁵ Lee C. Bollinger, *The Tolerant Society* (New York, Oxford University Press, 1989), p. 4.

¹⁶ These complexities and controversies are dealt with at length in Chapter 6, *infra*.

¹⁷ Ursula Owen, “Hate Speech – The Speech That Kills”, *27(1) Index on Censorship* 32 (1998), at 37.

¹⁸ Alexander Bickel, *The Morality of Consent*, *op. cit.*, p. 73.

Article 1 comprises four paragraphs, which are rather disjointed. Article 1.1 is celebratory of the richness of cultural diversity in the world, “our forms of expression and ways of being human”. It describes tolerance as, *inter alia*, “harmony in difference”, “a moral duty” as well as “a political and legal requirement” and “the virtue that makes peace possible”. These descriptions fail to elucidate the nature of tolerance, however. Article 1.2 points out that “Tolerance is not concession, condescension or indulgence” but that it is “above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others”. It also usefully points to the differentiated levels of application of tolerance, but the way it does so (by stating that tolerance “is to be exercised by individuals, groups and States”) is potentially problematic. Its identification of groups as an intermediate category assumes that groups are structured units or at least that they have representative structures capable of making decisions and taking formal stances that could be characterised as tolerant. It is difficult to imagine how a group *qua* group could exercise tolerance, unless via representative decision-making structures. To hold otherwise would be to assume consensual attitudes among all group members, thereby ignoring inevitable heterogeneity within groups.

Article 1.3 links tolerance to “human rights, pluralism (including cultural pluralism), democracy and the rule of law”. It then correctly states that it “involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments”. A puzzling inclusion in Article 1.4 is the statement that “the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one’s convictions”. Perhaps the intention here was to close some perceived loophole that might have allowed tolerance to be misconstrued as condoning social injustice. The remainder of this paragraph then approximates a description of tolerance: “It means that one is free to adhere to one’s own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one’s views are not imposed on others”.

To synthesise, Article 1, which purports to explain tolerance, does pick up on several key notions developed in the theoretical discussion, *supra*: tolerance can be considered from moral, political and legal perspectives; it is an active attitude that is respectful of the rights and differences of others; it is at home in an interrelated conceptualisation of human rights; it rejects fundamentalism; it recognises the value of the convictions and lifestyles of others.

Article 2 is concerned with one particular level of application of tolerance: the State-level. Basically, the case is made for a favourable enabling environment for the realisation of tolerance. This involves adherence to human rights norms, just laws and enforcement procedures, the availability of social and economic opportunities for everyone on a non-discriminatory basis, social and political inclusion.

The social dimensions of tolerance are explored in Article 3. It is noted that nowadays, “the globalization of the economy” and “rapidly increasing mobility, communication, integration and interdependence, large-scale migrations and displacements of populations, urbanization and changing social patterns” present additional challenges for the realisation of tolerance (Article 3.1). It recognises that tolerance can be promoted by education and the media. It reaffirms some of the socio-economic priorities of the UNESCO Declaration on Race and Racial Prejudice and advocates the use of scientific studies and networking for the advancement of international efforts to promote tolerance.

Article 4 describes education as “the most effective means of preventing intolerance” (para. 1). The importance of rights education is stressed, as is the need for education for tolerance to address the root causes of intolerance. In the same vein, education for tolerance “should aim at countering influences that lead to fear and exclusion of others, and should help young people to develop capacities for independent judgement, critical thinking and ethical reasoning” (Article 4.3). Relevant means for attaining these aims include the improvement of: “teacher training, curricula, the content of textbooks and lessons, and other educational materials including new educational technologies [...]” (Article 4.4).

In keeping with the overall mandate of UNESCO, Article 5 commits States to the promotion of “tolerance and non-violence through programmes and institutions in the fields of education, science, culture and communication”. Article 6 proclaims 16 November as the annual International Day for Tolerance.

The Declaration has a clear patchwork character: it is comprised of conceptual and practical elements as well as sociological ruminations and a measure of attention for State obligations. Its usefulness lies in its exploration of the different ramifications of tolerance and pluralism in a way that is hardly feasible within the strictures of legally-binding instruments. By tracing various strands of tolerance and pluralism, the Declaration therefore contributes to their elucidation. The importance of conceptual clarification cannot be gainsaid, given that, first of all, the concepts of tolerance and pluralism underlie and animate the entire system of human rights protection, and secondly, as already mentioned, attempts to explain the concepts simply are not forthcoming in legally-binding texts in which they are relied upon.

2.2 Towards a notion of comprehensive pluralistic tolerance

Having signalled the limited explanatory value of existing normative articulations of tolerance, the discussion will now continue with an exploration of relevant theories. The term, “pluralism”, is much used and abused. It tends to be bandied about in a variety of contexts – philosophical, political and legal, to name but a few – as an *idée reçue*; with its premises usually taken for granted and seldom explained, much less, questioned. Indeed, the use of the term is bedevilled by a lack of definitional precision and consistency across international instruments and academic literature (and notoriously even within international instruments and in the works of individual authors). These inconsistencies and the despairing confusion which they have generated have been well-documented, not least in the context of freedom of expression and information.¹⁹ Some definitional decortication is therefore in order if we are to disabuse ourselves of prevalent misunderstandings arising from inconsistent applications of this term.

This exploration of “pluralism” will begin with some brief etymological musings; take a philosophical spin and then veer towards a more standard legal analysis of normative provisions in international human rights law.

In its ordinary, everyday usage, “pluralism” is a (value-)neutral term which is purely descriptive of a particular societal state - in this case, a heterogeneous one, in which different groups, often with distinctive cultural identities, espousing different moral values and leading different lifestyles, co-exist. However, at another interpretive level – the one that concerns us

¹⁹ Dietrich Westphal, “Media Pluralism and European Regulation” [2002] EBLR 459-487.

here – the term is vested with an additional, value-laden signification. By acquiring an evaluative moral element, the concept becomes more purposive; more normative. As such, it has alternately been referred to as “moral pluralism”, “value-pluralism”,²⁰ and, with superior clarity, “a pluralism of values”.²¹

Thus conceived and interpreted, the notion of “pluralism” expands laterally in the direction of the adjacent notion of “tolerance”. Taken to its logical ends, this lateral expansion ultimately leads to a kind of “pluralistic tolerance” (also referred to elsewhere as “pluralist toleration”²² – but meaning essentially the same thing) – one of the most powerfully animating principles of the European Convention on Human Rights. Time and again, the European Court of Human Rights has averred that [societal] pluralism has been hard-won over the ages and that it is indissociable with democratic life. In the same vein, it has consistently held that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. The Court’s case-law concerning Articles 9 and 10 have proved very fertile ground for the cultivation of “pluralistic tolerance”.

The notion of pluralistic tolerance does not harbour any ambition to dissolve inter-community differences; rather, as is argued *infra*, its primary concern is to build and consolidate awareness and understanding of inter-community differences. In terms of democratic political theory, it could therefore be characterised as “integrationist” – as opposed to “assimilationist”. Although connotatively sceptical, there is a relevant kern of validity in Frank Michelman’s observations that pluralism involves “the deep mistrust of people’s capacities to communicate *persuasively* to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world”, and that it “doubts or denies our ability to communicate such material in ways that move each other’s views on disputed normative issues toward felt (not merely strategic) agreement without deception, coercion, or other manipulation”.²³ If the reconciliation of particular worldviews is a goal that is conceded to be ultimately unattainable, the default objective becomes the creation of structures and processes which provide for, or at least facilitate, the presentation and discussion of pertinent differences. The airing of such differences in democratic, discursive fora is a laudable societal goal in itself: the democratic merits of the structural and procedural facilitation of disagreement are considerable, if often under-appreciated.²⁴

2.3.1 Minimum moral and ideological commonality

It is of crucial importance to insist that all of the foregoing assumes the (prior) existence of minimal foundations of ideological commonality, without which democratic society simply cannot exist.²⁵ There need not be agreement on all substantive values, but at least on the terms

²⁰ Joseph Raz, *The Morality of Freedom* (New York, Oxford University Press, 1986), pp.

²¹ Isaiah Berlin, “Two Concepts of Liberty”, in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp.166-217, at 217.

²² Joseph Raz, “Free Expression and Personal Identification”, 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 322.

²³ Frank Michelman, “Law’s Republic”, 97 *Yale Law Journal* 1493, 1507 (1988). Also quoted in Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton, Princeton University Press, 1995), p. 128.

²⁴ See further on this point: John Keane, *The Media and Democracy* (UK, Polity Press, 1991), pp. 176, 178 and 179.

²⁵ See also, in this connection, Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London, SAGE Publications, 1995), pp. 20 and 141.

of democratic engagement; an *a priori* commitment by all communities to the animating philosophies and support structures of democratic society. There are many theoretical ways of describing this anterior commitment to the implied terms and conditions of democratic engagement. One could, for example, take a “social contract” style of approach, after Rousseau, or explore the niceties of other variations on the civil compact theme. Although academic literature on this topic is rich and varied and grapples with many problematic questions,²⁶ it need not detain us unduly here. The main point to be stressed is that tolerance expresses “a recognition of common membership that is deeper than these conflicts [i.e., serious conflicts – at the deepest level – about the nature and direction of society], a recognition of others as just as entitled as we are to contribute to the definition of our society”.²⁷

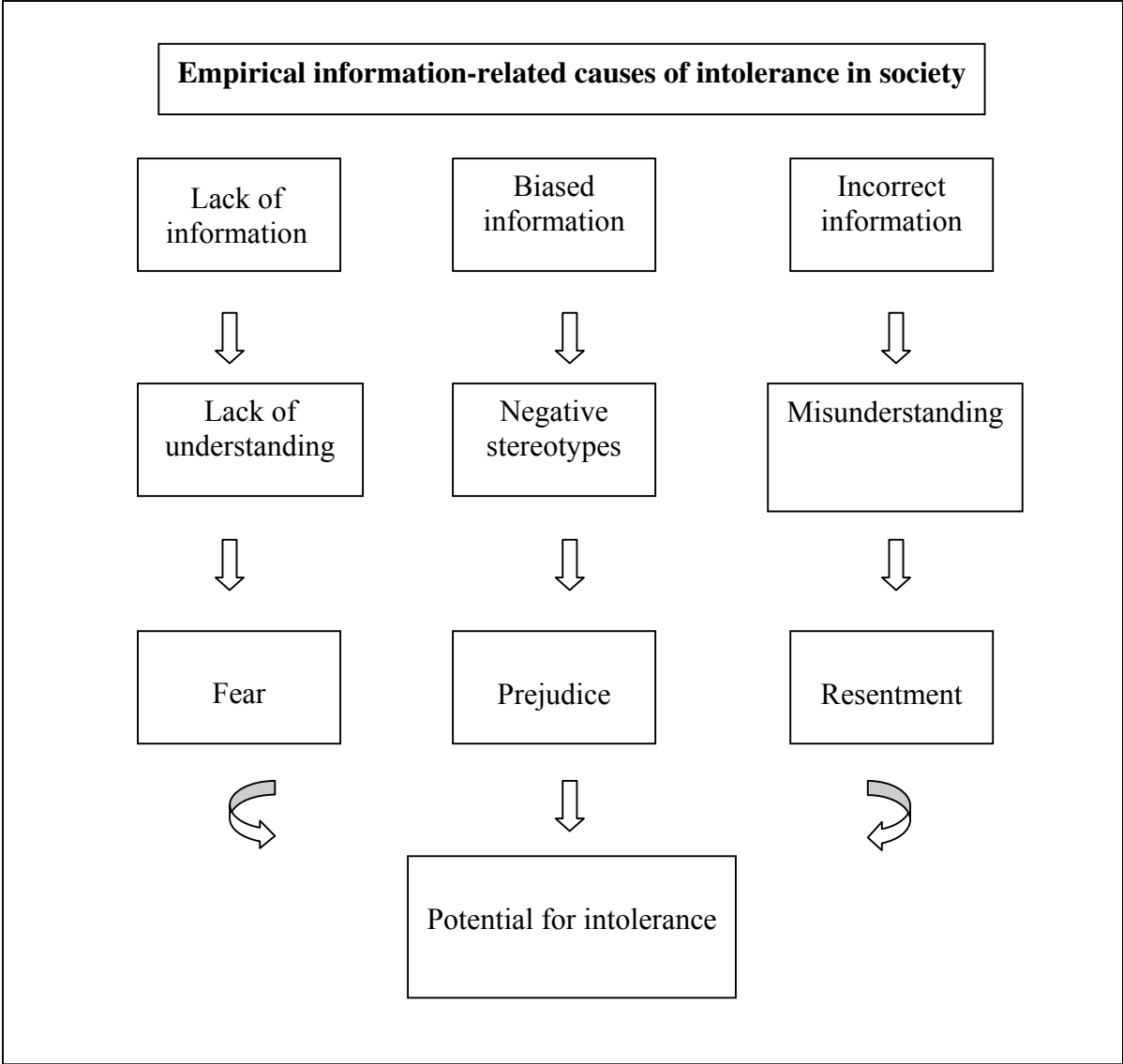
In any society, occasional incidents can strike raw community nerves, cause hurt and clamouring for vengeance. One must resign oneself to the inevitability of such occasional flash-points for society (while, of course, striving to minimise their incidence). One strategy for pre-empting the occurrence of such flash-points is to examine the underlying reasons for the “rawness” of inter-community nerves in the first place.

As discussed at the beginning of Chapter 1, individuals and groups exhibit intuitive uneasiness/distrust/dislike of that which is foreign and unfamiliar to them; that which lies outside the circle of their own experience.²⁸ In philosophy and literature, the irruption of the alien is often discussed in terms of otherness. In religion, the appellation has traditionally been more emotionally charged and (ironically, perhaps) decidedly less charitable. Instinctive distrust of otherness or difference is one of the many reasons for intercommunity stand-offishness and/or hostility. This distrust feeds on lack of information about and consequent comprehension of, the other. The following diagram seeks to empirically set out information-related causes of intolerance:

²⁶ For example, firstly, is it necessary to (formally) ascertain group consent to be bound by the tenets of democracy be ascertained? How could it be ascertained? Would it have to be expressed actively (and if so on a once-off basis or regularly) or could it be inferred (and if so, from positive actions or merely passive behaviour)?

²⁷ T.M. Scanlon, “The difficulty of tolerance”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 187-201, at 193.

²⁸ A disclaimer of subjectivity and empirical non-verifiability applies here.



This diagram illustrates the importance in pluralistic democratic society of the adequacy and availability/accessibility of information and ideas in terms of their quantity, objectivity and accuracy. In this respect, questions of presentation and representation are extremely important. From the perspective of persons belonging to minorities, problematic practices in this regard include: “tokenism; negative stereotyping; unrealistic and simplistic portrayals of their community; negative or non-existent images of their countries or areas of origin”.²⁹ Engagement with these practices and their underlying issues pursuant to international instruments will be examined in detail in Chapter 6 of this study.

The arguments and observations and speculations canvassed above all appear to gravitate towards, and indeed precipitate, the conclusion that greater inter-community communication would help to reduce tensions and to foster intercultural and intergroup understanding and tolerance. This preliminary conclusion – or better, working principle – is consistent with Eric Barendt’s conceptualisation of freedom of expression as not only containing a set of rights,

²⁹ Andrea Millwood Hargrave, Ed., *Multicultural Broadcasting: concept and reality*, Report for the British Broadcasting Corporation, Broadcasting Standards Commission, Independent Television Commission and Radio Authority, November 2002, p. 2.

but also reflecting important public, societal values, especially pluralistic tolerance.³⁰ T.M. Scanlon goes even further by arguing that a commitment to freedom of expression actually implies “certain institutional arrangements as crucial means to those goals”.³¹

If the notion of tolerance espoused here is to be in any way meaningful, then it has to necessarily be stronger than mere indifference to the identities, creeds and worldviews of other groups in society.³² On such a reading, tolerance has to be conscious, informed and considered. This can only be achieved when there is effective communication and engagement between individuals and groups,³³ and as Lee C. Bollinger has noted, “free speech stands symbolically as the gateway to social intercourse”.³⁴ Dialogical interaction across community lines provides various groups with opportunities to articulate and advance their identities, values and viewpoints, as well as commensurate opportunities for hearing and listening to descriptions of the identities, values and viewpoints of other groups (which are often unfamiliar to them). Exchange and reciprocity of perspective are central here; the notion of tolerance involved is necessarily “deliberative”.³⁵

While undoubtedly of importance in instances of individualised communication, the realisation of inter-community communication is also of considerable importance for society in general. Thus, a compelling case can be made for pursuing this objective in structural and systematic terms.³⁶ Furthermore, as posited by Jacob T. Levy: “Whether through the evolved rules or explicit agreement”, different cultural communities “must develop a framework for interaction – the interactions of their members as well as the interactions of their traditions and norms and rules.”³⁷ The significance of Levy’s point lies in the fact that it looks beyond the specifically verbal preoccupation of most analyses of structural intercommunity dialogue. It probes the dialogical character of deeper cultural values and their non-verbal expression. Such an approach acknowledges that communicative channels are merely part of more pervasive societal structures. Bhikhu Parekh advocates a similarly coherent and comprehensive approach: intercommunity dialogue would be structured by what he terms “operative public values” (see further, Chapter 3.1.1), and there is a need to find “new institutional forums” in which such dialogue could be conducted.³⁸

2.3.2 Pluralistic tolerance, democracy and freedom of expression

One of the most compelling arguments in favour of minority rights is the need to safeguard democratic society from what has been termed the “tyranny of the majority”, a term first introduced into the lexicon of political theory by Alexis de Tocqueville. The notion requires little explanation: it involves unchecked or insufficiently checked majoritarian tendencies and preferences which tend to ride roughshod over minority values and interests. Morally

³⁰ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 36.

³¹ T.M. Scanlon, “The difficulty of tolerance”, *op. cit.*, p. 189.

³² See further, s. 2.1.2(i), *supra*, for a more detailed discussion of the various shades of meaning ascribed to “tolerance”.

³³ See further, Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 36.

³⁴ Lee C. Bollinger, *The Tolerant Society*, *op. cit.*, p. 238.

³⁵ See generally: James Bohman, “Deliberative Toleration”, 31 *Political Theory* (No. 6, December 2003), pp. 757-779.

³⁶ This point will be developed significantly, *infra*.

³⁷ Jacob T. Levy, *The Multiculturalism of Fear* (New York, Oxford University Press, 2000), p. 41.

³⁸ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (New York, Palgrave Macmillan, 2006), p. 306.

speaking, the legitimacy of majority rule is contingent on the existence of mechanisms allowing for the effective participation of minorities in deliberative political processes. Only such inclusive participatory practices can provide “the moral basis for binding everyone to the rule ultimately adopted”.³⁹ This point can easily be extended beyond decision-making and also applied to the legitimation of ideas generally through effective participation in public debate. The key consideration is, as John Dewey has noted, that ideas be given the opportunity “to spread and become the possession of the multitude”.⁴⁰ This is of clear relevance for information about minority groups as well as their views and interests. The underlying concern is for “the methods and conditions of debate, discussion and persuasion”.⁴¹

But the workings of democracy can be distorted or subverted at the other extreme of the spectrum too. Unbridled contractarianism could, for instance, lead to vocal and influential minorities dictating in large measure the affairs of state.⁴² Some minority groups might - just like their majoritarian counterparts - try to use the apparatus of state to extend the application of their values society-wide. One must also reckon with what has been termed the “displaced majority syndrome”, a belief among dominant societal groups “that too much attention is being paid to the needs of ethnic communities, which are becoming more assertive”.⁴³ Such tendencies, too, go against the grain of truly democratic ideals. As Isaiah Berlin has put it, “truth and justice” are not “the monopoly of the martyrs and the minorities” and society should “strive to remain fair even to the big battalions”.⁴⁴

Fears of majority tyranny or minority diktat are not confined to the political arena. Given the far-reaching influence of the media on public deliberation and the formation of public opinion, these fears also spill over into the media sector. Power in the media sector can yield significant influence in the political sector. The skewing of public debate is not at far remove from the skewing of political decision-making (see further, Chapter 7). This proximity between official and non-official institutions in the public sphere has already been underlined.

Thomas Emerson’s understated fourth rationale for freedom of expression⁴⁵ – which has eloquently been described by another commentator as “a means of maintaining societal homeostasis and social cohesion”⁴⁶ – deserves special mention at this juncture. It explains the crucial importance of freedom of expression in the triangular relationship linking pluralistic tolerance, democracy and freedom of expression. He explicates:

³⁹ Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 42.

⁴⁰ John Dewey, *The Public and its Problems* (Chicago, The Swallow Press, Inc., 1954), p. 208.

⁴¹ *Ibid.* He describes the “essential need” for “the improvement of the methods and conditions of debate, discussion and persuasion” as “*the problem of the public*” (italics per original).

⁴² See further in this connection: Albert Weale, “Toleration, individual differences and respect for persons”, in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen, 1985), pp. 16-35, at 23 *et seq.*

⁴³ Roger Eatwell, “Why are Fascism and Racism Reviving in Western Europe?”, 65 *Political Quarterly* (No. 3, July/September 1994), pp. 313-325, at 319. It would be interesting to undertake an empirical examination of the extent to which the so-called “multiculturalism of fear” is a contributory factor to the shaping of attitudes and jockeying for power.

⁴⁴ Isaiah Berlin, “Historical Inevitability”, in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp. 94-165, at 151.

⁴⁵ The three other rationales for freedom of expression put forward by Emerson describe freedom of expression as being essential: “as a means of assuring individual self-fulfillment”; as a “process for advancing knowledge and discovering truth”, and “to provide for participation in decision making by all members of society”: Thomas I. Emerson, *The System of Freedom of Expression* (New York, Random House, 1970), pp. 6-7.

⁴⁶ Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998), pp. 65-66.

[...] freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. Moreover, the state at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.⁴⁷

John Rawls also places great store by “the stability of just institutions”, reasoning that such “stability means that when tendencies to injustice arise other forces will be called into play that work to preserve the justice of the whole arrangement”.⁴⁸ In other words, when democracy and justice enjoy firm institutional and societal anchorage, the dangers posed by anti-democratic forces can be more readily absorbed by the system. The strength of the democratic organism produces its own antibodies against anti-democratic infection, without needing to have recourse to more heavy-handed measures such as the antibiotics of coercive or repressive legislation.

2.3 Comprehensive pluralistic tolerance in practice

Just as pluralism – and by extension, democracy – presuppose the absence of discrimination and the existence of effective equality, so too are they predicated on the existence of tolerance. Pluralism demands a certain balancing of majority/minority interests, leading to the tolerance and democratic accommodation of minority interests. This has been recognised by the European Court of Human Rights:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁴⁹

The Court sees pluralism and tolerance very much as being in the service of effective political democracy:

in a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]⁵⁰

⁴⁷ Thomas I. Emerson, *The System of Freedom of Expression*, *op. cit.*, at 7. See also, for a fuller exposition of this rationale for freedom of expression, Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York, Random House, 1966).

⁴⁸ John Rawls, *A Theory of Justice (Revised Edition)* (USA, Harvard University Press, 1999), p. 192.

⁴⁹ *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

⁵⁰ *Steel & Morris v. United Kingdom*, Judgment of the European Court of Human Rights (Fourth Section) of 15 February 2005, para. 89.

The precepts of pluralism and tolerance are also of central relevance to other rights and interests that are themselves crucial for the assertion of minority identities, such as culture and language, and religion. As regards culture and language, it has been noted that:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.⁵¹

The foundational importance of freedom of religion for democratic society cannot be gainsaid. The Court has repeatedly held that the “pluralism indissociable from a democratic society, which has been dearly won over the centuries depends on it”.⁵² However, solutions as to how potentially competing interests ought to be balanced are not always self-evident. Pluralism entails diversity and divergence, which in turn mean that the balancing exercise can often involve a certain amount of antagonism.⁵³ To continue with the example of freedom of religion:

The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country’s problems through dialogue, even when they are irksome⁵⁴

Inherent in the protection and promotion of public debate and dialogue (especially concerning “irksome” issues or problems) is the risk that falsehoods will be floated and malice propagated. However, this is all part of the democratic experiment;⁵⁵ the cut and thrust of debate that is free, robust and uninhibited.⁵⁶ As stated in the *Handyside* case, information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broadmindedness” that underpin “democratic society”.⁵⁷ Thus, the catch-cry of consumers, “let the buyer beware”, is equally *de rigueur* in the domain of freedom of expression and information. The poet e.e. cummings has astutely extended the application of this slogan: “democ/ra(caveat emptor)cy”.⁵⁸

The purpose of this sub-section is merely to present a short selection of different instances on which the European Court of Human Rights has engaged with the notions of pluralism and

⁵¹ Article 2, UNESCO Universal Declaration on Cultural Diversity.

⁵² *Hasan & Chaush v. Bulgaria*, para. 60.

⁵³ *Kokkinakis v. Greece*, para. 33; *Metropolitan Church of Bessarabia and others v. Moldova*, para. 123; *Hasan & Chaush v. Bulgaria*, para. 78; *Serif v. Greece*, para. 49; *Agga v. Greece*, paras. 53, 56; *Manoussakis v. Greece*, para. 44; *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 93.

⁵⁴ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 93.

⁵⁵ Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

⁵⁶ Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵⁷ *Handyside v. United Kingdom*, *op. cit.*, para. 49.

⁵⁸ e.e. cummings, “a salesman is an it that stinks Excuse”, in G.J. Firmage, Ed., *E.E. CUMMINGS COMPLETE POEMS 1904-1962* (New York, Liveright, 1994), at p. 549.

tolerance.⁵⁹ Further examples of such engagement with these concepts are recurrent throughout Chapter 3.

Conclusions

Pluralism and tolerance are complex concepts. It is very important to engage with their conceptual complexity in order to clarify precisely what is involved when they are invoked in international instruments. Such invocations tend to occur as preambular rather than operative provisions. As such, they serve as guiding principles which help to shape the interpretive context of human rights generally. The two concepts are brought together in this analysis and described as pluralistic tolerance, which in turn is presented as an “operative public value”. To style pluralistic tolerance as an “operative public value” is to acknowledge the diverse practical implications of its conceptual complexity. It is also to articulate the actual approach of the European Court of Human Rights to pluralistic tolerance in democratic societies. This approach involves an appreciation of the societal benefits of vigorous debate, assured by effective communicative rights, equitable deliberative structures and processes, and viable communicative opportunities, including for persons belonging to minorities. This approach also involves engagement with minorities and their rights at the societal level and not in a compartmentalised fashion. Minorities are in a dialectical and dialogical relationship with other groups in society and the validation of their rights and interests need to be realised in that broader, integrated perspective.

It is the very essence of pluralistic tolerance that the expression of differences in values, beliefs and opinions be tolerated – subject to certain limits elaborated in accordance with the abuse of rights doctrine. Pluralistic tolerance must not be understood as a passive attitude, but as the active recognition of the need for democratic society to foster the expression of difference. It is rendered “comprehensive” when it is meaningfully applied across the whole spectrum of human rights (see further, Chapter 3). A key purpose of pluralistic tolerance is to prevent the curbing or chilling of public debate. Intolerant attitudes, or even genuine (but intensely subjective) grievances, should not be allowed to inflate restrictions on the right to freedom of expression that are enshrined in international law and (narrowly) interpreted by officially-designated authoritative bodies. Pluralistic tolerance must therefore serve as a brake on any illegitimate erosion of the right to freedom of expression. At the same time, it must also uphold other rights (eg. non-discrimination, participation, etc.) in order to ensure that any expression that does not fall under the limitations permitted by international law, but is nevertheless considered objectionable or offensive by discrete groups in society, can be vigorously contested on equitable terms of engagement.

The scrutiny and explication of the above considerations provided in this Chapter aim to offset the incantatory nature of invocations of pluralism and tolerance in international instruments. The analysis reveals that the theories underlying relevant provisions in international instruments are more multi-dimensional, and their implications more far-reaching, than is often appreciated. As an operative public value, the converged notion of pluralistic tolerance generally needs to be addressed in a more serious and focused way than heretofore. This demands renewed reflection on effective strategies for upholding and operationalising relevant values. It is particularly pertinent to enquire about the nature and extent of the obligations that such operationalisation would entail for States authorities and

⁵⁹ See further in this connection, Aernout Nieuwenhuis, “The Concept of Pluralism in the Case-Law of the European Court of Human Rights”, *European Constitutional Law Review*, 2007-3, pp. 367-384.

also for third parties, especially the media. Through its elucidation of the notion of pluralistic tolerance, this Chapter paves the way for a detailed examination of these questions in Chapter 6.

Chapter 3 – Substance of selected minority rights

- 3.1 Conceptual framework of human rights
 - 3.1.1 Interdependence of human rights
- 3.2 Added value of minority dimension to human rights
 - 3.2.1 Non-discrimination/Equality
 - 3.2.2 Participation in public life
 - 3.2.3 Education
 - 3.2.4 Culture
 - 3.2.5 Religion
 - 3.2.6 Language

*“Il faut que ça hurle par l’ensemble”¹
- Gustave Flaubert*

Introduction

This chapter emphasises the overall coherence of all human rights as well as their interconnectedness. This is the interpretive context in which the interplay between the rights of persons belonging to minorities and the right to freedom of expression must be developed. It looks, in particular, at the added value of minority rights to a select number of rights with which the right to freedom of expression and minority rights enjoy a high level of valency: non-discrimination/equality, participation, education, culture, religion and language. This exploration begins, in each case, at a general level explaining their conceptual underpinnings and tracing their development under international law. It then proceeds, again in each case, to a sharper focus on minority-specific features and applications of the right(s) in question. The specific importance of each of these rights within the freedom of expression/minority rights interface will then be addressed at various stages in the remainder of the thesis, as appropriate.

3.1 Conceptual framework of human rights

3.1.1 Interdependence of human rights

The conceptual framework chosen for this thesis is set out by the Vienna Declaration.² Article 5 of the Declaration forcefully states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States,

¹ This phrase was used by Gustave Flaubert to describe one of the main challenges he faced in creating the famous “Comices” scene in his *magnum opus*, *Madame Bovary* (Deuxième partie, Chapitre VIII, pp. 166 *et seq.* (France, Livre de poche, 1983). The scene was meticulously constructed by Flaubert with great intensity over a prolonged period of time. Flaubert, who was famous for his perfectionism, refers to the experience in a letter to Louise Colet, dated 12 October 1853: “[...] Si jamais les effets d’une symphonie ont été reportés dans un livre, ce sera là. Il faut que ça hurle par l’ensemble, qu’on entende à la fois des beuglements de taureaux, des soupirs d’amour et des phrases d’administrateurs. Il y a du soleil sur tout cela, et des coups de vent qui font remuer les grands bonnets. [...]” – *ibid.*, “Notes”, at p. 455.

² World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993).

regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

To insist on the interdependent and inter-related character of all human rights is not to deny that in practice, the exercise of various rights in certain situations can generate certain frictions, eg. the right to freedom of expression and the right to be free from racial discrimination. Rather, it is to insist on the presumptive coherence of rights.³ Such an integrated conceptualisation of human rights facilitates the exploration of how other rights relate to the right to freedom of expression and minority rights.

The great *forte* of an approach to human rights that is based on their “universal, indivisible and interdependent and interrelated” character is that it is even-textured. To approach a particular problem, eg. racism, from one or two specific angles, eg. non-discrimination and protection of human dignity, entails a risk that other harms and remedies will not be adequately considered. An integrated approach to human rights, however, reduces the risk of particularism or sectionalism and their attendant limitations. It could be argued, for example, that an integrated human-rights approach to racism would not only emphasise protection against prejudice, discrimination and violence, but also promote “voluntary identification based on shared culture” and indigenous rights.⁴ Such promotional strategies are not precluded by a sectional approach to racism (indeed they are already in evidence in ICERD, for example), but an integrated human-rights approach is *prima facie* more accommodating of such strategies because of its recognition of the continuity between negative and positive rights.

The universal character of rights implies that minority rights are part of a broader scheme and cannot be considered or developed in isolation. To translate this somewhat abstract argument into practical terms: this means that the development of minority rights is conditioned by its dialectic relationship with “majority” rights.⁵ The rights of one group in society cannot presumptively override those of another group. The promotion of rights for one group must reckon with consequences for rights of other groups. As already noted, in s. 2.4, *supra*, the European Court of Human Rights has stated:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁶

Another adjective frequently applied to human rights – most famously, perhaps, in the first preambular sentence of the Universal Declaration of Human Rights – but which is not mentioned in Article 5 of the Vienna Declaration, is “inalienable”. It is important to recall its meaning and relevance at this juncture. It means that as a matter of principle, human rights cannot be taken away from their holders (i.e., everyone), either by States authorities or by third parties. Limitations on particular rights can, of course, be legitimate in certain circumstances, but the importance of insisting on the inalienability of rights is to emphasise their presumptive primacy and the restricted application to be given to permissible limitations.

³ For a detailed conceptual exploration of this notion, see: Rolf Künneemann, “A Coherent Approach to Human Rights”, 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342.

⁴ Michael Banton, *The International Politics of Race*, *op. cit.*, at p. 187.

⁵ Michael Banton, *The International Politics of Race*, *op. cit.*, at p. 170.

⁶ *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

Central to this conceptualisation of human rights are the values of “pluralism, tolerance and broadmindedness”,⁷ which are prerequisites of democratic society (as consistently held by the European Court of Human Rights). These are the kind of values described by Bhikhu Parekh as “operative public values”, i.e., those values “that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members”, and which “constitute the moral structure of its public life and give it coherence and stability”.⁸ Parekh’s elaboration of the notion of “operative public values” furnishes us with an immensely helpful theoretical and practical model for our discussion of pluralistic tolerance in Chapter 2.3.1. Moreover, the model is relied upon consistently throughout the remainder of the thesis.

3.2 Added value of minority dimension to human rights

The conceptualisation of human rights as an integrated, systemic whole reinforces the recognition that “the very same values behind universal human rights require specific attention and protection in respect of members of minorities”.⁹ However, the commonality of underlying values does not imply that the strategies adopted for the protection and promotion of those values will be similarly congruent. These observations are the inevitable corollaries of the dual nature of minority rights, which comprise individual and collective aspects.

In figurative terms, minority rights can aptly be described as offshoots from individual human rights. As was seen in the previous section, provisions for minority rights in positive international law stress that they stem from central human rights principles and that they include the panoply of human rights recognised internationally. While this tendency has resulted in some redundancies in the restatement of certain rights, restatement is – of itself – not necessarily an unwelcome feature. By reiterating that a particular right also applies to minorities could be tantamount to stating that it is likely to be exercised differently by members of minorities and other individuals in society. However, stemming from, and reaching further than, individual human rights *simpliciter*, minority rights yield added value and should be regarded as human rights “plus”.¹⁰ At the very least, minority rights should serve the purpose of clarification, reaffirmation and recalibration of existing rights *vis-à-vis* persons belonging to minority groups. In some cases, they should also expand existing rights or identify new areas of application, most importantly for rights specifically requiring communal exercise. This can often imply certain affirmative obligations for States. These considerations are important when assessing whether the right to freedom of expression of persons belonging to minorities is exercised effectively.

This chapter examines the added value of a minority dimension to the following rights:

- (i) Non-discrimination/Equality
- (ii) Participation in public life
- (iii) Education

⁷ *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

⁸ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.

⁹ Martin Scheinin, “Minority rights: additional rights or added protection?”, in Morten Bergsmo, Ed., *Human Rights and Criminal Justice for the Down-trodden: Essays in Honour of Asbjorn Eide* (Leiden/Boston, Martinus Nijhoff Publishers, 2003), pp. 486-504, at 493.

¹⁰ See further, John Packer, “On the Content of Minority Rights”, *op. cit.*, pp. 153 *et seq.*

- (iv) Culture
- (v) Religion
- (vi) Language

These rights¹¹ have been selected for closer examination because of their propensity for interaction with the right to freedom of expression, which is the focus of Chapter 4. The order in which the above-listed rights have been enumerated is informed by a rough distinction between process- and object-oriented rights. The former category is concerned with enablement and empowerment whereas the latter prioritises results. Rights to non-discrimination/equality and participation help to define the matrix in which cultural, religious and linguistic rights can be realised. Educational rights straddle both categories, as they are alternately a means to an end and an end in themselves, depending on accentuation.

Effective provisions of non-discrimination and equality are prerequisites for the attainment of pluralism in society, as true pluralism cannot be said to exist if (individuals belonging to) certain groups suffer from discrimination or are denied equality of opportunity, equality before the law, etc. An effective right of participation in public life for all sections of society is an important means of perpetuating equality of opportunity and safeguarding pluralism. Effective participation in all aspects of public life ensures that a plurality of views and interests necessarily inform decision-making processes.

From a functional perspective, education also has a significant role to play in guaranteeing pluralism in society. This is achieved by ensuring that the principles of neutrality and impartiality are upheld in the educational sector and by making it a sector that is receptive to and representative of all groups in society. As stated by the European Court of Human Rights, the objective of Article P1-2, ECHR (right to education) is to safeguard “the possibility of pluralism in education which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention”.¹² This creates an obligation for States to “take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner”.¹³ The principles of non-discrimination and equality and of participation all contribute to the realisation of this goal, thereby demonstrating how the purposes and effects of all three of these process-oriented rights are closely intertwined.

3.2.1 Non-discrimination/Equality

UNITED NATIONS

The conceptual genesis of minority rights can be found in concerns for the free and full enjoyment by all individuals of the correlated rights of non-discrimination and equality. As such, these twin-rights have been identified as “the starting point of all other liberties”.¹⁴ However, non-discrimination and equality are much more than a mere point of departure, or

¹¹ The classical civil and political rights of freedom of association and freedom of expression may at first glance appear conspicuous by their absence (as separate categories). However, freedom of association is treated in a number of the above categories (eg. culture, religion, participation, etc.), and freedom of expression is the exclusive focus of the next chapter in this thesis.

¹² *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, Judgment of the European Court of Human Rights of 5 November 1976, para. 50.

¹³ *Ibid.*, para. 53.

¹⁴ Hersch Lauterpacht, quoted in B.G. Ramcharan, “Equality and Nondiscrimination” in Louis Henkin, Ed., *The International Bill of Rights* (Columbia University Press, New York, 1981), pp. 246-269, at 247.

basic premise for the enjoyment of other rights. They are also an end-goal in themselves. They are alternately a road-map and a destination.

The difference between non-discrimination and equality can at times appear nuanced. Whereas the former could conceivably be passive in form, a certain activism is generally demanded by the latter. Moreover, non-discrimination is a prerequisite for the achievement of equality and could be understood as being conceptually incorporated in the principle of equality.¹⁵ On another reading, one could describe non-discrimination and equality as the negative and positive statement of the same principle, thereby emphasising their yin-and-yangish character. In any event, equality itself comprises various conceptual gradations. On the one hand, it can be superficial, nominal, legal or formal, while on the other hand, it can be (f)actual, real, effective or substantive.

The *Minority Schools in Albania* case introduced the notion of establishing “perfect equality” between members of minorities and other nationals of a State “in every respect”.¹⁶ The Court later qualified this concept of equality as “an effective, genuine equality”.¹⁷ “Equality in law”, it was held, “precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”.¹⁸ The same court further contributed to the notion of equality in another judgment, when it held that: “There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law”.¹⁹

Another important concept in the context of equality/non-discrimination is that of “indirect discrimination”, which can be deemed to occur “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of that aim are appropriate and necessary”.²⁰ Although the specific term “indirect discrimination” is – surprisingly - not commonly used in UN and CoE instruments (which tend to rely instead on terms such as *de facto* (as opposed to *de jure*) discrimination), the notion itself is well-established and substantive conceptual overlap exists, notwithstanding terminological differences.

As alluded to *supra*, provisions for non-discrimination and equality in the enjoyment of human rights not only abound in international human rights law, they create the matrix in which it functions. They touch and affect all other rights and in that sense can be described as being truly tentacular.²¹ Some of the relevant provisions in international law are styled in

¹⁵ Note, however, that Ramcharan explains that the non-discrimination clauses in the UN Charter, UDHR and ICCPR were conceived of in order to supplement “the affirmative mandate of equality”, a line of thinking that implies

¹⁶ *Minority Schools in Albania*, Permanent Court of International Justice Advisory Opinion, p. 17.

¹⁷ *Ibid.*, p. 19.

¹⁸ *Minority Schools in Albania*, *op. cit.*, p. 19.

¹⁹ *Questions relating to Settlers of German Origin in Poland*, Permanent Court of International Justice Advisory Opinion No. 6 of 10 September 1923, Series B, p. 24.

²⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities* L 180/22 of 19 July 2000, para. 2(b). The corresponding definition of “direct discrimination” (para. 2(a)) reads: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.

²¹ This point is very clearly illustrated in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which is dotted with explicit references to the applicability of the principle of non-discrimination (and to a lesser extent “equality”): Article 2.1, 2.5, 3.1, 4.1.

general terms,²² whereas others are specifically intended for application to given themes.²³ The level of generality or specificity of relevant provisions is frequently determined by the nature and objectives of the convention or instrument in which they are to be found. However, not only are the principles of non-discrimination and equality all-pervasive, they are now widely recognised as forming part of international customary law and it has also been argued that “it would be difficult to deny them the character of *jus cogens*, at least as regards consistent patterns of comprehensive violations”.²⁴

The UN Charter strives for the realisation of human rights for all “without distinction as to race, sex, language, or religion”.²⁵ The kern of this idea is expanded significantly in the UDHR to become “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. This formula was replicated in the sister covenants of 1966 – the ICCPR and the ICESCR, albeit with one minor terminological difference: Article 2(1), ICCPR,²⁶ repeats the term “distinction”, whereas Article 26, ICCPR,²⁷ and Article 2(2), ICESCR,²⁸ both employ “discrimination”. The difference does, however, appear to be merely semantic, and of no conceptual or substantive significance. The drafting history of the ICCPR reveals that the proponents of both terms were motivated by the conviction that their respective lexical preferences were more comprehensive than one another and would afford the highest level of protection.²⁹ Clearly, a purposive interpretation of the relevant provisions in both Covenants is therefore called for.

What is of greater significance, however, is that the UDHR provided a more muscular guarantee for the right than that provided by the Charter. The combination of the phrases, “of any kind” and “such as”, leaves no doubt as to the non-exhaustive nature of the provision. The examples given are clearly only illustrative and the list is open-ended. Further corroboration of this view can be found in an examination of relevant provisions of the CRC. Elaborated more than 20 years after the covenants of 1966, Article 2, CRC, reflects the intervening development and further consolidation of notions of discrimination. It adds “ethnic origin” and “disability” to the list of examples of impermissible grounds for discrimination contained in earlier UN conventions.

²² The United Nations Charter (Arts. 1, 55), the Universal Declaration of Human Rights (Art. 2); ICCPR (Arts. 2(1), 3, 26); ICESCR (Arts. 2(2), 3).

²³ Eg., ICERD, CEDAW, UNESCO Convention against Discrimination in Education.

²⁴ B.G. Ramcharan, “Equality and non-discrimination”, *op. cit.*, p. 269.

²⁵ Articles 1(3) and 55(c).

²⁶ Article 2(1), ICCPR reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁷ Article 26, ICCPR reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸ Article 2(2), ICESCR reads: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁹ The relevant discussion and drafting history are both explored in B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, pp. 251 and 258-259. See also the relevant sections of Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.* and Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, *op. cit.*

Certain sub-groups of minorities can find themselves the victims of double discrimination. For instance, “minority women may be subjected to special forms of ‘gendered racism’”,³⁰ combining various forms of sexism with various forms of racism. This is also referred to as intersectionality – the zone or process of intersection of different types of discrimination. It can exist, *mutatis mutandis*, in respect of other (idiosyncratic) characteristics of minority groups, including religion, language and culture.³¹ When there is a concatenation of several of these characteristics and/or unfavourable circumstances, the discriminatory effect can be considerably exacerbated, amounting to more than a mere sum of its parts. The resultant multiplication of racist and other kinds of discriminatory practices lends further credence to the view that regular non-discrimination and equality provisions in law do not suffice to provide adequate protection for the rights of individual members of minority groups. In consequence, there is a real and constant need for non-discrimination and equality provisions to attain high levels of specificity in certain areas of their application.

As already demonstrated *supra*, any terminological differences between relevant provisions of the ICCPR and the ICESCR are negligible. Similarly, notwithstanding the different nature of both Covenants (in terms of their overall focus and the nature of the State obligations created under each), the non-discrimination and equality provisions of each are of imperative force. The essential difference between Article 2(1), ICCPR and Article 26, ICCPR, is that the scope of the former is limited to the rights set out in the Covenant, whereas the latter is a free-standing or non-accessory right and therefore applies even more broadly. Although the general legal obligations on States pursuant to the ICESCR are mainly obligations of conduct (as opposed to obligations of result) regarding the progressive realisation of economic, social and cultural rights, the Covenant’s non-discrimination provisions create an obligation of “immediate effect”, thereby testifying to its imperative nature.³²

Another *forte* of the non-discrimination provisions of the ICCPR is that the interpretation of very term “discrimination” is far-reaching, just like the grounds on which it can be invoked. According to the UN Human Rights Committee, the term 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 freedoms.³³

Affirmative action³⁴/special measures³⁵ is/are often warranted in order to ensure real equality between members of minority and majority groups within a society. According to General Comment 23, affirmative action is countenanced by Article 27, ICCPR, notwithstanding the negative formulation of the “right” guaranteed by the article.³⁶ States parties are under

³⁰ Teun A. Van Dijk, *Racism and the Press*, p.29.

³¹ Yoram Dinstein has identified six dimensions to the interplay between religion and discrimination. See further: Yoram Dinstein, “Freedom of Religion and the Protection of Religious Minorities”, in Yoram Dinstein and Mala Tabory, Eds., *The Protection of Minorities and Human Rights*, *op. cit.*, pp. 145-169, at 165-168.

³² CESCR General Comment No. 3 – The nature of States parties obligations (Art. 2, para. 1 of the Covenant), para. 1.

³³ General Comment No. 18, para. 7.

³⁴ Also referred to, on occasion, as “reverse discrimination,” or, “the notion that a minority sometimes has to be favoured at the expense of the majority if such groups are to achieve genuine equality.” - P. Dunay, *op. cit.*, at p. 36.

³⁵ This term is used in a number of international human rights treaties, eg. ICERD (see, specifically, Article 1.4 and 2.2). Again, the term means positive measures designed to offset prior inequality.

³⁶ See General Comment No. 23, paras. 6.1, 6.2, 9.

specific obligations to introduce and give effect to the positive measures of protection which are required for the vertical and horizontal implementation of the right. Affirmative action often necessitates positive measures which may imply differential treatment, provided that the rationale for such differentiation is reasonable and objective. The legitimacy of this differentiation is also subject to the further proviso that “the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups.”³⁷ Ian Brownlie continues: “even when the different treatment is not discriminatory in a legal sense, the modalities, the method of implementation may be unreasonable and hence discriminatory at the second level”.³⁸

As with other rights set forth in the ICCPR, according to the principle of equality, States Parties are sometimes required to take affirmative action “in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.³⁹ Specific corrective action directed at situations where “where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights”.⁴⁰ Measures adopted towards those ends - and which in practice do not go further than serving those ends - are considered as forms of “legitimate differentiation” for the purposes of the ICCPR. Indeed, it could be posited that the limits on the scope of “legitimate differentiation” mirror the inherent limits of the principle of equality itself, which does not extend to equality of result.

As submitted by B.G. Ramcharan, distinctions based on two kinds of differences are “generally considered admissible and justified” under the principle of equality: “differentiation based on character and conduct imputable to the individual for which he may be properly held responsible”, and (ii) “differentiation based on individual qualities, which in spite of not being qualities for which the individual can be held responsible, are relevant to social values and may be taken into account”.⁴¹ Among the former, Ramcharan counts industriousness, carefulness, decency, merit, lawfulness (and the opposites of each of the foregoing). Among the latter, he places physical and mental capacities and talent. The interaction of such morally-acceptable bases for distinction with equality of opportunity does not necessarily lead to equality of result. In the context of such forms of transformative interaction, it would seem immoral and also overly paternalistic to try to pursue an objective of equality of result.

ECHR

The non-discrimination provisions of the ECHR have already been considered *supra* and will not be re-assessed here.⁴²

FCNM

³⁷ Ian Brownlie, “Rights of Peoples in International Law,” in James Crawford, Ed., *The Rights of Peoples*, p. 10.

³⁸ *Ibid.*, p. 10.

³⁹ General Comment 18, para. 10. See also, B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, p. 255.

⁴⁰ *Ibid.* The Human Rights Committee has further stated: “Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population”, *ibid.*

⁴¹ B.G. Ramcharan, “Equality and Nondiscrimination”, *op. cit.*, p. 253.

⁴² See further, *infra*. The analysis *supra* focuses on how the non-discrimination and equality provisions relate specifically to persons belonging to national minorities. More ample treatment of the relevant provisions would be beyond the scope of this thesis.

As with the other international conventions already considered, the veritable cornerstone of the FCNM is its non-discrimination and equality provisions, the most important of which is Article 4, although Article 6(2)⁴³ also merits mention. Article 4 reads:

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

This, too, is a cross-cutting provision,⁴⁴ and one of the Convention's guiding principles. It places particular emphasis on the notion and objective of "full and effective equality" and contemplates positive measures for the attainment of this goal. It is applicable across the entire spectrum of public life, but also remains sensitive to the rights of the majority too. It shapes – and limits – any positive measures to the specific goal of achieving equality for minorities. Article 4 therefore calls for any relevant measures to respect the principle of proportionality and requires that they "do not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality".⁴⁵

EUROPEAN UNION

The main provision of the Charter of Fundamental Rights of the European Union dealing with non-discrimination is Article 21.⁴⁶ It reads:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 21 of the Charter is modeled on relevant UN and ECHR provisions, as well as the non-discrimination provisions of EU law. The Treaty of Amsterdam (1997) introduced an anti-discrimination article into the EC Treaty. The new Article 13 became:

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
[...]⁴⁷

⁴³ Article 6(2) reads: "The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity."

⁴⁴ See further, Duncan Wilson, "Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)", *op. cit.*

⁴⁵ Explanatory Report to the FCNM, *op. cit.*, para. 39.

⁴⁶ See further: Linos-Alexandre Sicilianos, "Article 21 – Non-discrimination", in *The Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, pp. 188-196.

It is clear that Article 13(1) does not have direct effect and merely provides a basis for “appropriate action”. Thus, after the entry into force of the Amsterdam Treaty in 1999, the European Commission introduced a package of measures designed to give effect to Article 13.⁴⁸ The package comprised two proposals for directives and a proposed action plan. Those proposals matured into, and were adopted as, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,⁴⁹ and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.⁵⁰ The stated purpose of the each is to “lay down a framework for combating discrimination”, on certain grounds, “with a view to putting into effect in the Member States the principle of equal treatment”.⁵¹ In the former Directive, the grounds in question are “of racial or ethnic origin”, whereas in the latter Directive, the grounds are “of religion or belief, disability, age or sexual orientation”. The only other difference in wording between both Directives’ first articles is the latter Directive’s stipulation that the discrimination which it targets concerns “employment and occupation”. As such, its focus is confined to particular settings. The Racial Discrimination Directive, on the other hand, has a broader application. The two Directives were conceived of as part of the same package, as already mentioned, and their drafting processes intertwined and they were ultimately adopted within a few months of one another.⁵² As a result of this conceptual, practical and temporal compression, it is not surprising that the Directives should be coherent (relying on the same understandings of basic concepts like direct and indirect discrimination) and complementary (eg. in terms of their focus on different sets of grounds of discrimination).

3.2.2 Participation in public life

UNITED NATIONS

The right to participation is another right that is process-, rather than object-oriented. It is ostensibly more concerned with means to ends than the ends themselves. While the right to participation is well-established in general international human rights law,⁵³ it is a relatively recent addition to the catalogue of rights of persons belonging to minorities. The right to

⁴⁷ Note: Article 13 has since been amended by the Treaty of Nice; the text quoted here is from the post-Nice consolidated version of the Treaty.

⁴⁸ See, by way of background, Jan Niessen and Isabelle Chopin, “The Starting Line and the Racial Equality Directive”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden/Boston, Martinus Nijhoff Publishers, 2004), pp. 95-110.

⁴⁹ OJ L 180/22, 19 July 2000.

⁵⁰ OJ L 303/16, 2 December 2000.

⁵¹ See Article 1 of both Directives.

⁵² See further: Adam Tyson, “The Negotiation of the European Community Directive on Racial Discrimination”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, *op. cit.*, pp. 111-130.

⁵³ See, by way of example: Articles 21 (participation in the government of one’s country; equal access to the public service), 27 (participation in cultural life), UDHR; Article 5, ICERD (elections, government, public affairs and cultural activities); Article 25, ICCPR (citizens – public affairs, elections); Article 15, ICESCR (cultural life). For a more complete listing, see: Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 72. See also: Henry Steiner, “Political Participation as a Human Right”, 1 *Harvard Human Rights Yearbook* (Spring 1988), pp. 77-134; Gregory Fox, “The Right to Political Participation in International Law”, 17 *Yale Journal of International Law* (1992) 539; Steven Wheatley, “Minority Rights, Power Sharing and the Modern Democratic State” in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 199-216.

participation comprises numerous different ramifications, many of which have special significance for minority groups. It is, for instance, a crucial way of ensuring that “representatives of persons belonging to minorities can participate in public decisions that generate space for the maintenance and development of minority identities”.⁵⁴ Although the particular minority dimension to the right to participation has not tended to heavily inform more general considerations of the right, some bridges have nevertheless been built between the general and the specific.

By way of illustration, Article 25, ICCPR, guarantees the right (of citizens) to: (a) “take part in the conduct of public affairs, directly or through freely chosen representatives”; (b) “vote and be elected at genuine periodic elections” by “universal and equal suffrage” and by secret ballot; (c) “have access, on general terms of equality, to public service in his country”. In its General Comment 25 elaborating on the content of the right contained in Article 25, ICCPR, the UN Human Rights Committee specifically states: “Information and materials about voting should be available in minority languages”.⁵⁵ It calls for positive measures to be taken “to overcome specific difficulties, such as illiteracy, *language barriers*, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively”.⁵⁶ However, no mention is made of facilitative measures for minority-language use in public affairs or in the public service sector.

Further elucidation of the scope of the right to participation, particularly as regards persons belonging to minority groups, can be gleaned from relevant jurisprudence of the UN Human Rights Committee. In *Mikmaq people v. Canada*,⁵⁷ the HRC found that the Canadian Government’s failure to invite representatives of the society to constitutional conferences on aboriginal matters – in that particular instance – was not unreasonable as “[A]rticle 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs.”⁵⁸ It held that Article 25(a) does not mean that “every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives”; rather “It is for the legal and constitutional system of the State party to provide for the modalities of such participation”.⁵⁹ It is disappointing that the HRC did not find a violation of Article 25 on the facts of the instant case as the theme of the constitutional conferences to which representatives of the Mikmaq tribal society were not invited was aboriginal matters – a topic which would *prima facie* have been of great relevance to members of the society. Although the right of minorities to participation has not fared much better when considered in the context of Article 27, ICCPR, the HRC has consistently attached considerable importance to efforts made by State authorities to consult with minorities when decisions liable to affect their lifestyle or livelihood are due to be taken.⁶⁰

⁵⁴ Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, *op. cit.*, p. 71.

⁵⁵ Para. 12, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), CCPR/C/21/Rev.1/Add.7, adopted on 12 July 1996.

⁵⁶ (emphasis added) *Ibid.*

⁵⁷ Communication No. 205/1986, *Mikmaq people v. Canada*, views adopted on 4 November 1991.

⁵⁸ *Ibid.*, para. 5.5.

⁵⁹ *Ibid.*, para. 5.4. The HRC further stated that to infer a right of direct participation by citizens would go “far beyond the scope of article 25(a)” – para. 5.5.

⁶⁰ Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, views adopted on 8 November 1994, para. 9.6 ; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, views adopted on 22 November 1996, para. 10.5; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, views of 20 October 2000, paras. 9.5, 9.6, 9.8.

Nevertheless, it has been reluctant to travel the extra mile and qualitatively assess relevant consultation processes.⁶¹

The right to participation in public life was explicitly and specifically integrated into minority rights provisions in the CSCE Copenhagen Document (1990) and thereafter also in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

The ground-breaking Para. 35 of the Copenhagen Document is set out in the following terms:

The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including in the affairs relating to the protection and promotion of the identity of such minorities.

The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

The operative parts of Article 2, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, read:

2.2 Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

2.3 Persons belonging to minorities have the right to participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.⁶²

The right has been framed in such a way as to ensure the participation of persons belonging to minorities in the general affairs of State, as well as in those matters impacting directly on their own interests. In practice, these often prove to be qualitatively different forms of participation. As regards the former, effective participation “can serve as a means of dispute resolution and sustain diversity as a condition for condition for dynamic stability of society”.⁶³ It has been holistically read into the latter provision that “Minorities should be involved at the local, national and international level in the formulation, adoption, implementation and monitoring of standards and policies affecting them”.⁶⁴

⁶¹ It limited itself to stating “That this consultation process [with the Muotkatunturi Herdsmen’s Committee about plans for a logging project] was unsatisfactory to the authors and was capable of greater inaction does not alter the Committee’s assessment [...] that the State party’s authorities did go through the process of weighing the authors’ interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management [...]” –*Jouni E. Länsman et al. v. Finland, op. cit.*, para. 10.5. See also in this regard, *Apirana Mahuika et al. v. New Zealand, op. cit.*, paras. 9.6, 9.8.

⁶² These provisions are bolstered by a reaffirmation of guarantees of freedom of association for minorities, including the transfrontier/international dimension to the right: Article 2, paras. 4 and 5. All of these provisions should be read in conjunction with Article 4.5 (which emphasises once again the importance of the full participation of persons belonging to minorities in “the economic progress and development in their country”) and Article 5 (which calls for due regard to be had for the legitimate interests of persons belonging to minorities in the planning and implementation of national policies and programmes and international programmes of cooperation and assistance).

⁶³ Asbjorn Eide, “Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, Working paper submitted to the Working Group on Minorities, Sub-Commission on Promotion and Protection of Human Rights, Commission on Human Rights, E/CN.4/Sub.2/AC.5/2000/WP.1, 27 April 2000, p. 8.

⁶⁴ *Ibid.*, p. 7.

The Declaration does not prescribe any specific modalities for the realisation of the right (in either sense), most likely because of the huge range of possibilities to choose from. Rather, the effectiveness of modalities of participation can only be evaluated against the specific and subjective needs, interests and general circumstances of discrete minorities.⁶⁵

The term, “public life”, must be construed broadly as it goes beyond “political life” and encompasses electoral and administrative contexts as well. It involves the ability to access and exploit modalities of governance (institutes, processes, services, official information and documentation) in effective and culturally and linguistically appropriate ways. It arguably also includes participation in public communication and debate, i.e., discussions on matters of public importance and interest, where relevant via the media. Thus, the notion “public life” is not restricted to the official workings of the State and its organs, but rather conveys a more flexible understanding of civic engagement (for which freedom of expression is clearly a *sine qua non*).

Along with the other qualifying terms, “cultural, religious, social, economic”, the scope of the right would indeed appear to be far-reaching. Moreover, it has been noted that the right to effective participation is “free-standing” and that “there is no indication of limitation of purposes for which participation may be sought”.⁶⁶ It has also been considered that the achievement of progress in the realisation of economic, social and cultural rights requires “popular participation [...] at all stages, including the formulation, application and review of national policies”.⁶⁷

ECHR/FCNM

The ECHR does not countenance a right to participation, as such. However, careful extrapolation from other Convention articles could arguably imply the essence of such a right.⁶⁸ The Court’s recurrent references to democratic society are of particular importance. Nevertheless, in the absence of an express ECHR right to participation, the right is primarily assured in the CoE context by Article 15, FCNM, as well as the European Charter of Local Self-Government.⁶⁹ Article 15, FCNM, provides as follows:

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

This succinctly worded article provides for a right of effective participation of persons belonging to national minorities generally, as well as a more specific right where issues affecting them are at stake. The adjectival force of “effective” in this context is considerable.

⁶⁵ *Ibid.*, p. 8 and Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 43.

⁶⁶ Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update”, *op. cit.*, at 43.

⁶⁷ Para. 11, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Maastricht 2-6 June 1986.

⁶⁸ For example, the right to: freedom of expression (Article 10, ECHR); freedom of assembly and association (Article 11); education (ECHR, P1-2); free elections (ECHR, P1-3), etc.

⁶⁹ CETS No. 122, adopted on 15 October 1985; entry into force: 1 September 1988.

As with rights protected under the ECHR, this right cannot be illusory or theoretical.⁷⁰ Representation of minorities that is merely tokenistic will not pass muster. Participation must be meaningful and real.

The terse formulation of Article 15, however, offers little guidance as to the substance of the right. It certainly has enabling, enhancing and empowering properties. However, it by no account stretches to cover equal representation on public bodies (rather, the goal pursued is equitable representation); a right of veto, or a right to pre-determine results.

In the First Cycle of its Monitoring of the FCNM, the Advisory Committee addressed a number of issues arising under Article 15,⁷¹ many of which concerned the foregrounding of minority issues in the affairs of State and engagement with minorities in connection with the same. For instance, the Advisory Committee pointed out the need to give minority issues greater prominence in government affairs, through their institutionalisation in governmental structures or their incorporation into policy-making.⁷² Particular attention was also paid to the need for a framework for dialogue between governments and minorities to be established and maintained.⁷³ In this respect, the Advisory Committee tended to call for a consolidated consultation structure to facilitate such dialogue (eg. a body representing the interests of minority groups within a State), or direct and systematic liaison with various minorities, or both.

The importance of structural guarantees for the political representation of persons belonging to minorities - at national and local levels – has also been emphasised.⁷⁴ On occasion, the Advisory Committee has expressly promoted decentralised or local government (as contemplated by para. 80 of the Explanatory Report to the FCNM),⁷⁵ thereby following Article 4(3) of the European Charter of Local Self-Government which provides that “Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen”.⁷⁶ These concerns of the Advisory Committee all relate to the objective of bringing persons belonging to national minorities closer to the locus of decision-making, particularly as regards those matters of greatest relevance to them. They are complemented by

⁷⁰ See, among other authorities in the jurisprudence of the European Court of Human Rights, *Airey v. Ireland*, para. 24: “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...]”.

⁷¹ See further: Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, in *Filling the Frame, op. cit.*, pp. 69-94; Alan Phillips, “Commentary: Economic participation of national minorities”, in *ibid.*, pp. 98-110.

⁷² Opinions on: Albania (para. 108); Armenia (para. 110); Lithuania (para. 104); Sweden (para. 97).

⁷³ Opinions on: Albania (para. 109); Armenia (para. 111); Austria (para. 100); Azerbaijan (para. 118); Cyprus (In respect of Article 15); Czech Republic (In respect of Article 15); Estonia (In respect of Article 15); Finland (In respect of Article 15); Germany (para. 89); Hungary (In respect of Article 15); Italy (In respect of Article 15); Lithuania (para. 104); Moldova (para. 119); Norway (para. 97); Poland (para. 124); Romania (In respect of Article 15); Russian Federation (para. 160); Serbia & Montenegro (paras. 166, 167, 168); Slovakia (In respect of Article 15); Spain (In respect of Article 15); Sweden (paras. 95, 96); Switzerland (paras. 76, 77); Ukraine (para. 111).

⁷⁴ Opinions on: Albania (para. 110); Armenia (para. 109); Croatia (In respect of Article 15); Cyprus (In respect of Article 15); Czech Republic (In respect of Article 15); Hungary (In respect of Article 15); Poland (para. 123); Serbia & Montenegro (para. 164); Ukraine (para. 110).

⁷⁵ Opinions on: Azerbaijan (para. 119); Hungary (In respect of Article 15); Moldova (para. 121); Serbia & Montenegro (para. 169).

⁷⁶ Marc Weller, “A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)”, *op. cit.*, p. 74.

the Advisory Committee's efforts to ensure effective participation of persons belonging to national minorities in elections⁷⁷ and political life generally.⁷⁸

Participation and employment in the public service sector have also come under scrutiny,⁷⁹ with certain branches occasionally being highlighted as requiring special attention, such as the judiciary, security and defence forces. The Advisory Committee has also frequently addressed issues relating to participation in/exclusion from (socio-)economic affairs.⁸⁰ Most often, this treatment focused on the problems encountered by specific minorities, especially the Roma, Gypsies, Travellers or Sinti.⁸¹ Although various aspects of socio-economic participation and exclusion have been explored in the Advisory Committee's Opinions (eg. impact of cross-border relations, land usage, lifestyle, etc.), it has nevertheless been submitted that the quality of the assessments offered would be enhanced if they were to (i) draw on comprehensive and reliable disaggregated data, and (ii) be informed by greater thematic expertise.⁸²

Marc Weller has measured the initial expectations generated by Article 15, FCNM, against actual treatment of the article in the First Monitoring Cycle:

Obviously, there does not exist one single specific model of performance that must be applied by all States Parties in all circumstances. This applies with particular force to issues of State construction and political systems design. However, even if States may dine *a la carte* when implementing Article 15, there must emerge a full and satisfying dinner at the end of the day. In other words, there may be a range of options for the achievement of the individual aspects of effective participation, but ultimately Article 15 is indeed a provision of hard law – and it is an obligation of result.⁸³

Despite being of more recent vintage than other minority rights recognised under positive international law, the right to effective participation is rapidly coming to be regarded as one of the most important. This can be attributed in large measure to the inexorable rise in contemporary political and legal discourse in Europe of the concept of good governance and the principle of subsidiarity in decision-making.⁸⁴ The right to effective participation is very closely connected to both.

⁷⁷ Opinions on: Albania (para. 111); Estonia (In respect of Article 15); Hungary (In respect of Article 15); Russian Federation (paras. 157, 159); Ukraine (para. 109).

⁷⁸ Opinions on: Ireland (para. 129); Lithuania (para. 104); Russian Federation (para. 158).

⁷⁹ Opinions on: Albania (para. 112); Azerbaijan (paras. 120, 121); Croatia (In respect of Article 15); Cyprus (In respect of Article 15); Estonia (In respect of Article 15); Italy (In respect of Article 15); Moldova (para. 120); Romania (In respect of Article 15); Serbia & Montenegro (para. 165); Slovakia (In respect of Article 15) and the United Kingdom (paras. 126, 128, 129).

⁸⁰ See the Advisory Opinions on: Albania (para. 112); Austria (para. 101); Czech Republic (In respect of Article 15); Estonia (In respect of Article 15); Finland (In respect of Article 15); Germany (para. 90); Hungary (In respect of Article 15); Ireland (para. 128); Italy (In respect of Article 15); Moldova (para. 120); Norway (para. 99); Romania (In respect of Article 15); Russia (para. 161); Serbia & Montenegro (para. 170); Slovakia (In respect of Article 15); Spain (In respect of Article 15); Switzerland (para. 75); Ukraine (para. 112) and the United Kingdom (para. 127).

⁸¹ All of the instances mentioned in the preceding footnote, with the exception of: Estonia, Norway, Russia, Serbia & Montenegro, Ukraine and the United Kingdom. None of these Advisory Opinions singled out any particular minority as regards (socio-)economic exclusion, but French and Italian speakers were specifically mentioned in this connection in the Advisory Opinion on Switzerland (para. 75).

⁸² Alan Phillips, "Commentary: Economic participation of national minorities", in *Filling the Frame, op. cit.*, pp. 98-110, at 110.

⁸³ Marc Weller, "A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of effective participation of persons belonging to national minorities (1998-2003)", *op. cit.*, p. 91.

⁸⁴ See further, John Packer, "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", *Helsinki Monitor* (No. 4, 2000), pp. 29-61, at 38.

OSCE

That the right to participation has become “Growth Area No. 1” in the field of minority rights is attested to by the elaboration and promotion of the Lund Recommendations on the Effective Participation of National Minorities in Public Life.⁸⁵ In keeping with the UN Declaration and other relevant international instruments, the “basic conceptual division” within the Lund Recommendations “follows two prongs: participation in governance of the State as a whole, and self-governance over certain local or internal affairs”.⁸⁶ It is important to recognise and reinforce this conceptual bifurcation as the needs of minorities and the modalities of participation in both cases are very different.

The Lund Recommendations contemplate a number of special arrangements intended to enhance the effectiveness of participation by national minorities in governmental decision-making. It is anticipated that the arrangements in question would be adapted to reflect *couleur locale* in States and that they would be applied at the level of central government and also at the regional and local levels.⁸⁷ They include special parliamentary representation for national minorities, including on parliamentary committees “and other forms of guaranteed participation in the legislative process”.⁸⁸ Formal or informal understandings that aim to assure national minority representation in Cabinet, in the Courts and in other (governmental and advisory) bodies are also advocated.⁸⁹ The importance of having minority interests adequately represented and asserted within government ministries is identified, as is the need for minorities (i) to be able to participate effectively in the civil service, and (ii) to have access to public services in minority languages.⁹⁰

Very usefully, the right of persons belonging to national minorities to vote and stand for office without discrimination is reiterated,⁹¹ as is the fact that the right “to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community”.⁹² The latter point has proved contentious in the recent jurisprudence of the European Court of Human Rights, and has led to divergent findings on the part of the Court (see *supra*). As regards electoral matters, proportional representation systems, some forms of preference voting and lower numerical thresholds for enhancing national minority representation in parliament, are all put forward.⁹³ It is also stated that the geographical boundaries of electoral districts should facilitate the equitable representation of national minorities.⁹⁴

Another recommendation is that “States should establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between

⁸⁵ The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, Foundation on Inter-Ethnic Relations, September 1999. See further: John Packer, “The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life”, in *Helsinki Monitor* 2000 No. 4, pp. 29-61.

⁸⁶ Introduction, the Lund Recommendations on the Effective Participation of National Minorities in Public Life, *op. cit.*

⁸⁷ Paras. 6, 11, *ibid.*

⁸⁸ Para. 6, *ibid.*

⁸⁹ Para. 6, *ibid.*

⁹⁰ Para. 6, *ibid.*

⁹¹ Para. 7, *ibid.*

⁹² Para. 8, *ibid.*

⁹³ Para. 9, *ibid.*

⁹⁴ Para. 10, *ibid.*

governmental authorities and national minorities”.⁹⁵ Such bodies would necessarily have wide-ranging functions⁹⁶ and could also include “special purpose committees for addressing such issues as housing, land, education, language, and culture”.⁹⁷ They would have to have adequate resources at their disposal.⁹⁸

According to the Explanatory Note to the Lund Recommendations, “the term ‘self-governance’ implies a measure of control by a community over matters affecting it”.⁹⁹ It is a foundational premise of the Lund Recommendations’ approach to self-governance that while certain areas of governance require uniformity and should therefore remain the preserve of central authorities, other areas benefit from diversity and are consequently better dealt with when delegated to subsidiary or regional or local authorities.¹⁰⁰ The division of functions between central authorities and institutions of self-governance need not be mutually exclusive: scope exists for certain functions to be shared.¹⁰¹ Whether the institutions of self-governance are territorial or not, they must always be democratically constituted and genuinely reflect the views of the affected population.¹⁰² Self-governance leads to minorities taking on an enhanced role in the determination of matters that are crucial to their identity and way of life.¹⁰³ In this spirit, any territorial arrangements for self-governance must go “beyond the mere decentralization of central government administration from the capital to regional or local offices”.¹⁰⁴

Finally, the Lund Recommendations examine the benefits of constitutional or legislative entrenchment for self-governance arrangements.¹⁰⁵ Various measures for the resolution of conflicts are considered, including judicial, administrative and other dispute-resolution mechanisms, of a fixed and *ad hoc* nature.¹⁰⁶ Such an emphasis confirms the understanding that the right to effective participation is concrete and not merely aspirational.

3.2.3 Education

UNITED NATIONS

Education is deemed to be “both a human right in itself and an indispensable means of realizing other human rights”.¹⁰⁷ As such, it does not fall neatly into either the category of object-oriented rights or the category of process-oriented rights: it straddles both. It is only in the specific circumstances of individual cases that it can properly be gauged whether the right is invoked for determinant or facilitative purposes. The link between the substantive and procedural strengths of the right to education is explicitly pointed out in Article 13(1), ICESCR, which sets out that States Parties “agree that education shall enable all persons to

⁹⁵ Para. 12, *ibid.*

⁹⁶ Para. 13, *ibid.*

⁹⁷ Para. 12, *ibid.*

⁹⁸ Para. 13, *ibid.*

⁹⁹ Para. 14, Explanatory Note to the Lund Recommendations, *op. cit.*

¹⁰⁰ Para. 15, the Lund Recommendations, *op. cit.*

¹⁰¹ Para. 15, *ibid.*

¹⁰² Para. 16, *ibid.*

¹⁰³ Para. 18, *ibid.*

¹⁰⁴ Para. 19, *ibid.*

¹⁰⁵ Paras. 22, 23, *ibid.*

¹⁰⁶ Para. 24, *ibid.*

¹⁰⁷ Para. 1, ICESCR General Comment No. 13.

participate effectively in a free society [...]”. Similarly, the essence of the right comprises civil-libertarian, socio-economical and cultural streaks.

As is the case with other rights, the canon of existing international human rights standards contains provisions guaranteeing educational rights generally, but also specifically concerning persons belonging to minorities.¹⁰⁸ Of the former, Article 26, UDHR, is the first which should be mentioned, owing to its germinative character:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The Convention on the Rights of the Child (CRC) sets out a general right to education in more extensive terms than any other global treaty. The operative articles read as follows:

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

¹⁰⁸ See generally: Patrick Thornberry & Dianne Gibbons, “Education and Minority Rights: A Short Survey of International Standards”, 4 *International Journal on Minority and Group Rights* (1997), pp. 115-152; Manfred Nowak, “The Right to Education”, in Asbjorn Eide, Catarina Krause & Allan Rosas, Eds., *Economic, Social and Cultural Rights* (2nd Edition) (Kluwer Law International, the Netherlands, 2001), pp. 245-271; Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books Ltd., London, 2003).

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

It is clear from CRC General Comment No. 1, entitled “The Aims of Education”, that the operative understanding of “education” goes “far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society”.¹⁰⁹ The General Comment also stresses that States fail to discharge their duties under Article 29(1) if they “do no more than seek to superimpose the aims and values of the article on the existing system without encouraging deeper changes”.¹¹⁰ Rather, to effectively promote Article 29(1), what is required is: “the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies”.¹¹¹ The far-reaching positive obligation on States envisaged here is of considerable potential relevance to persons belonging to minorities, as will be illustrated *infra*.

The ICCPR does not provide for the right to education; the right is assured instead by the longest article (Article 13) in the ICCPR’s sister covenant, the ICESCR. Nevertheless, various aspects of the right to education have been considered by the UN Human Rights Committee – under various substantive guarantees of the ICCPR, most notably the right to non-discrimination/equality and freedom of religion. In *Blom v. Sweden*¹¹² and *Lindgren et al. v. Sweden*,¹¹³ the Human Rights Committee emphasised that differential treatment of public and private schools in terms of the allocation of subsidies and ancillary benefits respectively was justified on the grounds of the different nature of both types of school. Key elements in this reasoning were the measure of State control exercised over each type of school and the freedom of parents to choose to send their children to either. In *Blom*, the Committee pointed out that the private school system is not subject to State supervision¹¹⁴ and in *Lindgren*, it observed that “a State party cannot be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all”.¹¹⁵ The benefits in question included free transport to and from school by bus, free textbooks and school meals, all of which were available to children attending public schools.

Differential State funding of schools was also at issue in *Waldman v. Canada*.¹¹⁶ Noting that it was not possible for religious denominations other than Roman Catholics to have their

¹⁰⁹ Para. 2, CRC General Comment No. 1, The Aims of Education: Article 29(1) (2001), adopted on 17 April 2001, Doc. No. CRC/GC/2001/1.

¹¹⁰ Para. 18, *ibid*.

¹¹¹ Para. 18, *ibid*.

¹¹² Communication No. 191/1985, *Blom v. Sweden*, Views adopted on 4 April 1988. It is interesting to note that in this case, the author of the communication also invoked Article 5(b) of the UNESCO Convention against Discrimination in Education (*infra*) and Article 13, ICESCR (*infra*).

¹¹³ Communication Nos. 298/1988 and 299/1988, *Lindgren et al. v. Sweden*, Views adopted on 9 November 1990.

¹¹⁴ *Blom v. Sweden*, *op. cit.*, para. 10.3.

¹¹⁵ *Lindgren et al. v. Sweden*, *op. cit.*, para. 10.3.

¹¹⁶ Communication No. 694/1996, *Arieh Hollis Waldman v. Canada*, Views of 3 November 1999.

schools incorporated within the (secular) public school system – and thereby entitling them to State funding, the Human Rights Committee found that such differential treatment could not be considered reasonable and objective.¹¹⁷ It held that the ICCPR does not require States to provide funding for denominational schools, but where States choose to do so, they should do make such funding available on a non-discriminatory basis.¹¹⁸

As well as considering the aforementioned structural issues concerning the right to education, the Human Rights Committee has also examined relevant substantive issues. In *Hartikainen v. Finland*,¹¹⁹ for instance, a challenge was mounted to a legislative requirement in Finland whereby children of atheist parents were obliged to attend classes on the history of religion and ethics. The author of the communication argued that such a requirement was incompatible with the right to freedom of religion, as guaranteed by the ICCPR. The subject, history of religion and ethics, was designed as an alternative to religious instruction for pupils whose parents objected to religious instruction. The Human Rights Committee took the view that such alternative instruction would not in itself be incompatible with Article 18, ICCPR (see further, *infra*), as long as the instruction would be “given in a neutral and objective way” and respectful of “the convictions of parents or guardians who do not believe in any religion”.¹²⁰ In reaching its conclusion that Article 18(4) had not been violated in the instant case, the Committee was influenced by the fact that in the relevant legislation, express provision was made for parents objecting to both religious instruction and instruction in the history of religion “to obtain exemption [for their children] therefrom by arranging for them to receive comparable instruction outside of school”.¹²¹

As intimated *supra*, the main provision for educational rights in the ICESCR is extensive. Article 13, ICESCR, reads:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as

¹¹⁷ Para. 10.5.

¹¹⁸ Para. 10.6.

¹¹⁹ Communication No. 40/1978, *Erkki Hartikainen v. Finland*, Views of 9 April 1981.

¹²⁰ Para. 10.4.

¹²¹ Para. 10.4.

may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 13 is supplemented by Article 14 (which deals with the (progressive) realisation of compulsory primary education, free-of-charge)¹²² and the content of the right has been further elaborated by General Comment No. 13.

Its inclusion in the ICESCR as opposed to the ICCPR is significant, not least because of the implications which that has for the nature of the obligation it creates for States. The ICESCR places States Parties under a general legal obligation of conduct or performance, rather than of result (which is the general norm for rights guaranteed under the ICCPR, for instance). This is clarified by Article 2(1), ICESCR:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Alongside the general provision for the progressive realisation of most rights contained therein, the Covenant also imposes various obligations of immediate effect,¹²³ most notably to ensure that relevant rights are exercised without discrimination¹²⁴ and that States “take steps” “within a reasonably short time” that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.¹²⁵ While the underlying rationale of the concept of “progressive realization” is that it should serve as “a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”, it must also “be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question”.¹²⁶ As such, it “imposes an obligation to move as expeditiously as possible towards that goal”.¹²⁷ The Human Rights Committee also interprets relevant States obligations as including “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.¹²⁸

Applying all of the foregoing to the specific ICESCR provisions regarding education, a number of points can be made. First, in the context of the aforementioned “minimum core

¹²² Article 14, ICESCR reads: “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.” See also in this connection, CESCR General Comment 11 – Plans of action for primary education (Article 14), adopted on 10 May 1999.

¹²³ CESCR General Comment No. 3 – The nature of States parties obligations (Art. 2, para. 1 of the Covenant), *op. cit.*, para. 1.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, para. 2.

¹²⁶ *Ibid.*, para. 9.

¹²⁷ *Ibid.*, para. 9.

¹²⁸ *Ibid.*, para. 10.

obligations”, the Human Rights Committee has held that a State Party would be *prima facie* in breach of its ICESCR obligations if “any significant number of individuals [within its jurisdiction] is deprived of [...] the most basic forms of education”.¹²⁹ Second, the steps to be taken by States to ensure the progressive realisation of relevant rights should be by all appropriate means, especially legislative measures. In this connection, education has been expressly mentioned by the Human Rights Committee as an area in which “legislation may also be an indispensable element for many purposes”.¹³⁰ Third, the Committee considers Article 13(2)(a), (3) and (4) as being suited to “immediate application by judicial and other legal organs in many national legal systems”.¹³¹ The creation of judicial remedies for educational rights would strengthen their implementation. These specific obligations on States are repeated and considerably reinforced in the very detailed CESCR General Comment No. 13 – The right to education (Article 13 of the Covenant).¹³²

The UNESCO Convention against Discrimination in Education (1960)¹³³ singles out the issue of the educational rights of national minorities in Article 5(1):

- (c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
 - (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
 - (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
 - (iii) That attendance at such schools is optional.

While the UNESCO Convention on Technical and Vocational Education (1989) does not contain any provisions of direct relevance to persons belonging to minorities, some of its provisions could conceivably be of indirect benefit to them.¹³⁴

In its specific treatment of the educational rights of minorities, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities places emphasis on States taking appropriate measures to ensure that persons belonging to minorities “may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue”.¹³⁵ The Declaration also encourages two-way traffic between majority and minority sections of society in terms of the acquisition of knowledge about their respective cultures.¹³⁶

Since the establishment of the position of UN Special Rapporteur on the Right to Education in 1998, a concrete, consolidated approach to the progressive realisation of the right to education has been pursued under the auspices of the UN.¹³⁷ This approach is built around the so-called

¹²⁹ *Ibid.*, para. 10.

¹³⁰ *Ibid.*, para. 3.

¹³¹ *Ibid.*, para. 5.

¹³² Adopted on 8 December 1999. See in particular, paras. 43-57.

¹³³ UNESCO Convention against Discrimination in Education, adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

¹³⁴ See, for example, Article 2(3) and Article 3(1)(a), UNESCO Convention on Technical and Vocational Education, adopted by the General Conference at its twenty-fifth session, Paris, 10 November 1989.

¹³⁵ Article 4.3, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *op. cit.*

¹³⁶ Article 4.4, *ibid.*

¹³⁷ The position was created by the UN Commission on Human Rights Resolution 1998/33 of 17 April 1998.

4-A (analytical) scheme which denotes “the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability”.¹³⁸ These essential features should be guaranteed in all of the States’ various roles in primary education, i.e., regulation, funding and provision.¹³⁹ The 4-A Scheme is often applied to post-primary education as well.

ECHR¹⁴⁰

At the European level, educational rights are provided for first and foremost by Article 2, Protocol No. 1 to the ECHR, which states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The European Court of Human Rights has repeatedly clarified the differential weighting of the various components of Article 2 (P1-2) by stating that the article “constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education”.¹⁴¹ Thus, the primary right is that of the child to education, whereas ensuring that the religious and philosophical convictions of parents are respected in the provision of education is of secondary importance.¹⁴² As the dominant part of the article is negatively-worded, there would appear to be limited scope for reading positive State obligations into the right in question. However, as the Court has pointed out, “The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account’”, meaning that “In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State”.¹⁴³

In the *Belgian Linguistic Case*,¹⁴⁴ the Court held that there was no obligation on States to “establish at their own expense, or to subsidise, education of any particular type or at any particular level”,¹⁴⁵ and this finding has consistently been followed in the subsequent jurisprudence of the Court and Commission.¹⁴⁶ Relevant State obligations can be discharged in two ways: (i) by merely permitting the establishment of private schools catering for

¹³⁸ Katarina Tomasevski, “Preliminary report of the Special Rapporteur on the right to education”, 13 January 1999, UN Doc. E/CN.4/1999/49, para. 50.

¹³⁹ *Ibid.*

¹⁴⁰ See generally: Luzius Wildhaber, “Right to Education and Parental Rights”, in R. St. J. MacDonald *et al.*, Eds., *The European System for the Protection of Human Rights* (1993), pp. 531-551; Duncan Wilson, *Minority Rights in Education: Lessons for the European Union from Estonia, Latvia, Romania and the former Yugoslav Republic of Macedonia* (Right to Education, 2002).

¹⁴¹ *Campbell & Cosans v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 February 1982, Series A, No. 48, para. 40 (following and providing a more succinct formulation of the Court’s earlier observation in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, para. 52).

¹⁴² *Jordebo v. Sweden*, Decision of the European Commission of Human Rights of 6 March 1987, Appn. No. 11533/85, para. ; *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 40.

¹⁴³ *Efstathiou v. Greece*, Judgment of the European Court of Human Rights of 27 November 1996, para. 28, following and cosmetically refining *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 37.

¹⁴⁴ Judgment of the European Court of Human Rights of 23 July 1968, Series A, vol. 6.

¹⁴⁵ P. 31.

¹⁴⁶ See, *inter alia*, *Jordebo v. Sweden*, *op. cit.*; *Andre Simpson v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 4 December 1989; *X. & Y. v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 7 December 1982, Appn. No. 9461/81; *40 mothers v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 9 March 1977, Appn. No. 6853/74; *W. & K.L. v. Sweden*, Decision of inadmissibility of the European Commission of Human Rights of 11 December 1985, Appn. No. 10476/83.

specific religious and philosophical convictions,¹⁴⁷ and (ii) by respecting “parents’ religious and philosophical convictions within the existing and developing system of education”.¹⁴⁸

On the first point: while the right to establish and run a private school is envisaged by Article 2 (P1-2), it is not an absolute right and “[I]t must be subject to regulation by the State in order to ensure a proper educational system as a whole”.¹⁴⁹ However, “such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols”.¹⁵⁰ Within these parameters, regulation could very legitimately seek to safeguard standards, values and balance in the education sector, especially in school curricula. Another important consideration concerning the lack of positive State obligations under Article 2 (P1-2) is the impact of non-discrimination and equality provisions. These provisions are by definition cross-cutting and as such, they also apply to “the exercise of each and every function [...] that they [i.e., States] undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education”.¹⁵¹ In consequence, differential treatment of public and private school systems in terms of State financing or subsidies could *prima facie* be a source of concern. However, complaints of such differential treatment to be heard by the Strasbourg adjudicatory organs have tended to be legitimised on the basis of the superior measure of State control exercised over the former.¹⁵²

Whereas attempts to ensure that the religious and philosophical preferences of parents are respected in the education sector have enjoyed measured success, similar efforts to win recognition for parents’ linguistic preferences have been routinely dismissed. The logic behind the differential treatment upheld by the European Court of Human Rights stems from the text of ECHR P1-2, which makes express reference to “religious and philosophical convictions”, but is silent on the question of linguistic characteristics. This logic is articulated in *Skender v. the Former Yugoslav Republic of Macedonia*,¹⁵³ a case in which the applicant complained about the authorities’ refusal to provide education in Turkish in a district where his daughters were to attend primary school. In that case, the Court stated that “a right to education in a particular language or a right to obtain from the State the creation of a particular kind of educational establishment cannot be derived from Article 2 of Protocol No. 1”.¹⁵⁴ In this respect, the Court followed the precedent set out in the *Belgian Linguistic Case*, viz. that ECHR P1-2:

does not require of States that they should, in the sphere of education or teaching, respect parents’ linguistic preferences, but only their religious and philosophical convictions. To interpret the terms “religious” or “philosophical” as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there.¹⁵⁵

¹⁴⁷ *X. v. Sweden*, Decision of the European Commission of Human Rights of 7 May 1984, Appn. No. 10201/82 (unpublished); *Y. v. Sweden*, Decision of the European Commission of Human Rights of 7 May 1984, Appn. No. 10202/82 (unpublished).

¹⁴⁸ *W. & K.L. v. Sweden*, *op. cit.*; *X. & Y. v. United Kingdom*, *op. cit.*; *X. v. United Kingdom*, Decision of the European Commission of Human Rights of 2 May 1978, Appn. No. 7782/77, DR 14, p. 179.

¹⁴⁹ *Jordebo v. Sweden*, *op. cit.*

¹⁵⁰ *Campbell & Cosans v. the United Kingdom*, *op. cit.*, para. 41.

¹⁵¹ *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 50.

¹⁵² *X. v. United Kingdom*, Appn. No. 7782/77, *op. cit.*

¹⁵³ *Skender v. the Former Yugoslav Republic of Macedonia*, Partial admissibility decision of the European Court of Human Rights (Third Section) of 22 November 2001, Appn. No. 62059/00.

¹⁵⁴ *Ibid.*, p. 9 of judgment. The Court proceeded to point out that the drafting committee of ECHR, P-1, rejected a proposal to include a right for parents to have the education of their children carried out in a language other than that of the State in question.

¹⁵⁵ *Belgian Linguistic Case*, *op. cit.*, p. 32.

On the second point, *supra*, viz. the obligation to respect parental religious and philosophical convictions: pursuant to the second sentence of Article 2 (P1-2), “the limit that must not be exceeded” is that the State “is forbidden to pursue an aim of indoctrination that might be considered as not respecting the parents’ religious and philosophical convictions”.¹⁵⁶ Thus, “in fulfilling the functions assumed by it in regard to education and teaching”, the State “must take care that information or knowledge contained in the curriculum is conveyed in an objective, critical and pluralistic manner”.¹⁵⁷ Neither the Court nor the Commission have ever signalled that there may be a positive obligation to expressly or actively accommodate the religious or philosophical convictions of parents in the education sector.

Educational rights have also been examined through the optic of other substantive articles of the ECHR. In *Cyprus v. Turkey*, the European Court of Human Rights found a violation of Article 10, ECHR, on the grounds that the screening/vetting by TRNC officials of the contents of school-books intended for Greek Cypriot pupils, prior to their distribution amounted to “excessive measures of censorship”.¹⁵⁸ During the period under consideration, “a large number of school-books, no matter how innocuous their content, were unilaterally censored or rejected by the authorities”.¹⁵⁹ Furthermore, the Court held that “the respondent Government failed to provide any justification for this form of wide-ranging censorship, which, it must be concluded, far exceeded the limits of confidence-building methods and amounted to a denial of the right to freedom of information”.¹⁶⁰

FCNM

As regards the FCNM, guarantees of educational rights are spread over three articles (Articles 12-14), which are bolstered by more general equality provisions (Articles 4, 5, 6).¹⁶¹

Article 12

1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.
2. In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.
3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

In the First Monitoring Cycle of the FCNM, the Advisory Committee has stressed the need to generally ensure a more multicultural or multi-ethnic character for school curricula which would be reflective of diverse ethnic identities.¹⁶² Coupled with the same is the need to

¹⁵⁶ *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 53.

¹⁵⁷ *Ibid.*, para. 53.

¹⁵⁸ *Cyprus v. Turkey*, para. 254.

¹⁵⁹ *Ibid.*, para. 252.

¹⁶⁰ *Ibid.*, para. 252.

¹⁶¹ For comprehensive analyses of the Advisory Committee’s treatment of Articles 12-14, FCNM, in its First Monitoring Cycle, see: Duncan Wilson, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)”, in *Filling the Frame*, *op. cit.*, pp. 163-228; Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, in *Filling the Frame*, *op. cit.*, pp. 234-254.

¹⁶² Opinions on: Albania (para. 102); Austria (para. 92); Czech Republic (In respect of Article 12); Estonia (In respect of Article 12); Finland (In respect of Article 12); Ireland (para. 125); Norway (paras. 92, 93); Poland (para. 118); Romania (In respect of Article 12); Slovakia (In respect of Article 12); Sweden (para. 86); Switzerland (para. 97); Ukraine (para. 103).

counter negative stereotyping of (certain) minorities in school curricula and textbooks.¹⁶³ The Committee has underlined the importance of minorities' right of participation in the realm of education, especially as regards policy formulation and the legislative process.¹⁶⁴ It has even been known to rebuke State authorities for failing to have an active State policy on national minority education.¹⁶⁵

The list of suggested lines of action in Article 12(2) is obviously non-exhaustive. As regards the adequacy of teacher-training opportunities, the Advisory Committee has tended to focus on teachers of minority languages and teachers in minority languages (i.e., teachers competent to teach a range of subjects in specific minority languages).¹⁶⁶ The availability of appropriate textbooks – especially in minority languages – was repeatedly addressed.¹⁶⁷ The important question of the affordability of textbooks has not escaped scrutiny either.¹⁶⁸ The facilitation of “contacts among students and teachers of different communities” has drawn comparatively less attention,¹⁶⁹ possibly because it falls squarely under the right to freedom of assembly and association which enjoys extensive protection under general international human rights instruments.

The Advisory Committee has not noticeably hierarchised the various tiers of formal education: the importance it has attached to one level or another has been determined in an *ad hoc* manner by assessments of surrounding circumstances, in particular the needs of relevant minorities. As well as examining access opportunities to different levels of education,¹⁷⁰ the Advisory Committee has also paid particular attention to the needs of specific minorities at various levels of the educational system. The Roma are a case in point because they tend to experience compounded difficulties in their access to formal education.¹⁷¹ The Advisory Committee has observed that the Roma “encounter difficulties with regard to pre-school education, absenteeism, the level of education attained, and isolation in certain schools”.¹⁷² Its detailed consideration of problems faced by the Roma has also included the itinerant nature of their culture,¹⁷³ the building of parental confidence in the school system and the simplification

¹⁶³ Opinions on: Azerbaijan (para. 112); Croatia (In respect of Article 12); Russian Federation (para. 151); Slovakia (In respect of Article 12); Switzerland (para. 97).

¹⁶⁴ Opinions on: Azerbaijan (para. 114); Finland (In respect of Article 12); Lithuania (para. 101); Moldova (paras. 116, 117); Switzerland (para. 98).

¹⁶⁵ Opinions on Armenia (para. 104).

¹⁶⁶ Albania (para. 103); Armenia (para. 105); Azerbaijan (para. 113); Estonia (In respect of Article 12); Finland (In respect of Article 12); Hungary (In respect of Article 12); Ireland (para. 127); Norway (para. 95); Romania (In respect of Article 12); Serbia & Montenegro (para. 153); Sweden (para. 88).

¹⁶⁷ Opinions on: Armenia (para. 105); Austria (para. 91); Azerbaijan (para. 113); Croatia (In respect of Article 12); Hungary (In respect of Article 12); Romania (In respect of Article 12); Russian Federation (para. 150); Serbia & Montenegro (para. 152); Sweden (para. 88); Ukraine (para. 104).

¹⁶⁸ Opinion on Serbia & Montenegro (para. 152).

¹⁶⁹ Opinion on Estonia (In respect of Article 12).

¹⁷⁰ Opinions on: Albania (para. 105 (university)); Armenia (paras. 105 (pre-school), 106); Estonia (In respect of Article 12 (pre-school and higher education)); Russian Federation (para. 152 (displaced populations), 153); Serbia & Montenegro (para. 157 (recognition of diplomas from Kosovo)); Ukraine (para. 106 (university)); United Kingdom (paras. 120, 121).

¹⁷¹ Opinions on: Albania (para. 104); Austria (para. 93); Croatia (In respect of Article 12); Czech Republic (In respect of Article 12); Finland (In respect of Article 12); Hungary (In respect of Article 12); Italy (In respect of Article 12); Moldova (para. 117); Norway (para. 94); Poland (para. 119); Romania (In respect of Article 12); Serbia & Montenegro (paras. 154-156); Slovakia (In respect of Article 12); Spain (para. 94); Ukraine (para. 105); United Kingdom (para. 122).

¹⁷² Advisory Opinion on Spain (para. 94). Similar wording is used by the Advisory Committee in respect of other countries.

¹⁷³ Opinion on Norway (para. 94).

of school registration formalities.¹⁷⁴ Special consideration has also been accorded the Traveller Community, with specific focus on exclusion, racism and bullying in schools; levels of education reached; literacy levels; lack of qualified teachers from Traveller Community; attendance levels; integration/non-segregation in schooling.¹⁷⁵

Article 13

1. Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.
2. The exercise of this right shall not entail any financial obligation for the Parties.

Although it does not preclude the possibility of State financing for private educational establishments run by minorities,¹⁷⁶ Article 13 is styled as a passive obligation on States Parties. The non-committal approach to the financing of private educational establishments established and/or run by minorities arguably goes against the clearly positive grain of minority rights protection generally. The reason is that in many countries, particularly in Central and Eastern Europe, “the state represents the only realistic source of funding in the short or medium-terms”.¹⁷⁷ Whether the second paragraph of the Article renders the first paragraph a regression from, *inter alia*, equivalent provisions of the ECHR, is a moot point. The answer depends, ultimately, on how readily principles of non-discrimination and equality would or could be applied to Article 13, FCNM. The all-pervasive nature of those principles in international human rights law (see further, *supra*) suggests that the implications of Article 13(2) could, in particular circumstances, lead to instances of *de facto* discrimination, or in other words, a denial of the right of persons belonging to national minorities to “full and effective equality”.

In any event, it can certainly be concluded that Article 13(2) has rendered the entire article a lame – if not dead – duck. It is little wonder, therefore, that in the First Monitoring Cycle of the FCNM, the Advisory Committee has made specific observations on Article 13 in respect of only five States. In two cases, the specific observations involved legal frameworks;¹⁷⁸ in two other cases, they involved the need for private schools for minorities¹⁷⁹ and in the fifth case, the question of funding for such schools was tackled.¹⁸⁰

Article 14

¹⁷⁴ Opinion on Romania (In respect of Article 12).

¹⁷⁵ See generally, Opinion on Ireland (paras. 122-127) and Opinion on United Kingdom (paras. 122-123).

¹⁷⁶ Para. 73, Explanatory Report to the FCNM, *op. cit.*

¹⁷⁷ Istvan Pogany, “Bilateralism versus Regionalism in the Resolution of Minorities Problems in Central and Eastern Europe and in the Post-Soviet States”, in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 105-128?, at 119.

¹⁷⁸ In its Opinion on Serbia & Montenegro, the Advisory Committee took the view that relevant domestic law should better reflect the right referred to in Article 13 (para. 158). In its Opinion on Switzerland, the Advisory Committee stated that the legal provisions of Cantons should not prevent the establishment of private schools with minority languages as the medium of instruction in areas outside of which the languages in question are traditionally spoken (para. 99).

¹⁷⁹ In its Opinion on Estonia, the Advisory Committee stated that pending reform of the educational system could result in increased need (and support) for private schooling in minority languages (In respect of Article 13). In its Opinion on Sweden, the Advisory Committee underlined the central role played by private schools in the provision of teaching in minority languages and called for further initiatives of this kind to be supported (para. 89).

¹⁸⁰ In its Opinion on Austria, the Advisory Committee urged the State authorities to continue discussions with the representatives of the Czech and Slovak minorities to identify funding solutions for the only school in Vienna providing fully bilingual education from kindergarten to upper secondary level for the Czech and Slovak minorities (para. 94). It also intimated that extra subsidies for private schools catering for the educational needs of other minorities could help to meet those needs (para. 95).

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Patrick Thornberry has been fiercely critical of this particular Article, stating that “Despite the presumed good intentions, the provision represents a low point in drafting a minority right; there is just enough substance in the formulation to prevent it becoming completely vacuous”.¹⁸¹ Not only does Article 14 suffer from congenitally weak and conditional wording; this is compounded by the Explanatory Report to the FCNM. According to the latter, the right set out (in sheepish terms¹⁸²) in para. 1 “does not imply positive action, notably of a financial nature, on the part of the State”.¹⁸³

The Explanatory Report also dresses up the string of conditionalities introduced in Article 14(2) as a “very flexibly” worded provision that allows States “a wide measure of discretion” in their implementation of the FCNM. Notwithstanding any “*possible* financial, administrative and technical difficulties associated with instruction of or in minority languages”,¹⁸⁴ the purported flexibility alluded to here could just as easily be described as fudge! States are simply left with too many ways to wriggle their way out of honouring the commitments that should be expected of them. Instead of offering States such an easy cop-out of their obligations, it would have been much more constructive if the FCNM or its Explanatory Report had instead sought to develop the notion of appropriate indicators for measuring progress towards the realisation of the right. Reliance on indicators is standard practice under other international human rights instruments such as the ICESCR. Finally, the criterion of “sufficient demand” that must be met in order to activate the right under Article 14 has deliberately not been defined - in order to allow States “to take account of their countries’ own particular circumstances”.¹⁸⁵ This, too, invites further subjective assessments by States authorities.

It is clear from the foregoing that the inherent defects of Article 14 are considerable and that it was always going to be very difficult to compensate for those shortcomings at the monitoring stage. The Advisory Committee has undoubtedly tried hard to salvage something from a nigh-impossible situation, but its efforts have been found wanting. Duncan Wilson has pointed out that “The Advisory Committee has been particularly hesitant in defining linguistic rights in education, and legal certainty under this article is consequently weak”. He has described the Advisory Committee’s practice under Article 14 as appearing “confused in general, leading to uncertainty as to the balance to be drawn between the various elements of the article, and the

¹⁸¹ Patrick Thornberry, “Minority Rights” in Academy of European Law, Ed., *Collected Courses of the Academy of European Law* (Vol. VI, Book 2) (The Netherlands, Kluwer Law International, 1997), pp. 307-390, cited in Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, at 234.

¹⁸² “undertake to recognise [...]” and not “recognise” *tout court*.

¹⁸³ Para. 74, Explanatory Report to the FCNM, *op. cit.*

¹⁸⁴ (emphasis added) Para. 75, *ibid.*

¹⁸⁵ Para. 76, *ibid.*

criteria for triggering the right laid out in paragraph two”.¹⁸⁶ Tove Skutnabb-Kangas goes so far as to suggest that:

[...] the formulation of the article (and therefore?) also some of its interpretations by the Advisory Committee may contribute to the depreciation/derogation rather than the promotion and protection of educational linguistic human rights, mainly through the omission of a principled, research-based stance on the right to mother-tongue education.¹⁸⁷

The Advisory Committee presumes the existence of a legislative framework for the implementation of Article 14, FCNM, which should set out the guarantees for learning minority languages in a clear, precise and detailed manner.¹⁸⁸ Relevant decision-making powers should also boast clarity of formulation.¹⁸⁹ Opinions have also given consideration to State policies and support for educational initiatives prioritising teaching in or of minority languages (including bilingual education).¹⁹⁰ The importance of ensuring participation of and consultation with minorities in relevant policy-formulation and decision-making has also been underscored.¹⁹¹

Although Article 14 only refers to the right to receive education in minority languages in territories inhabited by national minorities either traditionally or in substantial numbers, the Advisory Committee has sought to interpret this provision in a more expansive manner. As such, it has favoured (i) the strengthening of minority-language teaching in those areas where it is already provided, and (ii) the extension of minority-language teaching to regions other than those with dense or traditional minority populations.¹⁹² The Advisory Committee has also paid attention to the needs of dispersed and displaced minorities in this respect.¹⁹³ Needless to say, the particular needs of specific minorities have frequently been addressed by the Advisory Committee.¹⁹⁴

In practice, the Advisory Committee has shown itself to be more concerned about the availability of minority language/bilingual education during the most formative years of

¹⁸⁶ Duncan Wilson, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)”, *op. cit.*, p. 184.

¹⁸⁷ Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, p. 234.

¹⁸⁸ Opinions on: Armenia (para. 107); Azerbaijan (paras. 115, 116); Estonia (In respect of Article 14); Lithuania (paras. 102, 103); Norway (para. 96); Poland (para. 120); Russian Federation (para. 154); Serbia & Montenegro (Montenegro) (para. 162); Slovakia (In respect of Article 14); Sweden (para. 93); Ukraine (para. 97).

¹⁸⁹ See, for example, the Opinion on Lithuania (para. 103).

¹⁹⁰ Opinions on: Armenia (para. 108); Czech Republic (In respect of Article 14); Germany (para. 87); Italy (In respect of Article 14); Lithuania (para. 103); Romania (In respect of Article 14); Russian Federation (para. 155); Serbia & Montenegro (paras. 159, 162); Slovakia (In respect of Article 14); Sweden (paras. 91, 92); United Kingdom (para. 124).

¹⁹¹ Opinions on: Czech Republic (In respect of Article 14); Germany (para. 87); Poland (para. 121); Romania (In respect of Article 14); Ukraine (para. 108); United Kingdom (para. 125).

¹⁹² Opinions on: Albania (para. 106); Germany (para. 87); Norway (para. 96); Russian Federation (para. 155); Serbia & Montenegro (para. 163); Sweden (para. 90); Switzerland (para. 100); Ukraine (para. 108).

¹⁹³ Opinions on Russian Federation (para. 155) and Serbia & Montenegro (para. 163), respectively.

¹⁹⁴ Opinions on: Albania (para. 107); Armenia (para. 108); Azerbaijan (para. 117); Croatia (In respect of Article 14); Czech Republic (In respect of Article 14, *juncto* para. 66); Finland (In respect of Article 14); Germany (paras. 87, 88); Italy (In respect of Article 14); Lithuania (para. 103); Poland (para. 121); Romania (In respect of Article 14); Serbia & Montenegro (paras. 160, 163); Slovakia (In respect of Article 14); Spain (para. 95); Sweden (para. 90); United Kingdom (para. 125).

children's development,¹⁹⁵ although the Advisory Committee's observations regarding Article 12, FCNM, should also be considered in this connection. It is extremely difficult to discern any overall pattern of consistency in the Advisory Committee's approach to mother-tongue medium education. This has prompted some commentators to fault the differentiated, contextualised approach adopted, in particular because it would not appear to have been informed by "principled solutions" derived from leading research on a variety of educational models and their consequences.¹⁹⁶

In this connection, Tove Skutnabb-Kangas weighs up the competing merits of subtractive and additive language teaching and learning. In the former scheme, "a new (dominant/majority) language is learned *at the expense* of the mother tongue", whereas in the latter, "the new language is learned *in addition* to the mother tongue, which continues to be used and developed".¹⁹⁷ She is firmly of the view that the Advisory Committee should give pride of place to additive learning and teaching in its recommendations.

Examples of conceptual inconsistency have also been identified in the Advisory Committee's treatment of segregation in education. Once again, Skutnabb-Kangas has pleaded for greater conceptual clarity and the application of the findings of relevant research. She points out that the merits of advocating segregated classes for certain minorities cannot be assessed *in abstracto*; rather, regard must be had for the constituent features of the precise form of segregation involved. She posits that it is preferable to adopt instrumental segregation, i.e., segregation as a means to equality in the form of mother-tongue maintenance or language shelter models, than forms of segregation which are an end in themselves. She emphasises that segregation should be temporary, with a view to enabling students to develop the educational skills to facilitate their integration into mainstream educational structures (and society generally) at a later date. Permanent forms of segregation are often "a one-way street, both in terms of educational infrastructures and goals".¹⁹⁸ The distinction between physical and psychological segregation is also noteworthy. She cautions that early physical integration often leads to various kinds of segregation later. On the other hand, initial physical segregation can facilitate the integration of children into dominant society at a later date. The reasoning behind this is that segregated education in a mother-tongue environment allows children's educational faculties to develop optimally until such time as they have sufficiently mastered the dominant language for it not to hinder their overall educational progress in an integrated system.¹⁹⁹

In the absence of specifications such as those given above, it remains unclear precisely which forms of segregation are intended by the Advisory Committee in its Opinions. There is a

¹⁹⁵ Opinions on: Austria (Kindergarten, para. 97; fourth year of primary school, para. 98); Estonia ("basic" and secondary schools, In respect of Article 14); Germany (secondary school, para. 87; beyond primary school, para. 88); Sweden (pre-school, para. 94); Switzerland (full primary education, para. 100).

¹⁹⁶ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p.245.

¹⁹⁷ (emphasis per original) Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 239.

¹⁹⁸ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 241.

¹⁹⁹ Tove Skutnabb-Kangas, "Commentary: The status of minority languages in the education process", *op. cit.*, p. 242. It is worth noting that a Russian-speaking Latvian citizen lodged a complaint with the European Court of Human Rights to the effect that a legislative provision requiring state secondary schools to use Latvian as the sole language of instruction would adversely affect his academic performance. Ultimately, the Court did not pronounce on the merits of the case as it found that all domestic remedies had not been exhausted. See further: *Grisankova & Grisankovs v. Latvia*, Decision of inadmissibility of the European Court of Human Rights [...].

danger that unqualified references to, for example “separate special classes” could be construed as an endorsement of negative segregation models. Such interpretations could have very unfortunate consequences, especially for Roma children, who are frequently the object of such segregated education.²⁰⁰ Finally, it is worth noting that in the Opinions of the Advisory Committee, references to the relationship between minority languages and the State language in the educational sphere are few and far between.²⁰¹

The Hague Recommendations Regarding the Education Rights of National Minorities, *op. cit.*, are much bolder than the guarantees for education rights provided by ECHR P1-2 and Articles 12-14, FCNM. First, the Recommendations assert that “the relevant international obligations and commitments constitute international minimum standards” and should therefore not be interpreted restrictively.²⁰² Second, they call on States to be proactive in their approach to minority education rights, and more specifically, to “actively implement minority language education rights to the maximum of their available resources [...]”.²⁰³ This arguably leaves plenty of room to develop suitable indicators for measuring State progress towards the realisation of minorities’ education rights. Indeed, the Explanatory Note to the Recommendations makes explicit reference to Article 2, ICESCR, which also provides for the progressive realisation of rights (see further, *supra*).²⁰⁴ Third, the Recommendations explore minority (language) education rights in considerably more detail than many other international instruments.

The Recommendations attach great importance to the principle of minority participation in the elaboration and implementation of policies, programmes and curricula pertaining to minority language education.²⁰⁵ Participation through representatives of minority groups and direct parental involvement²⁰⁶ are both prized. The principle of decentralised decision-making is also recognised.²⁰⁷ In keeping with prevailing international law (see further, *supra*), persons belonging to national minorities have the right to establish and maintain their own educational institutions and while the State may not unduly interfere with this right, there is no obligation on States to provide funding for private educational initiatives. The right to seek “sources of funding without any hindrance or discrimination from the State budget, international sources and the private sector”²⁰⁸ is, however, put forth.

The section of the Recommendations entitled “Minority education at primary and secondary levels”²⁰⁹ deliberately draws on relevant educational research. It emphasises the

²⁰⁰ For a more ample discussion, including concrete examples gleaned from the Advisory Committee’s Opinions, see: Tove Skutnabb-Kangas, “Commentary: The status of minority languages in the education process”, *op. cit.*, pp. 243-245; Andrzej Mirga, “Commentary: The challenges of adaptation: from segregation to inclusive education”, in *Filling the Frame, op. cit.*, pp. 229-233.

²⁰¹ In its Opinion on Estonia, the Advisory Committee urged that “language immersion” programmes remain voluntary and that resources allocated thereto should not hamper the availability or quality of minority language education. In its Opinion on Finland, attention turned towards the need for instruction in the Finnish-language in the public school system on the Åland Islands. In its Opinion on Moldova, the Advisory Committee rather blandly called for a balanced response to the specific language needs of all national minorities, without prejudice to learning and teaching of the State language (thereby basically only rehashing the wording of Article 14(3)).

²⁰² Para. 3.

²⁰³ Para. 4.

²⁰⁴ Section “Measures and resources”, Explanatory Note to The Hague Recommendations, *op. cit.*

²⁰⁵ Paras. 5, 20, 21.

²⁰⁶ Para. 7.

²⁰⁷ Paras. 6, 7.

²⁰⁸ Para. 10.

²⁰⁹ Paras. 11-14.

complementarity between different stages of a child's educational development and the desirability of cultural congruence between teachers and pupils. According to the Recommendations, the medium of teaching at pre-school, kindergarten and primary school should ideally be the child's own language. At primary school level, the official State language should be taught as a subject on a regular basis and towards the end of the primary cycle, some other subjects could be taught in the official State language as well. The emphasis here is clearly on additive language learning (see further, *supra*).²¹⁰ At second-level, a substantial part of the curriculum should be taught in the minority language, with a gradual increase in the number of subjects taught in the official State language. The purpose of this section is to allow full knowledge of the mother tongue to be acquired through formal education, without hindering the learning of the official State language or chances for social integration later.²¹¹ This is very much in keeping with the Recommendations' overall aim of safeguarding multiculturalism in the context of social integration.²¹²

By including a section on "Minority education in vocational schools",²¹³ the Recommendations seek to pursue practical socio-economic goals and not just the (academic?) cultural objective of linguistic conservation. It is also recommended that tertiary education be provided for minorities in their own languages "when they have demonstrated the need for it and when their numerical strength justifies it".²¹⁴ This recommendation is more weakly worded than others, apparently because (i) of the high level of resources its realisation would necessitate, and (ii) increased mindfulness of the goal of integration in third-level education.²¹⁵

3.2.4 Culture

Culture is of its nature a very diffuse concept. Unsurprisingly, then, international instruments rarely seek to pin it down definitionally. One notable exception to this reluctance is the Preamble to the UNESCO Universal Declaration on Cultural Diversity (2001),²¹⁶ which reaffirms that culture should be regarded as:

the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

²¹⁰ See further: Guillaume Siemienski & John Packer, "Integration through Education: The Origin and Development of The Hague Recommendations", 4 *International Journal on Minority and Group Rights* (1997), 187-198, at 196.

²¹¹ See further: Section "Minority education at primary and secondary school levels", Explanatory Note to The Hague Recommendations, *op. cit.*

²¹² Paras. 1, 19. See further: Guillaume Siemienski & John Packer, "Integration through Education: The Origin and Development of The Hague Recommendations", *op. cit.*, at 189.

²¹³ Paras. 15, 16.

²¹⁴ Para. 17.

²¹⁵ See further: Section "Minority education at tertiary level", Explanatory Note to The Hague Recommendations, *op. cit.*

²¹⁶ Adopted unanimously by the UNESCO General Conference at its 31st session on 2 November 2001. For a detailed overview of UNESCO's other standard-setting and activities in the realm of culture, see generally: Yvonne Donders, "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" (forthcoming 2008, text on file with author).

Definitional approaches to “culture” matter,²¹⁷ even if they are in short supply in international instruments. They matter because they are foundational for defining and determining the scope of cultural rights. Cultural rights can, as Yvonne Donders has observed, span cultural dimensions to a range of other human rights, as well as “separate cultural rights, such as the right to culture or the right to cultural identity”.²¹⁸ The distinction between both categories of cultural rights can be of considerable practical importance, as will become apparent from the analysis of relevant case-law, *infra*.

Next to the UNESCO Declaration – with its specific focus on cultural *diversity* (discussed further in s. 7.4.1, *infra*) – other more general international human rights instruments also contain occasional references to various rights associated with the enjoyment of culture, but without attempting to provide a comprehensive definition of the concept. For instance, Article 27(1) of the Universal Declaration of Human Rights reads: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.²¹⁹ Pursuant to Article 27, ICCPR, persons belonging to ethnic, religious or linguistic minorities shall not be denied the right *inter alia* “to enjoy their own culture”. The overall tenor of UN HRC General Comment 23 implicitly affirms that culture is the crux of the concept of minority rights.

Article 15, ICESCR, formulates the right of everyone to participate in cultural life,²²⁰ to benefit from scientific progress and to enjoy intellectual property rights.²²¹ It reads:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Article 15, ICESCR, sets out rights that are to be enjoyed by everyone, including persons belonging to minorities. The CESCR’s General Comment No. 17, which focuses on Article

²¹⁷ See generally: Adam Kuper, *Culture: The Anthropologists’ Account* (Cambridge, Massachusetts/London, England, Harvard University Press, 1999).

²¹⁸ Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerpen/Oxford/New York, Intersentia, 2002), p. 73.

²¹⁹ For commentary on Article 27, UDHR, and its drafting history, see, Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l’homme*, *op. cit.*, pp. 252-257; Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 139-144; Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration and Beyond* (Leiden/Boston, Martinus Nijhoff Publishers, 2007).

²²⁰ The right to take part in cultural life is explored in detail in a series of papers produced in the context of a CESCR Day of General Discussion dedicated to the topic on 9 May 2008; see, *inter alia*, Yvonne Donders, “Cultural Life in the context of Human Rights”, UN Doc. E/C.12/40/13; Patrick Thornberry, “Cultural rights and universality of human rights”, UN Doc. E/C.12/40/15; Julie Ringelheim, “Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from the International Human Rights Case Law”, UN Doc. E/C.12/40/4.

²²¹ For commentary on Article 15, ICESCR, its drafting history and application, see, Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 144-162.

15(1)(c), ICESCR, stresses that States are under an obligation to protect the moral and material interests of authors belonging to ethnic, religious or linguistic minorities “through special measures to preserve the distinctive character of minority cultures”.²²² This obligation is styled as an obligation on States to “protect” the rights in question and involves, *inter alia*, a duty “to ensure the effective protection of the moral and material interests of authors against infringement by third parties”.²²³ The specific entailments of the enjoyment of these rights by persons belonging to minorities can be elucidated by reading Article 15, ICESCR, in conjunction with Article 27, ICCPR.²²⁴

As already noted, cultural dimensions to rights and cultural rights proper, comprise a complex of elements. Of central importance is what Yvonne Donders styles as the freedom of cultural identity: she describes it as a freedom and an emerging principle of international law rather than a right because in order to recognise it as a right, its content would have to be clarified, concretised and circumscribed.²²⁵ By treating it as a freedom, it retains the broadness of ambit that facilitates its further development. Within the developmental space created by the freedom, individuals can fully assume the collective dimension to their identities and due recognition can also be given to the importance of other considerations such as the right to participate in cultural life, association with land and lifestyle and organisational aspects of cultural life. These considerations will now serve as analytical axes for the forthcoming discussion of the content of cultural rights, as developed by the UN Human Rights Committee and the European Court of Human Rights.

Certain minorities have distinctive, traditional lifestyles which are defined by a special affinity with the land, or what Garth Nettheim has termed the “land-nexus”.²²⁶ Very often, that affinity stems not only from economic dependence on the land or traditional activities pursued on the land,²²⁷ but also from a sense of attachment to traditional homelands which can even have spiritual significance for some minority groups.²²⁸ The importance of this nexus for persons belonging to minorities has consistently been underscored by UN Human Rights Committee in its jurisprudence. The Committee has emphasised, for example, that economic activities are entitled to protection under Article 27, ICCPR, whenever they are “an essential element of the culture of an ethnic community”.²²⁹ This general rule holds true even when other economic activities are pursued in order to gain supplementary income²³⁰ or when traditional means of livelihood for minorities are adapted “to the modern way of life and

²²² General Comment No. 17 (2005), The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), Committee on Economic, Social and Cultural Rights, 12 January 2006, E/C.12/GC/17, para. 33.

²²³ *Ibid.*, para. 31. See further in this connection, Chapter 5.1.3.

²²⁴ *Ibid.*, fn. 22.

²²⁵ Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, pp. 337-345.

²²⁶ Garth Nettheim, in James Crawford, Ed., *The Rights of Peoples*, *op. cit.*, pp. 107-126, at 122. See also p.117.

²²⁷ Examples of such traditional activities include: hunting, fishing, reindeer husbandry. See General Comment No. 23, *op. cit.*, para. 7; Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, 8 November 1994, para. 9.5; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, 22 November 1996, para. 10.4.

²²⁸ See, for example, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, 8 November 1994 (esp. para. 9.3).

²²⁹ Communication No. 197/1985, *Ivan Kitok v. Sweden*, 27 July 1988, para. 9.2; Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.2; Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.2; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, 20 October 2000, para. 9.3.

²³⁰ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.2.

ensuing technology”.²³¹ However, economic dependence on particular lands will not – of itself – be sufficient to ground claims for (exclusive) use of those lands. The relationship with the lands must give rise to a distinctive culture.²³²

The Committee recognises the legitimacy of State interests in economic development,²³³ a goal which, in practice, does not always coincide with traditional land usage by minority groups. In seeking to balance these potentially conflicting interests, the Committee has held that “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27”.²³⁴ However, measures which have an impact amounting to a denial of the right to enjoy one’s culture will be considered incompatible with State obligations under Article 27.²³⁵ The Committee has circumspectly pointed out that even when different activities may not in themselves constitute individual violations of Article 27, the cumulative or collective impact of such measures could well do so.²³⁶

Over time, the European Court of Human Rights has come to attenuate its erstwhile stance that the rights and freedoms set forth in the ECHR are guaranteed to everyone and that the Convention does not guarantee specific rights to minorities. One of the first indicators of this attenuation was the Commission’s acceptance of the principle that under Article 8, ECHR, a minority group is “entitled to claim the right to respect for the particular life style it may lead as being ‘private life’, ‘family life’ or ‘home’”. Although culture is not mentioned expressly here, it could – given the breadth of the notion – certainly be inferred.²³⁷

Noack & Others v. Germany was a case involving a legal challenge to the proposed relocation of the inhabitants of a Sorbian village to a neighbouring village in order to allow for a large-scale mining project to be realised. Following its earlier jurisprudence,²³⁸ the European Court of Human Rights reiterated the principle that a minority’s way of life is, in principle, entitled to protection under Article 8, ECHR. The applicants’ membership of the Sorbian community weighed heavily on the Court (this fact was alluded to repeatedly throughout the judgment), a fact which, in the circumstances of the instant case, entitled them to “special protection”.²³⁹ The Court ultimately found that the population transfer would not amount to a violation of Article 8, *inter alia* because “the inhabitants will continue to live in the same region and the

²³¹ Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, *op. cit.*, para. 9.4, refining the principle stated in Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.3.

²³² Communication No. 760/1997, *Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, 6 September 2000, para. 10.6.

²³³ See, for example, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.4; Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, *op. cit.*, para. 9.4.

²³⁴ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.3, following Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, *op. cit.*, para. 9.4. In opting for this approach, the Human Rights Committee has explicitly rejected an approach based on the margin of appreciation doctrine, as often relied upon by the European Court of Human Rights.

²³⁵ See references in preceding footnote.

²³⁶ Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, *op. cit.*, para. 10.7.

²³⁷ This view is shared by Donders, who notes that in the absence of a specific article in the ECHR dealing with the protection of cultural identity, it tends to be “read into” the provisions guaranteeing other rights: Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*, at p. 333.

²³⁸ The judgment refers specifically to *G. & E. v. Norway*, *Buckley v. UK* and *Chapman v. UK*, all *op. cit.* – p. 10 of judgment.

²³⁹ p. 12 of judgment.

same cultural environment”.²⁴⁰ The Court was satisfied that “the need to preserve and sustain the village community and the Sorbian cultural identity” had been duly taken into account by the relevant authorities.²⁴¹

As discussed *supra*,²⁴² the Court’s judgments in a batch of cases concerning Gypsies in the UK has revealed a growing awareness of, and sensitivity to, the lifestyle of a particular type of minority. The Court has been prepared to give credence to the specifics of the Gypsy lifestyle, even to the point of acknowledging “the apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice”.²⁴³ This recognition that the traditional lifestyles of ethnic groups can and do evolve, and that such evolution needs to be properly reckoned with, is of seminal importance. It is a very positive development that the Court has been prepared to recognise this evolution and thereby confront the acute difficulties of appreciation that this may entail for relevant authorities in their policy- and decision-making processes. The Court has itself recognised the predicament facing authorities, who “are being required to give special consideration to a sector of the population which is no longer easy to define in terms of the nomadism which is the *raison d’être* of that special treatment”.²⁴⁴ Once again, given the nexus between (traditional) lifestyle and culture, this nascent sensitivity is to be welcomed as a constructive step towards greater recognition for cultural rights.

The ability of persons belonging to minorities to exercise their cultural rights is often contingent on their ability to freely assemble and associate for cultural purposes. A core value of democracy, the right to freedom of assembly and association is widely protected under international human rights law.²⁴⁵ Of those provisions, Article 11, ECHR, is the one which has generated the most case-law. By way of contrast, organisational aspects of cultural rights have infrequently come to the fore in the jurisprudence of the UN Human Rights Committee and where they have done so, they have been primarily concerned with questions of group representation or agency.²⁴⁶ Article 11, ECHR provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

At issue in the case of *Sidiropoulos and others v. Greece*²⁴⁷ was the refusal by the Greek courts to recognise a non-profit-making association, “The Home of Macedonian Civilisation”,

²⁴⁰ p. 13 of judgment. Importantly for the Court, the fact that the inhabitants of the village were to be relocated within the same region meant that the protection of their rights as Sorbs under Article 25 of the Constitution of the *Land* of Brandenburg would not be affected.

²⁴¹ p. 13 of judgment.

²⁴² Pp. of this chapter.

²⁴³ *Connors v. the United Kingdom, op. cit.*, para. 93.

²⁴⁴ *Ibid.*, para. 93.

²⁴⁵ Article 20, UDHR; Articles 21 & 22, ICCPR; Article 11, ECHR, etc.

²⁴⁶ See, for example, Communication No. 78/1980, *Mikmaq tribal society v. Canada*, 30 September 1980 (a case in which the Human Rights Committee refused to accept that the author of the communication was authorised to act as a representative for the Mikmaq tribal society).

²⁴⁷ Judgment of the European Court of Human Rights of 10 July 1998, paras. 37 & 38.

upon the authorities' suspicion that behind the association's stated cultural aims lay the intention to undermine the country's territorial integrity. The European Court of Human Rights rejected the respondent Government's argument that the upholding of Greece's "cultural traditions and historical and cultural symbols" constituted legitimate grounds for restricting the right to freedom of association under Article 11(2), ECHR. An important principle established by the Court in the *Sidiropoulos* case was followed in the later *Stankov* case (which formulated the principle more succinctly):

The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the Convention [...]²⁴⁸

The facts of the *Stankov* case were comparable to those in *Sidiropoulos*. The United Macedonian Organisation Ilinden was set up to "unite all Macedonians living in Bulgaria on a regional and cultural basis" and to achieve "the recognition of the Macedonian minority in Bulgaria".²⁴⁹ Its applications for registration as an association were turned down by the Bulgarian courts, which deemed the association's aims to be "directed against the unity of the nation"; "that it advocated national and ethnic hatred and that it was dangerous for the territorial integrity of Bulgaria".²⁵⁰ The courts reached this conclusion despite the statement in the association's statute that it would neither infringe Bulgaria's territorial integrity nor use "violent, brutal, inhuman or unlawful means" to achieve its aims.²⁵¹ In both cases, the Court took a hard line on the permissibility of restrictions under Article 11, holding in *Sidiropoulos*, for example, that: "Exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive".²⁵²

The principle elaborated in *Sidiropoulos* and *Stankov* would, however, appear to have been dealt a blow in *Gorzelik & Others v. Poland*. The facts of the case again involved the refusal by the competent domestic courts to accept the application for registration submitted by an association with cultural objectives - the Union of People of Silesian Nationality. Before the European Court of Human Rights, the Polish Government submitted that the denial of official registration to the Union pursued *inter alia* the legitimate aim of preventing disorder.²⁵³ It also alleged that the Union was seeking registration as an association in a bid to attain the status of a national minority. Under Polish law, the attainment of such status entitles the beneficiary group to various privileges, including in the electoral sphere.²⁵⁴ The Polish Government therefore contended that registration was sought in order to circumvent the provisions of electoral law at some future date.²⁵⁵

On this occasion, the Court let itself be swayed by speculations as to possible future activities of the association over and above those expressly set out in its programme. The Court took the view that the authorities' suspicions about the association's possible future activities could "easily" have been dispelled by the applicants, "in particular by slightly changing the name of

²⁴⁸ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 2 October 2001, para. 89. See also *Sidiropoulos v. Greece*, *op. cit.*, para. 44.

²⁴⁹ *Stankov & Ilinden v. Bulgaria*, *op. cit.*, para. 10.

²⁵⁰ *Ibid.*, paras. 11 & 12.

²⁵¹ *Ibid.*, para. 10.

²⁵² *Sidiropoulos v. Greece*, *op. cit.*, para. 38.

²⁵³ Para. 39.

²⁵⁴ Para. 40.

²⁵⁵ Para. 39.

their association and by sacrificing, or amending, a single provision of the memorandum of association”.²⁵⁶ Such alterations would not have harmed the existence of the association or interfered with the realisation of its goals, according to the Court. This reasoning by the Court is disappointing because it panders unnecessarily to hypothetical fears. The legal loophole could easily have been addressed by legislative initiative, thereby allowing the association the benefits flowing from registration and the resultant regularised status. This case has been referred to the Grand Chamber, but if upheld, it could – along with the *Refah Partisi* case (*supra*) – set a very negative precedent for the protection of minority rights by showing inordinate deference to potential threats to society arising from possible future activities... as alleged by State authorities.

The Court has also held that the right guaranteed by Article 11, ECHR, would be “largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention”.²⁵⁷ The Court therefore insisted that “the protection afforded by Article 11 lasts for an association’s entire life and that dissolution of an association by a country’s authorities must accordingly satisfy the requirements” of Article 11(2).²⁵⁸

EUROPEAN UNION

One of the most important legal bases for the protection of cultural heritage and diversity (including languages) is Article 151 of the Treaty establishing the European Community.²⁵⁹ Article 151(1) states: “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.²⁶⁰

Article 22 of the Charter of Fundamental Rights of the European Union²⁶¹ is entitled ‘Cultural, religious and linguistic diversity’; it reads: “The Union shall respect cultural, religious and linguistic diversity”. It is based on Article 6, TEU, and Article 151(1) and (4) of the EC Treaty.²⁶² Although the explicit reference to cultural diversity is welcome, it is hard to refute the suggestion that its importance is more symbolic than real. Pending the outcome of the stalled European Constitution, the Nice Charter remains a document that is merely politically- (and not legally-) binding on EU Member States. Moreover, even that symbolic importance is questionable, because, first of all, ‘shall respect’ is a significantly weaker formulation than, for example, ‘guarantee’ or ‘secure’. As such, it involves a considerably

²⁵⁶ Para. 65.

²⁵⁷ *United Communist Party of Turkey and Others v. Turkey*, Judgment of the European Court of Human Rights of 30 January 1998, para. 33.

²⁵⁸ *Ibid.*

²⁵⁹ Consolidated version, as published in the *Official Journal of the European Communities* of 24 December 2002, C 325/1.

²⁶⁰ See also in this connection, Articles 149, 150 and the subsequent paras. of Article 151, *id.* See also: Rachael Craufurd Smith, “From heritage conservation to European identity: Article 151 EC and the multi-faceted nature of Community cultural policy”, 32 *E.L. Rev.* (February 2007), pp. 48-69.

²⁶¹ Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

²⁶² Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, CHARTE 4473/00, p. 23. Explanations relating to the Charter of Fundamental Rights, as prepared under the authority of the Praesidium of the Convention which drafted the Charter (and since updated under the responsibility of the Praesidium of the European Convention, which drafted the European Constitution): see OJEC of 16 December 2004, C 310/424 *et seq.*, and for Article 22 of the Charter, *ibid.*, at p. 439.

lighter commitment for States. Second, the Explanatory Note does not spell out the essence or scope of cultural diversity, which suggests a non-committal attitude to – or wariness of – its actual or potential implications.

It is also disappointing that the commentary on Article 22 provided by the EU Network of Independent Experts on Fundamental Rights should only stretch to little over two pages.²⁶³ Its brevity could not possibly do justice to such an expansive and expanding topic. Despite the fact that the substance of the Charter shall not reduce or restrict the level of human rights protection guaranteed *inter alia* by international law and other international agreements by which the EU or its member states are bound (Article 53; see also Article 52(3)), the commentary on Article 22 hardly engages with the treatment of relevant legal issues under international (human rights) treaties at all.

More pointedly, the commentary is, in effect, dismissive of the importance of European Convention on Human Rights (ECHR) jurisprudence dealing with cultural matters. It states, in a brief paragraph, that in the absence of any specific provision in the ECHR that is ‘comparable to’ Article 22 of the Charter, the relevant case law of the European Court of Human Rights is limited to Article 14, ECHR, which focuses on non-discrimination in the exercise of rights safeguarded by the Convention. It then dispenses with the relevant case law by cursorily mentioning three cases – without even giving their facts or indicating their doctrinal importance. It is regrettable, to say the least, that such short shrift should be given in such an influential document to an area of “burgeoning” jurisprudential growth within the ECHR.²⁶⁴ Cultural diversity can only be achieved when pluralism is safeguarded at societal level, meaning that groups are able to practise their distinctive cultures both in public and in private. The exercise of cultural rights therefore entails the right to lead particular lifestyles, participate in cultural life and assemble, associate and organize for cultural purposes.²⁶⁵ As such, cultural rights can be described as having a high level of valency and interdependence with other rights. For that reason, the absence in the ECHR of a specific provision comparable to Article 22 of the Charter is not a valid reason to downplay the importance of provisions and case law ostensibly dealing with other rights, but also having clear relevance for cultural rights.

The commentary makes an explicit link between cultural diversity and broadcasting. It describes the Television without Frontiers Directive as being the text that is probably the closest to Article 22 of the Charter because of the instrumentality of its quota system for European works for preserving cultural creation and therefore diversity. However, the present tense is used when stressing the importance of Article 8, Television without Frontiers Directive, for guaranteeing linguistic diversity, and the text (thereby) fails to mention that Article 8²⁶⁶ was deleted by Directive 97/36/EC (although its essence has been subsumed into

²⁶³ Florence Benoît-Rohmer, “Article 22 – Cultural, religious and linguistic diversity”, in EU Network of Independent Experts on Fundamental Rights, *The Commentary of the Charter of Fundamental Rights of the European Union* (2006), pp. 197-199.

²⁶⁴ Geoff Gilbert, “The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights”, *op. cit.*

²⁶⁵ Yvonne Donders, *Towards a Right to Cultural Identity?*, *op. cit.*

²⁶⁶ Article 8 of Directive 89/552/EEC read: “Where they consider it necessary for purposes of language policy, the Member States, whilst observing Community law, may as regards some or all programmes of television broadcasters under their jurisdiction, lay down more detailed or stricter rules in particular on the basis of language criteria”.

the reformulated Article 3, Television without Frontiers Directive).²⁶⁷ All in all, because the analysis is so brief and broadbrush, its explanatory value is rather limited.

3.2.5 Religion

UNITED NATIONS²⁶⁸

Articles 2 and 55 of the UN Charter, discussed *supra*, list religion among the impermissible grounds for discrimination, but that is the extent of the Charter's treatment of religious freedoms. The protection and promotion of the right to freedom of religion are primarily assured at the global level by specific provisions of the Universal Declaration of Human Rights and the ICCPR. The collection of key existing UN instruments aimed at safeguarding relevant religious freedoms is completed by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,²⁶⁹ which further fleshes out the right to freedom of religion and belief (see further, *infra*). The prioritisation of the drafting of a Declaration eventually led to the (indefinite) abandonment of plans to elaborate an international Convention on the right to freedom of religion.²⁷⁰

Needless to say, a number of other instruments touch on specific aspects of the right to freedom of religion and belief.²⁷¹ As regards the specific (general) measures, Article 18, Universal Declaration of Human Rights, reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The special standing of the Universal Declaration of Human Rights in international law – owing to its particular moral authority arising from the manner of its adoption - has already been discussed. The ICCPR, because of its binding legal character and its applicability throughout the world, is the true centrepiece of global protection for the right to freedom of religion. Article 18, ICCPR, elaborates on the right provided for in the Universal Declaration, as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either

²⁶⁷ The operative sentence reads: 'La directive 89/552/CEE du 30 juin 1987 [*sic*] sur la télévision sans frontières est sans doute le texte le plus proche de l'article 22 dans la mesure où il prévoit un système de quotas d'œuvres européennes afin de préserver la création, et donc la diversité culturelle, et où il permet aux Etats membres, dans son article 8, d'avoir des exigences plus strictes afin d'assurer la diversité linguistique.', *ibid.*, p. 199.

²⁶⁸ See generally: Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague, 1996); John Witte, Jr., & Johan D. van der Vyver, Eds., *Religious Human Rights in Global Perspective* (Vols. I & II) (Martinus Nijhoff, The Hague, 1996); Kevin Boyle & Juliet Sheen, Eds., *Freedom of Religion and Belief: A World Report* (Routledge, London, 1997).

²⁶⁹ Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

²⁷⁰ See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19/Human Rights Centre, University of Essex, United Kingdom, 1992), pp. 61-71, at 63-64; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", 2000 B.Y.U.L. Rev. 905, at 918.

²⁷¹ For example: CRC, ICERD, CEDAW, UNESCO Convention against Discrimination in Education, ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation...

individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The parentage of the Universal Declaration and the substantive proximity between both Article 18's mean that the provisions are best considered in the same analysis. The bold assertion of the right to freedom of thought, conscience and religion in Article 18, UDHR – with its *expressis verbis* provision for the freedom to change one's religion - has never been matched in subsequent UN instruments. Despite the fact that some early drafts of the Covenant Article on freedom of religion being phrased in a negative manner (“No one shall be denied [...]”),²⁷² it quickly acquired an imperative, uncompromising tone. Aside from the controversy surrounding the freedom to “change” one's religion (see further, *infra*), there was broad agreement on its content. This broad agreement was kept intact by the triumph of diplomatic wording; as Karl Josef Partsch has speculated:

Atheists may have been satisfied to see “thought” and “conscience” precede “religion.” Liberals may have been pleased to see all three freedoms on an equal level without preference to any one of them. Strongly religious people may have regarded “thought and conscience” as corresponding not only to religion generally, but even to the only true religion, the one to which they adhere.²⁷³

Prima facie, the most striking result of the transition from the Declaration to the Covenant is that the clause, “freedom to change his religion or belief”, falls by the wayside. Nor does the clause appear in the later Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

This difference of opinion already existed at the time of the elaboration of the Universal Declaration of Human Rights, but the controversy managed to be contained at that juncture. It is widely believed that the compromise wording in the ICCPR, “to have or to adopt a religion or belief of his choice”,²⁷⁴ is sufficiently broad so as to include the right to change one's religion or belief,²⁷⁵ and indeed, this reading of Article 18, ICCPR, is confirmed by General Comment No. 22. Employing extremely cautious wording, the HRC has observed:

²⁷² Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, pp. 352-355.

²⁷³ (footnotes omitted) Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights* (Columbia University Press, New York, 1981), pp. 209-245, at 210.

²⁷⁴ Saudi Arabia had proposed that the words contained in an earlier draft, “to maintain or to change his religion or belief, and freedom [...]”, be deleted, but withdrew this proposed amendment in favour of a text submitted by Brazil and the Philippines which would have introduced the formula “to have a religion or belief of his choice” instead of “to maintain or to change his religion or belief”. The United Kingdom proposed that the words “or to adopt” be added after “to have”, and the sponsors accepted this suggestion. For further details on this particular aspect of the drafting history, see Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, pp. 355-361; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, *op. cit.*, pp.

²⁷⁵ Elizabeth Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, UN Doc. E/CN.4/Sub.2/1987/26, p. 4.

[...] that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.²⁷⁶

Bipolarisation over the freedom to change one's religion was the main reason why the drafting of the text that was to become the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proved to be such a “protracted”²⁷⁷ and “torturous”²⁷⁸ affair. That it took almost two decades of wrangling to reach consensus on a mere eight articles²⁷⁹ in a document that would not even be legally binding,²⁸⁰ speaks volumes about the heightened political sensitivities involved.

In the 1981 Declaration, the freedom to have or adopt a religion or belief of one's choice is transmuted into the freedom to have a religion or whatever belief of his choice. Semantically, this is a considerably weaker formulation than the already attenuated wording included in Article 18, ICCPR. On its own, the adoption of such a formulation would clearly have constituted a retrograde step as regards the protection of religious freedoms under international law. However, as part of the last-minute diplomatic compromise that was brokered, a new eighth article was introduced as a kind of safety-valve to prevent any erosion of standards of protection already established elsewhere in the canon of international human rights instruments. Article 8 of the final text reads:

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

Although this compromise has managed to prevent regression and preserve a certain baseline standard, there can be no doubt that it represents a significant symbolic set-back for international efforts to advance religious freedoms. This is compounded by the fact that the draft Convention on freedom of religion and belief has for all intents and purposes been shelved.

Pursuant to Article 4, ICCPR, the right to freedom of thought, conscience and religion is non-derogable – even in times of public emergency. This is a categorical affirmation of the fundamental nature of the right. The only permissible limitations to the right must be - as set out in Article 18(2), ICCPR - prescribed by law and necessary for the fulfilment of one of the enumerated aims. The relevant jurisprudence of the UN Human Rights Committee largely reflects this. In *Singh Bhinder v. Canada*,²⁸¹ for instance, the Committee found the requirement that Hindus wear hard hats instead of turbans in the work-place for safety reasons

²⁷⁶ Para. 5, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18), 30 July 1993.

²⁷⁷ Natan Lerner, “The Nature and Minimum Standards of Freedom of Religion and Belief”, *op. cit.*, at 919.

²⁷⁸ Clark, 1983, p. 23, quoted in Theodore S. Orlin, “Religious Pluralism and Freedom of Religion: Its Protection in Light of Church/State Relationships”, in Allan Rosas & Jan Helgesen, Eds. (with the collaboration of Diane Goodman), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Martinus Nijhoff Publishers, The Netherlands, 1992), pp. 89-111, at 95.

²⁷⁹ The eighth article was inserted hastily at the eleventh hour in order to broker a compromise on the controversial question of the right to change one's religion.

²⁸⁰ Although, as Natan Lerner correctly points out, “like all solemn declarations of the United Nations General Assembly, [it] implies an expectation of observance”: “The Nature and Minimum Standards of Freedom of Religion and Belief”, *op. cit.*, at 918.

²⁸¹ Communication No. 208/1986, *Singh Bhinder v. Canada*, Views adopted on 9 November 1989.

to be a legitimate form of discrimination. In *Waldman v. Canada, supra*, the Committee considered the differential funding of one class of denominational school to be incompatible with Article 26 as the differential funding lacked a reasonable and objective basis.²⁸²

The United Nations Human Rights Committee has also considered and pronounced on issues relating to the regulation of religious attire (or, to be more specific, the Islamic headscarf), but not in a dispositive manner. In *Hudoyberganova v. Uzbekistan*,²⁸³ the author of the Communication claimed that (as summarised by the Human Rights Committee) “her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs”.²⁸⁴ As such, the material facts of the case were very similar to those in the *Şahin* case, *infra*. The following passage captures the essence of the Human Rights Committee’s examination of the merits of the case:

The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5),²⁸⁵ policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.²⁸⁶

It was submitted *supra* that the Human Rights Committee’s consideration of the underlying issues in this case was not “dispositive”. That assessment is based on the inadequate factual and also contextual detail which informed the Committee’s findings. From the information before the Committee, it was not readily apparent precisely what kind of clothing the author was wearing (neither the author nor the State offered any specification in this regard).²⁸⁷ This

²⁸² In light of this finding, the Committee considered that no additional issues arose for consideration under, *inter alia*, Article 18, ICCPR: *Waldman v. Canada, op. cit.*, para. 10.7.

²⁸³ *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, 18 January 2005.

²⁸⁴ *Ibid.*, para. 6.2.

²⁸⁵ Author’s footnote: General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), adopted by the UN Human Rights Committee at its 48th session on 30 July 1993.

²⁸⁶ *Raihon Hudoyberganova v. Uzbekistan, op. cit.*, para. 6.2.

²⁸⁷ For an overview of terminology relating to the Islamic headscarf, see: Dominic McGoldrick, *Human Rights and Religion: The Islamic headscarf Debate in Europe* (Oxford & Portland, Oregon, Hart Publishing, 2006), pp. 4-5; B.P. Vermeulen *et al.*, *Overwegingen vij een boerka verbod*, Expert Report for the Dutch Cabinet, 3 November 2006, p. 11. The latter differentiates between some of the more frequently used terms as follows: “Hidjaab” is used as a generic term, covering variants ranging from garment covering entire body to headscarf

is a crucial factual element for any examination of whether the particular circumstances of the case could constitute a breach of the author's rights under Article 18, ICCPR. Moreover, as pointed out in the individual (dissenting) opinion of Committee Member Mr. Hipólito Solari-Yrigoyen, "the exclusion of the author, according to her own statements, arose from more complex causes, and not only the religious clothing she wore or her demand to cover her face within the Institute".

Absent adequate factual detail, Committee Member Sir Nigel Rodley offers apposite qualification of the Committee's findings in his individual opinion. Although in general agreement with the Committee, he explicitly dissociates himself from its assertion "duly taking into account the specifics of the context". He explains:

The Committee is right in the implication that, in cases involving such 'clawback' clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

The third individual opinion in this case – that of Committee Member Ms. Ruth Wedgwood – also picks up on the factual ambiguities of the case. For her, the failure to specify whether the author was prevented from wearing a *hijab* or head scarf "covering the hair and neck" or a garment covering the face (as prohibited by Institute regulations) is of pivotal importance. Such specification could have a determinative impact on the evaluation of the circumstances in which the alleged violation of the author's rights took place. Emphasising some very pragmatic considerations, she argues: "a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student's face would present a different set of facts".

It is interesting to note - by way of aside - that pragmatic considerations such as these have shaped the relevant approaches of the competent authorities in a number of States.²⁸⁸ In the Netherlands, for example, the Equal Treatment Commission (CGB) "does not easily consider the importance of communication in an employment relation to be an objective justification for indirect discrimination on the grounds of religion". It has, however, carved out an exception to this rule that recognises "the importance of good communication in the context of learning processes/education". For example, in a recent opinion, it held that:

concealing only the hair. "Boerka" is taken to mean a garment covering the entire body, including the head, with a small gauze at eye-level (typical for areas in Pakistan and Afghanistan). The Report states that it assumes this is the meaning intended by the Parliamentary Motion requesting the Cabinet to prohibit the wearing of the burka in public. The Motion was introduced by Geert Wilders (leader of Partij voor de Vrijheid) (Parliamentary doc. 29 754, no. 41; submitted on 10 October 2005 and adopted by Lower House of Dutch Parliament (Tweede Kamer) on 20 December 2005) in the context of a debate about combating terrorism (for critical commentary, see: E.J. Dommering, "Boerkaverbod is juridisch onwerkbaar", *NRC Handelsblad*, 21 November 2006). It was by way of follow-up to that Motion that the Report was commissioned by the Dutch Cabinet. The Report recognises that "boerka" can have other meanings, incl. garment worn around and covering the head, but which does have slits for eyes, and garment that hangs like a curtain before the face, leaving forehead and eyes free. The Report uses the term "nikaab" for other garments that cover face, but not eyes. It refers to "chador" as a headscarf that is worn around head without covering it. To avoid terminological confusion, the Report tends to refer to "face-covering veils" (gezichtsbedekkende sluiers), which includes "boerka" and "nikaab".

²⁸⁸ As documented in *Leyla Şahin v. Turkey*, Grand Chamber Judgment, *op. cit.*, paras. 63 & 64.

good communication in an educational setting, in combination with the importance of identification and future occupational participation, constituted an objective justification for the indirect discrimination practised by the school in that it prohibited wearing a niqaab (CGB 20 March, opinion 2003-40).²⁸⁹

ECHR²⁹⁰

Under the ECHR, freedom of thought, conscience and religion is vouchsafed by Article 9:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

It has already been demonstrated, *supra*, that the right to freedom of religion, as guaranteed by Article 9, ECHR, is firmly rooted in the principles of democracy and pluralism that underpin the entire Convention. The ambit of the right is thus wide: it accommodates the beliefs of adherents of traditional and non-traditional religions alike and “it is also a precious asset for atheists, agnostics, sceptics and the unconcerned”.²⁹¹ Moreover, the European Court of Human Rights has recognised that a huge diversity of religious affinities exists, if one includes “religions forming a very broad dogmatic and moral entity which as or may have answers to every question of a philosophical, cosmological or moral nature”.²⁹²

Whereas aims of “an idealistic nature” will not of themselves be enough to meet the requisite definitional criteria,²⁹³ specific forms of idealism could be. This was deemed to be the case for pacifism²⁹⁴ and veganism,²⁹⁵ but not for anti-abortion views.²⁹⁶ In other cases, for example concerning Druidism, the Strasbourg judicial organs did not find it necessary to pronounce on whether a belief-system could be classified as a religion for the purposes of Article 9, ECHR.²⁹⁷ In other cases still, the inability of applicants to clearly explain the content of their belief-systems meant that *inter alia* the Wicca-religion and Lichtenbeterism were not

²⁸⁹ “Advisory opinion of the Dutch Equal Treatment Commission on Employment, religion and equal treatment”, 12 August 2004, Doc. CGB advisory opinion/2004/06, p. 9. See also, *Leyla Şahin v. Turkey*, Grand Chamber Judgment, *op. cit.*, para. 64.

²⁹⁰ See generally, Malcolm D. Evans, *Religious liberty and international law in Europe* (Cambridge University Press, Cambridge, 1997).

²⁹¹ *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 25 May 1993, Series A, No. 260-A, para. 31; *Buscarini & Others v. San Marino*, Judgment of the European Court of Human Rights (Grand Chamber) of 18 February 1999, ECHR 1999-I, para. 34; *Dahlab v. Switzerland*, Judgment of the European Court of Human Rights of ..., p. 11 of judgment; *Leyla Sahin v. Turkey*, Judgment of the European Court of Human Rights (Fourth Section) of 29 June 2004, para. 66.

²⁹² *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, *op. cit.*, para. 53.

²⁹³ For example, in *VRU v. the Netherlands*, *op. cit.*, the aims of the applicant association were to provide legal advice to prisoners and look after their interests on a non-commercial basis.

²⁹⁴ *Arrowsmith v. the United Kingdom*, Report of the European Commission of Human Rights of 12 October 1978, Appn. No. 7050/75, D&R 19 (1980), para. 69.

²⁹⁵ *W. v. the United Kingdom*, Appn. No. 18187/91 (unpublished), cited in P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)* (Kluwer Law International, The Hague, 1998), at p. 548.

²⁹⁶ *Van den Dungen*, *op. cit.*

²⁹⁷ *Chappell v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 14 July 1987, Appn. No. 12587/86.

recognised as a religion or belief in the sense of Article 9.²⁹⁸ Some commentators have argued – persuasively – that a guiding principle for determining whether views can be classed as a religion or belief should be whether they “attain a certain level of cogency, seriousness, cohesion and importance”.²⁹⁹ The Court coined this formula while emphasising the distinction between beliefs and (philosophical) convictions on the one hand, and “opinions” and “ideas” (as per Article 10, ECHR), on the other hand.

It is clear from the wording of the Article that the essence of the right is the protection it affords the *forum internum* or “sphere of personal beliefs and religious creeds”.³⁰⁰ Whereas the *forum internum* may be considered to be inviolable,³⁰¹ the outward expression or “manifestation” of such beliefs and creeds is not.³⁰² Protection only extends to acts that are “intimately linked” to such beliefs and creeds, but any permissible restrictions must be in accordance with the criteria specified in Article 9(2). It has consistently been held by the judicial organs of the ECHR that Article 9 “does not protect every act motivated or inspired by a religion or belief”.³⁰³ Determining the motivational threshold required to trigger protection under Article 9 has often proven difficult, as is demonstrated by the case of *Arrowsmith v. the United Kingdom*.

The case arose out of the conviction of the applicant – a committed pacifist – for the distribution of pamphlets to British army soldiers urging them not to serve in Northern Ireland. The European Commission of Human Rights held that “when the actions of individuals do not *actually* express the belief concerned they cannot be considered to be as such protected by Article 9.1, even when they are motivated or influenced by it”.³⁰⁴ It is submitted here that *Arrowsmith* was a poor decision as it failed to take full account of the broader factual context involved. By focusing excessively on the absence of an express statement in the leaflets that they were motivated by the applicant’s pacifist convictions, the Commission failed to give due weight to the fact that the distribution of the leaflets was wholly consistent with the applicant’s other actions, all of which were inspired by her commitment to pacifism. As pointed out by Mr Opsahl in his (partly dissenting) separate opinion in the case, the applicant’s “acts were not only consistent with her belief, but genuinely and objectively expressed it when seen in their context”.³⁰⁵ Opsahl also warned against drawing the line too narrowly lest “only certain, perhaps the more traditional, types of

²⁹⁸ See generally: Peter Cumper, “The Rights of Religious Minorities: The Legal Regulation of New Religious Movements” in Peter Cumper & Steven Wheatley, Eds., *Minority Rights in the ‘New’ Europe*, *op. cit.*, pp. 165-183.

²⁹⁹ *Campbell & Cosans v. the United Kingdom*, Judgment of the European Court of Human Rights of 29 January 1982, Series A, No. 48, para. 36. See further: P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)*, *op. cit.*, p. 548.

³⁰⁰ *VRU v. the Netherlands*, Decision of inadmissibility of the European Commission of Human Rights of , Appn. No. 11308/84; *Van den Dungen v. the Netherlands*, Decision of inadmissibility of the European Commission of Human Rights of 22 February 1995, Appn. No. 22838/93.

³⁰¹ See further, P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights (3rd Edition)*, *op. cit.*, pp. 541-542.

³⁰² A variety of possible forms of manifestation are countenanced in this regard: “worship, teaching, practice and observance”.

³⁰³ *Kalac v. Turkey*, Judgment of the European Court of Human Rights of 23 June 1997, para. 27; the term “influenced” is used instead of “inspired” in *Arrowsmith v. the United Kingdom*, Report of the European Commission of Human Rights of 12 October 1978, Appn. No. 7050/75.

³⁰⁴ (emphasis added) *Ibid.*, para. 71. See also para. 75.

³⁰⁵ Para. 3 of Separate Opinion, *ibid.*

manifestation are protected, irrespective of the genuineness of the motivation”,³⁰⁶ a point of particular importance for minority groups.³⁰⁷

In any event, the Court has frequently conceded that “States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities”.³⁰⁸ The analysis will now proceed to examine the extent of the margin of appreciation afforded States Parties in the case-law of the Court from two perspectives: (i) Church-State relations, and (ii) restrictions on the manifestation of religion or belief.

CHURCH-STATE RELATIONS

In many countries, religious and ecclesiastical bodies are required to follow strict registration procedures. A State’s interest in maintaining such registration procedures is often explained by the assimilation of certain religious ceremonies (in particular marriage) and decisions of religious courts (eg. certain decisions on family and inheritance disputes) to civil ones.³⁰⁹ Religious leaders are therefore sometimes vested with certain (quasi-)judicial and administrative functions.³¹⁰ When this is so, there is an obvious public interest in the regulation of those functions by the State. However, the European Court of Human Rights has deemed it unnecessary “to decide *in abstracto* whether acts of formal registration of religious communities and changes in their leadership constitute an interference with the rights protected by Article 9 of the Convention”.³¹¹ This interpretation would appear to be consistent with the general principle whereby the Court is not allowed to examine legislative measures *in abstracto*.³¹²

The Court has, however, acknowledged that registration procedures for religious bodies are susceptible to abuse by administrative and ecclesiastical authorities: the application of registration criteria without due regard for principles of neutrality and equality could have the effect of restricting the activities of faiths other than an official, established or otherwise dominant Church.³¹³ In this regard, “but for very exceptional cases”, Article 9 “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.³¹⁴ This principle is obviously of crucial importance for minority religions, as the inability to register as a religious body, or the State authorities’ refusal to recognise it as such, could seriously impair its ability to organise itself or operate. By way of illustration, in the case of *Manoussakis v. Greece*, the applicant – a Jehovah’s Witness - had been prosecuted and convicted by the Greek authorities for having operated a place of worship without the necessary legal authorisation.³¹⁵ The European Court of Human

³⁰⁶ *Ibid.*, para. 3.

³⁰⁷ P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd Edition), *op. cit.*, p. 550.

³⁰⁸ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 96; *Cha’are Shalom Ve Tsedek v. France*, para. 84; *Manoussakis v. Greece*, para. 44; *Leyla Sahin v. Turkey*, para. 101.

³⁰⁹ *Serif v. Greece*, para. 50; *Agga v. Greece*, para. 57.

³¹⁰ *Serif v. Greece*, para. 52.

³¹¹ *Hasan & Chaush v. Bulgaria*, para. 77.

³¹² This is by virtue of Article 34, ECHR (ex-Article 25, ECHR: see Protocol No. 11 to the ECHR, *op. cit.*). For a more detailed consideration of the matter, see: *Klass & Others v. Germany*, Judgment of the European Court of Human Rights of 6 September 1978, Series A, No. 28, para. 33.

³¹³ *Manoussakis v. Greece*, para. 48.

³¹⁴ *Hasan & Chaush v. Bulgaria*, para. 78. See also, *Manoussakis v. Greece*, para. 47 and *Serif v. Greece*, para. 52.

³¹⁵ Similar factual circumstances formed the background to the case of *Pentidis and Others v. Greece*, Judgment of the European Court of Human Rights (struck off the list) of 2 June 1997, Appn. No. 23238/94.

Rights found that the applicant's freedom of religion had been violated, largely because of the way in which the relevant domestic authorities failed to process successive requests by the applicant for the required authorisation.

The withholding of registration from religious bodies can also impair their operation in other ways, such as the enjoyment of property rights and other benefits generally ensured by recognition of legal personality and the concomitant right of access to the courts.³¹⁶ As posited by the Court in *Metropolitan Church of Bessarabia & Others v. Moldova*:

Lacking legal personality, it [i.e., the applicant Church] cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations.³¹⁷

It went on to state that it could not regard the tolerance “allegedly shown by the government towards the applicant Church and its members [...] as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned”.³¹⁸

In a spate of cases beginning with *Serif v. Greece*, the Court considered contestations of leadership in religious communities. Its consistent line has been that in democratic societies, the State does not need to “take measures to ensure that religious communities remain or are brought under a unified leadership”.³¹⁹ *A fortiori*, “State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion”.³²⁰

The religious freedom of minorities can also be implicated in State affairs if oaths (of allegiance) to be taken upon appointment or election to public office are overtly religious in character. In *Buscarini & Others v. San Marino*, the applicants complained that at the material time in San Marino, “the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith”.³²¹ The European Court of Human Rights, upheld the view of the Commission that “it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs”.³²² The Court consequently found the facts of the case to constitute a breach of Article 9.³²³

³¹⁶ See, in this connection, *Canea Catholic Church v. Greece*, Judgment of the European Court of Human Rights of 16 December 1997, esp. paras. 41, 42 & 47. See also, *The Holy Monasteries v. Greece*, Judgment of the European Court of Human Rights of 21 November 1994.

³¹⁷ Para. 129. See also: *Hasan & Chaush v. Bulgaria*, para. 62.

³¹⁸ *Ibid.*

³¹⁹ *Serif v. Greece*, para. 52; *Agga v. Greece*, para. 59; *Hasan & Chaush v. Bulgaria*, para. 78;

³²⁰ *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 76 and also paras. 84, 85, 96; *Hasan & Chaush v. Bulgaria*, para. 78.

³²¹ *Buscarini & Others v. San Marino*, Judgment of the European Court of Human Rights of 18 February 1999, para. 30.

³²² *Ibid.*, para. 39.

³²³ Cf. *McGuinness v. the United Kingdom*, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 8 June 1999, Appn. No. 39511/98, a case in which a similar challenge was found not to be in breach of Article 9 as: (i) the oath was not overtly religious in character and the applicant would not forfeit his parliamentary seat for failing to take the oath; (ii) taking the oath would not have forced him to abandon his republican convictions or have prevented him from pursuing those convictions in Parliament. The applicant member of Sinn Féin had argued *inter alia* that to take the oath of allegiance to the British monarchy would offend his religious beliefs, pointing out that Roman Catholics are legally debarred from acceding to the British throne.

RESTRICTIONS ON THE MANIFESTATION OF RELIGION OR BELIEF

As noted *supra*, the exercise of determining whether certain acts are or are not motivated by religious convictions is highly subjective. Borderline cases abound. However, some acts, while closely linked to religion or belief, have consistently been found by the European Court of Human Rights to be beyond the pale of Article 9 protection. A pertinent example is “an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory”.³²⁴ Another example is “improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church”.³²⁵ The Court has taken a particularly dim view of improper proselytism in the context of clear hierarchical structures.³²⁶ Furthermore, engagement in particular types of employment (eg. defence forces,³²⁷ public education sector,³²⁸ etc.) may imply certain restrictions on the freedom to manifest one’s belief. Invariably, when assessing the necessity of an interference with the right to manifest one’s religion, the Court will consider the effect of the impugned measure.³²⁹ When a measure is only of limited effect, for example in terms of its duration or its application to a specified, confined area,³³⁰ it will have a better chance of avoiding censure.

A current source of friction in a number of European States is the extent to which the manifestation of religious beliefs can be compatible with the secular or non-denominational ethos of the education sector. Such points of friction often concern the wearing - out of tenaciously-held religious convictions - of particular items of clothing, artefacts or insignia. In their relevant case-law, the European Court and Commission of Human Rights have paid particular attention to the impact of such symbols on relevant third parties.

In *Karaduman v. Turkey*,³³¹ the applicant student challenged her university’s refusal to issue her with a degree certificate because she had submitted an identity photo in which she was wearing an Islamic headscarf. The university authorities (and subsequently the Turkish courts) were of the view that the photo contravened university regulations prohibiting the wearing of headscarves in the name of preserving the republican/secular nature of the university. The European Commission of Human Rights found that there had not been an interference with the applicant’s freedom of religion, as protected by Article 9, ECHR. In

³²⁴ *Wingrove v. the United Kingdom*, Judgment of the European Court of Human Rights of 22 October 1996, para. 52; *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, No. 295-A, paras. 47, 49; *Choudhury v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90.

³²⁵ *Larissis & Others v. Greece*, Judgment of the European Court of Human Rights of 24 February 1998, para. 45, following *Kokkinakis v. Greece*, *op. cit.*, para. 48.

³²⁶ *Larissis & Others v. Greece*, *op. cit.*, para. 51.

³²⁷ *Kalac v. Turkey*, Judgment of the European Court of Human Rights of 23 June 1997, para. 28; *Engel & Others v. the Netherlands*, Judgment of the European Court of Human Rights of 8 June 1976, Series A, No. 22, para. 57.

³²⁸ *Dahlab v. Switzerland*, *infra*; *X. v. the United Kingdom* (Muslim teacher sought to attend prayer services during school-time – firici agus tagairt iomlan); *Glaserapp v. Germany*, Judgment of the European Court of Human Rights of 28 August 1986, Series A, No. 104; *Kosiek v. Germany*, Judgment of the European Court of Human Rights of 28 August 1986, Series A, No. 105; *Vogt v. Germany*, Judgment of the European Court of Human Rights of 26 September 1995, Series A, No. 323.

³²⁹ *Cha'are Shalom Ve Tsedek v. France*, *op. cit.*, para. 87.

³³⁰ *Van den Dungen v. the Netherlands*, *op. cit.*

³³¹ Decision of inadmissibility of the European Commission of Human Rights of 3 May 1993, Appn. No. 16278/90, DR 74, p. 93.

reaching its conclusion, the Commission was swayed by two main arguments in addition to the objectives of the university dress regulations.

First, it considered that “by choosing to pursue her higher education in a secular university a student submits to those university rules, which may take the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs”.³³² The second argument was an extension of the first: “Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion”.³³³ More specifically, the Commission seemed to follow the observations of the Turkish Constitutional Court, *viz.* that “the act of wearing a Muslim headscarf in Turkish universities may constitute a challenge towards those who do not wear one”.³³⁴

The case of *Dahlab v. Switzerland* focused on the prohibition of a primary-school teacher in a State school from wearing an Islamic head-scarf while carrying out her professional activities. The impressionability of the pupils weighed heavily on the Court in its finding that the interference with the applicant’s freedom of religion was justified as “necessary in a democratic society”.³³⁵ The Court described the wearing of the headscarf as “a powerful external symbol” and expressed concern about its potential proselytising effect on young children. It also followed the Swiss Federal Court by querying the compatibility of wearing the headscarf with the principle of gender equality. This reasoning prompted the Court to state that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”.³³⁶

In its assessment of restrictions on the right to freedom of religion, the Court has not always adhered to the same evidentiary standards. In some cases, it insisted – correctly, it is submitted here – that a general reference to the creation of tension (arising from divided religious communities, or the existence of more than one religious leader) was not sufficient to warrant State interference. Such a reference would necessarily have to be bolstered by an allusion to specific “disturbances that had actually been or could have been caused” by relevant circumstances.³³⁷ By way of contrast, the Court has shown itself elsewhere in its jurisprudence to be very impressionable as regards vague fears of tension or unrest arising from religious disaccord.³³⁸ In those cases, it did not hold out for compelling evidence of the likelihood that the stated fears of the respondent governments would indeed materialise in practice.

³³² *Ibid.*, p. 108.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ The Court had regard “above all, to the tender age of the children for whom the applicant was responsible as a representative of the State”: p. 13 of the judgment.

³³⁶ *Ibid.*

³³⁷ *Serif v. Greece*, para. 53; *Agga v. Greece*, para. 60.

³³⁸ *Murphy v. Ireland*, Judgment of the European Court of Human Rights (Third Section) of 10 July 2003, Reports of Judgments and Decisions 2003-IX; *Refah Partisi v. Turkey*, *op. cit.* See further: (i) concerning the *Murphy* case, Tarlach McGonagle, “Commercial expression – the usefulness of an imperfect notion?” in Eoin O’Dell, Ed., *Freedom of Expression* (Dartmouth Publishing Ltd., England, forthcoming 2005), pp. ; (ii) concerning the *Refah Partisi* case, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Partisi Case”, 1 *Essex Human Rights Review* (No. 1, 2004), pp. 1-16.

The final case to be considered in this section is *Leyla Şahin v. Turkey*,³³⁹ which was ultimately heard by the Grand Chamber of the Court. It will be subjected to more detailed and rigorous analysis than the other cases discussed *supra* for three main reasons. First, the judgment contains a number of pronouncements that appear troublesome when viewed from the perspective of some of the recurrent themes of this thesis, in particular pluralism and pluralistic tolerance. Second, the judgment, having been delivered by the Grand Chamber, represents a very important jurisprudential point of reference for other international and national adjudicative bodies, and law- and policy-makers, in the context of the increasingly prevalent “Islamic headscarf debate” in Europe and the continuing elusiveness of consistency in regulatory approaches to relevant issues.³⁴⁰ Third, although the *Şahin* case provided an excellent opportunity to engage with crucial issues, in the heel of the hunt, the Court balked at the opportunity, opting instead to once again bury its head expeditiously in the sand of the margin of appreciation doctrine. In respect of this question, too, the significance of the *Şahin* judgment extends far beyond the facts of the case.

As to the facts of the case:³⁴¹ in the course of the applicant’s medical studies, a university regulation was introduced which provided, *inter alia*, that “students whose ‘heads are covered’ (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials”.³⁴² Subsequently, the applicant, who continued to wear the headscarf, was therefore denied admission to sit a written examination; refused permission to enrol for a particular course, and denied admission to another written examination. She unsuccessfully challenged the regulation before the courts. The university instituted disciplinary proceedings against the applicant, firstly for her failure to comply with the regulations on dress, and later on account of her participation in a collective protest against those regulations. The proceedings resulted in her suspension from the university for one semester. Her legal challenge to that decision was also dismissed by the courts.

The crucial matter for assessment in the case was the necessity of the impugned measure in a democratic society. When the Grand Chamber applied the Court’s general principles relating

³³⁹ Judgment of the European Court of Human Rights (Grand Chamber) of 10 November 2005, Application No. 44774/98. See further: Tarlach McGonagle, “The Islamic headscarf dilemma: case-note on *Leyla Şahin v. Turkey*”, 1 *Irish Human Rights Review* (Donncha O’Connell, Ed., No. 1, forthcoming 2008).

³⁴⁰ For overviews and commentary, see: (generally) Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford and Portland, Oregon, Hart Publishing, 2006), Emmanuelle Bribosia & Isabelle Rorive, “Le voile à l’école: une Europe divisée”, *Revue trimestrielle des droits de l’homme*, 2004, pp. 951-983; (France, Germany and the Netherlands) Aernout Nieuwenhuis, “State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Sahin v. Turkey*, Decision of 29 June 2004, Application Number 44774/98.”, 1 *European Constitutional Law Review* (No. 3, 2005), pp. 495-510; (France and the United States) T. Jeremy Gunn, “Religious Freedom and Laïcité: A Comparison of the United States and France”, 2004 B.Y.U.L. Rev. 419; (France) Cécile Laborde, “Secular Philosophy and Muslim Headscarves in Schools”, 13 *The Journal of Political Philosophy* (No. 3, 2005), pp. 305-329; (Germany) Christine Langenfeld & Sarah Mohsen, “Germany: The teacher head scarf case”, 3 Int’l. J. Con. Law, (No. 1, 2005): pp. 86-94, Oliver Gerstenberg, “Germany: Freedom of conscience in public schools”, 3 Int’l. J. Con. Law, (No. 1, 2005): pp. 94-106, Matthias Mahlmann, “Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the *Headscarf Case*”, 4 *German Law Journal* (No. 11, 2003), pp. 1099-1116; (United Kingdom) Gareth Davies, “Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v. Denbigh High School*. Decision of 2 March 2005.”, 1 *European Constitutional Law Review* (No. 3, 2005), pp. 511-530, Anat Scolnicov, “A dedicate follower of (religious) fashion?”, 64 *The Cambridge Law Journal* (No. 3, 2005), pp. 527-529.

³⁴¹ Similar facts formed the background to the case of *Zeynep Tekin v. Turkey*, Decision of the European Court of Human Rights (Fourth Section) (struck off the list) of 29 June 2004, Appn. No. 41556/98.

³⁴² *Ibid.*, para. 16.

to Article 9 to the facts of the case at hand, it closely followed the reasoning of the Fourth Section of the Court in its earlier judgment in the *Şahin* case. It affirmed, for instance, the pronouncement in the *Refah Partisi* case, that “An attitude which fails to respect [the principle of secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9”.³⁴³ The Grand Chamber acknowledged the importance of gender equality in the Turkish constitutional system, as the Fourth Section had done earlier, and then went on to approvingly cite the following passages from the Fourth Section’s judgment:

“... In addition, like the Constitutional Court..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), the issues at stake include the protection of the “rights and freedoms of others” and the “maintenance of public order” in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated..., this religious symbol has taken on political significance in Turkey in recent years.

... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.”³⁴⁴

Against that background, the Grand Chamber found the principle of secularism to be “the paramount consideration underlying the ban on the wearing of religious symbols in universities”.³⁴⁵ After considering the circumstances of the case, it stated that “Article 9 does not always guarantee the right to behave in a manner governed by a religious belief [...] and does not confer on people who do so the right to disregard rules that have proved to be justified”.³⁴⁶ It held, emphatically - by 16 votes to one, that no violation of Article 9 had taken place.

Although the mainstay of the applicant’s case was the claim that her rights under Article 9 had been breached, she also invoked her rights under Articles 8, 10 and 14, ECHR, and Article 2 of Protocol 1 to the ECHR (hereinafter ‘P1-2’)). The claims based on Articles 8, 10 and 14 were quickly and unanimously rejected by the Grand Chamber, but the claim based on P1-2 was subjected to lengthier scrutiny before also being denied. The applicant’s claim implicated the first sentence of P1-2: “No person shall be denied the right to education”. Relevant general principles of the Court were rehearsed (discussed broadly, *supra*) and applied to the facts of the instant case. It noted that the “obvious purpose of the restriction was to preserve the secular character of educational institutions”.³⁴⁷ The Court insisted on its finding of proportionality in respect of its analysis of Article 9 earlier in the judgment, before underscoring a number of factors. It considered, first of all, that the impugned measures

³⁴³ *Ibid.*, para. 114; *Refah Partisi* case, *op. cit.*, para. 93.

³⁴⁴ (Citation abridged by author) *Ibid.*, para. 115.

³⁴⁵ *Ibid.*, para. 116.

³⁴⁶ *Ibid.*, para. 121.

³⁴⁷ *Ibid.*, para. 158.

“manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance”.³⁴⁸ It found that the relevant decision-making process implementing the regulations did adequately weigh up the various interests at stake, and that it contained the necessary safeguards for the protection of students’ interests (eg. conformity with legislation and judicial review). It also considered that the “university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system”.³⁴⁹

In her dissenting opinion, Judge Tulkens began by subscribing to the “general principles” reiterated in the Grand Chamber’s judgment.³⁵⁰ She pointed out that the role of the Court in cases concerning conflicts between religious communities is to seek to reconcile universality and diversity, and not to “express an opinion on any religious model whatsoever”.³⁵¹ Her objections to the manner in which the majority of the Court applied the margin of appreciation doctrine in the *Şahin* case were twofold. First, she argued that the considerations of comparative approaches do not point towards a lack of relevant consensus at the European level as none of the approaches surveyed extended to university education (where students are less amenable to pressure). Second, she opined that there was little evidence of the requisite level of European supervision accompanying the margin of appreciation in the instant case.³⁵² She felt that the majority relied exclusively on reasons invoked by the Turkish authorities and courts by way of justification of the ban on wearing the headscarf. She also felt that the majority put forward in general and abstract terms the two main arguments of secularism and equality. While endorsing those principles, she objected to the manner in which they were interpreted in the instant case.³⁵³

Judge Tulkens insisted that alongside secularism, “Religious freedom is, however, also a founding principle of democratic societies”.³⁵⁴ She continued, trenchantly:

Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a “pressing social need”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court’s case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples [...].³⁵⁵

She then pointed up some inconsistencies in the relevant case-law of the Court and underscored the fact that the symbolic importance of the headscarf (or other external symbols of religious practice) “may vary greatly according to the faith concerned”.³⁵⁶

Her critical scrutiny then turned to the majority’s consideration that wearing the headscarf contravenes the principle of secularism and stated that this amounts to taking a “position on

³⁴⁸ *Ibid.*, para. 159.

³⁴⁹ *Ibid.*

³⁵⁰ Dissenting opinion of Judge Tulkens, *ibid.*, para. 1.

³⁵¹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 2.

³⁵² Dissenting opinion of Judge Tulkens, *ibid.*, para. 3.

³⁵³ Dissenting opinion of Judge Tulkens, *ibid.*, para. 4.

³⁵⁴ Dissenting opinion of Judge Tulkens, *ibid.*, para. 5.

³⁵⁵ Dissenting opinion of Judge Tulkens, *ibid.*, para. 5.

³⁵⁶ Dissenting opinion of Judge Tulkens, *ibid.*, para. 6.

an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism”.³⁵⁷ In her view, this generalised assessment overlooks the applicant’s (undisputed) submission that she had no intention of calling the principle of secularism into question. Similarly, it overlooks the absence of evidence that the applicant’s “attitude, conduct or acts” had actually contravened the principle. Furthermore, the *Dahlab* case was relied upon in the majority opinion, rather than distinguished. In that case, the applicant was a teacher, not a student like Leyla Şahin, and the role-model aspect of the teacher was accordingly emphasised by the Court. Judge Tulkens reasoned that “While the principle of secularism requires education to be provided without any manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students” appears different”.³⁵⁸

The dissenting opinion then adverts to the need to avoid equating the wearing of the headscarf with fundamentalism, especially in the absence of any suggestion that the applicant herself held fundamentalist views. Judge Tulkens added that “it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols”.³⁵⁹ Finally, in this connection, “The applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism”.³⁶⁰

Having dispensed with the principle of secularism, Judge Tulkens then turned her attention to the principle of equality, pointing out that the implied linkage between the ban on the headscarf and equality between men and women is never rendered explicit by the Court. She further ventured that wearing the headscarf can have various significations, and referred to such a finding by the German Constitutional Court in 2003 in support of her view.³⁶¹ She criticised the Grand Chamber’s reliance on what is for her “the most questionable part of the reasoning in [the *Dahlab*] decision, namely that wearing the headscarf represents a “powerful external symbol”, which “appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality” and that the practice could not easily be “reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils” (see paragraph 111 of the judgment, *in fine*)”.³⁶² She reasoned that:

It is not the Court’s role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. [...]”³⁶³

³⁵⁷ Dissenting opinion of Judge Tulkens, *ibid.*, para. 7.

³⁵⁸ Dissenting opinion of Judge Tulkens, *ibid.*, para. 7.

³⁵⁹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 10.

³⁶⁰ Dissenting opinion of Judge Tulkens, *ibid.*, para. 10.

³⁶¹ Dissenting opinion of Judge Tulkens, *ibid.*, para. 11.

³⁶² Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

³⁶³ Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

Her final argument in this connection is that if the wearing of the headscarf really was contrary to the principle of gender equality, the State would be under a positive obligation to prohibit it in all places, both in public and in private.³⁶⁴

Judge Tulkens also disagreed with the majority opinion that no violation had taken place of the applicant's right to religion. She agreed with the Grand Chamber that P1-2 is applicable to higher and university education.³⁶⁵ Where she differed from the majority was again in the assessment of the relevance and sufficiency of the reasons adduced for the interference with the applicant's right to education.³⁶⁶ Unlike the majority, Judge Tulkens argued that "no attempt was made to try measures that would have had a less drastic effect on the applicant's right to education in the instant case".³⁶⁷ She added that the Grand Chamber had not weighed up the competing interests involved, i.e., the damage sustained by the applicant on the one hand, and the overall benefit to be gained by Turkish society, on the other.³⁶⁸

Some cautionary tales

The European Court of Human Rights would do well to regard Judge Tulken's dissent in the *Şahin* case as a serious shot across its bows. Her criticisms of the reasoning applied by the majority in that judgment are well-calibrated and have a real urgency about them. A number of general criticisms will now be distilled from her specific criticisms, and fortified with further analysis.

First, the real nub of the case – the individual right of Leyla Şahin to manifest her religious beliefs by wearing the Islamic headscarf in a university setting – was largely sidelined by abstract assertions of various principles, such as secularism and equality, and assertions of public interests, such as the preservation of public order.

Secularism

In the absence of any evidence that the applicant – either in her intentions or actual conduct – sought to dispute or otherwise undermine the principle of secularism that is so cherished in the Turkish Constitutional system, it was disingenuous of the European Court to accept the primacy of that principle as a legitimate ground for upholding the impugned interference with Leyla Şahin's right to manifest her religious beliefs by sartorial means.³⁶⁹ Properly conceived, secularism should be perfectly reconcilable with the principle of (vibrant) religious pluralism. As Kevin Boyle has argued: "if pluralism is a defining value of democratic societies, as suggested by the European Court, then there must be 'pluralism of ideologies', to include spiritual as well as secular traditions".³⁷⁰ As alluded to in Judge Tulken's dissenting opinion, the preservation of a secularist ethos in the education sector can legitimately be achieved by imposing certain regulations on State employees in that sector; whether the extension of relevant regulations to the beneficiaries of education is permissible is a much more

³⁶⁴ Dissenting opinion of Judge Tulkens, *ibid.*, para. 12.

³⁶⁵ Dissenting opinion of Judge Tulkens, *ibid.*, para. 14.

³⁶⁶ Dissenting opinion of Judge Tulkens, *ibid.*, paras. 15 *et seq.*

³⁶⁷ Dissenting opinion of Judge Tulkens, *ibid.*, para. 17.

³⁶⁸ Dissenting opinion of Judge Tulkens, *ibid.*, para. 17.

³⁶⁹ See further, Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷⁰ Kevin Boyle, "Human Rights, Religion and Democracy: The Refah Partisi Case", *op. cit.*, p. 16. See further: Rolf Künneman, "A Coherent Approach to Human Rights", 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342, at 340.

contentious question.³⁷¹ Secularism has a very specific and sensitive history in Turkey,³⁷² but such contextual particularities do not mean that the European scrutiny so essential to the margin of appreciation doctrine should be waived. Indeed, precisely because of the Turkish experience of secularism as an imposed ideology since the foundation of the State, the margin of appreciation doctrine should not be allowed to cordon off the principle from careful scrutiny.

Gender equality

Recurrent references in the majority opinion to the upholding of gender equality similarly fail to convince. Such assertions are premised on the presumption that the Islamic headscarf is symbolically and instrumentally repressive of women's rights and that the decision to wear the headscarf is (to some extent) coerced rather than a matter of individual choice. Certainly, this is one prevalent interpretation of the symbolism of the headscarf, but it is by no means the only one. The decision to wear the headscarf can also be entirely of an individual woman's own volition, and moreover, wearing it can have emancipatory consequences for her, by facilitating her involvement in a range of public and professional activities. Symbolism and signification, therefore, are highly subjective notions and are best determined in concrete situations – not in sweeping generalisations such as those indulged in by the majority of the Grand Chamber. Moreover, as Judge Tulkens insisted, it is not even the task of the European Court of Human Rights to pronounce on the signification of religious symbols.³⁷³

In its superficial and disjointed handling of concerns for gender equality, the Court overlooked the potentially far-reaching exclusionary impact of a ban on wearing the headscarf in educational environment.³⁷⁴ A very “prudential calculus” is involved here, and in any case one that contemplates the likely longer-term implications of such a prohibition.³⁷⁵ Jacob T. Levy has the measure of this calculus when he asks:

Would a ban mostly have the effect of getting Muslim girls in public school to leave their scarves behind, or would it mostly have the effect of keeping them out of the public schools, perhaps encouraging the growth of private schools in which they gain less exposure to a world outside their own community?³⁷⁶

Such trends can ultimately make the realisation of societal goals, such as integration and the promotion of inter-group understanding and tolerance, significantly more difficult.

Relatedly, the Court also put store by the argument that permitting the headscarf to be worn could pressurise others into also wearing the headscarf, but against their will.³⁷⁷ However, given that no evidence was adduced of any examples of such pressure, such a fear can only be regarded as theoretical. Furthermore, as suggested by Judge Tulkens, university students generally exhibit a heightened capacity to resist such peer pressure, unlike their younger

³⁷¹ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷² See further, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Partisi Case”, *op. cit.*, pp. 14 *et seq.*

³⁷³ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7.

³⁷⁴ See further: D. Christopher Decker, “Case Comment: Leyla Sahin v Turkey”, E.H.R.L.R. 2004, 6, 672-678, at p. 678; Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law (*Leyla Sahin v. Turkey*, 29 June 2004)”, n.d., available at: <http://www.strasbourgconference.org> (visited on 29 May 2006) p. 13 of document.

³⁷⁵ Jacob T. Levy, *The Multiculturalism of Fear* (New York, Oxford University Press, 2000), p. 61.

³⁷⁶ *Ibid.*

³⁷⁷ The *Şahin* case, *op. cit.*, para. 115.

school-going counterparts.³⁷⁸ Both of the foregoing arguments bring the necessity of the impugned measures even further into question. In any event, the argument itself diverts attention away from the motivation and conduct of the wearer of the headscarf to those around her. As Gareth Davies has pointed out in respect of a different (but not entirely dissimilar) case, shifting the focus to how certain conduct is interpreted by third parties “comes dangerously close to allowing individuals to be judged by the prejudices of others”,³⁷⁹ a practice which he regards as being “entirely at odds with both reason and the law”.³⁸⁰

Public order

As with the “pressure on others” argument, the justification of the impugned measures on the grounds of maintaining public order also rings hollow.³⁸¹ Again, no evidence of the applicant causing any disruption to public order was submitted to the Court. What did weigh heavily on the Court’s reasoning, though, was the politicisation of the headscarf by extremist political movements in Turkey.³⁸² In the absence of any evidence (or even assertion) before the Court that the applicant had any connection with, or inclination towards, Islamic fundamentalism or other forms of political extremism, the Court’s reliance on this justification is misplaced.³⁸³ It could be taken as implicitly tarring the applicant and religious fundamentalists with the same brush, thereby fuelling suggestions that the Court’s approach was founded on fear and distrust of unfamiliar cultures,³⁸⁴ or the “Threatening Other”, as Tore Lindholm has put it.³⁸⁵ It could also be seen as another example of the Court’s apparent inability to see Islam other than as a monolithic religion. The reality, of course, is that Islam comprises many different strands, just like other major religions. Finally, in this connection, the *Refah Partisi* case raised very serious questions about the Court’s approach to the tenets and practices of Islam,³⁸⁶ and it is to be regretted that the Court in *Şahin* has opted to reiterate some of its more troublesome findings in the *Refah Partisi* case.³⁸⁷

Conclusion

The headscarf debate is proving polemical and divisive at national and international levels alike. There is considerable divergence across States in terms of approaches and attitudes and the reality of such divergence is unlikely to disappear in the near future. Similarly, the contestation of various approaches adopted by States is likely to continue before international bodies. The initial attempts by the European Court of Human Rights and the United Nations

³⁷⁸ Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 7 [Check!].

³⁷⁹ Gareth Davies, “Banning the Jilbab”, *op. cit.*, p. 520.

³⁸⁰ *Ibid.*, p. 522.

³⁸¹ See further, Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief”, *op. cit.*, pp. 11-12 of document.

³⁸² The *Şahin* case, *op. cit.*, para. 115.

³⁸³ See further, the Dissenting opinion of Judge Tulkens in the *Şahin* case, *op. cit.*, para. 10.

³⁸⁴ For further exploration of the theoretical and practical implications of such a fear-grounded policy, see: Jacob T. Levy, *The Multiculturalism of Fear*, *op. cit.*, pp. 33 *et seq.*

³⁸⁵ Tore Lindholm, “Comments on the Case of Leyla Sahin v. Turkey: Political and Public Morality Aspects”, n.d., available at: <http://www.strasbourgconference.org> (visited on 29 May 2006), p. 3 of document.

³⁸⁶ For example, Kevin Boyle has suggested that “The Refah case can be read to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European Convention” (footnote omitted): Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Party Case”, *op. cit.*, p. 12.

³⁸⁷ A full exploration of the problematic aspects of the Refah Partisi case is beyond the scope of this note, but see generally, Kevin Boyle, “Human Rights, Religion and Democracy: The Refah Party Case”, *op. cit.*, and Ben Olbourne, “Refah Partisi (The Welfare Party) v Turkey”, E.H.R.L.R. 2003, 4, 437-444.

Human Rights Committee to deal with relevant matters in a decisive and convincing manner have been found wanting.

In the *Şahin* case, the Court showed rather unquestioning deference to arguments of principle advanced by the Turkish authorities and to specific contextual factors obtaining in Turkey, despite their often tenuous relevance to the facts of the instant case. Considerations of secularism and political extremism in Turkey are prime examples of this. As a result, the Court will find it difficult to refute claims that it has – not for the first time in respect of cases against Turkey – succumbed to “the insidious temptation to resort to a ‘variable geometry’ of human rights which pays undue deference to national or regional ‘sensitivities’”.³⁸⁸ Another highly problematic aspect of the *Şahin* judgment is the lack of refinement in its consideration of matters relating to Islam. In sum, it is regrettable that in this case, the Court would appear to have ascribed its own subjective significations to the Islamic headscarf (as a religious symbol) and imputed motivations to the applicant that were not supported by the evidence before the Court. It is imperative for the credibility of the Court that this emergent doctrinal blight be prevented from spreading to other stalks of the Court’s jurisprudence.³⁸⁹

It can only be hoped that the emergent jurisprudence of the European Court of Human Rights can be sensibly and sensitively consolidated, as its exposure to, and experience with, relevant issues increases. The impact of the Court’s standard-setting role in this regard is far-reaching, as evidenced, *inter alia*, by references to the *Şahin* case by the United Nations Human Rights Committee. This makes the Court’s responsibility all the greater.

FCNM

As regards the FCNM, Article 8 deals most directly with religious rights of persons belonging to national minorities. It reads:

The Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.

The Explanatory Report to the FCNM is laconic in its treatment of Article 8, merely stating that the Article expands on the general announcement of the guarantee for freedom of religion issued in Article 7, FCNM,³⁹⁰ and that it combines several elements from the CSCE Copenhagen Document dealing with religion in one single provision.³⁹¹ In the first cycle of monitoring of the FCNM, issues arising under Article 8 prompted comparatively few detailed specific observations on the part of the Advisory Committee. Indeed, in 16 of the 30 Advisory Opinions adopted (and published so far), the Advisory Committee found that the

³⁸⁸ Lord Lester of Herne Hill, Q.C., “The European Convention on Human Rights in the New Architecture of Europe: General Report”, 38 *Yearbook of the European Convention on Human Rights* (1995), pp. 223-236, at 226-227.

³⁸⁹ See further, Tore Lindholm, “The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief”, *op. cit.*, pp. 17-18 of document.

³⁹⁰ Article 7, FCNM, reads: “The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.”

³⁹¹ Explanatory Report to the FCNM, *op. cit.*, para. 54.

implementation of Article 8 by States Parties did “not give rise to any specific observations”.³⁹²

The specific observations of the Advisory Committee in respect of the other 14 States have scrutinised the interlinkage between non-discrimination/equality and religion, thereby illustrating once again the cross-cutting nature of the former. The observations in question have centred on the differential treatment of various religious entities in some contexts³⁹³ and relations between the State and various religions in countries where there is an official or established church. It has been posited that although “a state church system is not in itself in contradiction with the Framework Convention and [...] the latter does not entail an obligation *per se* to fund religious activities”,³⁹⁴ sensitivity must be shown to how the resulting situation affects the rights of minority religions. This is because any scheme of public financing directed only at the state church could – depending on its terms or manner of its implementation - prove discriminatory. Issues of religious discrimination and hatred, as well as blasphemy, have been dealt with directly.³⁹⁵

The Advisory Committee has also examined matters which can loosely be classed as pertaining respectively to the administration and practice of religion. As to the former, it has concerned itself with the registration of religious entities,³⁹⁶ the restitution of church property³⁹⁷ and the preservation of religious heritage.³⁹⁸ As to the latter, it has considered religious education³⁹⁹ and literature and information of religious content,⁴⁰⁰ assuring a suitable burial place for adherents to a minority religion,⁴⁰¹ and the implications of the regulation of the circumcision of male children for a particular religious minority.⁴⁰²

In its treatment of the above issues, the Advisory Committee has sought to ensure the application of objective criteria⁴⁰³ and the balancing of various interests involved.⁴⁰⁴ It has called for attention to be paid to the application of Article 4 and other provisions of the FCNM.⁴⁰⁵ It has advocated an approach based on consultation with relevant minorities on a number of occasions.⁴⁰⁶ These tendencies are complementary and can be taken as evidence of a generally consistent overall approach on the part of the Advisory Committee.

However, the language used by the Committee is often diplomatic to the point of being non-committal or meaningless. Examples include: address the broad formulation of the law;⁴⁰⁷

³⁹² Opinions on: Armenia, Austria, Czech Republic, Germany, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Malta, Romania, San Marino, Slovak Republic, Spain, Switzerland and the Ukraine.

³⁹³ Opinions on: Croatia (In respect of Article 8); Serbia & Montenegro (para. 143).

³⁹⁴ Opinions on: Denmark (In respect of Article 8) and Finland (In respect of Article 8), but see also the Opinion on Norway (para. 84), for similar wording. In the Opinion on Cyprus, the Advisory Committee noted “with satisfaction” that the State authorities had begun to provide religious officers/leaders from religions other than the Orthodox Church with remuneration on an equal footing with their Orthodox counterparts (para. 35).

³⁹⁵ Opinion on the United Kingdom (paras. 116 and 117, respectively).

³⁹⁶ Opinions on: Azerbaijan (para. 106); Estonia (In respect of Article 8); Russian Federation (para. 142).

³⁹⁷ Opinion on Albania (para. 96).

³⁹⁸ Opinion on Poland (para. 111).

³⁹⁹ Opinion on Norway (para. 85).

⁴⁰⁰ Opinion on Azerbaijan (para. 107).

⁴⁰¹ Opinion on Moldova (para. 108).

⁴⁰² Opinion on Sweden (para. 80).

⁴⁰³ Azerbaijan.

⁴⁰⁴ Albania.

⁴⁰⁵ Croatia, Norway.

⁴⁰⁶ Estonia, Moldova, Sweden.

⁴⁰⁷ Azerbaijan.

review the question⁴⁰⁸ or effect;⁴⁰⁹ ongoing review;⁴¹⁰ examine further legal measures;⁴¹¹ identify appropriate⁴¹² or pragmatic⁴¹³ solutions. The language used by the Advisory Committee creates the impression that it lacks decisiveness. Introducing some tendencies and findings by hesitant phrases such as “information exists” or “it is reported that” further undermine the credibility of the recommendations. It suggests that (i) the Committee itself might be unsure of the trustworthiness of the information at its disposal, and (ii) that it lacks the courage of its convictions, tentative and all as they may be.

On a rare occasion when the Advisory Committee actually did recommend possible courses of concrete action (i.e., the abolition of the crime of blasphemy or its extension to apply to other faiths as well as Christianity), it was much less a case of sticking its neck out than one of obediently following the European Commission of Human Rights and the findings of the national courts when seized with the same issue.⁴¹⁴ The Advisory Committee’s recommendation merely that the existence of minorities be taken into account⁴¹⁵ marks a new nadir of banality and adds absolutely nothing to efforts to raise standards of minority rights protection. Finally, at the risk of being overly pedantic, one could also criticise the insipidity of the remark that problems “merit further attention”.⁴¹⁶ If something is deemed to be a problem, then of course it demands more attention until such time as it is resolved!

3.2.6 Language

Language rights and issues are emphasised in diverse ways in relevant international human rights standards.⁴¹⁷ Attempts to categorise those emphases are therefore useful. Robert Dunbar has proposed two broad categories of language rights: those “encompassing a regime of linguistic tolerance”, including “measures which aim to protect speakers of minority languages from discrimination and procedural unfairness, among other things”⁴¹⁸ and those “encompassing a regime of linguistic promotion”, including “measures which create certain ‘positive’ rights to key public services, such as education and public media, through the medium of minority languages”.⁴¹⁹

The former category is typically protected under non-discrimination and equality provisions (see further, s. 3.2.1, *supra*). Dunbar’s reference to protection against procedural unfairness in this connection is apposite. A considerable body of international case-law exists concerning

⁴⁰⁸ Denmark.

⁴⁰⁹ Finland.

⁴¹⁰ Norway.

⁴¹¹ United Kingdom.

⁴¹² Moldova.

⁴¹³ Sweden.

⁴¹⁴ See further: *Choudhury v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90 and *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, [1991] 1 All ER 306; 1991 1 QB 429.

⁴¹⁵ Poland.

⁴¹⁶ Russian Federation.

⁴¹⁷ For a general overview, see: Fernand de Varennes, *Language, Minorities and Human Rights* (The Netherlands, Kluwer Law International, 1996); Fernand de Varennes, “Linguistic identity and language rights”, in Marc Weller, Ed., *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (New York, Oxford University Press, 2007), pp. 252-323.

⁴¹⁸ Robert Dunbar, “Minority Language Rights in International Law”, 50 *International and Comparative Law Quarterly* (January 2001), pp. 90-120, at 91.

⁴¹⁹ *Ibid.*, at 92.

linguistic rights in the context of court proceedings. Most notably among that case-law, a spate of cases have been taken by Breton speakers against France in international fora in order to assert their right to use their language in court proceedings. From the point of view of the applicants, those cases (eg. *K. v. France*,⁴²⁰ *Bideault v. France*,⁴²¹ *T.K. v. France*,⁴²² *M.K. v. France*,⁴²³ *C.L.D. v. France*,⁴²⁴ *Guesdon v. France*⁴²⁵ and *Cadoret & Le Bihan v. France*⁴²⁶) have been largely unsuccessful. It was consistently held in these cases that the coupling of freedom of expression and language rights did not give rise to a right to choose one's preferred language for court proceedings (especially in instances of demonstrable proficiency in the ordinary language of the proceedings). In minority-specific treaties, provisions on the use of minority languages in judicial proceedings do enjoy an enhanced level of recognition and protection (eg. Article 10.3, FCNM; Article 9, ECRML; Paras. 17-19, Oslo Recommendations regarding the linguistic rights of national minorities).

This category would also include the right to use one's own language in private and in public, orally and in writing (eg. Article 10.1, FCNM). As such, the right spans a range of areas, activities and it connects in important ways with other human rights. The use of languages in cultural activities and facilities (eg. Article 12, ECRML), in economic and social life (eg. Article 13, ECRML; Para. 12, Oslo Recommendations) and in community life and the NGO sector (eg. Paras. 6-7, Oslo Recommendations) is thus encouraged by various measures. In *Ballantyne, Davidson & McIntyre v. Canada*, the UN Human Rights Committee drew a number of these strands together and pronounced, importantly, that it was not necessary to prohibit commercial advertising in English in order to protect the vulnerable position of the French-speaking community in Canada.⁴²⁷ It reasoned that such protection "may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade", eg. by requiring that advertising appear in French and in English. It stated: "A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice".

Linguistic rights belonging to Dunbar's first category also include the right to use one's name in one's own language and to have it officially recognised as such (eg. Article 11.1, FCNM, Para. 1, Oslo Recommendations). They furthermore include the right to have topographical indications displayed in minority languages in areas where minority populations attain certain levels of concentration (eg. Article 11.3, FCNM; Para. 3, Oslo Recommendations).

The latter of the two categories suggested by Dunbar tends to be recognised in tailored provisions, especially in treaties or other texts focusing specifically on minorities or language rights. The right to learn one's mother tongue and to be educated in one's mother tongue is the subject of Article 14, FCNM and Article 8, ECRML (both discussed in s. 3.2.3, *supra*). The promotion of the language rights of persons belonging to minorities via the media is dealt with in detail in Chapters 7 and 8, *infra*.

⁴²⁰ (1984) 35 DR 203.

⁴²¹ Appn. No. 11261/84, 48 DR 232. See also *Isop v Austria*, 8 Yb.ECHR 338 (1965).

⁴²² UN Doc. A/45/40 (1990).

⁴²³ Communication No. 222/1987.

⁴²⁴ Citation.

⁴²⁵ UN Doc. A/45/40 (1990).

⁴²⁶ Communication Nos. 221/1987 & 333/1988.

⁴²⁷ Communication Nos. 359/1989 & 385/1989.

Under generalist human rights treaties, there has been a traditional reluctance to embrace a right to public services in minority languages. In *Inhabitants of Leeuw-St-Pierre v Belgium*,⁴²⁸ for example, the European Commission of Human Rights ruled inadmissible a claim by a group of Belgian citizens that their freedom of expression had been infringed when their municipal authorities refused to provide them with administrative documentation in French. It held that the ECHR did not guarantee freedom of linguistic choice in respect of dealings with municipal authorities. In treaties and standards with explicit focuses on minority rights and languages, the attention to the linguistic dimension to the right to effective participation in public life is accordingly rendered more explicit as well (eg. Article 10.2, FCNM; Article 10, ECRML; Paras. 13-15, Oslo Recommendations). Nevertheless, the nature and extent of relevant State obligations in this connection tend to be shaped by considerations such as the geographical concentration of persons belonging to given minorities and whether a real demand for the provision of official and public services in minority languages exists.

Linguistic rights take on added importance in the context of political representation, given the functional importance of politics for democracy. In *Fryske Nasjonale Partij v Netherlands*,⁴²⁹ the European Commission of Human Rights was unwilling to countenance the applicants' claim that their right to freedom of expression had been violated as the submission of their registration for election was in Frisian and not in Dutch. In *Podkolzina v. Latvia*, the European Court of Human Rights found that procedural shortcomings (i.e., discretion of a single inspector) for assessing the applicant's linguistic proficiency (a precondition for standing in Parliamentary elections) amounted to a violation of Article 3 of ECHR Protocol No. 1 (eligibility to stand in elections).⁴³⁰ Similar facts were at issue in *Ignatane v. Latvia*, except that the applicant had sought to stand as a candidate in local elections.⁴³¹ The *Ignatane* case was considered by the UN Human Rights Committee and it concluded that Article 25, ICCPR (participation in public life, eligibility to vote and be elected in elections, access to public services), had been violated, on account of the *ad hoc* and discretionary manner in which the applicant's linguistic competence had been reviewed.

The importance of the freedom of transfrontier exchanges undercuts both categories and all of the different applications of linguistic rights discussed in the foregoing paragraphs. For this reason, the freedom is expressly safeguarded (eg. Article 17, FCNM; Article 14, ECRML).

It should be noted that the protection and promotion of linguistic diversity is a recurrent objective in many international legal and other instruments. While linguistic diversity does not correspond to an individual or group right, pursuance of the objective necessarily implicates a variety of rights. Linguistic diversity cannot be achieved without *a priori* securing a wide range of linguistic rights (across both of the aforementioned categories).

As regards the European Union,⁴³² Article 22 of the Charter of Fundamental Rights of the European Union (cultural, religious and linguistic diversity) is of importance for the objective

⁴²⁸ (1965), 8 Yearbook of the European Convention on Human Rights 338.

⁴²⁹ (1986) 45 DR 240.

⁴³⁰ *Podkolzina v. Latvia*, Judgment of the European Court of Human Rights (Fourth Section) of 9 April 2002.

⁴³¹ *Antonina Ignatane v. Latvia*, Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999 (2001).

⁴³² Constraints of space prevent a comprehensive overview of EU law concerning language rights and issues; but see in this connection: Xabier Arzoz, Ed., *Respecting Linguistic Diversity in the European Union* (Amsterdam & Philadelphia, John Benjamins Publishing Co., 2008); Bruno de Witte, "Language Law of the European Union: Protecting or Eroding Linguistic Diversity?", in Rachael Craufurd Smith, Ed., *Culture and European Union Law*, *op. cit.*, pp. 205-241; Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (The Netherlands, Kluwer Law International, 2002). Relevant current developments

of furthering linguistic diversity within Europe. Its bases, emphases, strengths and weaknesses have already been considered in s. 3.2.4, *supra*, and will not be repeated here.

Conclusions

The conventional theory that all human rights constitute an inter-related and interdependent whole holds enormous explanatory power. The presumptive coherence of all human rights does not, however, preclude the possibility that their actual interplay, in specific circumstances, could involve varying degrees of friction. This explains the importance of comprehensive pluralistic tolerance as an operative public value and as a guiding interpretive principle.

No matter how exhaustive an analysis of the right to freedom of expression may be, unless it contextualises the relationship of the right with other human rights, it remains inevitably incomplete. Thus, relational aspects of the right to freedom of expression and other human rights must be identified and appreciated. In this respect, the right to freedom of expression clearly intersects with the added value of the minority dimension to a number of selected rights, especially: non-discrimination/equality, participation, education, culture, religion and language. Again, comprehensive pluralistic tolerance serves as a foil to any resistance to the recognition of the minority dimension to these rights.

The greater the level of awareness of the precise content of each of the aforementioned rights, the easier it is to identify their potential synergies with the right to freedom of expression of persons belonging to minorities. This Chapter explores in a detailed manner the general scope of each of these rights, as well as their specific minority-oriented application. A number of enquiries pursued later in this thesis draw on specific elements of the overviews provided in this Chapter in order to elucidate important frictions and synergies involving the right to freedom of expression of persons belonging to minorities. For instance, the rights to non-discrimination/equality, participation and freedom of expression converge into a powerful synergy in respect of access to media. The principles of “availability, accessibility, acceptability and adaptability”, developed in the context of primary education, retain much of their relevance for persons belonging to minorities in the context of more applied forms of education, eg. training of journalists, media literacy, etc. Another example of convergent rights involves cultural, educational, linguistic and expressive rights in the context of educational curricula and materials, or more specifically, the manner in which the lifestyles, cultures and languages of minorities are expressed therein. As the media are vital agents for the transmission of culture and language, considerations of media functionality are determinative in assessments of whether the right to freedom of expression of persons belonging to minorities is effective in practice. As the question of effectiveness is tied to the suitability of various fora or media for the satisfaction of expressive needs, the centrality of cultural and linguistic rights is obvious. Finally, as regards religion: a detailed understanding of the content of the right to freedom of religion reveals that it does not extend to a right not

can be tracked in: François Grin, Tom Moring *et al.*, *Support for Minority Languages in Europe*, Final Report on a project financed by the European Commission, Directorate Education and Culture (submitted: May 2002; published: February 2003); Michl Ebner, Rapporteur, “Report with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057(INI))”, Committee on Culture, Youth, Education, the Media and Sport, European Parliament session document, 4 September 2003, Final A5-0271/2003.

to be offended on the basis of one's religious beliefs, thus rendering attempts to restrict the right to freedom of expression on that basis problematic.

Chapter 4 – Theories of freedom of expression for minorities

- 4.1 Overview of main theories of freedom of expression
 - 4.1.1 Application of main theories of freedom of expression in international law
- 4.2 Rationales for access to expressive opportunities
 - 4.2.1 Democratic participation in public life
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- 4.5 New technologies and new regulatory paradigms

Introduction

Whereas Chapter 3 includes extensive focuses on the added value of a minority dimension to a number of rights that relate in different ways to the right of freedom of expression, Chapter 4 examines the added value of a minority rights dimension to the right to freedom of expression proper. It commences with a rehearsal of some of the more common rationales for freedom of expression and lends them different emphases reflecting various specificities of the aforementioned minority dimension to the right. The instrumental role of the media in the realisation of the right to freedom of expression is then examined, first in general terms and subsequently from the perspective of persons belonging to minorities. The need to engage with media functionality and to differentiate between different media types is stressed. Particular attention is paid to the suitability of community, public service, commercial and transnational media for fulfilling the diverse communicative and informational needs and preferences of persons belonging to minorities.

If the media do not operate in a favourable environment (constitutional, legal, political and societal), it is likely that they will be unable to perform the various democratic functions ascribed to them, eg. public watchdog, contribution to opinion-formation and public debate, provision of fora for public debate. The final focus of this chapter is the extent to which technology-driven changes have conditioned new technological realities and communicative possibilities, behavioural patterns of media usage and consequently the emergence of new regulatory paradigms.

4.1 Overview of main theories of freedom of expression

As a general rule, the right to freedom of expression does not discriminate. It is a fundamental right for everyone. Therefore, any attempts to plead the case for an enhanced right to freedom of expression for members of certain groups in society, for example minorities, would appear

to be misguided and problematic *ab initio*. A more promising way to ensure that the right to freedom of expression for minorities is not just sterile and theoretical, but real and effective, would be to examine the interplay between the right to freedom of expression, specific minority rights and general rights with particular relevance for minorities. To do so, our enquiry must first be situated in an appropriate frame of reference.

The frame of reference chosen for present purposes is that of international human rights law, where freedom of expression takes its place in a catalogue of rights. It has already been explained in the Introduction that freedom of expression is not only a constitutive right, but an instrumental one as well. As such, its interaction with a number of other rights vouchsafed by international human rights law is notably dynamic. Although there is a tendency to perceive the interaction of freedom of expression with other rights as frictional (eg. the right to enjoy one's good name, the right to privacy, the right not to be subjected to racism, etc.), this is a lop-sided perspective and an unfortunate tendency. The interactional relationship between freedom of expression and other rights often generates enhanced understandings and applications of the rights in question. The focus here will, however, be limited to the impact of such interaction in respect of minority rights. As already discussed in Chapter 3.1.1, the potential for synchronicity and synergy, rather than competition and conflict, is particularly evident in the case of the interaction of the right to freedom of expression with religious, linguistic, cultural and educational rights. Those rights were loosely classed as object-oriented, but it was stressed that their optimal realisation is dependent on the optimal realisation of other rights, loosely described as process-oriented, such as the right to non-discrimination/equality, associative and participatory rights. Again, freedom of expression is certainly capable of ameliorating the realisation of these process-oriented rights as well.

Before exploring some of the particular interfaces between freedom of expression and other rights, it is important to stress that the grounding of the right alongside other human rights enshrined in international law makes for welcome internal and external consistency in the interpretation and implementation of human rights. In other words, it is conducive to the coherent interpretation of discrete instruments setting forth guarantees of human rights, but also facilitates heightened levels of coherence across such instruments. To the extent that freedom of expression is interpreted in keeping with this perspective, it serves to underscore the universal, indivisible, interdependent and interrelated nature of human rights, as affirmed *inter alia* in the Vienna Declaration of 1993 (see further, s. 3.1.1, *supra*).¹

Rationales for the protection of freedom of expression are numerous, rich and varied. As noted by Lucas A. Powe, Jr.:

Each of the theories has explanatory power. Each has serious weaknesses. Each one, taken on its own, fails to provide an adequate basis for heightened protection of freedom of expression. [...] the whole is stronger than the sum of its parts. There is a synergy among the various explanations for freedom of expression that is lost when the discussion deals with the strengths and weaknesses of a single theory. Hence, when only one theory of freedom of expression is put forward, the claim

¹ World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993). See, in particular, Article 5 of the Declaration, which reads: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

for heightened protection will be weaker than if the full panoply of justifications were brought to bear on the problem [...]²

Rather than have to choose between the various theories and to seek to ground freedom of expression in any “unitary principle”³ (which would be a very subjective, ambitious and futile exercise anyway⁴), the analytical framework of positive international human rights law has much pragmatic appeal. It provides a context that is well-suited to conducting legal analysis, while at the same time offering the possibility to draw eclectically on the philosophical sophistication of distinct theories of freedom of expression. Given that the various theoretical justifications of the right to freedom of expression are “occasionally mutually exclusive, but more often just compatibly different” and that the right serves a number of purposes, it would not be unusual if several of those purposes were to “coalesce around a particular grouping of circumstances”.⁵ In such a scenario, the right to freedom of expression and other rights could be implicated, thereby emphasising their interdependent character. This choice of framework does not negate or even diminish the importance of the right to freedom of expression; as already stated, it merely ensures a particular contextualisation.

A venerable line of scholars have – in their own ways – argued that freedom of expression merits special consideration, even compared with other freedoms. This argument is grafted onto one of the quintessential liberalist theses of a negative conception of rights (see further, s.3.1.2, *infra*, for a more extensive discussion of this concept – and its implications for freedom of expression). Under this conception of rights, special reasons must be adduced in order to justify the imposition of any constraint on individual rights. It demands “a maximum degree of non-interference [with individual liberty] compatible with the minimum demands of social life”.⁶ As Ronald Dworkin has argued, for example, “once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based”.⁷

² Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (University of California Press, California, 1991), p. 240. See also Powe’s further quip on p. 252: “By ignoring the synergy among rationales [for freedom of expression], they [a number of named scholars] mistakenly treat a division as if it were a platoon.” Other authors do indeed appear to reject the view that the different rationales for freedom of expression are necessarily bound together in a synergic whole: for instance, Susan Brison is dismissive of the most commonly advanced rationales for freedom of expression on the basis that they are too consequentialist: Susan J. Brison, “The Autonomy Defense of Free Speech”, *Ethics* 108 (January 1998): 312-339, at 321-322.

³ Frederick Schauer, “Free Speech and the Argument from Democracy”, in J. Roland Pennock & John W. Chapman, Eds., *Liberal Democracy: Nomos XXV* (USA, New York University Press, 1983), pp. 241-256, at 242. He continues: “But it is more likely that ‘freedom of speech’ is a bundle of interrelated principles, related by no more than a family resemblance. These principles may each have their own justification, and the scope and strength of the principles will be determined by those justifications.” See also, Frederick Schauer, *Free speech: a philosophical enquiry* (USA, Cambridge University Press, 1982), p. 14.

⁴ Some authors have, nevertheless, sought to group relevant rationales for freedom of expression under an expansive version of particular rationales, eg. the autonomy-based “persuasion” principle (i.e., the State may not restrict expression on the basis of its ability to persuade those encountering it to act in ways contrary to the State’s interests). See, for example, David A. Strauss, “Persuasion, Autonomy, and Freedom of Expression”, 91 *Colum. L. Rev.* 334.

⁵ Frederick Schauer, “Public Figures”, 25 *William and Mary Law Review* p. 905 (1984), at p. 930, “Public Figures”. See fn. 38, p. 910.

⁶ Isaiah Berlin, “Two Concepts of Liberty”, in Isaiah Berlin, *Liberty* (Ed. Henry Hardy) (Oxford University Press), pp.166-217, at 207. Berlin associates this demand in particular with Mill and Constant, to whom he refers as “the fathers of liberalism”, *ibid.*

⁷ Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth & Co. Ltd., 1977), p. 200.

More specifically, as regards freedom of expression, Dworkin rejects “the suggested principle that the Government can simply ignore rights to speak when life and property are in question”, continuing: “So long as the impact of speech on these other rights remains speculative and marginal, it must look elsewhere for levers to pull.”⁸ This is central to his famous “rights-as-trumps” approach; an approach which, incidentally, should not be mistaken as absolutist. Dworkin himself willingly concedes that “arguments of principle, which support a particular constraint on liberty on the argument that the constraint is required to protect the distinct right of some individual who will be injured by the exercise of the liberty”.⁹ Frederick Schauer, too, has utilised the same metaphor to make essentially the same point: under a “Free Speech Principle”, “free speech is a good card to hold”; “It does not mean that free speech is the ace of trumps”.¹⁰

When other interests (as opposed to specific individual rights) are pitted against the right to freedom of expression, however, the superior weighting attached to the latter ought to be readily brought to bear on the balancing exercise. Thus, whenever the (perceived) competing interest is based on an “argument of policy” (as opposed to “an argument of principle”),¹¹ to use Dworkin’s phrase, the balancing exercise is conducted “with our thumbs on the free speech side of the scales”,¹² to use Schauer’s. The conclusion prompted by this qualitative distinction between rights and interests is that rights can act as veritable side-constraints on the right to freedom of expression, whereas it is considerably more difficult for assumed societal or public interests to lay claim to such a power of curtailment.¹³

The special consideration afforded to the right to freedom of expression results from the strength of the conceptual premises on which it rests. All those premises – varied as they are – style freedom of expression as a vital vector for the advancement of individual autonomy or self-fulfilment, or for the advancement of democratic practices or societal interests. The main rationales for freedom of expression could be briefly (but non-exhaustively) summarised as:

- self-fulfilment/self-realisation/self-actualisation/individual autonomy;¹⁴
- the advancement of knowledge/discovery of truth/avoidance of error;
- effective participation in democratic society; self-government;¹⁵
- distrust of government/slippery slope or camel’s nose in the tent arguments;
- societal stability and progress;
- tolerance and understanding/conflict prevention;
- the enablement of other human rights, and
- a variety of derivative rationales.¹⁶

⁸ *Ibid.*, p. 204.

⁹ *Ibid.*, p. 274. Frederick Schauer makes a similar point: “The Free Speech Principle is important in all cases within its scope, but it is only necessarily more important in cases where no identifiable individual right is present on the other side of the balance.”, *Free speech: a philosophical enquiry, op. cit.*, p. 134.

¹⁰ Frederick Schauer, *Free speech: a philosophical enquiry, op. cit.*, p. 9.

¹¹ Ronald Dworkin, *Taking Rights Seriously, op. cit.*, p. 274. See also, Ronald Dworkin, “Is the Press Losing the First Amendment?”, *27 New York Review of Books* (No. 19, 4 December 1980), pp. 49- 57.

¹² Frederick Schauer, *Free speech: a philosophical enquiry, op. cit.*, p. 133.

¹³ For a topical example, see the discussion on offence based on religious convictions, s. 6.3, *infra*.

¹⁴ See, for example: Susan J. Brison, “The Autonomy Defense of Free Speech”, *Ethics* 108 (January 1998): 312-339.

¹⁵ See, for example: Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948); William J. Brennan, “The Supreme Court and the Meiklejohnian Interpretation of the First Amendment”, *79 Harv. L. Rev.* 1 (1965).

¹⁶ For a concise elaboration of the content of these theories, see Chapter 2, *supra*, and Tom Campbell, “Rationales for Freedom of Communication”, in Tom Campbell & Wojciech Sadurski, Eds., *Freedom of*

It is the argument from democracy that dove-tails with the present argument from inter-related human rights to the greatest extent. Furthermore, it is Eric Barendt's elaboration of the argument from democracy that most approximates the argument from inter-related human rights. Barendt's characterisation of the argument as being "from citizen participation in a democracy"¹⁷ is more refined than the conventional treatment given to the argument, which tends to be limited to the importance of ideas and information for the processes of opinion-forming and decision-making by the body politic. As such, Barendt deep-links to the essential features of the argument, *viz.*, equality and participation. However, he stops short of incorporating them into a broader rights-based argument, such as the one advanced here.

Nevertheless, it is useful to reflect on the specific structural connection between the rights to non-discrimination/equality and participation (see further, s. 8.1, *infra*). Within "the liberal conception of equality", Ronald Dworkin discerns the existence of two different rights: to equal treatment and to treatment as an equal. The right to equal treatment entails a right "to the same distribution of goods or opportunities as anyone else has or is given".¹⁸ The right to treatment as an equal, on the other hand, involves a right "to equal concern and respect in the political decision about how these goods and opportunities are to be distributed"¹⁹ – participatory rights, for want of a better description. Dworkin regards the right to treatment as an equal as more fundamental to the right to equal treatment.

It is also useful to dwell on the specific role of the rights to non-discrimination/equality and participation in strengthening the flanks of the right to freedom of expression. The central thesis here is that other rights – especially those process-oriented rights of non-discrimination/equality and of participation – when deployed in conjunction with the right to freedom of expression, can serve to reinvigorate the exercise of that right for members of minority groups, without adulterating the indiscriminate character of the right itself. It will be recalled from Chapter 2 that the operative notions of "equality" and "participation" under international human rights law are better described as "effective equality" and "effective participation". In order for both notions to be effective in the context of freedom of expression, they will have to be applied in such a way as to furnish and safeguard expressive opportunities for minorities. This will usually involve engaging with impediments to the realisation of freedom of expression that are deeply embedded in societal and institutional structures (see further, Chapter 8).

A conflation of socio-political and economic circumstances can have a determinant effect on individuals' ability to exercise their right to freedom of expression. The high incidence of members of minority groups suffering socio-political and economic disadvantage makes it

Communication (England, Dartmouth Publishing Co. Ltd., 1994), pp. 17-44. For a more detailed exposition of their content, see: Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, pp. 3-86; Eric Barendt, *Freedom of Speech* (2nd Edition) (United Kingdom, Oxford University Press, 2005), pp. 1-23. By way of aside, it is interesting to note that in the first edition of Prof. Barendt's *Freedom of Speech* (1985), he enumerates three basic theories of free speech: "Mill's argument from truth"; "Free speech as an aspect of self-fulfilment", and "The argument from citizen participation in a democracy" (pp. 8-23 of the first edition). In the second edition of his book (2005), the first theory has been broadened into "Arguments concerned with the importance of discovering truth" and a fourth theory has been added. The "new" theory can therefore be considered a conclusion of mature reflection on the fortunes of freedom of expression in democratic politics over a time-span of two decades. The fact that the period in question was book-ended by Thatcherism and Blairism might go some way towards explaining why the "new", fourth theory is: "Suspicion of government".

¹⁷ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, pp. 18-21.

¹⁸ Ronald Dworkin, *Taking Rights Seriously*, *op. cit.*, p. 273.

¹⁹ *Ibid.*

more difficult for them to enjoy access to the media, thereby compounding their political disenfranchisement, social exclusion and inability to effectively exercise their right to freedom of expression. However, of themselves, those adverse circumstances militating against minorities' ability to fully exercise their right to freedom of expression do not amount to an infringement of that right. Factual circumstances may leave the subjects of the right in a position of incapacity, but incapacity cannot ordinarily be construed as an infringement of rights, absent other considerations that might transform the evaluation.

Examples of transformative considerations would include situational inequality directly resulting from exclusionary or discriminatory institutional practices or a history of persecution. Degrees of intensity and permanency are highly relevant here. This can be usefully elucidated by drawing on the concept of “durable inequality”,²⁰ or better, “durable but preventable inequality”, from which certain minority groups suffer. Michael Walzer describes the “deepest and most enduring inequalities” as being “not primarily economic in their origins”, but as having “their roots in cultural and racial/ethnic differences and in the political exploitation of these differences”.²¹ Members of groups disadvantaged by “durable inequality” are “categorized and stigmatized collectively, not individually, and then they are systematically discriminated against socially and economically”,²² according to Walzer. The right to non-discrimination/equality is triggered – in a strictly legal sense – by any of a combination of factors: when the discrimination/inequality is perpetrated institutionally (thereby implicating the vicarious liability of the State for the actions of its civil servants); repetitive patterns of preventable discrimination/inequality (thereby implicating State liability for acquiescence or failure to take positive measures to prevent the discrimination/inequality), etc.

The relationship between the issues broached in the preceding two paragraphs and freedom of expression for minorities will be discussed in greater detail in Chapters 5-8. What is important for immediate purposes is to make clear that the right to non-discrimination/equality, notwithstanding its cross-cutting tendencies, should not be perceived as a panacea for all the ills and injustices of society – a certain circumstantial threshold must be reached before the right will take effect in such a way as to impose positive obligations on States authorities (see further, the discussion on negative and positive conceptions of liberty, s. 5.2.2, *infra*). Thus, while it may have been characteristically astute of Rousseau to posit that, “Precisely because the force of circumstance tends always to destroy equality, the force of legislation ought always to tend to preserve it”,²³ from the perspective of the international protection of human rights, the question is unfortunately not quite so straightforward.

4.1.1 Application of main theories of freedom of expression in international law

These issues are by no means alien to the international law-making arena. The drafters of the ICCPR did consider a proposal to the effect that “measures shall be taken to promote the freedom of information through the elimination of political, economic, technical and other

²⁰ Michael Walzer develops this concept, the coinage of which he attributes to Charles Tilly, *Durable Inequality* (Berkeley, University of California Press, 1998). See further: Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* (New Haven & London, Yale University Press, 2005?), pp. 29 *et seq.*

²¹ Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism*, p. 29.

²² *Ibid.*, p. 30.

²³ Jean-Jacques Rousseau, *The Social Contract* (Trans. Maurice Cranston) (England, Penguin, 2004), p. 59.

obstacles which are likely to hinder the free flow of information”.²⁴ The proposal - and another colourably similar one²⁵ - “were rejected mainly on the grounds that they dealt with temporary situations or technical problems, rather than the right to freedom of expression itself, and should not, therefore, be included in a universal instrument of a lasting character”.²⁶ Experience has shown that the drafters underestimated the transient nature of structural impediments to the realisation of the right to freedom of expression. Nevertheless, their reluctance to prescribe legally-enforceable State obligations to ensure favourable conditions for the exercise of the right to freedom of expression lives on to this day (again, see further, the discussion on negative and positive conceptions of liberty, s. 5.2.2, *infra*).

Considerations raised by durable inequality and the legacy of historical discrimination have also been featured at the international level, but more successfully than attempts to eradicate obstacles to the free flow of information. In fact, they have brought about a particular pro-equality doctrine that is cognisant of the specific plight of traditionally-subjugated minorities. The UN Human Rights Committee has referred to the need to address and redress “historical inequities”²⁷ – or, in other words, accumulated injustices and discrimination - suffered by particular minority groups. Similarly, but more searchingly, some commentators have argued for enquiries to go beyond an unquestioning assumption of historical injustice and to examine the extent to which such injustice is perpetuated by existing societal and institutional systems.²⁸ This approach captures what should be regarded as the true *telos* of the “historical inequities” doctrine and accordingly casts it as “‘historical inequities’ and the continuing effects thereof”.²⁹ Such a view attaches high importance to current realities, but in a historically contextualised way. It is therefore more refined than the stock arguments which rely too heavily on the injustices of the past, on the one hand, and those which are overly dismissive of the long-lasting consequences of those self-same injustices, on the other hand.

Moving, then, from specific issues to more general ones as this section winds to a close, it should be noted that the UN Human Rights Committee has stated its own preference to present the right to freedom of expression on a broader canvas of rights and interests for examination. This approach is therefore consistent with the analytical frame of reference adopted in this study, i.e., the interdependence of all human rights. The importance of relational aspects of human rights is best explained in terms of their ability to reveal the potential for synergic interaction between rights, which helps to render their exercise more effective in practice. The Committee’s concern is also not so much for the theoretical right, as for “the precise regime of freedom of expression in law and in practice”; “the interplay between the principle of freedom of expression and such limitations and restrictions which

²⁴ Proposal submitted by the Yugoslav Republic, E/CN.4/SR.167, para. 70, cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 396.

²⁵ The gist of the second proposal was that nothing in the article on freedom of expression should prevent a State Party from taking “measures which it deems necessary in order to bring its balance of payments into equilibrium”: E/CN.4/SR.162, para. 33 (GB); E/CN.4/SR.163, para. 6 (AU), cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 396.

²⁶ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, pp. 396-397.

²⁷ *Bernard Ominayak and the Lubicon Lake Band v. Canada*, United Nations Human Rights Committee Communication No. 167/1984, adopted on 26 March 1990, para. 33.

²⁸ See, for example, Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990), p.

²⁹ (emphasis added) Alfred de Zayas, “The Examination of Individual Complaints”, in Gudmundur Alfredsson *et al.*, Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 67-122, at 113.

determines [*sic*] the actual scope of the individual's right".³⁰ To this end, it has requested States Parties to furnish adequate information in their periodic reports "about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right".

To conclude, a proper appraisal of the interaction between freedom of expression and other rights and interests demands a root-and-branch approach. While the appropriateness of the overarching analytical framework of international human rights law has already been explained, it has also become increasingly evident that the right to freedom of expression should be regarded as having central structural importance in that framework. Thus, we can advisedly explore the theory and workings of the right, after the fashion of Thomas Emerson, in terms of an entire "system of freedom of expression".³¹ This casts the subject of our scrutiny as an "interrelated set of rights, principles, practices, and institutions", which has a discernible "overall unity of purpose and operation".³² Such a two-tiered analytical framework allows for full consideration of the myriad forces – ideological, legal, socio-political, cultural, economic, etc. – that pummel the right to freedom of expression into its actual shape.

4.2 Rationales for access to expressive opportunities

The importance of active access to the media can be grounded in several rationales, including participation in democratic procedures and public debate, and the advancement of cultural and linguistic objectives. Flowing from these two rationales, in particular, access can be taken as having a crucial, controlling influence on expressive opportunities, the breadth and depth of public debate and the shaping of cultural and political narratives.³³ Effective access to the media therefore facilitates countermajoritarian posturing by minority groups, as well as the correction of biases in dominant cultural and political discourse. This line of reasoning prompts the conclusion that the kind of pluralism regarded as a hallmark of democratic society is well-served by effective, active access to viable expressive opportunities (see further, Chapter 8).

4.2.1 Democratic participation in public life

It has already been demonstrated how both the right to freedom of expression and the right to participate in public life are heavily reliant on the prior existence of a vibrant public sphere. In turn, the existence of a vibrant public sphere is necessarily predicated on the existence of free, independent and pluralistic media. This is because of the media's watchdog role on the one hand, and their forum-providing role on the other hand. In modern democratic society, the media provide vital fora for public discussion to take place. When they assume such a role or when such a role is thrust upon them, they become powerful gate-keepers to the extent that they can control access to public debate. Their power also derives from their ability to mediate and thereby influence content. These observations explain the edginess about

³⁰ UN Human Rights Committee, General Comment 10, Freedom of expression (Article 19), 29 June 1983, para. 3.

³¹ Thomas I. Emerson, *The System of Freedom of Expression* (New York, Random House, 1970), esp. pp. 3 *et seq.*

³² *Ibid.*, p. 4.

³³ See, *inter alia*, Owen M. Fiss, "Silence on the Street Corner", XXVI *Suffolk University Law Review* (No. 1, Spring 1992), pp. 1-20, at 19; Monroe E. Price, *Television The Public Sphere and National Identity*, *op. cit.*

concentrations of media power and the absence of media-related pluralism which prevails in Chapter 7.

It is hard to come up with a more lucid articulation of the importance of access to the media for the principle of participation in democratic society than that provided by T.M. Scanlon:

Access to means of expression is in many cases a necessary condition for participation in the political process of the country, and therefore something to which citizens have an independent right. At the very least the recognition of such rights will require governments to insure that means of expression are readily available through which individuals and small groups can make their views on political issues known, and to insure that the principal means of expression in the society do not fall under the control of any particular segment of the community.³⁴

In his seminal article, “Access to the Press – A New First Amendment Right”,³⁵ Jerome Barron likens the denial of access rights to prior or previous censorship,³⁶ which is generally anathema to most stalwart proponents of freedom of expression.³⁷ The reason for taking such a dim view of *ex ante* censorship is its drastic nature; its ability to totally foreclose both expression and expressive opportunities. In both cases – denial of access to the media and prior censorship – information and ideas are prevented from being aired or heard. However, denial of access, especially if systemic in nature, is the more drastic of the two, because prior censorship is usually directed at specific types of content, whereas the (systemic) denial of access is more likely to be content-neutral. The denial of access to the media – when no alternative expressive opportunities are available – can lead to information and ideas being nipped in the bud and the right to freedom of expression being thwarted.

Barron’s central argument – that the interests of fairness dictate that some form of mandatory access to the media should be available to counter information and ideas purveyed by the media - is cogent and merits careful consideration, but it becomes more difficult to sustain when the denial of access is not blanket in nature, but applicable only to particular media. As explained in s. 8.1.1, *infra*, international law does not recognise a right of individuals or groups to access particular media. Only “contingent” rights of access are admitted, otherwise – to formulate the pragmatic argument for this state of affairs - the way would be open “for such overload and chaos as to constitute a virtual *reductio ad absurdum*”.³⁸ This is particularly true because every medium has its own inherent restrictions (eg. temporal, spatial, etc.) and under what Owen Fiss has termed the “dynamic of displacement”,³⁹ a decision to broadcast

³⁴ T.M. Scanlon, “A theory of freedom of expression”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 6-25, at 22.

³⁵ Jerome A. Barron, “Access to the Press – A New First Amendment Right”, 80 Harv. L. Rev. 1641 (1967). Barron is often credited with being the first (academic) to develop the case for access rights under the US First Amendment; this article was repeatedly referred to by the US Supreme Court in the *Red Lion* case and in its jurisprudential progeny.

³⁶ See also in this connection, Owen M. Fiss, “Silence on the Street Corner”, *op. cit.*

³⁷ For example, Alexander Bickel has quipped that a “criminal statute chills, prior restraint freezes” – Alexander Bickel, *The Morality of Consent* (New Haven, Yale University Press, 1975), p. 61. It should, however, also be noted that Frederick Schauer, Eric Barendt and others have explored persuasive arguments which contend that *post facto* censorship and sanctioning are capable of matching the drastic effects of *ex ante* proscriptions: [citations!]. Barendt, for instance, argues that publishers may prefer not to risk criminal prosecution and that in such cases *ex post facto* sanctions can have a deterrent effect that freezes. It is submitted here that *ex ante* proscriptions are more drastic, because they do not even give the publisher the option of risking criminal prosecution (such an option remains open to the publisher in Barendt’s example; he can partly be the author of his own fate).

³⁸ Judith Lichtenberg, “Introduction”, in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 1-20, at 17.

³⁹ Owen M. Fiss, “Free Speech and Social Structure”, 71 *Iowa Law Review* 1405 (1986), at p. 1415.

particular content necessarily entails a decision not to broadcast other content. As such, the power of the media to determine what to broadcast or publish “subtracts from public debate at the very moment that it adds to it”.⁴⁰

From the point of view of democratic theory, a deeper-scooping and more purposive argument would focus on the Meiklejohnian assertion that: “What is essential is not that everyone shall speak, but that everything worth saying shall be said”.⁴¹ Moderation or mediation is therefore required in order to ensure effective public deliberation though the avoidance of “unregulated talkativeness”.⁴²

Although Meiklejohn envisaged the State as playing the role of moderator of public debate, it should not be precluded that the media – as majorly significant agents for the propagation of information and ideas – could provide mediation in public debate. Indeed, *de facto*, one of their quintessential roles – the selection, presentation and treatment of issues – is inescapably mediatory in nature. The outstanding issue is therefore whether their mediation in public debate is grounded in altruism: “The free press must be free to all who have something worth saying to the public, since the essential object for which a free press is valued is that ideas deserving a public hearing shall have a public hearing.”⁴³ However, it should be noted that such an ascribed role for the media is changing (at least for some media) due to technological developments and resultant changes in patterns of media usage (see further, s. 4.5, *infra*).

4.2.2 Creating alternative discursive spaces

The importance of the media can also be gauged in terms of their discussion-fostering/forum-providing role. In modern democratic society, the media provide vital fora for public discussion to take place. When they assume such a role or when such a role is thrust upon them, they become powerful gate-keepers to the extent that they can control (the terms of) access to public debate.

Furthermore, the power of the media also stems from their ability to influence public debate – through initial agenda-setting, but also through their mediation of ensuing discussion. Roger Silverstone and Myria Georgiou have elucidated the dynamics at play in the mediation of public debate by the media as follows:

Mediation is a political process in so far as control over mediated narratives and representations is denied to individuals and groups by virtue of their status or their capacity to mobilise material and symbolic resources in their own interests. Mediation is also a political process in so far as dominant forms of imaging and story-telling can be resisted, appropriated or countered by others both inside media space, that is through minority media of one kind or another, or on the edge of it, through the everyday tactics of symbolic engagement, in gossip, talk or stubborn refusal.

The media, seen through the lens of these contested processes, provide frameworks for identity and community, equally contested of course, but significantly available as components of the

⁴⁰ *Ibid.*

⁴¹ Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948), p. 25.

⁴² *Ibid.*

⁴³ The Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago, University of Chicago Press, 1945?), p. 129 (Appendix).

collective imaginary and resources for the collective agency. This is the context in which minorities and their media need to be understood [...]⁴⁴

Given the far-reaching influence of the media on public deliberation and – by extension - the formation of public opinion, concerns about the implications for democracy of concentrations of media power and the absence of media-related pluralism seem well-founded. The threats posed by such concentrations of media power to the workings of democracy are blatant and they are often invoked as a principal justification for the need to safeguard media pluralism and diversity.

4.2.3 Creating and sustaining (cultural) identities

“Identity”, as posited by Asbjorn Eide, “is essentially cultural”,⁴⁵ but coupling together the concepts of “culture” and “identity” does not make the sum of their parts any easier to define. Cultural identity is the product of an attempted synthesis of elements that are - all at once - subjective and objective; factual and aspirational; latent and active; historical and contemporary. To compound matters further, in order to determine the nature of the relationship of individual identity to group identity, the concept of the situated self must also lock horns with the notion of libertarian individualism. While the Sisyphean task of reaching an adequate definition of cultural identity is beyond the scope of this thesis, a selection of relevant general remarks and references would nevertheless offer welcome conceptual contextualisation.

Benedict Anderson has famously defined/described a nation as “an imagined political community” that is limited [by physical boundaries] and sovereign.⁴⁶ Anderson’s description of a nation as “imagined”, places it very consciously in opposition to Ernest Gellner’s characterisation of a nation as an invention.⁴⁷ For Anderson, invention rhymes with ‘fabrication’ and ‘falsity’, whereas ‘imagining’ and ‘creation’ would actually be closer to the mark. He explains: “In fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.”⁴⁸

But nations – and indeed other communities – can be imagined in different ways, including ways which are less contingent on geo-political limitations. These imaginings can incorporate a diasporic dimension,⁴⁹ a term which itself comprises a high level of internal differentiation.

⁴⁴ Roger Silverstone & Myria Georgiou, “Editorial Introduction: Media and Minorities in Multicultural Europe”, 31 *Journal of Ethnic and Migration Studies* (No. 3, May 2005), pp. 433-441, at 434. For a lengthier discussion of relevant issues, see generally: Monroe E. Price, *Television, The Public Sphere, and National Identity* (Oxford, Clarendon Press, 1995).

⁴⁵ Asbjorn Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague, Martinus Nijhoff Publishers, 2002), pp. 83-97, at 97.

⁴⁶ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised Edition) (USA, Verso, 1991), p.6.

⁴⁷ Ernest Gellner, *Thought and Change*, p. 169.

⁴⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, *op. cit.*, p. 6.

⁴⁹ See further: Kevin Robins, “Beyond Imagined Community? Transnational Media and Turkish Migrants in Europe”, in Stig Hjarvard, Ed., *Media in a Globalized Society* (Denmark, Museum Tusulanum Press/University of Copenhagen, 2003), pp. 187-205. See also: David Morley & Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (London, Routledge, 1995).

Whether communities are imagined as nations, or in sub-, inter-, or extra-national terms, or whether groups are constituted on the basis of ideological or other affinities or objectives (see Chapter 1), an appropriate, formal framework is necessary to ensure the protection and promotion of their identities.⁵⁰

Discrete group identities are optimally engendered against a background of not only tolerance, “but also a positive attitude of cultural pluralism by the state and the larger society”,⁵¹ according to Eide. Both the acceptance of, and respect for, “the distinctive characteristics and contribution of minorities in the life of the national society as a whole”⁵² are required, in his view. The importance of this triumvirate of pluralism, tolerance and participation for minority rights generally can hardly be overstated. Indeed, as has already been observed in Chapter 2, some commentators regard participation as one of the best gauges of tolerance in pluralist society.⁵³

States have a particularly high level of responsibility for assuring the protection and promotion of their component cultural identities. As regards protection, policies and measures with harmful or assimilatory aims or effects must be avoided, or if already in place, discontinued. As regards promotion, States can reasonably be expected to actively and purposefully facilitate “the maintenance, reproduction and further development of the culture of the minorities”.⁵⁴ Appropriate facilitative initiatives should be pursued across the spread of areas falling within State competence.

The media, for their part, have a crucial role to play in the consolidation and legitimisation of group identity. They can, for instance, become agents of “cultural consecration” in the sense of the term intended by Pierre Bourdieu.⁵⁵ The foregoing characterisation of the media as autonomous discursive spaces suggests that the media are a logical choice of locus for the pursuit of the project of imagining a community’s identity. They constitute a forum in which various – and often competing – visions and versions of shared elements of identity can be put forward, explored, debated and ultimately rejected or validated. The media are often the handmaidens of – especially fledgling or divided - States seeking to assert national identities.⁵⁶ As such, they can be saddled with the responsibility of propagating a politically-determined image of the nation or community.

According to Anderson: “processes by which the nation came to be imagined, and, once imagined, modelled, adapted and transformed.”⁵⁷ In other words, what is involved here is an ongoing process of imagining; a dynamic force. Inherent in any definition of culture is its propensity for further development. As such, the media must prove responsive to the changing identities of groups, to imaginative alterations/revisions and adjustments.

⁵⁰ Stig Hjarvard, “Introduction”, in Stig Hjarvard, Ed., *Media in a Globalized Society*, *op. cit.*, pp. 7-14(?), at p. 11.

⁵¹ Asbjorn Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, *op. cit.*, p. 97.

⁵² *Ibid.*

⁵³ See, for example, T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), esp. pp. 194-195.

⁵⁴ Asbjorn Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, *op. cit.*, p. 97.

⁵⁵ Pierre Bourdieu, *Language and Symbolic Power* (Polity Press, United Kingdom, 1991), p. 121.

⁵⁶ [Price – market for loyalties; Greenwalt – symbols; give concept of “Turkishness” as extreme example of this – mention dropping of charges against Pamuk]

⁵⁷ Anderson, p. 141.

By running their own media outlets, minorities and other communities of shared interests acquire considerable autonomy. In itself, this is an important step to the realisation of such groups' rights to participation and the enjoyment of cultural life, in particular, as well as non-discrimination and equality. It presents them with the opportunities and space in which they can explore and define their identities. However, minority media and the discursive spaces which they are instrumental in creating, tend to be distinctive and self-contained. As such, they – by and large – do little to inform or educate society as a whole about the particular identities of the groups in question. They are also of limited value in advancing the goals of inter-community communication and the promotion of tolerance. They are not designed to build societal bridges. However, that is not to say that they cannot and do not build such bridges. Cooperation between minority and majority groups, or various minority groups can prove workable and mutually beneficial (eg. *TG4* in Ireland, *Omrop Fryslan* in the Netherlands). In some instances, minority broadcasters may even pursue deliberate strategies of securing “a hybrid audience beyond the grassroots ghetto”:⁵⁸ in the interests of broader cultural legitimation as well as for economic reasons.

Linguistic identity

Tensions between the freedom and regulation of language use (especially where the latter rhymes with restriction) have great capacity for creating unity and division (if not polarisation) in society. This is hardly surprising, for a variety of reasons. First, it is a well-established tenet of international law that language is an impermissible ground for discrimination.⁵⁹ It is often argued, however, that non-discrimination should not be seen as an end-goal in itself and that equality is the preferred paradigm to be strived for. The notion of “effective equality” which permeates the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM) is increasingly *de rigueur*. Allied to this is the particular reading of relevant international law provisions which holds that the purpose of such provisions is “to go beyond a guarantee of non-discrimination towards a more positive notion of conservation of linguistic identity.”⁶⁰ In short, all of this leads to a more assertive, pro-active role for the law in the protection of language.

Second, language can be a vehicle for consolidating a sense of national identity or, more accurately, perhaps, the majoritarian identity of a given State. On the other hand, it can equally be a mechanism for asserting minority or non-majoritarian identities. A third reason is that language is inextricably bound up in cultural matters. Indeed, the same is also true of the relationship between language and education; language and the media, and language and participation in public life generally. The nature of these highly sensitive relationships can have a determinative effect on society, leading alternately to greater cohesion or fragmentation (or even ghettoisation), depending on the line of argumentation pursued. The writer, Hugo Hamilton, epigrammatically captures the immanent complexities, sensitivities and symbolisms of these relationships, when he quotes his father as averring: “your language is your home and your country is your language and your language is your flag”.⁶¹

⁵⁸ Chris Atton, *Alternative Media* (Sage Publications, London, 2002), p. 144.

⁵⁹ Ample evidence of this is provided by Article 2(2), ICCPR and ICESCR; Article 14, ECHR (and Protocol No. 12 to the ECHR (when it enters into force)); Article 21 of the Charter of Fundamental Rights of the European Union (as incorporated into the Draft Constitution for the European Union), all of which cite language as one of the prohibited grounds for discrimination (see further *infra*).

⁶⁰ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991), p.197.

⁶¹ Hugo Hamilton, *The Speckled People* (London, Fourth Estate, 2003), p. 3.

4.3 Role of the media

The foregoing sections have attempted to explicate the most important rationales for access to expressive opportunities. As the media very often constitute the most effective expressive opportunities available, this section will largely synthesise and summarise the rationales already outlined and consider them in terms of the media as an institutional force in democratic society. Roger Silverstone has captured the multi-layered importance of the media with characteristic verve:

It's all about power, of course. In the end. The power the media have to set an agenda. The power they have to destroy one. The power they have to influence and change the political process. The power to enable, to inform. The power to deceive. The power to shift the balance of power: between state and citizen; between country and country; between producer and consumer. And the power that they are denied: by the state, by the market, by the resistant or resisting audience, citizen, consumer. It is all about ownership and control: the who and the what and the how of it. And it is about the drip, drip, drip of ideology as well as the shock of the luminous event. It is about the media's power to create and sustain meanings; to persuade, endorse and reinforce. The power to undermine and reassure. It is about reach. And it is about representation: the ability to present, reveal, explain; and also the ability to grant access and participation. It is about the power to listen and the power to speak and be heard. The power to prompt and guide reflection and reflexivity. The power to tell tales and articulate memories.⁶²

The foregoing points clearly to the need to study and comprehend the media's "power of definition, of incitement, of enlightenment, of seduction, of judgement".⁶³

4.3.1 Media functionality

Assessments of the media's pervasiveness, power and influence are often prone to hyperbolic descriptions. Nevertheless, strong statements may very well be required to capture the full extent of their reach in all three of the aforementioned respects. If not totally ubiquitous, the media certainly come close to ubiquity and have properly been described by Roger Silverstone as "an essential dimension of contemporary experience".⁶⁴ Furthermore, as Silverstone has also noted, "Our daily passage involves movement across different media spaces and in and out of media space".⁶⁵ It is perhaps axiomatic to state that different media can and do perform different functions, and that they do so with varying degrees of effectiveness. It is precisely this differentiated functionality of various types of media that explains our daily "movement[s] across different media". The choice of media used at any given moment is influenced by purposive and behavioural considerations. Time-use and other studies tend to show that different media are used for different purposes and with different levels of intensity, depending on the setting and time of day.⁶⁶

⁶² Roger Silverstone, *Why Study the Media?* (London/Thousand Oaks, CA/New Delhi, SAGE Publications, 1999), p. 143.

⁶³ *Ibid.*

⁶⁴ Roger Silverstone, *Why Study the Media?* (London/Thousand Oaks, CA/New Delhi, SAGE Publications, 1999), p. 1. See also, Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London, SAGE Publications, 1995), p. 155.

⁶⁵ *Ibid.*, p. 8.

⁶⁶ Tom Moring, "Functional Completeness in Minority Language Media", in Mike Cormack & Niamh Hourigan, Eds., *Minority Language Media: Concepts, Critiques and Case Studies* (Clevedon, Multilingual Matters Ltd., forthcoming: May 2007), pp. 17-33, at p. 23.

Without wishing to detract from the idiosyncratic nature of individual preferences for particular media, it is also relevant to consider preferential patterns of media usage among groups, notably minorities. Such a group-oriented enquiry is relevant to the extent that persons belonging to minorities may share certain collective characteristics that would profoundly influence their individual media preferences. A shared language would be the best example of such a characteristic. The linguistic specificity of particular group inevitably shapes the media preferences of persons belonging to such groups – one way or another. Most people in a linguistic group may very well prefer to use media in their own language – to the extent that such media are available (although it cannot be discounted that some members of such groups may – for various reasons – have a preference for media employing dominant societal languages). This can facilitate their access to information, on the one hand, or their access to, and ability to participate effectively in, discursive fora on the other.

Such a group-oriented enquiry is also relevant to the extent that persons belonging to minorities are similarly structured in social terms and are therefore similarly affected by situational factors. General literacy levels within particular groups would be a good example of a situational factor of this kind: if average literacy levels within a particular minority group are very low, print media could be considered a less viable type of media than various broadcasting options. The same arguments apply *mutatis mutandis* to levels of familiarity with new media technologies (and of course the extent of their penetration in minority groups). Groups with strong oral traditions might conceivably exhibit preferences for types of media that best accommodate orality. Another example would be whether the group is territorially compact or dispersed, as such geographical facts could influence the suitability of different media for the entire group.

A further group-oriented approach has been developed by Tom Moring. He usefully applies the general notion of “institutional completeness”, defined by Will Kymlicka as a minority group having “a full range of social, educational, economic, and political institutions, encompassing both public and private life”,⁶⁷ specifically to the media sector.⁶⁸ For Moring, institutional completeness in respect of the media denotes “the level of completeness of a media system that serves a particular minority” and he proposes that such completeness is best measured in terms of: (i) the availability of different types of media, and (ii) the availability of different formats [within available media types].⁶⁹ To the extent that it is not already included in the notion of “formats”, an additional means of measurement could be thematic orientations of content. The focus on formats/thematic orientations of content is important in the context of minority media (especially in minority-language broadcasting) because in the context of limited airtime and scarce financial resources, there is a tendency to prioritise certain formats/themes. In practice, this generally leads to the predominance of news/information programmes, programmes about cultural events of relevance to minorities and sometimes educational or children’s programmes too.⁷⁰ To the extent that other

⁶⁷ Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (New York, Oxford University Press, 1995), p. 78. Similarly, Raymond Breton has described the notion as the ability of a community to “perform all the services required by its members”: Raymond Breton, “Institutional Completeness of Ethnic Communities and the Personal Relations of Immigrants”, Vol. LXX *The American Journal of Sociology* (No. 2, 1964), pp. 193-205, at p. 194.

⁶⁸ Tom Moring, *Access of National Minorities to the Media: New Challenges*, Report for the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Doc. DH-MIN(2006)015, 20 November 2006, p. 9. For a lengthier discussion, see generally: Tom Moring, “Functional Completeness in Minority Language Media”, *op. cit.*

⁶⁹ *Ibid.*

⁷⁰ Tom Moring, “Functional Completeness in Minority Language Media”, *op. cit.*, at p. 25.

formats/themes are neglected, it is not realistic to speak about full institutional completeness in the media sector (or functional completeness – see further, *infra*).

Returning briefly to the more general notion of institutional completeness, it is important to note that the notion is sometimes perceived to be a crucial feature of schemes for minority rights protection. Although not legally-binding, the Advisory Opinion of the Permanent International Court of Justice in the *Minority Schools in Albania* case⁷¹ provides valuable insights into relevant thinking. It expressly links the need to achieve “perfect equality” between minority and majority sections of the population with the need to ensure for minorities “suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics”.⁷² It reasons:

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 its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.⁷³

Later in the same Advisory Opinion, the Court refers to the minority institutions as being those “which alone can satisfy the special requirements of the minority groups”.⁷⁴ Obviously, the quoted statements relate first and foremost to the facts of the case under consideration by the Court. Nevertheless, the general line of argumentation does have broader appeal. It argues that it is indispensable for minorities to have their own key institutions in the interests of ensuring equality for members of the minority group with members of the majority population and of sustaining the minority group as a group. Such an approach could be described as being based on principles of group autonomy or internal self-determination.

The goals of this reading of institutional completeness can also be applied to institutional completeness in the media sector. However, the question of whether or not those (and other relevant) goals are realised in practice does not depend solely on the extent of a minority group’s institutional completeness. To complement the quantitative focus of the notion of “institutional completeness”, Moring introduces the notion of “functional completeness” as its qualitative counterpart. The latter notion refers to “the extent to which people within a target group actually lean on the media supply that is produced for them (in their language or for their community).⁷⁵ In practice, for a host of reasons – not least linguistic, political and economic, minority groups are unlikely to enjoy “perfect” institutional completeness in the media sector. Only in very rare cases will the degree of institutional completeness actually attained correspond to functional completeness for members of a minority group.⁷⁶ This is because the question of functionality depends on the viability of the overall range of media types and formats (including thematic orientations) for the fulfillment of the minority group’s various communicative needs. If the overall range of media types and formats is *a priori* incomplete, the likelihood of the range being functionally sufficient is reduced accordingly. This would obviously not hold true if the limited range of media types and formats available correspond to the media preferences of members of the minority group – whether by virtue of a well-conceived media policy for the minority group, or simply by happenstance.

⁷¹ *Minority Schools in Albania*, PCIJ, Advisory Opinion, 6 April 1935, Series A/B, No. 64, pp. 4-36.

⁷² *Ibid.*, p. 496.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 499.

⁷⁵ Tom Moring, *Access of National Minorities to the Media: New Challenges*, *op. cit.*, at p. 9.

⁷⁶ Tom Moring, “Functional Completeness in Minority Language Media”, *op. cit.*, at p. 19.

Finally, as regards functional completeness in the media sector, consideration should additionally be given to the concepts of needs and preference.⁷⁷ Needs in respect of the media vary per group and within groups. Any evaluation of the functionality of available media will inevitably be contingent on whether relevant needs are understood as giving primacy to the minority language in broadcasting, setting it on an equal footing with the majority language, or using it as a complementary language. Individual media preferences have already been discussed, *supra*, but consideration should also be given to preferences of groups (to the extent that they are ascertainable): if a majority of members of a minority group are not in favour of sustaining certain levels of minority-language broadcasting, the viability of measures geared towards such ends might be brought into question. This has been referred to as the “strict preference condition”.⁷⁸

If, in practice, the range of media types and formats that is available to a particular minority group is not viable for the fulfilment of their various communicative needs, this could give rise to a violation of a State’s obligations both in terms of freedom of expression and minority rights. Under such an approach, functional completeness could be used as a means of assessing whether members of a minority group enjoy an *effective* right to receive and impart information. Relevant State obligations could, in accordance with the tripartite typology of State obligations in respect of human rights (see s. 5.2.3, *infra*), be regarded as “fulfillment-bound” obligations insofar as they require the State to secure the requisite existential status for members of the minority group whereby they could effectively exercise their right to freedom of expression.⁷⁹

4.3.2 Media types

The notion of mass media rests on the prior notion, widely used in sociological studies, of *Gesellschaft* – a large, undifferentiated and impersonal society. The term, coined by Ferdinand Tönnies, is generally used in its dichotomization of *Gemeinschaft*, a community or “primary group bound by intimate ties regulating itself through the force of tradition and opinion”.⁸⁰ “Mass” is capable of multiple – often evaluative and politically-tinted - interpretations,⁸¹ but for present purposes, it is its descriptive function that must be retained. It describes, first and foremost, the ability of the media to reach a societal mass. As such, it emphasises the point-to-multipoint nature of the media. This consideration is vitally important when it comes to assessing the influence of the media and the development of regulatory policies and measures. Although the term “mass” usefully conveys the idea of wide reach, at the same time, it also suffers from one of the general shortcomings of theories of mass society⁸² by its inability to illuminate relational dynamics within the “mass” to which it refers.

⁷⁷ Tom Moring, *Access of National Minorities to the Media: New Challenges*, *op. cit.*, at p. 10.

⁷⁸ *Ibid.*; ???, Tom Moring, “Functional Completeness in Minority Language Media”, *op. cit.*, at pp. 28-30, and more extensively in: François Grin & Tom Moring, with Durk Gorter, Johan Häggman, Dónall Ó Riagáin and Miquel Strubell, *Support for Minority Languages in Europe*, Final Report on a project financed by the European Commission, Directorate Education and Culture, 2003, p. 190.

⁷⁹ Rolf Künemann, “A Coherent Approach to Human Rights”, *op. cit.*, at p. 328.

⁸⁰ Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (USA, Basic Books, 1999), p. 383. See further: Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (Revised Edition) (New York, The Free Press, 1962), p. 27.

⁸¹ Daniel Bell, for instance, distinguishes between mass as: undifferentiated number; the judgment by the incompetent; the mechanized society; the bureaucratized society, and mob – *The End of Ideology*, *op. cit.*, p. 22.

⁸² Daniel Bell, *The End of Ideology*, *op. cit.*, p. 38.

It does not lend itself to recognition of, or responsiveness to, the compositional complexities of the societal mass which is its object.

But even without being qualified by “mass”, the “media” is an amalgamated concept and it would be methodologically remiss at this juncture to attempt to analyse its objectives and impact in macro terms. Instead, it is necessary to disaggregate the concept and essentialise its constituent parts in order to emphasise the different objectives pursued by each. These objectives span an entire spectrum: informational, social, (politically) deliberative, creative, entertainment, etc. The effectiveness of particular media can only be assessed in terms of their specific objectives and any discussion of the equivalence of particular media should avoid comparing apples and pears.

First of all, one may distinguish between mainstream and alternative media, with radical media⁸³ being counted as a subset of the latter. Distinctions between levels of geographical operation are also pertinent: international, national, regional, local and community. The last-named category is, however, rarely understood in a purely geographical sense: it is also laden with additional qualitative goals and features which frequently happen to coincide with its geographical reach (see further, 4.3.2(i), *infra*). A final cleavage involves majority and minority media. These two appellations are vague, expansive terms, and as such are more suited as short-hand phrases than tools for clinical definition. Nevertheless, the distinction that they point up is important for the purposes of analytical orientation. The expressive objectives and strategies of persons belonging to minorities can differ hugely, depending on whether mainstream or minority media are used. This is illustrated by the non-exhaustive selections of features⁸⁴ of mainstream and minority media listed below. The strategic importance of mainstream and minority media – and the dilemma of choosing which one to espouse – is captured well by Silverstone and Georgiou:

Media representation involves both participation and recognition. And participation is a matter of the capacity to contribute to the mainstream, to enable the minority voice or visibility on national channels or the national press, but it is also a matter of the capacity to gain a presence on one’s own terms on the nationally owned spectrum or on the global commons of the internet. Participation ultimately involves the equal sharing of a common cultural space. There are different issues here, and different politics, but both raise the questions of whether or how to enable minorities to speak, but also, and this is crucial, to enable them to be heard. Who is speaking and on behalf of whom? Do journalists from ethnic minorities speak as members of that ethnic group or as disinterested and professional journalists? But we must ask, too, who is listening and with what consequences?⁸⁵

Mainstream and minority media

Given the documented shortcomings of the classic, unitary public sphere as elaborated by Habermas, much critical thinking and writing has been devoted to the co-existence of a variety of public spheres. Against this backdrop, the contrasting merits of majority and minority media will now be considered, as well as the necessary complementarity between them. Different rights and interests, aims and strategies are at play on each level, but as we shall see, this does not mean that they are mutually exclusive.

⁸³ See, for example, John Downing, *Radical Media: the Political Experience of Alternative Communication* (Boston, MA, South End Press, 1984).

⁸⁴ Not all of these features necessarily apply in all cases – the purpose of the lists is to be illustrative rather than prescriptive or exhaustive.

⁸⁵ Roger Silverstone & Myria Georgiou, “Editorial Introduction: Media and Minorities in Multicultural Europe”, *op. cit.*, at 436-437.

Mainstream media

- Public sphere – more opinions leads to debate that is more inclusive and more representative
- Elimination of discrimination and promotion of equality
- Participation in general affairs of State and society
- Intercommunity communication
- Fostering of mutual understanding and tolerance
- Expression of distinct cultural identities and challenging of (negative) stereotypes
- Promotion and validation of (minority) ways of life and traditions

Minority media

- Creation of alternative public spheres/own discursive spaces
- Empowerment of minority groups at local level
- Participation in own affairs
- Own institutions as a means of eliminating discrimination and promoting equality
- Promotion of language, culture and religion of minorities
- Validation of history, heritage and creative activities of minorities
- Positive impact on minority communities – creation of network of information exchange; social capital, etc.
- Employment opportunities and economic spin-offs

By providing for the expression of increasingly varied opinions, the media render the public sphere more inclusive and representative of diverse societal elements. Mainstream media should therefore strive to achieve a state of discursive toing and froing. This involves accommodating as wide a spectrum of minority views and interests as possible within majoritarian structures. Proponents of such accommodations frequently point out the risks of intellectual and cultural ghettoisation and isolation that inhere in alternative or minority media structures.⁸⁶

It is widely accepted that the main motivation for the establishment and maintenance of minority media is to prevent assimilation and shape distinctive discursive spaces for minorities and other groups in society. A discursive space can be defined as: “a site of cultural production where the process of representation is shaped by the discursive construction of power relations between producers, participants, audiences and regional, national and international flows within a global mediascape”.⁸⁷ As such, the independence of such discursive spaces is of paramount importance. So, too, is the number of actors required to give shape to discursive spaces. These spaces are shaped and controlled by the groups themselves, and not by dominant societal groups. Within such spaces, cultural identities can blossom without being in the shadow of dominant cultures. In the same vein, ideologies and stereotypes nurtured and reinforced by dominant groups and the mainstream media can be countered. Furthermore, minority languages can be promoted as the medium of programming

⁸⁶ See, for example, Milica Pesic, “Commentary: Media representation of national minorities and the promotion of a spirit of tolerance and intercultural dialogue”, in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 139-143, esp. at 140.

⁸⁷ Niamh Hourigan, *Escaping the Global Village: Media, Language & Protest* (USA, Lexington Books, 2003), p. 143.

and communication. In short, the goal of advancing intra- and inter-group definition is well-served by the existence of autonomous discursive spaces.

4.3.2(i) Community media

Certain types of minority broadcasting can be considered to be “community broadcasting” by virtue of the objectives and strategies they have in common. Various definitions of community broadcasting have been propounded in academic and NGO circles and among broadcasters themselves. Although the term is often defined and the practice regulated by legislation at the national level, there is no authoritative, legally-binding definition of the term at the international level (notwithstanding UNESCO’s extensive engagement with the topic). Nevertheless, a broad consistency can be detected across the variety of definitions emanating from the various contexts just mentioned. For instance, it has been described as:

independent broadcasting that is provided for the good of members of the public in a specific location or for a particular community of interest and whose primary purpose is to deliver social gain rather than to operate on a commercial basis or for the private gain of individuals linked to the service.⁸⁸

The World Association of Community Radio Broadcasters (AMARC), an association “favouring consultation, coordination, cooperation, exchange and promotion of community radio broadcasters”, explains in its Articles of Association that the term “community radio broadcaster” means: “a non-profit radio broadcaster who, in accordance with the fundamental principles of AMARC, offers a service to the community in which it is located or which it serves, while promoting community expression and participation.” AMARC’s Declaration of Principles, alluded to in the foregoing quotation, states, *inter alia*, that members of AMARC:

- Contribute to the expression of different social, political and cultural movements, and to the promotion of all initiatives supporting peace, friendship among peoples.
- Recognize the fundamental and specific role of women in establishing new communication practices.
- Express through their programming:
 - The sovereignty and independence of all peoples;
 - Solidarity and non-intervention in the internal affairs of other countries;
 - International cooperation based on the creation of permanent and widespread ties based on equality, reciprocity, and mutual respect;
 - Non-discrimination on the basis of race, sex, sexual preference or religion;
 - And respect for the cultural identity of peoples.

On the basis of the foregoing (and other) definitions and descriptions of community (radio) broadcasting, its key features can be said to include:

- In service of community (both local communities and communities of interest⁸⁹)
- Individual participation in all stages of broadcasting
- Independent and non-profit status

“Community media”, it has been noted, “have at their heart the concepts of access and participation”.⁹⁰ Three prime advantages of community broadcasting for minority

⁸⁸ Steve Buckley, Toby Mendel *et al.*, *To Give People Voice*, (Penn University Press, 2007), p. 161 (of draft manuscript, on file with author).

⁸⁹ Downing/Husband...

communities are: (i) autonomy over all stages of the broadcasting process, the preparation and transmission of programmes; (ii) fostering of community cohesion; (iii) democratisation of intra-community communicative structures and processes. All of these advantages flow from one of the central underlying assumptions about community communication, i.e., “the assumption of a shared relevance that community issues have for both parties, both senders and receivers, because they all participate in the same community and because the community serves as a frame of reference for a shared interpretation of the relevance of the topics communicated within the community”.⁹¹ As community broadcasting is generally less institutionalised than other forms of broadcasting, the accessibility of its structures and operations to members of the community is more easily assured.

In practice, licensing authorities often apply different criteria to applications for community licences than to other types of licences.⁹² They tend to focus on the extent to which the proposed service matches identifiable or expressed community interests, the representativeness of those proposing the service *vis-à-vis* the community as a whole, provision for inclusive participation, feasibility of management and financial structures and plans. The assessment of prospective services is sometimes carried out in consultation with representatives of the communities themselves. Performative standards are also usually different in respect of community broadcasting, thereby reflecting the specificity of its objectives and strategies. Impact assessment, again frequently involving representatives of the target communities, is also a common procedural feature of regulatory supervision of licensed community broadcasters.⁹³

4.3.2(ii) Public service media/content

Broadcasting and public service in the broadest sense of the term can both boast long and strong traditions in Europe. They are capable of mutually-exclusive existence, owing to their distinctive aims, yet interaction between the two has great synergic effects on society and democracy. As posited by one commentator: “Public service in the spirit of democracy demands an unqualified commitment to the common good. Nothing less will do; nothing more is needed”.⁹⁴ Of course, it is the ascertainment of “the common good” that remains vexing. How public service is assured via broadcasting can be explained to the philosophies animating public service broadcasting.

The extensive traditional rationales for public service broadcasting have been elaborated authoritatively by many commentators⁹⁵ and it is not intended to reproduce the full extent of other analyses here. It would, however, be useful to note that Georgina Born and Tony Prosser identify three essential normative criteria for public service broadcasting: citizenship

⁹⁰ Chris Atton, *Alternative Media* (London, Sage Publications, 2002), p. 17.

⁹¹ Ed Hollander, James Stappers, and Nicholas Jankowski, “Community Media and Community Communication”, in Nicholas W. Jankowski, Ed., *Community Media in the Information Age: Perspectives and Prospects* (Cresskill, New Jersey, Hampton Press, Inc., 2002), pp. 19-30, at 23.

⁹² For a (now dated) survey of the theory and practice of community broadcasting across a wide sample of European countries, see: Nick Jankowski, Ole Prehn & James Stappers, Eds., *The People’s Voice: Local radio and television in Europe* (London, John Libbey & Co. Ltd., 1992).

⁹³ Slot in a few references to broadcasting law and its application in Ireland. Mention incorporation of AMARC definition in Irish legislation.

⁹⁴ Louis C. Gawthrop, *Public Service and Democracy: Ethical Imperatives for the 21st Century* (New York, Seven Bridges Press, LLC, 1998), p. 101.

⁹⁵ See, for example, E. Barendt, *op. cit.*, Chapter III ‘Public Broadcasting’, pp. 50-74 and T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, Malaysia, 2000).

(“enhancing, developing and serving social, political and cultural citizenship”), universality and quality of services and of output.⁹⁶ Eric Barendt, for his part, identifies six basic features of public service broadcasting:

- general geographical availability;
- concern for national identity and culture;
- independence from both the state and commercial interests;
- impartiality of programmes;
- range and variety of programmes and
- substantial financing by a general charge on users.⁹⁷

A more detailed recipe for public service broadcasting is also given by Born and Prosser (while acknowledging that not all of the proposed ingredients would command universal support):

- universal access or availability;
- mixed programming or universality of genres;
- high quality programming in each genre, including innovation, originality and risk-taking;
- a mission to inform, educate and entertain; programming to support social integration and national identity;
- diverse programming catering to minorities and special interest groups, to foster belonging and counteract segregation and discrimination;
- programming reflecting regional identities;
- provision of independent and impartial news and fora for public debate and plurality of opinion;
- commitment to national and regional production, and to local talent;
- a mission to complement other broadcasters to enrich the broadcasting ecology;
- affordability; and
- limited, if any, advertising.⁹⁸

The foregoing provides a clear idea of what public service broadcasting entails and of its potential for minorities in terms of accessibility of participatory mechanisms and the availability of targeted programming. The details of specific structures and practices to enhance the value of PSB for minorities are explored in the section of this study focusing on the monitoring mechanisms of the FCNM and the ECRML (Chapters 7 and 8). Two major issues currently faced by PSB are the extent to which its remit ought to be developed in respect of new media platforms and the nature of its relationship to media markets (and its ultimate position and role in those markets). The resolution of these issues will affect the future shape of PSB and its relevance as a primary source of broadcasting for minorities.

One of the most vigorous sources of encouragement for public service broadcasters to harness the full potential of new media services has been the (not distinterested) European Broadcasting Union. It has stated:

⁹⁶ G. Born & T. Prosser, “Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC’s Fair Trading Obligations”, 64 *The Modern Law Review* (Issue No. 5, September 2001), pp. 657-687, at p. 671.

⁹⁷ *Op. cit.*, p. 52.

⁹⁸ *Op. cit.*, p. 671.

Public broadcasting organizations have always been at the forefront of innovation in the broadcasting field, both on the technical side and in terms of diversifying their programming offer. In line with this tradition, and except where expressly and exceptionally stipulated otherwise, they continue to be entitled, and indeed are obliged, to make their programme offer available to the public in the most appropriate manner and form suggested by the changing viewing and listening habits of the public in an evolving audiovisual environment. This includes a complementary and diversified programme offer (thematic channels), its technical delivery (digital transmission, bouquets, on-line delivery) and its mode of funding (pay-TV, pay-per-view). As long as the additional programme offer is provided by the public broadcasting organization itself, the same legal principles of funding apply as in the case of its traditional core service.⁹⁹

PSB's position in relevant markets could be: (i) a neo-liberal approach trumpeting the primacy of the market and calling for the abolition of PSB; (ii) pure PSB as a niche broadcaster, "offering only broadcast content and services which private broadcasters find commercially unrewarding",¹⁰⁰ and "whatever the market may offer, the community still has a duty to provide broadcasting services free from the effect of the profit motive, offering the individual a 'basic supply' of what he/she needs as a member of a particular society and culture, and of a particular polity and democratic system".¹⁰¹ The abolition of PSB would, needless to say, have drastic consequences for minorities, but either of the other two approaches would preserve its potential.

The following two sub-sections provide an overview of the detailed regulatory provisions governing PSB at the European level, first those developed by the EU and secondly those developed by the Council of Europe.

European Union

A regulatory framework for PSB does exist at the European level, but it really is a framework: the Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States recognises that it is largely for each Member State to confer, design and organise the remit for PSB in their own countries.¹⁰² This is because "the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".¹⁰³ The Protocol also sets out that State funding for PSB must be tied to the fulfilment of the broadcasters' public service remit.

A Resolution concerning public service broadcasting adopted by the Council of the European Union in 1999 was more expansive when outlining the importance of PSB.¹⁰⁴ It notes that "in view of [PSB's] cultural, social and democratic functions which it discharges for the common good, [it] has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity". It continues by "stressing that the increased diversification of the programmes on offer in the new media environment reinforces the importance of the

⁹⁹ "The Public Service Broadcasting Remit: Today and Tomorrow", Statement by the European Broadcasting Union (Legal Department) of 29 April 1998, available at: http://www.ebu.ch/leg_public_service.pdf.

¹⁰⁰ Karol Jakubowicz, "Public Service Broadcasting: A Pawn on an Ideological Chessboard", in Els de Bens, Ed., *Media Between Culture and Commerce* (Bristol, UK/Chicago, USA, Intellect Books, 2007), pp. 115-141, at 115.

¹⁰¹ *Ibid.*, at 116.

¹⁰² Protocol to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ C 340/109 of 10 November 1997.

¹⁰³ *Ibid.*

¹⁰⁴ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30/1 of 5 February 1999.

comprehensive mission of public service broadcasters”. In consequence, it positively encourages PSB to branch out into new media services and to exploit the potential of the new technological opportunities on offer in furtherance of their mandate.

Further guidance on the question of State funding for PSB is provided by the aforementioned Council Resolution (1999) and, in greater detail, the European Commission’s Communication on the application of State aid rules to public service broadcasting.¹⁰⁵ The Communication requires States to provide a clear and precise definition of the public service remit, where such a definition is not already in existence. It allows States to define this remit, and to provide for the financing and general organisation of the public broadcasting sector, in a manner that would give due recognition to relevant national specificities. All of this is, however, subject to the important proviso that any measures adopted for the financing of public service broadcasters will have to conform to certain standards of transparency in order to allow for the assessment of the proportionality of such measures.¹⁰⁶

The criteria established by the ECJ in its *Altmark* judgment are also crucial – they reiterate and build on the aforementioned requirements:¹⁰⁷

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The Commission recently launched a public consultation on the future framework for State funding of PSB.¹⁰⁸ The development of the public service remit in the new media environment has been identified as one of the important focuses of the consultation exercise.¹⁰⁹

The regulatory picture that has been sketched here shows that it is largely for Member States to define and develop the remit of PSB in their own countries and that they may finance PSB as long as a certain number of procedural and other criteria are met. There is strong

¹⁰⁵ Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04).

¹⁰⁶ See further, T. McGonagle, “European Commission – State Aid Rules to Public Service Broadcasters Clarified”, IRIS 2001-10: 4.

¹⁰⁷ Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Judgment of the Court of Justice of the European Communities of 24 July 2003, Rec.2003, p.I-7747, esp. paras. (87, 88), 89-94.

¹⁰⁸ As announced in the European Commission’s press release, “State aid: Commission launches public consultation on the future framework for State funding of public service broadcasting”, IP/08/24, 10 January 2008. See also: Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (n.d.), available at: <http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf>.

¹⁰⁹ *Ibid.* See, in particular, s.2.2.1 of the second-named document in the previous footnote.

encouragement for the continuation and development of PSB activities on new media platforms.

Council of Europe

The approach to PSB taken by the Council of Europe is determined primarily by relevant standard-setting texts adopted by the Committee of Ministers. Numerous Recommendations are relevant, and the key definitional elements were conveniently synthesised in a Recent Recommendation on the remit of public service broadcasting in the information society¹¹⁰ and portray PSB as:

- a) a reference point for all members of the public, offering universal access;
- b) a factor for social cohesion and integration of all individuals, groups and communities;
- c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
- d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
- e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

These “key elements underpinning the traditional public service remit” are broadly consistent with the theoretical discussion *supra*. Each of them is elaborated upon in the Recommendation and the section on diversity is discussed in greater detail, *infra*, s.7.4... It is noteworthy that the title of the Recommendation refers to “public service media”, which acknowledges that other media platforms are increasingly being used to pursue public service objectives.¹¹¹ Further recognition of that trend is provided by a subsequent Recommendation adopted by the Committee of Ministers – on measures to promote the public service value of the Internet.¹¹²

The Recommendation’s central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by:

- “upholding human rights, democracy and the rule of law [...] and promoting social cohesion, respect for cultural diversity and trust” in respect of the Internet and other ICTs;
- setting out parameters for the roles and responsibilities of all key stakeholders within clear legal and other regulatory frameworks;
- promoting awareness in the private sector of the ethical dimension to relevant activities and the adjustment of practices in light of human rights concerns;
- encouraging, where appropriate and on an inclusive basis, “new forms of open and transparent self- and co-regulation” enhancing accountability for key actors.

The suggested measures for attaining the central objective of the Recommendation should be considered in light of the guidelines elaborated in the detailed and extensive appendix to the

¹¹⁰ Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007.

¹¹¹ See further, in this connection: OFCOM, *A new approach to public service content in the digital media age: The potential role of the Public Service Publisher*, Discussion Paper, 24 January 2007 & Summary of responses, 13 June 2007.

¹¹² Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, 7 November 2007.

Recommendation. The guidelines focus first on human rights and democracy. In order to uphold human rights in the specific context of the Internet and ICTs, the rights to freedom of expression and association and assembly should not be subject to any restrictions beyond those provided for in the European Convention on Human Rights. The need to uphold the right to private life and correspondence on the Internet, proprietary rights (including intellectual property) and educational rights (including “media and information literacy”) is similarly stressed. So too is the importance of other values and interests, such as “pluralism, cultural and linguistic diversity, and non-discriminatory access to different means of communication via the Internet and other ICTs”. Civic engagement in e-democracy, e-participation and e-government, and the development by public administrations of diverse communicative possibilities, are advocated under the rubric, ‘Democracy’.

The second structured focus of the guidelines is ‘Access’. It calls for: strategies promoting affordable access to ICT infrastructure, including the Internet; “technical interoperability, open standards and cultural diversity in ICT policy covering telecommunications, broadcasting and the Internet”; diversification of software models, including proprietary, free and open source software; affordable Internet access for everyone, especially those with particular needs arising from various situational specificities; public access points to the Internet and other ICT services; integration of ICTs into education; media and information literacy and training.

The guidelines then address ‘Openness’. The key concern here is to safeguard freedom of expression and the free circulation of information on the Internet. To this end, they promote: active public participation in the creation of content on the Internet and other ICTs (specifically by refraining from imposing licensing requirements on individuals and from applying general blocking or filtering measures; facilitating re-use of existing digital content resources in accordance with intellectual property rights and of public data); “public domain information accessibility via the Internet”; adaptation and extension of the remit of public service media specifically to the Internet and other ICTs.

‘Diversity’ is the fourth main focus of the guidelines and it strives for equitable and universal involvement in the development of Internet and ICT content. As such, it encourages: developing a cultural dimension to digital content production, including by public service media; preserving the digital heritage; participation in “the creation, modification and remixing of interactive content”; measures for the production and distribution of user- and community-generated content; capacity-building for local and indigenous content on the Internet; multilingualism on the Internet.

The final focus of the guidelines is ‘Security’ - a more catch-all category than its title suggests. It underscores the importance of: the Cybercrime Convention and its Additional Protocol; network and information security; legislative measures and appropriate enforcement agencies to deal with spam; enhanced cooperation between ISPs; protection of personal data and privacy; combating piracy in the field of copyright and neighbouring rights; improving transparent and effective consumer protection; promoting safer use of the Internet and ICTs, especially for children.

This summarised overview of some of the main strands to the Council of Europe’s approach to PSB confirms its suitability for the advancement of the communicative and informational needs and interests of minorities. This is clear from the objectives and strategies involved.

4.3.2(iii) Commercial media

Whereas media with purely commercial objectives are not usually vaunted for their contribution to the advancement of the right to freedom of expression of persons belonging to minorities, that does not mean that they are without importance for the realisation of that goal.

First, in some countries, commercial media (especially broadcasters) are subject to certain public service commitments. These can be public service obligations set out in regulation and applicable to all (or a wide selection of) broadcasters, or they can be specific obligations taken on voluntarily by individual broadcasters in return for remuneration. The former practice has always existed (to varying degrees) and the latter appears to be becoming more commonplace of late. Despite the extension of public service obligations to the commercial sector by broadcasters voluntary subscription to contractual obligations, there remains, as Monroe Price has correctly pointed out, a certain tension or contradiction between the forced cohabitation of overall commercial objectives and a limited amount of public service objectives.¹¹³ In concrete instances of both sets of objectives conflicting with one another, it is far from certain that the public service objectives would be able to hold their own, to the extent that they only account for a small, contractually-defined portion of the broadcaster's overall activities and services.

Second, the prioritisation of profits does not presumptively favour the informational preferences of minorities, but at the same time, it does not preclude the possibility that minority preferences could be served by them. As John Keane has noted, commercial publishers of opinion are "primarily concerned to satisfy the demands of audiences within the boundaries of market competition".¹¹⁴ Thus, "Media entrepreneurs certainly provide choices, but they are always within the framework of *commercially viable* alternatives".¹¹⁵ It is well-documented that certain minority groups can constitute lucrative niches in the broadcasting market, eg. satellite channels serving certain ethnic groups in the UK. The commercial attractiveness of a particular group is then determined by commercial calculations: critical mass; definable interests that are translatable into content terms; established patterns of media usage; general level of affluence, etc. Presence on commercial media (whether as slots on general/mainstream channels or as dedicated channels) can often enhance the public prestige of the interests/languages/cultures involved to a greater extent than comparable presence on PSB channels. While the general potential of commercial media to advance minority preferences in media output should not be overlooked, it should not be overstated either. The coincidence of minority interests and commercial viability is the exception rather than the rule and commercial media rarely provide proactively for unpopular programming based on altruistic motivations.

Third, it is important to recognise the negative impact that the failure of commercial media to cater for minorities' programming preferences can have. As commercial media very often reach large audiences, their influence on the formation of public opinion and indeed, the framing of issues for public discussion, is significant. The non-inclusion of programming involving and directed at minorities has ramifications far beyond the act of exclusion: questions of participation, equality and non-discrimination, cultural, linguistic, religious and other identities are all implicated. As explained by Myria Georgiu: "Identities are not shaped

¹¹³ Monroe Price, ...

¹¹⁴ John Keane, *The Media and Democracy* (UK, Polity Press, 1991), p. 91.

¹¹⁵ *Ibid.*

only through positive and creative processes of participation and communion, but also in processes of exclusion, marginalization and regressive ideologies”.¹¹⁶ This third general observation can be related back to the reference at the beginning of this subsection to certain obligations and standards that apply across the board to all media or all media within a given sector (eg. broadcasting). Such measures can help to prevent exclusionary tendencies and practices in respect of commercial broadcasting.

4.3.2(iv) Transnational media

Given the political economy of international media, it is little wonder that analysts should express scepticism as to their ability to enhance the right to freedom of expression of persons belonging to minorities. The business plans on which their economic and political might depend are often rightly perceived as anathema to the communicative needs and interests of persons belonging to minorities. Moreover, objectives of cultural imperialism are also imputed to dominant players on the international media scene. These issues are considered in further detail, *infra*, in the context of diversity in the media. For present purposes, however, the dangers posed by the globalising and homogenising potential of international media are not contested as such, but the attention will focus instead on the countervailing potential of international media to satisfy *certain* communicative needs of *certain* minority groups. Some of the reluctance to accept the validity of this proposition is clearly the result of conceptual associations with particular terminological choices.

By way of illustration, references to the international media instantly evoke dominant media players, such as the “Big Five”.¹¹⁷ On the other hand, references to “transfrontier” media conjure up an alternative framework, especially in Europe, where the term takes on a specific meaning given the regulatory predominance of the EU’s Television without Frontiers Directive and the CoE’s European Convention on Transfrontier Television. Another terminological variant is “transnational” media, which is (at least in European academic writing) increasingly being used in respect of media products and services originating outside of Europe, but which can be received within Europe.¹¹⁸ The reason for alluding to these terminological differences is to advance three related points. First, each of the terms mentioned could be taken to mean essentially the same thing, i.e., media that operate across State borders. Second, patterns of usage have emerged which have, in effect, attached different connotations to different terms. Thus, while there is considerable potential overlap between the different terms, in practice, each has its own distinctive conceptual ballast. Third, once these (admittedly imperfect) distinctions between the relevant terms have been flagged, and their acquired emphases explained, the question of whether “international media” can be

¹¹⁶ Myria Georgiou, *Diaspora, Identity and the Media: Diasporic Transnationalism and Mediated Spatialities* (Cresskill, New Jersey, Hampton Press, Inc., 2006), p. 9.

¹¹⁷ Ben H. Bagdikian, *The New Media Monopoly* (Boston, Beacon Press, 2004), p. 3 – discussed at greater length, *infra*.

¹¹⁸ See generally: Jean K. Chalaby, “Deconstructing the transnational: a typology of cross-border television channels in Europe”, 7 *New Media & Society* (No. 2, 2005), pp. 155-175; Philip Schlesinger, “Wishful Thinking: Cultural Politics, Media, and Collective Identities in Europe”, 43 *Journal of Communication* (No. 2, Spring 1993), pp. 6-17; Jean K. Chalaby, Ed., *Transnational Television Worldwide: Towards a New Media Order* (I.B. Tauris, London/New York, 2005); Jean K. Chalaby, “Television for a New Global Order: Transnational Television Networks and the Formation of Global Systems”, 65 *International Communication Gazette* (No. 6, 2003), pp. 457-472; John Sinclair, Elizabeth Jacka & Stuart Cunningham, *New Patterns in Global Television* (Great Britain, Oxford University Press, 1996).

considered suitable communicative outlets for persons belonging to minorities, becomes much more nuanced and meaningful.

The importance of these media can be gauged, *inter alia*, by their ability to satisfy informational needs of minorities no longer resident in their kin-States or diasporic minorities. Another important dimension to transnational media concerns cultural representation and identity-formation. In this respect, the transnational “recognizes both the possibilities of networks and communities to surpass national boundaries, as well as the continuing significance of the national borders in partly framing and restricting social actions and their meanings”.¹¹⁹ Furthermore, the importance of the transnational dimension is crucial for the universality of human rights, in general, but the right to freedom of expression, in particular.¹²⁰ Its importance is also attested to by the inclusion of express provisions safeguarding cross-border exchanges in both the FCNM and the ECRML. The specific importance of the media has been explained in terms of their ability to “renegotiate and represent diasporic copresence and a common past through images, which shape the (selective) renewed and contemporary collective memory and provide repertoires for the construction of new individual and communal identities”.¹²¹ This explanation also holds true in respect of kin-State minorities.

Finally, it should be noted that to the extent that certain minority groups rely heavily on the informational output of transfrontier media, it can be argued that such media make viable contributions to existing diversity in terms of source, outlet and content.

4.3.2(v) Other types of media

The list of different types of media presented above is by no means exhaustive. The Internet and other new media technologies may appear conspicuous by their absence, but they are considered in detail in s. 4.5, *infra*. Other omissions include “alternative media” (including grassroots and alternative advocacy media¹²²) and “radical media” (i.e., media that are “generally small-scale and in many different forms, that express an alternative vision to hegemonic policies, priorities, and perspectives”¹²³), both of which¹²⁴ are linked to social movement theory.¹²⁵ Their omission is explained by the fact that they are not dealt with as distinct types of media in relevant international legal texts.

The purpose of the above selection is to highlight the differences between common types of media in terms of their purpose, functionality and reach. The foregoing discussion reveals that each of the media types surveyed can contribute in different ways to rendering the right to freedom of expression (in all its component parts) effective for persons belonging to

¹¹⁹ Myria Georgiou, *Diaspora, Identity and the Media: Diasporic Transnationalism and Mediated Spatialities* (Cresskill, New Jersey, Hampton Press, Inc., 2006), p. 10.

¹²⁰ Article 10(1), ECHR and Article 19(2) both use the formula, “regardless of frontiers”.

¹²¹ *Ibid.*, p. 13.

¹²² Chris Atton, *Alternative Media*, *op. cit.*, at 16 (drawing, *inter alia*, on the work of Michael Traber).

¹²³ John D.H. Downing *et al.*, *Radical Media: Rebellious Communication and Social Movements* (Thousand Oaks/London/New Delhi, Sage Publications Ltd., 2001), p. v.

¹²⁴ For a typology of alternative and radical media, see: Chris Atton, *Alternative Media*, *op. cit.*, at 27.

¹²⁵ See further, in this connection: Alberto Melucci, *Challenging codes: Collective action in the information age* (UK, Cambridge University Press, 1996); Doug McAdam, Sidney Tarrow & Charles Tilly, *Dynamics of Contention* (USA, Cambridge University Press, 2001); Doug McAdam, John D. McCarthy, Mayer N. Zald, Eds., *Comparative perspectives on social movements: Political opportunities, mobilizing structures, and cultural framings* (USA, Cambridge University Press, 1996).

minorities. It should not be overlooked that other, less structured media can also play an important role in realising this objective. The foregoing discussion is also important because the monitoring processes of relevant international treaties have so far revealed little awareness of the functional differences between different types of media (see further, *infra*). When the communicative needs and preferences of persons belonging to minorities are optimally served by the functional features of particular types of media, there is a greater likelihood that they will exercise their right to freedom of expression in an effective manner.

4.4 Enabling environment for media freedom

The concept of “enabling environment” provides an extremely useful analytical frame for issues relating to media freedom.¹²⁶ It allows for full-scale ecological examination of the broader legal and policy environment in which the media operate. The concept is also sufficiently capacious to include scope for the evaluation of other extraneous factors affecting media performance, in particular political, socio-economic and cultural factors. The healthiness of the enabling environment in which media operate can be largely determinative of whether or not the media effectively realise their stated goals.

The realisation of an optimal, or at least favourable, enabling environment *for media freedom* is only possible when an optimal or favourable enabling environment *for human rights* in general has already been achieved. The extent to which freedom of expression is protected and promoted in a given society is often regarded both as a prerequisite for other media freedom(s) and as an informal barometer for the existence of other human rights. As consistently argued throughout this thesis, however, the right to freedom of expression is inextricably linked to a broad range of other human rights, in particular the rights of non-discrimination/equality, participation, freedom of religion or belief, cultural identity and heritage, language and education. According to the inter-related and interdependent conceptualisation of human rights espoused here, the antecedent enabling environment for human rights would also necessarily include minority rights. Furthermore, an enabling environment for human rights is necessarily shaped by principles, structures and practices of democracy and the upholding of the rule of law.

A favourable enabling environment for media freedom needs to rest on firm foundations. As well as the human rights grounding already described, it is also influenced in important ways by the operative public values of a given society. Typically, such values would include pluralism and tolerance.

The constitutional enshrinement of freedom of expression and other media freedoms are crucial features of a favourable enabling environment for media freedom. Relevant statutory provisions are also very important, but constitutional provisions boast superior legitimacy and permanency. Media objectives, practices and structures all generally tend to be regulated. The impact of that regulation can be assessed in micro and macro terms. The particular effects of individual regulatory provisions (eg. on journalistic freedoms, security of journalists (professional and physical), access to information, protection of sources, media ownership,

¹²⁶ For a comprehensive exploration of the concept, see, Peter Krug & Monroe E. Price, “The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance”, The USAID Office of Democracy and Governance Occasional Paper Series, January 2002, Doc. No. PN-ACM-006, and more recently and succinctly, Monroe Price & Peter Krug, “The Enabling Environment For Free and Independent Media” in Mark Harvey, Ed., *Media Matters: Perspectives on Advancing Governance & Development from the Global Forum for Media Development* (Beijing, Internews Europe, 2007), pp. 94-101.

competition, State subsidies for the promotion of certain public interest objectives etc.) also have an aggregative effect which is a primary force in the shaping of the enabling environment.

The architecture of State institutions is also very important in this respect: they should ideally be democratic, transparent and accountable and foster interaction with the public. Media regulatory authorities should be independent and representative. Their structures and *modi operandi* should ensure transparency, accountability, participation in policy-formulation and effective appeals mechanisms against official decisions. They should broadly conform to the principles of good governance.

Factors other than the formal laws and institutions of State also shape the enabling environment for media freedom. As Price and Krug have noted, “there is a close interaction between what might be called the legal-institutional and the socio-cultural, the interaction between law and how it is interpreted and implemented, how it is respected and received”.¹²⁷ The prevailing political culture can also exercise a decisive influence on the ability of the media to carry out their objectives. In democratic countries, traditions of political stability are generally conducive to the existence of free and independent media. In conflict or (immediate) post-conflict situations, a different paradigm operates, in which different roles are assumed by or thrust upon the media.¹²⁸ Regulation (to the extent that it can withstand the conflict-related pressures) and public attitudes and expectations are coloured by the ambient political situation. In transitional democracies, too, the media may be susceptible to political vicissitudes and interference.¹²⁹ It is important that regulatory measures be tailored to the exigencies of prevailing situations. Very different kinds of regulation are required in very different political contexts.

All too often, the great importance attaching to the enabling environment for media development is understated. The securing in society of the rule of law, freedom of expression (including independence of the media and other related freedoms), human rights generally, democracy, pluralism, tolerance, etc., are necessary prerequisites for media development. This general rule is equally applicable to the use of media by minorities. The Advisory Committee on the FCNM has, on occasion, found that “problems pertaining to freedom of the media and the rights and situation of journalists *in general* may also affect the environment surrounding the media of persons belonging to national minorities”.¹³⁰

Guarantees of media-related pluralism are also important for minorities. Thomas Gibbons, in disaggregating the term, has usefully distinguished between three distinct levels of media-

¹²⁷ Monroe Price & Peter Krug, 2007, *op. cit.*, at p. 96.

¹²⁸ See generally, Monroe E. Price & Mark Thompson, Eds., *Forging Peace: Intervention, Human Rights and the Management of Media Space* (Edinburgh, Edinburgh University Press, 2002).

¹²⁹ See further: Jan van Cuilenburg & Richard van der Wurff, Eds., *Media and Open Societies: Cultural, Economic and Policy Foundations for Media Openness and Diversity in East and West* (Amsterdam, Het Spinhuis, 2000); Karol Jakubowicz, *Rude Awakening: Social and Media Change in Central and Eastern Europe* (New Jersey, Hampton Press, Inc., 2007); David L. Paletz & Karol Jakubowicz, Eds., *Business as Usual: Continuity and Change in Central and Eastern European Media* (New Jersey, Hampton Press, Inc., 2003); Monroe E. Price, Beata Rozumilowicz, and Stefaan G. Verhulst, Eds., *Media Reform: Democratizing the media, democratizing the state* (London, Routledge, 2002); Andrei Richter, *Post-Soviet perspective on censorship and freedom of the media* (Moscow, UNESCO, 2007).

¹³⁰ (emphasis added) Advisory Committee Opinion on Ukraine (First Monitoring Cycle), adopted on 1 March 2002, para. 96. See also in this connection: Advisory Committee Opinion on Azerbaijan (First Monitoring Cycle), adopted on 22 May 2003, paras. 43 & 52.

related pluralism: content, source and outlet.¹³¹ Of these, content is the most substantive in character, whereas source and outlet are more instrumental (to achieving the aim of securing pluralism at the content level). Minorities have a clear interest in pluralism being guaranteed at all three levels. Pluralism of content ensures that they can draw on a wide range of diverse information, which is particularly important for opinion-forming and decision-making processes and political empowerment. The absence of pluralism at the level of sources (i.e., media ownership) can lead to the constriction of public debate and its domination by powerful political and commercial interests. These dangers have already been alluded to in the previous section, *supra*. The interest of minorities in the maintenance of pluralism among outlets is tied in with what is sometimes referred to as the media functionality principle. The ability to choose between different outlets or types of media increases the likelihood of effectively communicating one's message. In short, the media offer available to the general public is only meaningful for minorities to the extent that the offer includes media outlets that correspond to their real communicative needs.

Concerns for market sustainability are always present in minority media circles. Nowadays, the media have to operate in an increasingly competitive and commercialised environment. This is especially true of the broadcasting sector. In consequence, the need to boost audience shares is growing steadily as a driver of broadcasting policy. Public service broadcasters (PSBs) are also willy-nilly caught up in this vortex, despite the specificity of their mandate. The stark reality is that minority-interest programmes (and especially minority-interest programmes in “less prevalent (national or regional) languages”¹³²) almost never command large audience shares. This can have adverse effects on advertising revenues, which in turn can lead to a general reluctance to broadcast minority-language programmes, particularly at peak viewing/listening times. In such an inhospitable climate, a persuasive case can be made for contemplating prescriptive regulation; financial stimulation; administrative relaxation, all with a view to adequately catering for the needs and interests of persons belonging to national minorities.

Another important feature of the enabling environment, also stressed by Price and Krug, and which is also central to any conceptualisation of the role of the media in any healthy democratic society, is the level of public awareness, understanding, credibility and appreciation of the socio-political role and relevance of the media. This demands the generation of “a special kind of literacy [...] that encompasses a desire to acquire, interpret, and apply information as part of a civil society”¹³³.

Finally, it should be noted that the concept of “enabling environment” is increasingly being relied upon in international policy-making circles. The most pertinent example in the context of this thesis is, perhaps, the World Summit on the Information Society, the concluding documents of which give detailed consideration to the importance of favourable enabling

¹³¹ Thomas Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

¹³² Bruno de Witte, “Surviving in Babel? Language Rights and European Integration”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff, 1992), pp. 277-300, at p. 299.

¹³³ Monroe Price & Peter Krug, 2007, *op. cit.* at p. 99. See further, John Dewey, *The Public and its Problems*, *op. cit.*, at .

environment for ICTs.¹³⁴ Those documents affirm the importance of ensuring a suitable enabling environment for the Information Society at national and international levels.¹³⁵ A key paragraph in the Geneva Declaration of Principles reads:

The rule of law, accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centred Information Society. Governments should intervene, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance the development of the ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities.¹³⁶

As such, the WSIS documents go beyond pure human rights and legal issues, to address economic and technological issues as well. This makes for comprehensiveness and connectedness in its approach. It is extremely important to include these additional dimensions in the formulation of policies to promote favourable enabling environments for communicative activities.

The foregoing discussion has shown the importance of a favourable enabling environment for the realisation of media freedoms. Its importance can also be gauged in terms of the realisation of freedoms enjoyed, or aspired to, by minority media. The focus will now shift to lines of thinking and normative provisions which recognise the importance of media objectives and seek to enhance the enabling environment for media freedom in light of those objectives.

4.4.1 Enhanced liberty for the media/the Fourth Estate

One of the profound paradoxes of democracy is that if it functions well, criticism of it will thrive. Criticism should pervade throughout society, but it is rooted in the media and, increasingly, civil libertarian and other non-governmental organisations.¹³⁷ It is not without reason that many people have come to regard the media as the Fourth Estate; a would-be extra pillar in a radical reworking of Montesquieu's tripartite division of powers. The term, "the Fourth Estate", is one of notoriously imprecise metes and bounds,¹³⁸ which perhaps explains why the European Court of Human Rights has never actually used the term even though it has consistently shown great deference to the concept.

The coinage of the term is generally attributed to Edmund Burke, who – the story goes – used it to refer disparagingly to a group of parliamentary reporters in 1787.¹³⁹ The evolution of the doctrine has – since the very beginning – been dogged with questions about the democratic credentials of the media. Nowadays, such questions tend to be framed in terms of

¹³⁴ See, in particular, "Building the Information Society: a global challenge in the new Millennium", Declaration of Principles, World Summit on the Information Society, Geneva, 12 December 2003, Doc. WSIS-03/GENEVA/DOC/4-E, s. 6 (paras. 38-50).

¹³⁵ *Ibid.*, para. 38; Tunis Commitment, World Summit on the Information Society, Tunis, 18 November 2005, Doc. No. WSIS-05/TUNIS/DOC/7-E, para. 9.

¹³⁶ "Building the Information Society: a global challenge in the new Millennium", *op. cit.*, para. 39.

¹³⁷ The European Court of Human Rights has recognised as much, *inter alia*, in *Steel & Morris v. United Kingdom*, when it referred to "the legitimate and important role that campaign groups can play in stimulating public discussion" – Judgment of 25 January 2005, para. 95.

¹³⁸ See generally: Chapters 1 and 2 of Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Australia, Cambridge University Press, 1998).

¹³⁹ *Ibid.*, pp. 49 and 97.

transparency, accountability and standards generally. The democratic aspirations and commercial realities (of ownership, market, etc.) make for very uneasy bedfellows.

The centrality of the (mass) media to the dynamics of democracy has been recognised time and again by the European Court of Human Rights, having ascribed to the media the “vital role of public watchdog”.¹⁴⁰ The Court has stated that it is incumbent on the media to impart information and ideas on all matters of public interest. It has also consistently held that “[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.¹⁴¹ In light of this function of the media (corrective, curative, supervisory, stabilising – call it what you will), the Court has tended to carve out a zone of protection for the media’s right to freedom of expression that is even greater than that of ordinary individuals.¹⁴² This vision of the media ascribes to them an important critical role in democratic society; it envisages them as “criticasters”.¹⁴³

One hallmark of the expanded zone of the media’s freedom of expression is the notion of journalistic independence. Importantly, this independence filters from the editorial level down to coal-face journalism and reporting. A key pronouncement in this regard reads: “the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists”.¹⁴⁴ This commitment to the autonomy of the media in a democratic society goes a long way to guaranteeing operational latitude for journalists. Moreover, this operational latitude stretches to include “possible recourse to a degree of exaggeration, or even provocation”.¹⁴⁵

However, alongside the enjoyment of journalistic freedom – as defined by the Court - are concomitant duties and responsibilities¹⁴⁶ (discussed further in Chapter 4 (Section 1)). Speaking extra-judicially, the former President of the European Court of Human Rights, Luzius Wildhaber, has stated that: “While the Court has rightly stressed the potentially chilling effect of placing restrictions on speech that may be offensive to individuals or sectors of the community, genuine debate may also be stifled by over-aggressive and inadequately researched journalism.”¹⁴⁷

This, as already mentioned *supra*, is the nub of the problem concerning public resistance to a wider endorsement of the Fourth Estate doctrine. More principled scions of the media argue and crave for the media to be defined according to their vigilance in monitoring and divulging

¹⁴⁰ *The Observer & Guardian Newspapers Ltd. v. United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, No. 216, para. 59.

¹⁴¹ *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30, para. 65.

¹⁴² This approach by the Court is without prejudice to the level of freedom of expression enjoyed by individuals: *Steel & Morris v. United Kingdom*, *op. cit.*, para. 89.

¹⁴³ See further, Tarlach McGonagle, “Broadcasters as Criticasters” (forthcoming).

¹⁴⁴ *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999-III, para. 63, drawing on *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298, para. 31.

¹⁴⁵ *Prager & Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 26 April 1995, Series A, No. 313, para. 38.

¹⁴⁶ See Article 10(2) of the European Convention on Human Rights.

¹⁴⁷ Luzius Wildhaber, “The right to offend, shock or disturb? – aspects of freedom of expression under the European Convention on Human Rights”, Sixth Annual RTE/UCD Lecture in the series: Broadcasting, Society and the Law, Dublin, 11 October 2001, available at (also published in the *Irish Jurist*).

the excesses of various branches of State and society. Or at least, that's the theory; or, some would say, "the fiction". It's also a theory according to which the defining goal of the media is to leave no stone unturned in their quest for "the best obtainable version of the truth".¹⁴⁸ It's a theory that is perhaps out of kilter with the reality of media professionals chasing sex and sleaze and sensationalism and salaciousness. This prompts the question, paraphrasing Lucas A. Powe: how well does [media] promise match performance? "How well is the press exercising its informing function? Is the press meeting its responsibilities, indeed its sole purpose, in vindicating the public's right to know?"¹⁴⁹ In addressing these questions, it is useful to distinguish between different types of media in terms of their purpose, functionality and reach (see s. 4.3, *supra*).

4.5 New technologies and new regulatory paradigms

The growth and maturation of the European Court's attitude towards the media can largely be attributed to their function to serve the aforementioned public interest through the provision of information and stimulation of public debate. The Court's attitude would appear to be premised at least in part on the point-to-multipoint nature of mass media communications; on the understanding that information purveyed and disseminated by the mass media will reach a larger section of society than communications between ordinary individuals. The contiguous considerations of impact and influence are key to this conception of the role and activities of the media.

Could or should this state of affairs under which the media enjoy preferential status change in the online world (as broadly defined)? Or, in other words, in a world where the barriers to mass communication are drastically diminished? Or in a world where communications services are becoming increasingly customised, personalised and individualised? Or in a world where the "proliferation of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas",¹⁵⁰ cutting them off from the rough and tumble of democracy; denying them the formative experience of being confronted with unwanted ideas; denying them exposure to situations where tolerance has to be learnt? Or, more poetically, in a world with a diminished incidence of "serendipitous encounters"¹⁵¹?

Some of these highlighted trends can contribute to the erosion of shared, collective experience and the reduction of common reference points; thus negatively affecting participatory democracy and engendering social fragmentation.¹⁵² The net result of these trends and tendencies is that individuals are increasingly cocooning themselves in informational and communicational universes of their own creation; potentially leading to a Hall-of-Versailles type of effect where their own views are merely mirrored on all sides and distorted somewhat by virtue of excessive amplification. This stark prognosis is one of the arguments frequently

¹⁴⁸ Carl Bernstein, in E. Hazelcorn & P. Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Dingle, Ireland, Brandon Book Publishers Ltd., 1993), pp. 17-25, at p. 19.

¹⁴⁹ Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkeley & Los Angeles, University of California Press, 1991), p. 257.

¹⁵⁰ T. McGonagle, "Changing Aspects of Broadcasting: New Territory and New Challenges", *IRIS plus* 2001-10, p. 5. For a more expansive treatment of these issues, see generally, C.R. Sunstein, *Republic.com* (Princeton, N.J., Princeton University Press, 2001).

¹⁵¹ A.L. Shapiro, *The Control Revolution* (USA, Public Affairs, 1999), p. (xvi).

¹⁵² See further, C.R. Sunstein, *op. cit.*, especially Chapter 1, "the daily me", pp. 3-22.

invoked in favour of prohibition of websites and chat-groups dedicated to the propagation of hate speech and other types of extremist activities, for example.

Its starkness should not, however, be exaggerated. Filtering trends and proclivities towards self-insulation in the comforting surrounds of like-minded opinions are age-old practices and tendencies respectively. The Internet, like all of its forerunner communications technologies, will take some getting used to, particularly given the sheer diversity of communicative forms involved and the sheer diversity of information and opinions it makes available.¹⁵³ It is typical for pioneering technological changes to set a blistering pace; for regulatory responses to lag somewhat behind this *peloton*, gasping for breath, and for cultural changes to remain largely out of the picture, with much ground to make up. Familiarity with the workings and potential of the online world will eventually harness much of the awe and apprehension that have characterised the debate thus far.¹⁵⁴

Quo vadis, then, for the media? First, is the cherished freedom of expression of the media – as staked out by the European Convention on Human Rights and the European Court of Human Rights – likely to be transposed *en bloc* to the online world? This is by no means sure. Crucially, though, the enjoyment of relevant freedoms by media actors in the off-line world has always been contingent on the simultaneous exercise of certain duties and responsibilities (including, first and foremost, that journalists – in principle – “obey the ordinary criminal law”,¹⁵⁵ and also that they act “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”¹⁵⁶). There is nothing to suggest that such a proviso would not (or does not already!) apply online as well.

This line of analysis begs further questions: first, in the online world, where it is much easier for individuals to engage in mass communication, are the above-mentioned distinctions between media actors and ordinary citizens *qua* communicators still valid? The phenomenon of blogging is a perfect example of a communicative practice of major societal significance of which the foregoing question can be asked.¹⁵⁷ On what grounds could such distinctions then be sustained?¹⁵⁸ Would the rationales of impact, influence and service of the public interest, discussed above, be able to survive the transition to the online world?

In any case, it is patent that the Internet holds unprecedented potential for multi-directional communicative activity: unlike traditional media, it entails relatively low entry-barriers for

¹⁵³ See further, the discussion of novel communicative and informational features of the Internet in *ACLU v. Reno*, 929 F.Supp. 824 (11 June 1996), at 842-844.

¹⁵⁴ See generally, Ithiel de Sola Pool, *Technologies of Freedom* (Massachusetts and London, England, The Belknap Press of Harvard University Press, Cambridge, 1983).

¹⁵⁵ *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I, para. 52; see also, *Dupuis & others v. France*, Judgment of the European Court of Human Rights of 12 November 2007, para. 43. It should be noted that the Court found that there had been a violation of Article 10 in the particular circumstances of both these cases.

¹⁵⁶ *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV, para. 53, drawing on *Goodwin v. United Kingdom*, Judgment of the European Court of Human Rights of 27 March 1996, Reports of Judgments and Decisions, 1996-II, para. 39.

¹⁵⁷ See further in this connection: Anne Flanagan, “Blogging: A Journalist Need Not A Journalist Make”, 16 *Fordham Intell. Prop. Media & Ent. L.J.* 395; Anne Flanagan, “The blogger as journalist under UK law”, 10 *Communications Law* (No. 4, 2005), pp. 125-129; Laurent Pech, “Sur l’affaire O’Grady et al. c/Apple ou de l’art de distinguer entre journalistes, journalistes-blogueurs et simple blogueurs en matière de protection des sources”, *Légipresse* No. 237 (December 2006), pp. 161-166.

¹⁵⁸ One suggested approach centres on a test of journalistic process, modelled on the *Reynolds* criteria: Anne Flanagan, “Blogging: A Journalist Need Not A Journalist Make”, *op. cit.*

speakers and listeners/viewers and it blurs/reduces the distinction between receiving and providing information and other types of content. This has prompted the oft-quoted observation that the Internet is “the most participatory marketplace of mass speech that [...] the world” has ever seen. The quotation is perhaps somewhat clumsily formulated, but its essence is certainly accurate. Whether its participatory promise is upheld in practice will depend in part on trends of commodification of information and content and the success of counter-currents at the interface of intellectual property and technology.¹⁵⁹

The second line of analysis is more oriented towards the practice of journalism in an online environment. With the ease of direct access to original sources of information, including official information and in any case, the information which shapes the news of the day, there may be less of a role to be played by media professionals according to traditional conceptions of straight reporting. However, not everyone will invest the time and effort in checking original sources. Those who do will have to re-examine their approach to the intake and digestion of news and information available online. This need is prompted not only by the explosion of information caused by the advent of Internet-technology, its abundance and availability.¹⁶⁰ This informational boon is captured in the sloganistically-appealing remark, “It is no exaggeration to conclude that the content on the Internet is as diverse as human thought”.¹⁶¹ The need is also by various qualitative features of that information: anonymity of, or lack of information about, the provider; lack of traditional intermediaries processing/providing/packaging the information; resultant difficulties in assessing the credibility of the information, especially when it originates in foreign or unfamiliar institutions, organisations or cultural contexts.¹⁶²

A particular role could perhaps be envisaged here for public service broadcasters if they were to assume the role of intermediaries or trustees by pointing the public towards other online material (extraneous to their own sites) to which they would have awarded a sort of “seal of approval”. By doing so, they would vouch for the reliability of content on other websites as being of the same high standards as on their own websites. Such a public-service kite-marking initiative could develop to become a useful navigational tool in the online world; enabling the website of the broadcaster to become a portal which would confer credibility on external content.¹⁶³ This “reliability-enhancing”¹⁶⁴ initiative would lead any reputable public service broadcaster to be identified as a “beacon of trust”¹⁶⁵ in the online world.¹⁶⁶

Overall, the media will have to take on a more intermediary role; place greater emphasis on analysis and interpretation; counter the self-interest agenda of organisations providing information; help to sift facts from rhetoric and comment on the extracted matter. This is no mean challenge for a sector which arguably bears the most responsibility for “the triumph of idiot culture” (i.e., the rise of a media culture in which serious journalism is eclipsed by an

¹⁵⁹ N. Elkin-Koren & N.W. Netanel, Eds., *The Commodification of Information* (Great Britain, Kluwer, 2002).

¹⁶⁰ See, for example, *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996), p. 881.

¹⁶¹ *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996), p. 842, para. 74.

¹⁶² See further, Anton Vedder, “Misinformation through the Internet: Epistemology and Ethics”, in Anton Vedder, Ed., *Ethics and the Internet* (Antwerpen/Groningen, Intersentia, 2001), pp. 125-132, at p. 128.

¹⁶³ *Ibid.*, p. 130.

¹⁶⁴ *Ibid.*, p. 131.

¹⁶⁵ D. Docherty, “Empires and evolution: public service content in the new media”, *27 Intermedia* (Issue No. 2, May 1999), pp. 20-23, at p. 23.

¹⁶⁶ See further, Tarlach McGonagle, “Changing Aspects of Broadcasting: New Territory and New Challenges”, *op. cit.*, pp. 6-7.

obsession with sensation and scandal).¹⁶⁷ This is a call for the media to rediscover their roots; their informative, dissident tradition. They will have their work cut out for them.

An interesting corollary question is often overlooked: what is the likely impact of the inexorable rise of Internet-related communication on the more traditional, off-line media? Will Darwinian theories apply? Will adaptation solely within the confines of the off-line world prove possible? Or will virtually all (mass) media concerns have to reinvent themselves in such a way as to secure footholds in the off- and online worlds?¹⁶⁸ As observed by a leading commentator in the early 1980s: “The new media are not only competing with the old media for attention, but are also changing the very system under which the old media operate”.¹⁶⁹ That observation now seems prescient, given its continued validity in respect of the Internet. It is also clear that the relationship between new and traditionally-used media is complex and evolutive and not simply either one of displacement or reinforcement.¹⁷⁰ Whether the impact of new media on existing media will be predominantly additive or substitutive depends in no small measure on the functionality of the technology in question and its ability to fulfil the communicative needs and interests of its users. It also depends on the comparable levels of functionality of different media.¹⁷¹

Having “developed by accretion, as piecemeal responses to new technology”, contemporary media regulation can be considered “complex and unwieldy”.¹⁷² Different regimes often apply to different media and each regime is characterised by its own specificities. In consequence, it can prove difficult to identify or achieve consistency in these different regimes. The reality of ongoing and projected technological changes has already precipitated fresh thinking about the best (regulatory) means of attaining desired objectives; of honouring specific values. This is particularly true in light of trends of convergence and individualisation.¹⁷³

Such is the global and complicated nature of information technology and the modern media in general, that a multitude of additional regulatory difficulties (many of them unprecedented) has arisen. As concisely stated by Lawrence Lessig: “[R]elative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption – all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace.”¹⁷⁴ Coupled with this detailed observation is the fact that the innovative features of new information technologies¹⁷⁵ have heightened the exposure of the traditional shortcomings of already-existing regulatory structures. It is at this juncture that the notions of self- and co-regulation (S&CR) have been introduced into the debate.

¹⁶⁷ Carl Bernstein, in Ellen Hazelcorn & Patrick Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Dingle, Ireland, Brandon Book Publishers Ltd., 1993), pp. 17-25, at p. 20.

¹⁶⁸ See further, on these questions, Colin Sparks, “The Impact of the Internet on the Existing Media”, in Andrew Calabrese & Colin Sparks, Eds., *Toward a Political Economy of Culture: Capitalism and Communication in the Twenty-First Century* (Lanham, etc., Rowman & Littlefield Publishers, Inc., 2004), pp. 307-326.

¹⁶⁹ Ithiel de Sola Pool, *Technologies of Freedom*, *op. cit.*, at 22.

¹⁷⁰ *Ibid.*, at 39-40.

¹⁷¹ *Ibid.*, at 40.

¹⁷² Thomas Gibbons, *Regulating the Media* (2nd Edition) (London, Sweet & Maxwell, 1998), p. 300.

¹⁷³ See further, T. McGonagle, “Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea”, *IRIS plus* 2002-10, p. 2.

¹⁷⁴ L. Lessig, *Code and other laws of cyberspace* (New York, Basic Books, 1999), p. 166.

¹⁷⁵ See, briefly, *supra*, and very extensively in *ACLU v. Reno*, 929 F.Supp.824 (11 June 1996).

Another impetus for the emergence of the notions of S&CR has been the current debate on, and quest for, better governance at the European level.¹⁷⁶ In this context, the European Commission's White Paper on European Governance has enumerated five key principles of good governance: openness, participation, accountability, effectiveness and coherence.¹⁷⁷ S&CR have been mooted as suitable means of helping to honour these principles in practice.

As demonstrated elsewhere,¹⁷⁸ the notions of S&CR are characterised by their fluidity. This definitional dilemma has been compounded by a lack of consistency in interpretations of the relevant (and other proximate) terms. (Pure) self-regulation is widely regarded as the "control of activities by the private parties concerned without the direct involvement of public authorities".¹⁷⁹ Co-regulation, for its part, refers to the "control of activities by a combination of action from private parties and public authorities".¹⁸⁰ Another term, coined to embrace as wide a selection of co-regulatory practices as possible, is "regulated self-regulation", which describes "a form of self-regulation that fits in with a framework set by the state to achieve the respective regulatory objectives".¹⁸¹ Another variant on the co-regulatory terminology is "audited self-regulation",¹⁸² a term which tends to enjoy greater currency in the US than in Europe. The least that can be stated with certainty is that the terms indicate "lighter-touch" forms of regulation than the traditional State-dominated regulatory prototype.

It is imperative, however, that one avoids getting bogged down in definitional minutiae. What *is* important, though, is that one grasps that the principle of co-regulation implies a novel approach to regulation, by virtue of its in-built potential for involving an increased number of interested parties (to a greater or lesser extent) in a flexible regulatory process. It might be useful if one were to conceive of regulation in terms of a continuum stretching from the traditional State-dominated model through co-regulation to self-regulation.

Figure 1: Regulatory continuum

¹⁷⁶ See, in this connection, European Governance: A White Paper, Commission of the European Communities, 25 July 2001, COM(2001) 428 final; Mandelkern Group on Better Regulation Final Report, 13 November 2001; both of which were welcomed by the Laeken European Council, 14-15 December 2001.

¹⁷⁷ White Paper on European Governance, *op. cit.*, p. 10.

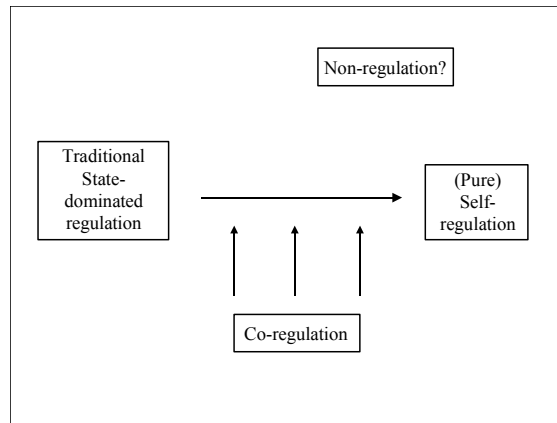
¹⁷⁸ Wolfgang Schulz & Thorsten Held, *Regulated Self-Regulation as a Form of Modern Government* (United Kingdom, University of Luton Press, 2003); Tarlach McGonagle, "Co-regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *op. cit.*; Carmen Palzer, "Co-Regulation of the Media in Europe: European Provisions for the Establishment of Co-regulation Frameworks", *IRIS plus* 2002-6; Wolfgang Schulz & Thorsten Held, "Regulated Self-Regulation as a Form of Modern Government", Study commissioned by the German Federal Commissioner for Cultural and Media Affairs, Interim Report (October 2001).

¹⁷⁹ Mandelkern Group Report, *op. cit.*, p. 83.

¹⁸⁰ *Ibid.*, p. 81; see also, *ibid.*, p. 17.

¹⁸¹ Wolfgang Schulz & Thorsten Held, *op. cit.*, p. 85. The coiners of the term elaborate on its flexibility in the following manner: "Thus, all means of governmental influence on self-regulatory processes can be described and phenomena referred to as co-regulation in other contexts are covered as well."

¹⁸² Audited self-regulation has been described as: "the delegation by Congress or a federal agency to a nongovernmental entity the power to implement laws or agency regulations, with powers of review and independent action retained by a federal agency" - D.C. Michael, "Federal Agency Use of Audited Self-Regulation as a Regulatory Technique", 47 *Administrative Law Review* (Spring 1995), pp. 171- 254, at p. 176.



The vagueness of what exactly co-regulation entails and the relative shortage of tried and tested models to examine have served to stymie its development, both as a concept and as a practice. While it is understandably difficult to conceive of and develop practical guidelines for co-regulation *in abstracto*, some recent research is likely to make a significant contribution to the concretisation of relevant discussions.¹⁸³ One research project examined a variety of S&CR models from different jurisdictions and from that starting point, came up with a “tool-box” of appropriate instruments for “the regulation of self-regulation”.¹⁸⁴ Subsequently, some of the persons involved in that research had a central role in the elaboration of a *Study on Co-Regulation Measures in the Media Sector*.¹⁸⁵ This study surveyed existing co-regulatory practices concerning press, broadcasting, online and mobile services and film and interactive games in the (then) 25 EU Member States.¹⁸⁶ The study also spanned the following regulatory objectives: protection of minors and human dignity; advertising; quality ethics, diversity of private media; access, setting of standards. As such, it represents a wealth of descriptive material, facilitating both thematic and geographical comparisons and analysis. A section focusing on impact assessment is a useful empirical component to the study, permitting evaluations of actual co-regulatory practices.¹⁸⁷ Contextualisation is provided by a discussion of co-regulation under the ECHR and under EU law.¹⁸⁸ Notwithstanding the contribution of these and other research projects to general comprehension of the concept of S&CR, a related and perhaps self-evident observation is that some areas and political/legal contexts are better suited to S&CR than others.¹⁸⁹ But the

¹⁸³ Wolfgang Schulz *et al.*, *Study on Co-Regulation Measures in the Media Sector: Final Report* (Study for the European Commission, Directorate Information Society and Media Unit A1 Audiovisual and Media Policies Tender DG EAC 03/04), June 2006. See also: Christopher T. Marsden, “Co-Regulation in European Media and Internet Sectors”, 8 *MultiMedia und Recht* (No. 1, 2005), pp. 3-7; Christopher T. Marsden, “Co- and self-regulation in European media and Internet sectors: The results of Oxford University’s study www.selfregulation.info”, 9 *Communications Law* (No. 5, 2004), pp. 187-195; Scott G. Dacko & Martin Hart, “Critically Examining Theory and Practice: Implications for Coregulation and Coregulating Broadcast Advertising in the United Kingdom”, 7 *The International Journal on Media Management* (2006 (?), Nos. 1&2), pp. 2-15.

¹⁸⁴ W. Schulz & T. Held, *Regulated Self-Regulation as a Form of Modern Government*, *op. cit.*

¹⁸⁵ Wolfgang Schulz *et al.*, *Study on Co-Regulation Measures in the Media Sector*, *op. cit.*

¹⁸⁶ *Ibid.*, pp. 1-2.

¹⁸⁷ *Ibid.*, Chapter 4 – Impact Assessment.

¹⁸⁸ *Ibid.*, Chapter 5 – Implementation: ss. 5.1 and 5.2, respectively.

¹⁸⁹ For a fuller discussion of the possible thematic ambit of S&CR (including with respect to the independence of journalists; tackling hate speech; the protection of minors; advertising, and technical standards), see T. McGonagle, “Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea”, *op. cit.* See also, *IRIS Special: Co-Regulation of the Media in Europe* (Strasbourg, the European Audiovisual Observatory, 2003).

vagueness that has characterised – and to an extent hampered – the debate on co-regulation so far should not be perceived uniquely in a negative light. It is precisely the same vagueness or intangibility that enables the notion to offer so much potential for milking.

The advantages of a committed co-regulatory system are numerous: greater representation and participation would result in the guiding documents commanding the confidence of all parties; the channelling of industry expertise into the regulatory drafting process would lead to greater sensitivity to the realities of the media world; an efficient system of sanctions, again elaborated multilaterally, would also enhance the credibility of the system (unlike State-devised equivalent structures which have traditionally tended to elicit resistance from industry players); procedural efficiency and expeditiousness; regulation would be more flexible, more easily and swiftly adapted to changing realities ushered in by technological and societal developments.

At the European level, there are increasing indications of enthusiasm in regulatory- and policy-making circles for the exploration of S&CR techniques specifically in relation to the media. As regards the European Union, the new Audiovisual Media Services (AVMS) Directive provides a good example of how the erstwhile cautious support for S&CR has quickly grown more confident.¹⁹⁰ The new Article 3.7 introduced by the AVMS Directive reads:

Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

Of itself, Article 3.7 is of limited substantive relevance. The core obligation it places on Member States - merely to encourage co- and/or self-regulatory regimes [...] – is tame. The nature of S&CR is not explained in the Article, nor are any of its key features alluded to. Recital 36 discusses S&CR at greater length, but its explanatory power is also limited. It points to the suitability of S&CR for advancing consumer protection and for the attainment of public interest objectives. The third of Recital 36's three paragraphs is the one dealing most explicitly with co-regulation. It reads:

Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively.

In addition, both the Directive on electronic commerce (Article 16)¹⁹¹ and the Data Protection Directive (Article 27)¹⁹² have stressed the importance of codes of conduct; an approach which

¹⁹⁰ Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM (2002) 778 final, 6 January 2003.

¹⁹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17 July 2000, p. 1.

¹⁹² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, p. 31.

represents a tentative move away from traditional regulatory techniques and arguably in the direction of co-regulation.

As regards the Council of Europe, while a formal review of the European Convention on Transfrontier Television has yet to be announced, a 2003 report¹⁹³ concludes with a consideration of the architecture of future regulation, including S&CR as possible options. There has been a guarded willingness to countenance S&CR at successive European Ministerial Conferences on Mass Media Policy (eg. Prague, 1994; Thessaloniki, 1997; Cracow, 2000; Kyiv, 2005). The prospect has also been broached in the Committee of Ministers' Recommendation on self-regulation concerning cyber content,¹⁹⁴ the Standing Committee's Statement on human dignity and fundamental rights of others,¹⁹⁵ and perhaps most explicitly, the Council of Europe's Submission to the 2nd Preparatory Committee for the World Summit on the Information Society;¹⁹⁶ the Committee of Ministers' Declaration on freedom of communication on the Internet;¹⁹⁷ the Committee of Ministers' Recommendation on the right of reply in the new media environment;¹⁹⁸ the Committee of Ministers' Declaration on human rights and the rule of law in the Information Society;¹⁹⁹ the Committee of Ministers' Declaration on protecting the role of the media in democracy and in the context of media concentration;²⁰⁰ the Committee of Ministers' Recommendation on promoting freedom of expression and information in the new information and communications environment.²⁰¹

The level of politico-legal support for S&CR as sketched above seems to be growing independently of any accompanying attempts to define its scope. This has predictably fuelled the criticism that passing textual references to S&CR are no more than lip-service on the part of governmental and intergovernmental organisations in their purported quest to attain high-minded principles for the enhancement of participatory practices in their decision-making processes. It has also fuelled scepticism about the practical appeal of S&CR. While this criticism is persuasive and this scepticism is not without foundation, neither should lead to the routine dismissal of S&CR as regulatory alternatives, without first attempting to engage meaningfully with the substantive issues involved.

Finally, it should be reiterated that the underlying objectives of S&CR can be addressed effectively even without having been formulated in the idiom of S&CR as such. This point is demonstrated by the concern for inclusive, participatory governance of the Internet and its

¹⁹³ Report by Dr Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, Standing Committee on Transfrontier Television of the Council of Europe, Doc. T-TT(2003)002, 24 April 2003.

¹⁹⁴ Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), 5 September 2001.

¹⁹⁵ Statement (2002)1 on Human Dignity and the Fundamental Rights of Others, Standing Committee on Transfrontier Television of the Council of Europe, 12-13 September 2002. For a fuller discussion of the relevant provisions of these texts, see Tarlach McGonagle, "Co-Regulation of the Media in Europe: The Potential for Practice of an Intangible Idea", *op. cit.*

¹⁹⁶ Democracy, human rights and the rule of law in the Information Society, Contribution by the Council of Europe to the 2nd Preparatory Committee for the World Summit on the Information Society, Doc. WSIS/PC-2/CONTR/32-E of 9 December 2002.

¹⁹⁷ Adopted by the Committee of Ministers of the Council of Europe on 28 May 2003.

¹⁹⁸ Recommendation Rec(2004)16, adopted on 15 December 2004.

¹⁹⁹ CM(2005)56 final, 13 May 2005.

²⁰⁰ Adopted on 31 January 2007.

²⁰¹ CM/Rec(2007)11, adopted on 26 September 2007.

inherent goal-setting, as articulated in the concluding documents of the World Summit on the Information Society:

The Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.²⁰²

Remaining concerns

In the preceding section, a number of so-called regulatory alternatives have been canvassed. Another, more fundamental question, is obviously whether there should be regulation at all. Or more aptly, whether there should be additional regulation, for much time and effort have thankfully been spent debunking the all-too-frequently recurring misperception that the online world is unregulated. In regulatory matters, reflex should be replaced by reflection. It is only once the need for specific regulation has been convincingly established that its possible mechanics should be considered. There is a certain unease among critics of S&CR about the sharing (or partial transfer) of regulatory responsibilities that have traditionally been the preserve of the State. The fear that S&CR bodies would lack the authority, accountability and a host of other (procedural) safeguards necessary for ensuring the public service role they would be expected to fulfil is also very palpable.

In response to these concerns, it ought to be pointed out that co-regulation should not be perceived as a result-driven phenomenon. One of the most attractive features of co-regulation is that its structures are designed to optimise quality of governance and it attaches paramount importance to process values. Greater representation and participation in regulatory structures is one of the first of these process values that comes to mind; an inclusiveness of a greater selection of parties. In the same vein, responsiveness to the public and an ability to serve the stated interests and needs of diverse societal groups is another prerequisite. The process should remain transparent and easily accessible to the public. Structures should be in place ensuring user-friendliness as regards complaints and appeals mechanisms, with the possibility of ultimate recourse to an independent arbiter or the courts. Co-regulation offers a structural framework that is particularly conducive to guaranteeing these – and other – process values.

Operational autonomy for the co-regulatory body is also crucial, and adequate, independent financing is a *sine qua non* for the same if the body is to be insulated from powerful political and commercial interests. A co-regulatory system's accountability to the public could be safeguarded by structured evaluation processes (eg. governing the start-up phase which would include the drafting of codes, guidelines, etc., and equally once the system is up and running and the codes, etc., are being implemented). An earnest espousal of these principles – which could be set out in the enabling legislation that would set up the co-regulatory system – would go a long way towards meeting some of the ideals of good governance as set out in the European Commission's White Paper, such as the creation of "a reinforced culture of consultation and dialogue".²⁰³

²⁰² "Building the Information Society: a global challenge in the new Millennium", *op. cit.* para. 48.

²⁰³ *Op. cit.*, p. 16.

An increasing openness to the potential of S&CR is now very much a feature of the regulatory *Zeitgeist*. For co-regulation to establish itself as a viable regulatory model, it will need to bridge the gap between theory and practice; a gap of considerable scepticism and resistance. In order to do so, its drivers will have to keep a resolute focus on the primary goal to be achieved: to ensure a more equitable type of regulation which would enhance opportunities for freedom of expression, not curtail them.

Finally, although already mentioned, *supra*, the potential of S&CR for ensuring the effective participation of persons belonging to minorities in regulatory structures and processes governing the media merits reiteration. Effective participation in S&CR mechanisms clearly ripples into the exercise of the right to freedom of expression by persons belonging to minorities. At a general level, Karol Jakubowicz has noted that “A major role can be played by problem definition: whoever defines the problem under discussion can then control the process – set the agenda, determine policy framing and formulation, develop solutions, etc.”²⁰⁴ This is true, *a fortiori*, in respect of problem and issue definition in the realm of media regulation, as was demonstrated in the discussion of the features of an appropriate enabling environment for freedom of expression, *supra*, s. 4.4. Effective participation in S&CR would therefore create equitable opportunities for representatives of persons belonging to minorities to contribute to the setting of parameters for policy formulation and thereby the terms of conceptual and substantive engagement with particular issues, especially those of greatest relevance for their own needs and interests.²⁰⁵

Conclusions

This chapter follows through on the rationales for the rights of persons belonging to minorities and examines their relevance in respect of freedom of expression. It sets out the minority-specific dimension to each of the main theories for freedom of expression. It thereby shows that is particularly important for minorities to be able to participate in public life/debate, contest dominant orthodoxies in society, and create, sustain and develop their identities. These particular interests in expressive rights are, of course, shared with non-minority groups, but their importance is appropriately accentuated in respect of minorities owing to their situational specificities (eg. prevalent societal discrimination against them could hinder their access to the media and other communicative fora) or the specificities of their identities (eg. linguistic divergence from other societal groups: specific features of cultural identity may restrict the range of communicative fora or media via which it can viably be transmitted). This discussion provides clear linkage between minority-specific aspects of theory and practice.

The right to freedom of expression clearly cannot be exercised in an effective manner in the absence of expressive opportunities and outlets, the *primus inter pares* of which is the media (which are capable of providing fora and content alike). However, the media is a term that is too general and too amalgamated to be analytically meaningful for present purposes. Different types of media correspond to varying degrees to the various but specific communicative needs and preferences of different groups in different situations. Inevitably, in different sets of circumstances, certain media will therefore be more effective than others. The notion of media functionality is of great analytical value in this connection. This Chapter examines the various

²⁰⁴ Karol Jakubowicz, “Media Governance Structures in Europe”, in Els de Bens, Ed., *Media Between Culture and Commerce* (Bristol & Chicago, Intellect Books, 2007), pp. 197-223, at 197.

²⁰⁵ See further, in this connection, Chapter 8.3, *infra*.

dimensions to media functionality, first in the context of different types of media, and second, in relation to the specific communicative needs and interests of minorities. The double disaggregation involved in this theoretical approach opens up a level of detail and specificity that is largely absent from conventional interpretive and monitoring approaches to relevant international instruments. As such, its application in practice could greatly enhance interpretive and monitoring approaches and especially assessments of whether the right to freedom of expression of persons belonging to minorities is effective in concrete cases.

Despite the importance of media functionality as a factor influencing the ability of different types of media to render the exercise of the right to freedom of expression effective, other important – and prior – influences must also be considered. The media (in general) are best able to carry out the democracy-oriented tasks ascribed to them in a favourable enabling environment. The existence of such an environment implies, at a minimum, respect for rule of law and human rights generally and for the right to freedom of expression and minority rights in particular. Key elements of an appropriate enabling environment include constitutional, legislative and other regulatory standards guaranteeing relevant freedoms, reinforced by official state policies concerning media regulation and minority rights and societal attitudes to both. The extent to which operative public values such as pluralistic tolerance are upheld is also of central importance.

The final focus of this Chapter is on the advent of new communications technologies. These new technologies entail a combination of novel qualitative and quantitative features which have led to new practices and patterns of communication in society, which in turn have given rise to new communicative needs and interests. The impact of these new technologies has affected all groups in society, but not necessarily in identical ways. The most pertinent technology-driven changes include media convergence, participatory models for generation of content, commodification of information, individualisation of choice, explosion of available information. As with the so-called “traditional” media (eg. print media, broadcasting), the suitability of particular technological opportunities for minority groups depends on considerations of media functionality and on their ability to afford and use the technology in question.

Another decisive change concerns a new direction in regulatory thinking, prompted by technological developments and an apparent willingness by States authorities to engage with industry and civil society actors. New co-regulatory approaches to media regulation offer considerable potential for the inclusion of minority perspectives in law- and policy-making exercises and that potential should be thoroughly explored with a view to its maximisation by all interested parties.

There are a number of upshots to the foregoing. The emergence of new technological possibilities and practices has occasioned the need for reappraisals of existing understandings of media functionality and regulatory policy. Chapter 5 makes the case for the extension of these reappraisals to be extended to interpretive and monitoring processes of international instruments containing provisions dealing with freedom of expression.

Chapter 5 – Normative coupling of freedom of expression and minority rights

- 5.1 An underexplored nexus (minority rights/freedom of expression) of international law
 - 5.1.1 Generalist international law: tentative tendencies
 - 5.1.1(i) Actual couplings
 - 5.1.1(ii) Attempted couplings: United Nations
 - 5.1.1(iii) Attempted couplings: Council of Europe
 - 5.1.1(iv) Attempted couplings: assessment
 - 5.1.2 General State obligations (pluralism; non-discrimination, equality and access rights)
 - 5.1.3 Qualifying State obligations
- 5.2 New trends in the development of the nexus under international law
 - 5.2.1 Filling the interstices of international law
 - 5.2.2 Modesty of scope and content of treaty law
 - 5.2.3 Under-utilisation of treaty law
- 5.3 Emergence of differentiated protection for minorities' right to freedom of expression
 - 5.3.1 Framework Convention for the Protection of National Minorities (FCNM)
 - 5.3.2 European Charter for Regional or Minority Languages (ECRML)
- 5.4 Conceptual over-stretch and non-treaty-based standard-setting
 - 5.4.1 Guidelines on the use of Minority Languages in the Broadcast Media

*“‘Since when,’ he asked,
‘Are the first line and the last line of any poem
Where the poem begins and ends?’”
- Séamus Heaney¹*

Introduction

Chapter 4 explores a selection of theories on freedom of expression and the media, particularly from the perspective of persons belonging to minorities. The present chapter will demonstrate that many of the principles, theories and issues addressed in Chapter 4 are also reflected in the various provisions guaranteeing the right to freedom of expression under international law. The citation from Séamus Heaney introducing this chapter is equally applicable to legal standards. They do not begin or end with textual formulations. They incorporate – to varying extents – drafting processes, historical and teleological purposes and their normative and societal impact. This premise explains the inclusion of the forthcoming focuses on such peri-textual aspects of international legal standards.

5.1 An underexplored nexus (minority rights/freedom of expression) of international law

The leading provisions in international law concerning the right to freedom of expression will be subjected to close scrutiny at various junctures in Chapters 6 and 7. For present purposes, it is sufficient to note that the most important of those provisions are Article 19, UDHR, Article 19, ICCPR and Article 10, ECHR. As already noted in earlier chapters, Article 27, ICCPR, is the leading provision concerning minority rights. It is important to signal, by way of introduction to this chapter, that the absence of explicit and extensive linkage between the

¹ Séamus Heaney, “The Fragment”, in *Electric Light* (London, Faber & Faber Ltd., 2001), p. 57.

aforementioned provisions guaranteeing freedom of expression and minority rights, can be explained largely by historical and political reasons. Whereas the US (along with Britain and France) championed the cause of freedom of expression (or “freedom of information”, to use the UN parlance of the time), the USSR and its allies championed the rights of minorities. The ideological polarisation that defined the Cold War also precluded the possibility of the synergic application of freedom of expression and minority rights. Early evidence of this polarisation was to be found in the political pressure brought to bear by both sides concerning the creation of sub-commissions to the Commission on Human Rights. This pressure was applied along the above-mentioned lines and resulted in the establishment of a Sub-Commission on Freedom of Information and of the Press, on the one hand, and a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, on the other hand.² It has been noted that “This was but the beginning of continual finger-pointing by American and Soviet UN representatives at the respective weaknesses of their countries”.³

5.1.1 Generalist international law: tentative tendencies

5.1.1(i) Actual couplings

No provision of *generalist* international human rights treaty law couples the right to freedom of expression and the rights of minorities *in an explicit and detailed way*.⁴ Article 17(d) of the Convention on the Rights of the Child comes closest, by requiring States Parties to “encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”. However, this provision did not enjoy an entirely smooth passage through the drafting process. From the introduction of the draft proposal to “[E]ncourage the mass media agencies to have particular regard to the linguistic needs of minority groups”,⁵ quibbling began over the most appropriate wording to designate “minority groups”. In due course, the relevant *termini technicus* evolved to refer to the linguistic needs of “the child who belongs to a minority group or an indigenous population”,⁶ before its final wording was settled on.

Whereas proposed alternative wordings such as “indigenous population” and “indigenous child” drew criticisms from various quarters, it was an intervention by the Turkish observer specifically targeting the formulations, “minority group” and “indigenous population”, that

² For commentary, see: John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 20.

³ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, *op. cit.*, at 36.

⁴ Article 27, ICCPR, of course, states *inter alia* that persons belonging to minorities shall not be denied the right “to use their own language”. That provision could therefore be described as “explicit”, but not as “detailed” insofar as it does not explore or reflect the (potential) extent of the intersectionality of the rights in question.

⁵ The Baha’i International Community (an NGO with consultative status with ECOSOC) submitted a proposed wording on the topic which included the following provision: “encourage mass media agencies to disseminate their child-oriented programmes not only in the official language(s) of the State but also in the language(s) of the State’s minority and indigenous groups”. However, this proposal was not considered by the 1983 Working Group. See further: E/CN.4/1983/62, Annex II (E/CN.4/1983/WG.1/WP.2/WP.29); Sharon Detrick, Jaap Doek & Nigel Cantwell, Eds., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (The Netherlands, Martinus Nijhoff Publishers, 1992), p. 281.

⁶ Text as adopted by the Working Group at first reading, E/CN.4/1988/WG.1/WP.1/Rev.2, pp. 14-15; Sharon Detrick *et al.*, *op. cit.*, p. 288.

proved the most pointed.⁷ He argued that the failure in various international fora to reach consensual definitions of these concepts meant that the proposed subparagraph would be “non-applicable”.⁸ He deployed this argument in the context of his more general view that the subparagraphs in the draft article as superfluous to its introductory part and argued that “it should not be the role of this Convention to give detailed guidance as to what the States Parties should do in implementing the article”. Thus, he urged the deletion of all subparagraphs, or as a second-best option, the deletion of subparagraph (d) at least. When the draft text was adopted without accepting his suggestions, the observer for Turkey reiterated his position and added that “there would be no alternative by States Parties but to interpret, under the circumstances, these terms according to their national law”. He rounded off his intervention by mooted the possibility of adopting a reservation to that effect when the Convention would be opened for signature.⁹

The coupling of freedom of expression and minority rights in Article 17(d) is shored up to a limited extent by other sub-sections of Article 17. For example, Article 17(a) obliges States Parties to “encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29”. In turn, Article 29 – which focuses on the goals of education – explicitly recognises the importance of developing respect for a child’s “own cultural identity, language and values [...]”,¹⁰ and of cultivating understanding, tolerance and other virtues.¹¹ Finally in this connection, Article 17(b) requires States to “encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources”.

Despite the dearth of successful couplings of the right to freedom of expression and minority rights in international treaties, there have been a few examples of “near misses”, both in the context of the United Nations and the Council of Europe.

5.1.1(ii) Attempted couplings: United Nations¹²

In 1948, a draft Convention on Freedom of Information was drawn up by a United Nations Conference on Freedom of Information.¹³ Some of the exchanges at the Conference were no more than early rehearsals of ideological stances *vis-à-vis* freedom of information/expression that would soon come to typify relevant debates in the Cold War era.¹⁴ As such, some of the conference proceedings have been disparagingly described as a “dialogue between the deaf”.¹⁵ Despite this criticism, the conference was “hailed as a great success”¹⁶ – at the time -

⁷ Considerations 1989 Working Group, E/CN.4/1989/48, pp. 53-55; Sharon Detrick *et al.*, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, *op. cit.*, p. 289.

⁸ *Ibid.*; Sharon Detrick *et al.*, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, *op. cit.*, p. 290.

⁹ *Ibid.*

¹⁰ Article 29.1(c), CRC.

¹¹ Article 29.1(d), CRC.

¹² The author is grateful to David Goldberg for helpful exchanges on events dealt with in this subsection.

¹³ United Nations Conference on Freedom of Information: Final Act (Lake Success, New York, United Nations Publishing, 1948).

¹⁴ John P. Humphrey, *Human Rights & the United Nations: a great adventure*, *op. cit.*, at 35.

¹⁵ *Ibid.*, at 53.

¹⁶ *Ibid.*

due to its adoption of three draft conventions,¹⁷ 43 resolutions and draft articles for the international bill of rights. Subsequent procedures and events quickly altered enthusiasm for the achievements of the conference. John P. Humphrey, who was the executive secretary of the conference, believed that the conference would indeed have been a “great success” if the three draft conventions had been opened for signature and ratification immediately after the conclusion of the conference. He explained the failings of the post-conference procedures as follows:

If the countries invited to the conference had been asked to give their delegations full powers to sign any conventions approved by it, the three conventions would undoubtedly be in force today. But because it was thought that their prestige and authority would be enhanced if the conventions were approved by the United Nations before they were opened for signature, the three drafts together with the rest of the final act were sent to the Economic and Social Council for further action. This gave the opposition the time to organize its forces as well as unlimited time in which to press its point of view. In ECOSOC and later in the General Assembly, there began a long and frustrating process of discussion and amendment. In brief, the amendments which the communist and developing countries forced on the United Nations were from the Western point of view so radical that the draft conventions became unacceptable. What was coming to the surface was the resentment felt in many countries toward the monopolistic practices of the great news-gathering agencies, and the too simple concept of freedom of information current in the West, particularly among professional journalists. And as so often happens, the opposition overreacted.¹⁸

Thus, the draft Convention on Freedom of Information came to be further discussed in ECOSOC and the General Assembly. If ever a drafting process was going nowhere in a hurry, this was it! Ultimately, the draft convention never saw the light of day.¹⁹ Nevertheless, the draft text, as originally drawn up in 1948, contained some provisions that were of particular relevance to minorities. For instance, the following excerpt from Article 3 of the draft Convention merits consideration:

Each Contracting State shall encourage the establishment and functioning within its territory of one or more non-official organizations of persons employed in the dissemination of information to the public, in order to promote the observance by such persons of high standards of professional conduct, and in particular:

[...]

(e) To counteract the persistent spreading of false or distorted reports which promote hatred or prejudice against States, persons or groups of different race, language, religion or philosophical conviction.²⁰

If adopted, this provision would have accorded minorities a measure of protection which they do not enjoy under contemporary international law. The wording of the introductory sentence is somewhat abstruse, but it seems to concern the free (i.e., unhindered) operation of media entities which are independent of State control. The defining purpose of such media entities

¹⁷ The three draft conventions focused on: the gathering and international transmission of news; the institution of an international right of correction, and freedom of information. Of the three, only the convention concerning the institution of the international right of correction was formally adopted and entered into force.

¹⁸ *Ibid.*

¹⁹ In 1951, the draft Convention was revised by an *ad hoc* committee of the UN General Assembly and in 1959, the Third (Social, Humanitarian and Cultural) Committee of the General Assembly proceeded to have a detailed discussion of the *ad hoc* committee's revised text (now comprising 19 articles). From 1959 through 1961, the Third Committee managed to approve the text of the Preamble to the draft Convention, as well as Articles 1-4. Lack of time prevented further discussion of, or progress on, the remainder of the *ad hoc* committee's revised draft text. Further discussion of the draft text was postponed therefore until the following year's session, and that self-same exercise in procrastination was repeated every year until 1973, whereafter the agenda item completely disappeared without explanation!

²⁰ Draft Convention on Freedom of Information, *Yearbook of the United Nations 1947-48*, pp. 593-595.

would be the promotion of professional quality in the media sector. The description of the State duty (“shall encourage”) is not necessarily oxymoronic: rather, it insists that the obligation on States is an imperative one, but that the obligation is merely to “encourage” the creation and operation of media entities.

It is, however, para. (e) that would have filled a gap in international law, by virtue of its focus on “false or distorted reports which promote hatred or prejudice against” particular groups. Promotion would – most likely – involve a lower evidentiary standard than “incitement” – the *ne plus ultra* of free expression according to the current canon of international law and a term which has a distinct meaning in criminal law generally. The elements of falsity or distortion would also cover sensationalist reporting, stereotyping, and a range of other journalistic and presentational styles not currently covered *per se* by existing standards.

So far, so good, but what about the likely consistency of this enhanced protection for minorities (as the subjects of particular types of reporting) with a robust system of free expression? A crucial consideration would be whether the promotion of hatred or prejudice would be judged subjectively or objectively. Second, while the lower evidentiary standard implied by promotion could diminish the level of protection for vigorous, abrasive types of expression, the extent to which this would be so could, perhaps be offset by a strict insistence on the persistency with which the false or distorted reports would be spread. A final – and empirically verifiable²¹ – cause for concern is the danger that States authorities would seek to (ab)use the criteria of falsity and distortion in order to silence opponents of governmental authority or policy.

Whereas Article 3(e) may have had the potential to influence practices of portraying minorities in the media, the manna of participatory rights of access to the media was not to be found elsewhere in the draft Convention. On the contrary, Article 5, for example, stated that: “Nothing in the present Convention shall prevent a Contracting State from reserving under its legislation to its own nationals the right to edit newspapers or news periodicals produced within its territory.” The naked fear of foreign influence on the shaping of news or public opinion is exposed by this provision; a fear that has not fully been dispelled, as shown by the drafting of the FCNM (see further, Chapter 1, *supra*).

5.1.1(iii) Attempted couplings: Council of Europe

A number of attempts were also made to explicitly couple the right to freedom of expression with the rights of minorities in the European Convention on Human Rights. The first occurred during the drafting process of the Convention and the second (discussed *infra* in the context of Article 9, FCNM) concerned a proposal to review Article 10 of the Convention in the mid-1990s.

The *travaux préparatoires* of the European Convention on Human Rights document efforts to ensure that the final text of the provision on freedom of expression would expressly refer to certain particularised interests of minorities. At an early stage in the drafting process, one of the Irish representatives, James Everett, submitted that the Convention should secure for all citizens “and particularly for any minority in their country [...] freedom of speech and

²¹ Ref. to relevant ARTICLE 19 texts on “false news”.

expression of opinion generally; freedom of association and assembly; freedom from discrimination on account of religion or other political opinion”.²²

More specifically, at a later stage in the drafting process, another one of the Irish representatives,²³ William Norton, pressed *inter alia* for the amendment of Article 10(2) of the draft Convention so that it would “stipulate that no restriction should be imposed on the right of national minorities to give expression to their aspirations by democratic means”.²⁴

While the *travaux* do not reveal any conscionable objections to this proposal, it seems that its ultimate omission from the final text can be best explained by the fact that it hitched its fortunes on those of the agenda to secure broader and stronger protection for minority rights in the nascent Convention. That agenda was set out in specific, formal terms as “the need for an examination of the problem of the wider protection of the rights of national minorities, with a view to a more precise definition of the rights of these minorities”.²⁵ When that broader agenda failed to prevail, the specific proposal to amend Article 10(2) was, in effect, similarly doomed.²⁶

What would have been the impact of such wording, had it been adopted? Any attempt to answer this question will be necessarily speculative, but there are good grounds for believing that its impact could have been far-reaching, not least if it had been embedded in the constellation of broader minority rights that was simultaneously being lobbied for in the drafting process.²⁷ One likely consequence of the proposal would have been to give firm

²² *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. I, p. 104.

²³ Although Everett and Norton were both members of the same political party (the Labour Party), it is unclear to what extent their respective interventions were synchronised. As Ireland was extremely homogeneous at the time, it might appear here to be an unlikely champion of minority rights. However, it is most likely that the interventions were born out of concern for the interests and welfare of the Catholic/nationalist minority in Northern Ireland (this theory has been given credence by other commentators, especially in respect of Everett, see: Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration* (Council of Europe Publishing, Strasbourg, 2000), p. 51). In the post-war period, the Council of Europe was the first international forum in which Ireland managed to participate (its application to join the United Nations was blocked until 1955) and initially, at least, most of the Irish delegates saw involvement in the emergent and then fledgling Council as an opportunity to bring the festering issue of the political partition of the island of Ireland to a wider international audience. The so-called “sore thumb” of partition dominated Irish foreign policy at the time. See further: Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration*, *op. cit.*, esp. pp. 41-42. Moreover, the then-wording of Articles 2 and 3 of the Irish Constitution laid territorial claim to the six counties comprising Northern Ireland. In 1998/9(?), the wording of these Articles was amended in a constitutional amendment endorsing the content of the Good Friday Agreement. Crucially, in that amendment, the territorial claim was dropped, to be replaced by more conciliatory language cherishing all traditions on the island of Ireland). See further: J.M. Kelly; James Casey [details of latest editions].

²⁴ *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. V, p. 60. See also, *ibid.*, p. 274, where this shortcoming is criticised in same breath as omission of right of political opposition.

²⁵ Letter by Sir David Maxwell-Fyfe, Chairman of the Committee on Legal and Administrative Questions [of the Consultative Assembly] to the Chairman of the Committee of Ministers, 24 June 1950. The need to address the issue of minority rights was pointed out in a Report by the Committee on Legal and Administrative Questions to the Consultative Assembly (Doc. 77, para. II) and Maxwell-Fyfe’s letter duly reminded the Committee of Ministers of that fact. See further, Vol. V, p. 40.

²⁶ This reading of events is seemingly corroborated by comments by another Irish delegate, to the effect that the signing of the draft Convention was intended as an “instalment on what the peoples of Europe want” – T.F. O’Higgins, *The Irish Independent*, 17 August 1950, quoted in Michael Kennedy and Eunan O’Halpin, *Ireland and the Council of Europe: from isolation towards integration*, *op. cit.*, p. 72.

²⁷ In general terms, the case for greater protection of minority rights was consistently championed throughout the drafting process by a Danish representative, Mr. Lannung. See, in particular, Vol. I, p. 54; Vol. V, p. 22.

protection to the expression of minorities' secessionist aspirations, as long as they would be articulated in accordance with the precepts of democracy. The safeguarding of such a right for minorities would enter into direct collision with the entitlement of States authorities – specified in Article 10(2) - to restrict the exercise of the right to freedom of expression in the interests of “territorial integrity”. *Prima facie*, it is very difficult to see how these conflicting standpoints could be reconciled in practice, without leading to the neutering of one or the other. If the freedom of expression of minorities were to trump the legitimate restriction of expression on the grounds of “territorial integrity”, States comprising volatile political enclaves where independence/secession movements enjoy widespread support, would be deprived of one of their most convenient justifications for political repression and censorship of expression. The European Court of Human Rights has found time and again that State measures interfering with the right to freedom of expression based on the objective of preserving territorial integrity can be a mere sham for discrimination against, or repression of, political opposition.²⁸ The coincidence of political opposition and secessionist minorities is not unusual, thus rendering minorities more susceptible than other sections of the population to measures clamping down on expression that could jeopardise territorial integrity.

5.1.1(iv) Attempted couplings: assessment

The purpose of documenting these “near misses” in international law can hardly be dismissed as mere academic indulgence. They provide very valuable insights into: (a) the general sensitivity of minority issues in the immediate post-World War II period; (b) the fearful determination of States to restrict the freedom of expression of certain (often minority) groups on account of the clear nexus between strong protection for freedom of expression and effective political participation.

(a) As we have already seen in Chapter 1, *supra*,²⁹ the Universal Declaration of Human Rights contains no provisions explicitly protecting minority rights. Another Resolution, entitled “Fate of Minorities”,³⁰ was adopted by the UN General Assembly on the same day as the Resolution proclaiming the Universal Declaration.³¹ The Resolution, “Fate of Minorities”, called for a “thorough study of the problem [*sic!*] of minorities” so as to enable the UN to “take effective measures for the protection of racial, national, religious or linguistic minorities”. Thus, in one fell swoop, the importance of minority rights was recognised (at least nominally) and sidelined.

One could argue that the collapse of the League of Nations system, compounded by the atrocities of the Second World War, had left a gaping void in the international law-making arena. In such a standardless and structureless context, it was - perhaps - not unreasonable to insist that any novel approach to the protection of minority rights (which, we must not forget, was a much more contentious concept then than it is nowadays) be grounded in a “thorough study of the problem of minorities”. However, given the widespread political apprehensiveness-*cum*-nervousness about explicitly recognising and protecting minority rights (especially without clearly defining their content in advance), this insistence could not but have had dilatory consequences and led to a *de facto* sidelining of the issue of minority rights.

²⁸ [List and detail relevant cases, esp. those against Turkey]

²⁹ p. 17.

³⁰ UN General Assembly Resolution 217 C (III) of 10 December 1948.

³¹ UN General Assembly Resolution 217 A (III) of 10 December 1948.

The “fate” of proposals to explicitly enshrine minority rights protection in the draft European Convention on Human Rights proved similarly inauspicious. Mr Lannung, a Danish representative, presented a Report on “the problem of the wider protection of the rights of national minorities”³² and the Committee on Legal and Administrative Questions of the Consultative Assembly of the Council of Europe “unanimously recognised the importance of [the] problem”.³³ However, stressing that its task was “to draw up a list, not of fundamental rights, which must be defined in a general declaration, but only of those which appeared suitable for inclusion in an immediate international guarantee”,³⁴ the Committee decided to adhere to the fundamental rights listed in the operative article [Article 2] of the draft Resolution under consideration – which did not include minority rights *per se*. Again tracking the course of events in the UN General Assembly, the Committee also decided to put on formal record, its “approval in principle of M. Lannung’s declarations” and to “draw the attention of the Committee of Ministers to the need for a subsequent examination of the problem, with a view to defining more exactly the rights of national minorities”.³⁵

The foregoing historical perspectives reveal clear instances of parallelism in UN and Council of Europe approaches to the protection of minority rights. Essentially, the parallelism may be summarised as prioritisation in principle being reduced to procrastination in practice. Political wariness towards the active development of minority rights was very much the order of the day in both IGOs. Any effective attention paid to minority rights was largely subsumed in wider focuses on equality.

(b) The second useful purpose of analysing the aforementioned “near misses” of international treaty law is the opportunity this affords to explore relevant issues and interlinkages. By way of brief review, the main examples given *supra* involved: additional protection for certain groups from false or distorted reports promoting hatred or prejudice; prohibiting non-nationals from editing newspapers or news periodicals, and the right of minorities to express their aspirations by democratic means. Individually and collectively, these examples implicate not only the right to freedom of expression and minority rights, but several of the other fundamental rights mentioned at the beginning of this chapter as qualitatively strengthening the right to freedom of expression. The first example – enhanced group protection from hatred and prejudice – clearly lies at the heart of the right to non-discrimination and equality. The second example is not only discriminatory, but restrictive of participatory rights. The third example also involves participatory rights and implicitly the right to self-determination.

A number of underlying concerns can be detected. Firstly, there is the societal imperative of countering hatred and prejudice. Secondly, one can sense across the other two examples a fear of/respect for the ability of the media to influence and shape public opinion. Hence, States’ determination to retain control of political and cultural narratives on their own territory and to prevent non-nationals from influencing those narratives by taking up editorial positions in newspapers. While the third example need not necessarily involve the media, it does pay homage to the importance of being able to contribute to the shaping of public debate and relevant (national) narratives. Once again, two key axes are discernible here: the axis of

³² First Session of the Consultative Assembly of the Council of Europe, Strasbourg, 10 August - 8 September 1949; Sitting of the Committee on Legal and Administrative Questions, 5 September 1949: *Collected Travaux*, Vol. I, p. 200 (see also Eighth Sitting of the Consultative Assembly, 19 August 1949, p. 54).

³³ *Ibid.*, pp. 200; Fifteenth sitting of the Consultative Assembly, 5 September 1949, *ibid.*, p. 220.

³⁴ *Ibid.*, p. 222; see also, *ibid.*, p. 200.

³⁵ *Ibid.*, at 222; 200.

expression and its perlocutionary effect of influencing public opinion, on the one hand, and the axis of expression and effective political participation, on the other hand.

5.1.2 General State obligations

Traditionally, discussions about civil and political rights have been presumptively framed in terms of negative liberty. This is a notion which has been given much of its contemporary theoretical shape by Isaiah Berlin. Drawing on the intellectual tradition of Locke, Mill, Constant, de Tocqueville and others, Berlin has articulated one of the key tenets of the notion as follows:

there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling.³⁶

The notion of negative liberty is therefore centrally concerned with the demarcation of zones of personal autonomy and agency on the one hand, and legitimate State action on the other. Essentialising the concept, Berlin describes the zone of non-interference by the State as “liberty *from*; absence of interference beyond the shifting, but always recognisable, frontier”.³⁷

Often associated with civil libertarianism, hostility to intervention by State authorities has particularly strong resonance in the realm of freedom of expression. This is a hostility of principle: distrust of governmental motivation for the regulation (read: restriction) of expression;³⁸ fear that paternalistic State impulses would encroach on moral and intellectual freedom; inevitable slippery slope arguments, such as: “repression has no stopping place. Once begun, it can quickly move all the way to a totalitarian system”.³⁹

History provides ample evidence that these arguments of principle and these fears have a very real basis. This historical legitimacy, in turn, lends much persuasive force to the negative conception of civil and political rights generally and freedom of expression in particular. Yet, such an exclusively negative conception is necessarily incomplete. A positive conception of liberty – with its implicit recognition of positive State obligations - is not only possible, but potentially complementary to its negative counterpart.

In order to appreciate that there is no inherent contradiction or necessary tension in the compossibility of negative and positive conceptions of liberty (and *a posteriori* negative and positive State obligations), it is important to understand and distinguish between the different roles played by the State in the system of freedom of expression (see further the detailed discussion of these roles at the end of this section, *infra*).

³⁶ Isaiah Berlin, “Two Concepts of Liberty”, in *Liberty* (Ed. Henry Hardy) (Oxford University Press), p. 171.

³⁷ (emphasis per original) *Ibid.*, p. 174.

³⁸ See, for example: Geoffrey R. Stone, “Democracy and Distrust”, 64 *Colorado Law Review* 1171 (1993).

³⁹ Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 724. See also Salman Rushdie’s comment: “You think you can give away one per cent of your freedom and you’ve still got 99 per cent, but actually, once you give away the first one per cent it’s very remarkable how fast the other 99 per cent goes”, Salman Rushdie, ‘Secrecy and Censorship’, in E. Hazelcorn & P. Smyth, Eds., *Let in the Light: Censorship, secrecy and democracy* (Ireland, Brandon Book Publishers Ltd., 1993), pp. 26-38, at 29.

Turning then to the complementarity between both conceptions of liberty (or sets of State obligations): it can be justified by substantive and instrumental arguments. As to the former: when exclusion and discrimination are institutionally and societally entrenched, negative liberty may be inadequate to render certain rights – notably freedom of expression – meaningful for the victims of such exclusion and discrimination. Positive, equalising measures are then called for in order to realise such rights. As to the latter: positive rights – such as effective participation; equality of access to institutionalised forms of communication, etc. – are often, as Berlin himself assures us, a means for protecting the negatively conceived liberty of individuals (and groups).⁴⁰

The recognition of certain positive State duties in certain concatenations of circumstances should not be construed as implying that States are somehow obliged to remove all impediments – including all kinds of social and economic disadvantage - to the maximal realisation of rights. Such an ambitious claim – for the doctrine of positive State obligations to be a panacea for all the ills of society – could never be sustained (see further, s. 5.2.3(ii), *infra*). As Berlin points out, for one’s liberty to be breached, some kind of agency – either governmental or third-party – must be involved; “Mere incapacity to attain a goal” is not sufficient.⁴¹ He illustrates the point colourfully with the quip: “It is not lack of freedom not to fly like an eagle or swim like a whale”.⁴² Attention must rather focus on specific circumstances which impede sections of the population from exercising their right to freedom of expression and which clearly do fall within the zone of legitimate State responsibility (or “interference”, to continue to apply Berlin’s terminology). As Eric Barendt has argued, the suggestion that “government should ensure that all individuals and groups are in a position to communicate their views muddles freedom, or liberty, of speech with the conditions for its exercise”.⁴³ This is a difficult point and it will be revisited in greater detail in the following sub-section.

5.1.3 Qualifying State obligations

For reasons of conceptual convenience, the duties of States which correlate to human rights are frequently styled as those which are “positive” or “affirmative” on the one hand and those which are “negative” or “restrictive” on the other hand. Technically speaking, though, such qualifiers more accurately describe the kind of action required of States in order to fulfil their duties in respect of human rights.⁴⁴ The distinction between positive and negative State obligations has considerable appeal as an organising principle and this is reflected in the structure of subsequent chapters of this thesis. In order to structure the forthcoming discussion of various State obligations, the distinction provides a convenient (if somewhat rough) way of separating two broad categories of obligations. Chapter 6 focuses on negative State obligations whereas Chapters 7 and 8 focus on positive State obligations. Within each chapter, greater specificity emerges, both in terms of the obligations identified and the rigour with which they are analysed.

⁴⁰ Isaiah Berlin, “Two Concepts of Liberty”, *op. cit.*, at p. 211.

⁴¹ *Ibid.*, p. 169.

⁴² *Ibid.*

⁴³ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 104.

⁴⁴ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, New Jersey, Princeton University Press, 1980), p. 52; see also p. 53.

One of the main conceptual limitations of the distinction is that it suggests a (complete) separation of negative and positive State obligations. This is why it will be relied on here for the purpose of imposing structural order on the discussion and not as the guiding analytical principle. In reality, although negative and positive State obligations are often readily distinguishable, it can also be difficult to pinpoint where one category ends and the other begins. Intersection and overlap between the two are not uncommon. By way of illustration: the negative State obligation to protect persons belonging to minorities from “hate speech” can logically flow into the positive State obligation to facilitate access for such persons to the media. This logical flow is explored in considerable detail in Chapter 6, but it can be summarised here by saying that an effective and comprehensive approach to combating “hate speech” would ordinarily involve preventive measures, including pro-active policies to secure minority involvement in media activities. In the same vein, the negative obligation to counter hate speech and severe forms of negative (ethnic) stereotyping by the media is logically and seamlessly connected to the positive obligation to promote tolerance and intercultural understanding. Viewed as such, it seems more accurate to conceptualise negative and positive State obligations as being situated on a continuum or a sliding scale, rather than as being mutually exclusive.

The conceptual limitation described in the previous paragraph is by no means fatal to the utility of the distinction between negative and positive State obligations for broad categorising purposes. The complete separation of the two categories is not explicit, after all: it is merely one possible reading of the inter-categorical relationship. Nevertheless, greater analytical refinement is required beyond the purposes of broad categorisation. To that end, a more sophisticated analytical model (“a Three-Partite Spectrum of Obligations”⁴⁵), typically associated with Henry Shue and Asbjorn Eide, as adapted by Rolf Künnemann, allows for greater evaluative probing.

Künnemann grounds his model in the conceptualisation of human rights as each right being “linked to an existential status (of human beings) and to State obligations”.⁴⁶ “Roughly speaking”, he writes, “an existential status tells us how human beings are entitled to live in relation to the State under these human rights, and obligations tell us the rules which States subscribe to under this right to satisfy the existential status for their citizens (and others)”.⁴⁷ The different obligations relating to a human right tend to become “increasingly explicit in the process of implementation of the right”.⁴⁸ However, States are also subject to a prior, or “generic”, obligation, *viz.* the obligation to ensure the full implementation of the right. Three “categorical obligations” flow from the generic obligation, namely to respect, to protect, and to fulfil the existential status.⁴⁹ He elucidates the nature of these obligations as follows:

The obligation to respect obliges the State to avoid depriving a human being of this existential status in situations where that status has been attained. The obligation to protect obliges the State to prevent third parties (e.g., other individuals) from depriving a human being of this status in situations where the status has been attained. The obligation to fulfil obliges a State to secure the existential status for human beings in situations where that status has not been attained (i.e., in situations of deprivation).⁵⁰

⁴⁵ Rolf Künnemann, “A Coherent Approach to Human Rights”, 17 *Human Rights Quarterly* (No. 2, 1995), pp. 323-342, at p. 327.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at p. 328.

⁵⁰ *Ibid.* See also the discussion in s. 5.2.2, *supra*.

There is one further level to Künnemann's model of State obligations:

In the process of implementation, each of these three obligations gives rise to a category of more specific obligations respecting, protecting, or fulfilling the related status: respect-bound obligations, protection-bound obligations, and fulfillment-bound obligations. The analysis of the specific obligations in these three categories reveals something like a characteristic spectrum of obligations under a given human right.⁵¹

The usefulness of this model is perhaps best gauged by considering the extent to which it facilitates evaluative specificity. In other words, its value is that it enables specific obligations to be identified and those obligations can then serve as markers in monitoring and adjudicative processes. In Künnemann's own words:

Determining whether a State acts consistently with its generic obligation is much more difficult than determining whether a specific obligation of conduct – i.e., a rule stipulating or prohibiting a well-defined State measure – is fulfilled or disregarded. The process of implementing a human right consists largely of deriving concrete obligations of conduct from the generic obligation.⁵²

Künnemann's point is borne out by the identification and elucidation of States' obligations under the ICESCR in the following section.

5.1.3(i) International human rights treaty law⁵³

All international human rights treaties share the primary objective of ensuring that the rights enshrined therein are rendered effective for everyone. However, the formulae and approaches relied upon for the realisation of that objective tend to vary per treaty. Each human rights treaty has its own standard of metricity, but conversion is possible between the different metric systems because of the broad congruence of their underlying objectives, *viz.* the effective universal realisation of human rights for everyone. Conversion is also facilitated by the interdependent and inter-related character of human rights, meaning that a general presumption of consistency applies across specific treaties and their specialised focuses. In the following paragraphs, a sample of international treaties (i.e., ICCPR, ICESCR and ECHR) will be surveyed to illustrate the different but comparable approaches to ensure that human rights are effective in practice.

ICCPR

Article 2(1), ICCPR reads:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:

⁵¹ *Ibid.*

⁵² *Ibid.*, at p. 341.

⁵³ The author is grateful to Yvonne Donders and Wilfred Steenbruggen for their helpful reading suggestions for this section.

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Under Article 2(1) of the ICCPR, States Parties must “respect” and “ensure” to all individuals subject to its jurisdiction the rights recognised in the Covenant in a non-discriminatory manner. The obligation undertaken by States Parties is therefore twofold. First, “to respect” all of the rights recognised in the ICCPR, States must not violate them. Second, “to ensure” those rights is a more far-reaching undertaking and, according to one leading commentator, it “implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights”.⁵⁴ The reading of affirmative State obligations into Article 2, ICCPR, is borne out by subsequent paragraphs of the Article and the interpretive clarifications offered, *inter alia*, by the UN Human Rights Committee’s General Comment No. 31 – “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”.

Article 2(2) requires States “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”. This requirement is “unqualified and of immediate effect”.⁵⁵ In addition, pursuant to Article 2(3), States “must ensure that individuals also have accessible and effective remedies to vindicate those rights”.⁵⁶ Importantly for persons belonging to minorities, the envisaged remedies “should be appropriately adapted so as to take account of the special vulnerability of certain categories of person [...]”.⁵⁷

ICESCR

As regards the ICESCR, Article 2(1) reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Here the textual emphases are on the progressive achievement of the full realisation of the rights recognised in the Covenant.⁵⁸

⁵⁴ Thomas Buergenthal, “To Respect and Ensure: State Obligations and Permissible Derogations”, in Louis Henkin, Ed., *The International Bill of Rights* (1981), pp. 72-91, at 77. Buergenthal also notes that such affirmative obligations could include “providing some access to places and media for public assembly or expression” – *ibid.*

⁵⁵ General Comment No. 31 [80] – “The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, 29 March 2004, para. 14.

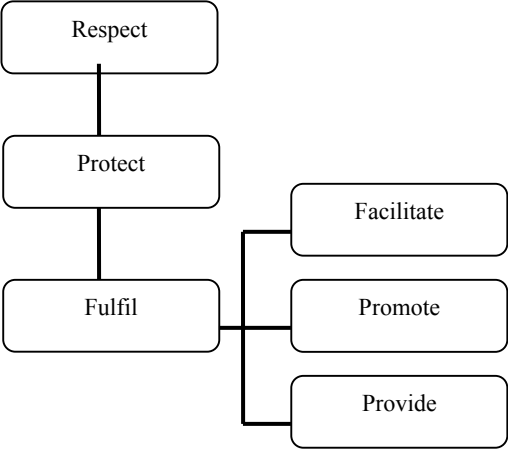
⁵⁶ General Comment No. 31, para. 15.

⁵⁷ *Ibid.*

⁵⁸ General Comment No. 3, para. 11.

In recent General Comments adopted by the CESCR, a conceptually clear approach to the States obligations generated by human rights has been developed and consolidated. The approach recognises that every human right “imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil”, with the latter branching into obligations to facilitate and to provide.⁵⁹ This approach was first formulated by the CESCR in its General Comment 12 and has been employed in each of the Committee’s General Comments since then. However, in subsequent GCs, it has undergone certain variations or refinements. In GCs 12 and 13, for instance, the obligation to fulfil comprises the obligations to facilitate and to provide.⁶⁰ In GC 14, the additional obligation to promote is introduced⁶¹ and in each of the subsequent GCs (i.e., nos. 15-18), the obligation to fulfil is described as incorporating all three obligations, although the order in which they are listed varies.⁶²

Different levels of State obligations to fully realise human rights for everyone



It should be noted that the nature of the various State duties is not always described in identical terms across General Comments to the ICESCR and this is true, *a fortiori*, of its treatment in other relevant international human rights treaties (see *supra*). Sometimes the language used evolves to become more efficient or more expansive. The resultant improvements gradually become consolidated through repetition and this, in turn, leads to greater textual consistency across General Comments. On the other hand, sometimes slight variations in relevant formulae persist - for whatever reason. The following exploration of the nature of each level of State duties will commence with an examination of the essence of the duty before proceeding to tease out specific aspects of the generic duty that become apparent in respect of particular rights.

Obligation to respect

⁵⁹ For a summary of this approach, see Asbjorn Eide, “Economic, Social and Cultural Rights as Human Rights”, in Asbjorn Eide *et al.*, Eds., *Economic, Social and Cultural Rights* (2nd Edit.) (The Netherlands, Kluwer Law International, 2001), pp. 9-28, at 23-25.

⁶⁰ General Comment No. 12, para. 15; General Comment No. 13, para. 46.

⁶¹ General Comment No. 14, para. 33.

⁶² The order in which they are listed is as follows: General Comment No. 14: to facilitate, provide and promote (para. 33); General Comment No. 15: to facilitate, promote and provide (para. 25); General Comment No. 16: to provide, promote and facilitate (para. 17); General Comments Nos. 17 and 18: to provide, facilitate and promote (paras. 34 and 22, respectively).

The duty to *respect* human rights is considered to be a duty of abstention, restraint or non-interference. In essence, “The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right [...]”.⁶³ It entails specific duties in respect of particular rights. Among those duties is the obligation to refrain from denying or limiting equal access for all persons, including minorities to [adequate food and water, “preventive, curative and palliative health services”, decent work, etc.]. Notwithstanding the reference to all persons, minorities are sometimes singled out for special mention (eg. in respect of health⁶⁴ and work⁶⁵), which reflects an awareness of their situational specificities (eg. disadvantage, discrimination, marginalisation). More oblique references to minorities are also relevant, eg. the requirement that States refrain from “arbitrarily interfering with customary or traditional arrangements for water allocation”.⁶⁶ Useful extrapolations could also be derived from the requirement that States’ laws, policies and public programmes be vetted for gender-sensitivity.⁶⁷ There are also recurrent references to States’ duty not to discriminate.

The examination of States’ obligations at three distinct levels allows for a sharper determination of the scope of States’ obligations in relation to specific rights. As the foregoing analysis has shown, the duty to *respect* human rights prevents States from interfering directly or indirectly with the enjoyment of rights. When applied to specific rights, this generic duty accordingly branches out into a number of specific duties. Some of those specific duties could be applied *mutatis mutandis* to the right to freedom of expression (in each of its component parts). The foregoing discussion has attempted to mark out the transferability of some of the specific State duties identified in respect of specific rights guaranteed by the ICESCR to the right to freedom of expression. The following table seeks to present the suggested transfer process in tabular form.

| Type of State obligation | Specific implications: ICESCR | Specific implications: freedom of expression/media |
|---------------------------------|--|--|
| Respect | Non-discrimination | Non-discrimination in freedom to seek, receive and impart information and ideas |
| | Recognition of situational specificities of minorities | Recognition of specific communicative needs and interests of minorities arising from situational specificities |
| | Equal access to services and resources necessary for effective exercise of right | Equal access to media and other communicative fora |

⁶³ GC 14, para. 33; GC 15, para. 21; GC 17, para. 28; GC 18, para. 22.

⁶⁴ GC 14, para. 34.

⁶⁵ GC 18, para. 23.

⁶⁶ GC 15, para. 21.

⁶⁷ GC 16, para. 18.

| | | |
|--|------------------------------------|--|
| | Disaggregated approach to services | Functionality of different fora in terms of seeking, imparting and receiving information and ideas |
|--|------------------------------------|--|

Obligation to protect

The duty to *protect* human rights requires States Parties “to take measures that prevent third parties from interfering with the enjoyment of [a right]”.⁶⁸ While the term, “third parties”, should be understood broadly, one General Comment states that it includes “individuals, groups, corporations and other entities as well as agents acting under their authority”.⁶⁹ The acknowledgement of the situational specificities of minorities by States authorities is also a necessary precondition for honouring their obligation to protect human rights: GC 17 identifies as one of the elements of the duty to protect the rights enshrined in Article 15(1)(c), ICESCR, “an obligation to protect the moral and material interests of authors belonging to [ethnic, religious or linguistic] minorities through special measures to preserve the distinctive character of minority cultures”.⁷⁰ It could be noted in passing that this particular obligation could also conceivably entail an obligation to fulfil (see further, *infra*).

This recognition of the need to “preserve the distinctive character of minority cultures” does not, however, imply unconditional acceptance or accommodation of specific cultural practices. In the context of the right to health, States are obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning.⁷¹ They are also required to prevent third parties from “coercing women to undergo traditional practices, e.g. female genital mutilation” (*ibid.*). In a similar vein, as part of their duty to protect the right to equality (between men and women), States are required “to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women”.⁷²

In order to effectively protect certain rights, States are under a duty to uphold equal access to, say water, and must therefore adopt “the necessary and effective legislative and other measures” to prevent third parties from denying equal access to others.⁷³ This becomes particularly important when (to stick with the same example) water services have been privatised. Here, States are obliged to prevent private operators or controllers from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.⁷⁴ States’ obligations to uphold equal access extend to the underlying or ancillary determinants of those rights, eg. structures, services or resources which are indispensable for the effective exercise or enjoyment of the rights in question. Thus, in respect of the right to health, States are obliged to “adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties”.⁷⁵ States must ensure that the privatisation of the health sector does not jeopardise the “availability, accessibility,

⁶⁸ GC 13, para. 47; GC 14, para. 33; GC 15, para. 23; GC 17, para. 28; GC 18, para. 22.

⁶⁹ GC 15, para. 23.

⁷⁰ Para. 33; see also para. 32 which deals with indigenous peoples.

⁷¹ GC 14, para. 35.

⁷² GC 16, para. 19. Again, a case could be made for (also) regarding this obligation as an obligation to fulfil.

⁷³ GC 15, para. 23.

⁷⁴ GC 15, para. 24.

⁷⁵ GC 14, para. 35.

acceptability and quality of health facilities, goods and services”.⁷⁶ This particular obligation has been crafted in a way that incorporates indicators for the effectiveness of its implementation. It enumerates specific qualitative criteria for the evaluation of health facilities, goods and services. By distinguishing between facilities, goods and services, it implicitly recognises their differentiated functionalities in respect of the full realisation of the right to health. States are also obliged to “ensure that third parties do not limit people’s access to health-related information and services”.⁷⁷

Finally, the duty to protect a specific right may also include a requirement to establish “an effective regulatory system” incorporating various process values (eg. independent monitoring, genuine public participation) and powers of sanction. One example would be privately-controlled water services;⁷⁸ another would be cases where public services are partially or fully privatised (GC 16, para. 20, which refers to the requirement for States “to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights”).

The following table seeks to present the specific obligations that have been identified under the generic State obligation to protect human rights in the context of the ICESCR (i.e., the treaty-context in which the typology has been most extensively used to date) and their possible analogous application to the right to freedom of expression:

| Type of State obligation | Specific implications: ICESCR | Specific implications: freedom of expression/media |
|---------------------------------|---|--|
| Protect | Ensure equal access to health care and health-related services provided by third parties | Ensure equal access to media services provided by third parties |
| | Ensure privatisation of health sector does not threaten availability, accessibility, acceptability and quality of health facilities, goods and services | Ensure privatization of media does not threaten availability, accessibility, acceptability and quality of media goods and services |
| | Prevent harmful social or traditional practices and coercion into same | Prevent abusive speech or incitement to hatred |
| | Ensure third parties do not limit others’ access to health-related information and services | Ensure third parties do not limit others’ access to media content or services; media transparency and accountability |

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ GC 15, para. 24.

| | | |
|--|--|--|
| | Effective regulatory system based on procedural values for preventing access abuses | Effective regulatory system based on procedural values for preventing access abuses |
| | Elimination of prejudices, customary and other practices perpetuating inferiority and stereotypes | Elimination of prejudices, customary and other practices perpetuating inferiority and stereotypes |
| | Establishment of public institutions, agencies and programmes to protect against discrimination | Establishment of public institutions, agencies and programmes to protect against discrimination |
| | (Partly) privatised public services: monitoring and regulation of conduct to ensure not violate equality | (Partly) privatised public services: monitoring and regulation of conduct to ensure not violate equality |
| | Special measures to preserve the distinctive character of minority cultures | Special measures to preserve the distinctive character of minority cultures |

Obligation to fulfil

In short and general terms, “the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of” a right.⁷⁹ Before the tripartite typology of States’ obligations (to respect, protect and fulfil) was formally applied to the ICESCR for the first time in GC 12, the ramifications of the obligation to fulfil had not been translated into structurally separate components. In GC 12, the CESCR, while respecting the three principal levels of obligation, introduced the intermediate-level obligation “to facilitate”.⁸⁰

As already noted, *supra*, under its current state of development, the obligation to fulfil a right is generally taken to comprise obligations to facilitate, promote and provide (as set out succinctly in GC 15, para. 25). The choice of order in which the obligations are listed and considered here is explained by the fact that it follows the evident gradation in levels of State intervention that each obligation entails.

Fulfil (facilitate)

Generally speaking, the obligation to fulfil (facilitate) requires States “to take positive measures that enable and assist individuals and communities to enjoy” a right.⁸¹ The first GC to use the tripartite typology, GC No. 12, states that “The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people’s access to and

⁷⁹ GC 14, para. 33.

⁸⁰ GC 12, fn. 1.

⁸¹ (GC 13, para. 47). GC 14, para. 37; GC 18, para. 27; the wording used in GC 15, para. 25 and GC 17, para. 34, is also very similar.

utilization of resources and means to ensure their livelihood, including food security” (para. 15)). Extrapolating from this obligation in respect of food, an equivalent obligation in respect of the right to freedom of expression could entail securing access to and the ability to use expressive resources (i.e., expressive fora such as the media) and information security (which could include the exchange of information in responsible and reliable ways).

Fulfil (promote)

The engagement of GCs 14-18 with the obligation to fulfil (promote) reveals two main lines of approach: (i) the requirement to take measures centring on the public dissemination of information, awareness-raising, education and training,⁸² and (ii) participation in public affairs and significant, relevant decision-making processes; consultation.⁸³ Useful analogies for the right to freedom of expression of persons belonging to minorities can be drawn from the (non-exhaustive) list of detailed obligations set out in GC 14 (para. 27):

- (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information;
- (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups;
- (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services;
- (iv) supporting people in making informed choices about their health.

First, the role of the State as a speaker is implicated: it must disseminate information of importance for public health, including information about the availability of health services and harmful traditional practices. Relatedly, it must ensure that the public can receive sufficient, relevant and reliable information in order to make informed choices. Second, it must ensure that the (public) services provided for members of vulnerable or marginalised groups are culturally appropriate and otherwise correspond to their specific needs. Again, these obligations are also directly applicable to the right to freedom of expression. This is demonstrated in various contexts, but perhaps most convincingly in respect of the monitoring of the FCNM (see s. 6.5.1 and s. 8.3.2, *infra*).

Fulfil (provide)

The obligation to fulfil (provide) is the most far-reaching and interventionist of State obligations to fulfil human rights. As such, it could be regarded as the Cape of Good Hope of human rights.⁸⁴ As stated in GC 13: “As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal”.⁸⁵ Formulated thus, this obligation is potentially very far-reaching. However, GC 13 also seeks to limit its scope by insisting that “the extent of this obligation is always subject to the text of the Covenant”.⁸⁶ This is the only instance in the GCs surveyed where the limitations of the

⁸² GC 14, para. 37, GC 15, para. 25, GC 16, para. 21, GC 18, para. 28.

⁸³ GC 17, para. 34; see also GC 16, para. 21.

⁸⁴ The Cape of Good Hope was formerly known as the Cape of Storms, and viewed with trepidation because of uncertainty about what lay beyond that point. It was renamed in order to encourage further maritime exploration, and ultimately, progress.

⁸⁵ GC 13, para. 47; see also: GC 12, para. 15, GC 14, para. 37, GC 15, para. 25, GC 17, para. 34, GC 18, para. 26.

⁸⁶ GC 13, para. 47.

obligation are spelt out. As a result, it is difficult to ascertain whether the failure to repeat the limitation in GCs adopted since GC No. 13 is due to concern on the part of the CESCR that it might diminish the potential of the obligation to fulfil (provide) by inviting overly cautious or restrictive interpretations of the same. (At least) two GCs offer additional detail concerning the specific obligations entailed by the obligation to fulfil (provide). GC 17 refers to ensuring the ability of persons to seek and obtain effective redress in cases of violation of their [moral and material] interests [resulting from their scientific, literary or artistic productions].⁸⁷ GC 18, for its part, points out the need for legal recognition of a right [to work]; the adoption of various policies and plans for its realisation in practice, as well as appropriate resource-allocation strategies.⁸⁸ Mechanisms for assuring redress for violations of intellectual property interests and equitable resource-allocation structures and processes could both be very important for the fulfilment/provision of the right to freedom of expression (of persons belonging to minorities). Thus, here, too, bases for extrapolation can readily be identified.

To summarise and further contextualise the foregoing analysis of States' obligations under the ICESCR: the application of this tripartite typology of States' obligations to the ICESCR has greatly enhanced the interpretive clarity surrounding the rights enshrined in the Covenant. Whereas it is typically associated with the ICESCR, it is increasingly being applied in the context of other international human rights treaties, eg. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁹ and ICERD.⁹⁰ References to the typology in the General Comments or Recommendations adopted in respect of the aforementioned treaties occasionally affirm that it is applicable to all human rights, including civil and political rights. This view is supported by a growing body of academic writing⁹¹ and standard-setting initiatives outside of IGO structures.⁹² This trend reinforces the view that it is no idle exercise to extrapolate from the application of the typology to specific rights guaranteed under the ICESCR. Nevertheless, the typology has yet to be formally endorsed by the Human Rights Committee in any of its General Comments relating to the ICCPR.

European Convention on Human Rights

When general concepts are given more specific applications, a number of distributaries flow from the general premises. This rule of thumb also applies to the general theory of positive State obligations and its specific applications. The flow from general to specific can usefully be examined through the approach to relevant issues adopted by the European Court of Human Rights. Clearly, one of the foundational premises for the Court's general approach to positive State obligations⁹³ is its concern that the purpose of the ECHR is to "guarantee not

⁸⁷ GC 17, para. 34.

⁸⁸ GC 18, para. 26.

⁸⁹ See, for example, Committee on the Elimination of Discrimination against Women, General Recommendations Nos. 24 (focusing on Article 12, CEDAW (Women and health)) (paras. 14-17) and 25(dealing with Article 4(1): temporary special measures) (para. 4).

⁹⁰ See, for example, Scott Leckie, "Violations of Economic, Social and Cultural Rights", SIM Special 20, *op. cit.*, pp. [check against printed version, up to fn. 35].

⁹² See, for example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Human Rights Quarterly, Vol. 20, No. 1 (1998), Netherlands Quarterly of Human Rights, Vol. 15, No. 2 (1997), SIM Special No. 20 (Netherlands Institute of Human Rights, Utrecht, 1998), Guideline 6 – Obligations to Respect, Protect and Fulfil. See also: Victor Dankwa, Cees Flinterman and Scott Leckie, "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", SIM Special 20, *op. cit.*, pp. 19-21.

⁹³ Another central premise is the "living instrument" doctrine generally followed by the Court (see further, s. 4.2.2(i), *infra*). This premise (also known as the "dynamic and evolutive" approach) is sometimes invoked in tandem with the "practical and effective rights" premise (eg. in *Stafford v. the UK*, para. 68 and *Christine*

rights that are theoretical or illusory but rights that are practical and effective”.⁹⁴ Based on an analysis of relevant jurisprudence of the European Court of Human Rights, Alastair Mowbray has concluded that “various forms of positive obligations have been imposed upon different governmental bodies in order to secure a realistic guarantee of Convention rights and freedoms”.⁹⁵ What exactly a “realistic guarantee” entails is best determined on a case-by-case basis, although certain trends can tentatively be identified per Convention article.

In its *Airey* judgment, the Court stated that “although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.⁹⁶ In *X. & Y. v. The Netherlands*, it supplemented that statement by admitting that such “obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.⁹⁷ This is an important extension of the principle as articulated in anterior case-law; it confirms a degree of horizontal applicability of relevant rights.

The Court has deliberately adopted similar reasoning regarding the right to freedom of assembly; it held that “genuine, effective freedom of peaceful assembly” cannot:

be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be [...]⁹⁸

The pattern of recognising that positive State duties are sometimes necessary in order to render rights effective can also be detected in respect of Article 10. Such positive State duties apply to procedural and substantive matters alike. In David-versus-Goliath-type situations, where negligibly-funded informational campaigns aiming to influence debate on matters of public interest are pitted against the muscular financial might of multinational corporations, fairness requires that some approximate equality of arms be strived for. In the Court’s own words:

If, however, a State decides to provide such a remedy [against defamation] to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for.⁹⁹

Although the Court does not go to the trouble of spelling out the (self-evident?) implications of its pronouncement – it seems logical that it would be for the State to guarantee the requisite measure of procedural fairness and equality of arms. No other actor is appropriately placed or vested with the necessary authority to do so.

Goodwin v. the UK, para. 74). If the ECHR is interpreted in a dynamic manner, there is always a possibility of expanding the scope of positive State obligations.

⁹⁴ *Airey v. Ireland*, para. 24. See also, *mutatis mutandis*, the judgment of 23 July 1968 in the “Belgian Linguistic” case, Series A no. 6, p. 31, paras. 3 in fine and 4; the above-mentioned Golder judgment, p. 18, para. 35 in fine; the Luedicke, Belkacem and Koç judgment of 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

⁹⁵ Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79, at 78.

⁹⁶ *Airey v. Ireland*, *op. cit.*, para. 32. See also: (see the above-mentioned *Marckx* judgment, p. 15, para. 31).

⁹⁷ Judgment of the European Court of Human Rights (Chamber) of 26 March 1985, para. 23.

⁹⁸ *Plattform “Ärzte für das Leben”*, Series A, no. 139 (1988), para. 32.

⁹⁹ *Steel & Morris v. UK*, *op. cit.*, para. 95.

As regards more substantive concerns, the Court has accepted in principle that positive measures may be required of States in order to give effect to the right to freedom of expression (as with Articles 8 and 11, including the protection of the right in the sphere of relations between individuals¹⁰⁰), but it has yet to meaningfully explore the practical workings of the principle. For instance, in *Özgür Gündem v. Turkey*, taking as its starting point, “the key importance of freedom of expression as one of the preconditions for a functioning democracy”, the Court recognised that:

Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention.¹⁰¹

This recognition amounts to an important statement of principle, even if the Court does immediately go on to concede:

The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities [...].¹⁰²

Differentiated roles and duties of States regarding expression

It should be obvious by now that as well as placing States under a general duty of non-interference, the right to freedom of expression also gives rise to positive obligations for States. It requires them to stimulate freedom of expression and information by assuring broader societal circumstances that are conducive to freedom of expression and pluralism generally.¹⁰³ Eric Barendt takes the view that as freedom of expression is “primarily a negative liberty”, there are persuasive arguments against “the recognition of general positive free speech rights”.¹⁰⁴ Thus, he cautions against the acceptance of “broad propositions of principle about positive free speech rights” out of fear for the “range of possible implications” that could flow from such propositions.¹⁰⁵ Nevertheless, he does concede that “in some contexts, there is a convincing case for upholding narrowly defined positive free speech rights”.¹⁰⁶ It is submitted here that positive State obligations in respect of the right to freedom of expression can be slotted into two main categories: (i) pluralism, and (ii) non-discrimination, equality and access rights. These categories will be the focus of Chapters 7 and 8, *infra*.

¹⁰⁰ See, among other authorities, *Fuentes Bobo v. Spain*, Judgment of the European Court of Human Rights of 29 February 2000, para. 38.

¹⁰¹ *Özgür Gündem v. Turkey*, Judgment of the European Court of Human Rights (Fourth Section) of 16 March 2000, para. 43.

¹⁰² *Ibid.*

¹⁰³ See, for example, Dirk Voorhoof, “Guaranteeing the freedom and independence of the media”, in *Media and democracy* (Strasbourg, Council of Europe Publishing, 1997?), pp. 35-57, at pp. 42-43.

¹⁰⁴ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 105.

¹⁰⁵ *Ibid.*, p. 103.

¹⁰⁶ *Ibid.*, p. 105.

As mentioned earlier in this section, the State can and does assume different roles in relation to the protection and furtherance of free expression. An exploration of those roles usefully elucidates the extent of concomitant State responsibilities. Zechariah Chafee, Jr. has characterised the relationship between the State and expression as being threefold: “(1) the use of governmental power to limit or to suppress discussion, (2) affirmative governmental action to encourage better and more extensive communication, and (3) government as a party to communication.”¹⁰⁷ State responsibilities vary in accordance with the role being performed. Arguably, so too does the level of scrutiny to which State measures are subjected.¹⁰⁸

(1) Limitation or suppression of discussion

It is in respect of this particular role that the State should pursue a presumptively – or generally – abstentionist line. The central reason for this is distrust of governmental intentions and actions. This sense of distrust has nourished US First Amendment doctrine more than it has European standards concerning freedom of expression, and is well captured in the following citation: “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion”.¹⁰⁹

This is an iron-plated argument from classical liberalism that regards the importance of negative liberty or non-interference by the State as fundamental. However, as will be demonstrated in the next Chapter, this presumption of non-interference is rebuttable, and there are clearly situations in which State intervention is not only desirable, but also necessary, in order to limit or suppress certain types of particularly harmful expression.

(2) Facilitation or encouragement of expression

The goal of facilitation and creation of expressive opportunities can be achieved in a variety of ways. For instance, the State could play the role of arbiter, ensuring, to take the famous Meiklejohnian example,¹¹⁰ that all parties in a town-hall meeting are given adequate opportunity to express themselves. Central to the moderating task is the conviction that the purpose of freedom of expression is not to ensure “unregulated talkativeness”.¹¹¹ Rather, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹¹² In its capacity as arbiter of the fairness of public debate, the creation and upholding of certain rights of access to the media could be seen as modern-day policy objectives for the State. Alternatively, the pursuit of this objective could also be more far-reaching, if conceived

¹⁰⁷ Cited in The Commission on Freedom of the Press, *A Free and Responsible Press* (Uni. of Chicago Press, Chicago, 1945?), p. 136 (summary of Zechariah Chafee, Jr., *Government and Mass Communications*). See also: Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 4; Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995) (generally).

¹⁰⁸ Owen Fiss, for example, enquires as to “whether the allocative state should be subjected to the same strict scrutiny as the regulatory one when it comes to speech”: Owen M. Fiss, *The Irony of Free Speech* (Cambridge & London, Harvard University Press, 1996), p. 29.

¹⁰⁹ Robert Jackson, J., in *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943). Cited in Samuel Walker, *Hate Speech: The History of an American Controversy* (USA, University of Nebraska Press, 1994), p. 2 and p. 166.

¹¹⁰ See generally, Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York, Harper & Bros., 1948), and esp. p. 25.

¹¹¹ *Ibid.*, p. 25.

¹¹² *Ibid.*, p. 25.

of as the promotion of media- and information-related pluralism. Such a conceptualisation would point towards a more allocative or distributory role for the State.

An allocative role for the State as regards expression is by no means uncontested, however. Some commentators express uneasiness about subsidising speech, whether artistic, educational or other. Their unease stems from a typical and deep-seated liberalist suspicion of governmental intervention: “The official patron easily turns into the authoritative regulator. Further, the view that government is needed, by subsidy and regulation, to establish or enable the expression of the disadvantaged or the unequal, signifies a disturbing reliance on government. Rights undergo a self-inconsistent transformation when they are conceptualized as what government policy must positively provide or promote.”¹¹³

(3) Participation in communicative process

Government speech or government-sponsored speech could serve the purpose of countering harmful speech from third-party quarters, or it could serve the purpose of advancing perspectives that are either neglected or discriminated against. In these senses, it could the government’s role as a speaker could be viewed as closely related to its other two roles in relation to speech. But government speech, *qua* speech, could have – and often does have – the additional characteristic of providing information on matters of importance to society. Needless to say, in no circumstances should messages concerning matters of importance to governmental parties be twisted into or disguised as matters of importance to society.

5.2 - New trends in the development of the nexus under international law

5.2.1 – Filling the interstices of international law

The foregoing sections have demonstrated that the international protection accorded to minorities’ freedom of expression is – overall - quite erratic. That is why, as noted in the introduction to this thesis, it is extremely important to identify and group the disparate provisions in international instruments dealing with the topic. It is only through the documentation and analysis of the numerous relevant provisions that key features of the overall picture can be extracted. In light of these considerations, it is useful to consider Karol Jakubowicz’s proposed “full matrix of the rights of national minorities in the media field” (reproduced in its original tabular form here):¹¹⁴

| Negative goals | Positive goals | |
|---|--|--|
| I. “Ban, combat” | II. “Assist” | III. “Empower” |
| State action to prohibit, disavow, marginalise, counteract all forms of discrimination and inequality | State action to develop public policy and regulation and provide assistance and funds to guarantee the right of minorities to media in | State not to hinder, or take action to ensure minority access to, and participation in, the media at the level of: 1. Programming |

¹¹³ George Kateb, “The Freedom of Worthless and Harmful Speech”, in Bernard Yack, Ed., *Liberalism without Illusions* (Chicago, University of Chicago Press, 1996), pp. 220-240 at 238.

¹¹⁴ Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)” in *Filling the Frame: Five years of monitoring the Framework Convention for the Protection of National Minorities*, pp. 113-138, at p. 118.

| | | |
|--|--|---|
| | <p>their own languages, to access to media from kin and/or neighbouring countries and to a proper representation of their identity, culture, history and interests in media content, as well as action to promote inter-cultural and inter-ethnic dialogue and understanding</p> | <ol style="list-style-type: none"> 2. Work-force 3. Editorial control and management 4. Ownership of media 5. Regulation and oversight 6. Legislation, public policy |
|--|--|---|

The usefulness of this proposed matrix derives from a number of its features. First, it identifies a wide range of specific State obligations, as developed by, or inferred from, a number of international instruments.¹¹⁵ Second, it points to the purposes of those State obligations and how they benefit persons belonging to minorities. Although the usefulness of the matrix as a possible analytical framework is readily acknowledged here, it will not be adopted as the model for the remainder of this thesis. It is referred to because, notwithstanding differences of terminology, it is similar to the “respect, protect, fulfil” approach to freedom of expression for persons belonging to minorities developed *supra*. Both involve the break-down of relevant State obligations and their categorisation in purposive terms, thereby elucidating the substantive specificities of the right and how to determine whether the right is being effectively realised in practice.

It has already been shown that the relationship between the right to freedom of expression and minority rights in international treaties of a generalist nature has not been particularly fecund. There is perhaps a certain inevitability about this: by their very nature, generalist human rights treaties can hardly be expected to provide detailed or sophisticated protection for specific niche rights or for interfaces between specific rights. Rather, such detailed or elaborate provisions could be more logically included in specialised treaties, where the narrow thematic focus would be more conducive to the exploration and elaboration of details, nuances and technicalities. Notwithstanding the role that could be played by specialised treaties in this respect, some commentators remain reluctant to accept that international law could have the capacity to negotiate the specific exigencies of discrete minority rights at all. The various arguments and general reasoning that coalesce into this reluctance merit careful scrutiny.

The essence of the case rejecting - or at least stringently querying – the appropriateness of international law as a vehicle for the protection and promotion of minority rights is captured in the following quotation:

But it is doubtful that international law will ever be able to do more than specify the most minimal of standards. The members of various linguistic groups have quite different needs, desires, and capacities, depending on their size, territorial concentration, and historic roots. A set of guidelines that is satisfactory to a small, dispersed immigrant group will not satisfy a large, concentrated historic minority. [...] Any attempt to define a set of rights that applies to all linguistic groups, no matter how small and dispersed, is likely to end up focusing on relatively modest claims. [...] Both

¹¹⁵ *Ibid.*, at 118-119. Note that subsequent sections of this thesis examine an extensive range of State obligations in detailed fashion.

majority and minority groups want much more than is, or could reasonably be, guaranteed in international law.¹¹⁶

The foregoing quotation from Will Kymlicka and Alan Patten refers specifically to the rights and needs of members of linguistic groups, but one can easily extrapolate from the specificity of their chosen example and apply the concerns they outline to a broader range of discrete minority rights and needs. The central thrust of their case is twofold: international law is ill-equipped to deal with the issues at hand because of minimalistic tendencies in its scope and content (this will be considered in detail in the next section, *infra*) and it is insufficiently attentive or responsive to *couleur nationale* or, better, *locale*.

The importance of local-level action, engagement, politics, etc., cannot be gainsaid. The proximity of law to its subjects generally favours heightened sensitivity to specificity. However, these truisms do not detract from the importance of underlying principles and paradigms, the articulation of which often takes place at another level. *Couleur locale* should inform the implementation of general principles in such a way as to maximise their efficiency in practice. The potential for synergic interaction is considerable. When Michael Ignatieff attributes the success of human rights in modern times (at least partly) to their ability to go global by going local,¹¹⁷ this kind of synergy certainly deserves some of the accolades.

Nevertheless, even laws that are finely tuned to the specificities of local needs and circumstances can be found to be deficient. Legal provisions are but one instrument of social policy; others play different but no less valid - and even vital - roles in achieving social objectives. The dynamic interplay between legal and non-legal regulatory measures and other societal forces will be considered in detail in Chapter 9, *infra*.

International law is subject to a number of inherent limitations. For analytical purposes, it is desirable to identify and group the most salient of these limitations. One possible way of doing so would be to focus on: (i) the modest scope and content of international treaties - individually and collectively; (ii) the under-utilisation of existing international law instruments (i.e., inadequate implementation, monitoring and enforcement), and (iii) overstretch in standard-setting, i.e., the reliance on international law - especially human rights instruments - in attempts to realise objectives for which they were not designed. At first glance, the distinction between (i) and (iii) may appear to be artificial, but in actual fact, that is not the case. The modest scope and content of treaties concerns arguments of legal formalism, whereas the focus on the overstretch of human rights instruments is more concerned with deviations from legal formalism and, indeed, a somewhat cavalier regard for its importance.

5.2.2 Modesty of scope and content of treaty law

It is perhaps easy to be sceptical or cynical about what international treaties can or seek to achieve, particularly given the *Realpolitik* of their drafting processes. More often than not, State representatives come to the drafting table with the narrow intention of preventing agreement on any measures that would curtail the action of their home States when action is

¹¹⁶ Alan Patten & Will Kymlicka, "Introduction - Language Rights and Political Theory: Context, Issues, and Approaches" in Will Kymlicka & Alan Patten, Eds., *Language Rights and Political Theory* (New York, Oxford University Press, 2003), pp. 1-51, at pp. 34-5.

¹¹⁷ Michael Ignatieff, Michael Ignatieff *et al.*, *Human Rights as Politics and Idolatry* (Princeton Uni. Press, Princeton, 2001), p. 7. This point is picked up on later in the same volume by K. Anthony Appiah, *ibid.*, p. 106.

needed to defend their States' "essential interests", or on measures that would adversely affect their home States' non-essential interests.¹¹⁸ Drafting exercises are inevitably also infused with altruistic intentions and a resolve to advance shared interests, but it is doubtful that such commonality of principle and purpose between States representatives would always take precedence over more viscerally-felt, parochial anxieties. Given this *Realpolitik*, the sardonic quip by Philip Allott, "A treaty is a disagreement reduced to writing",¹¹⁹ does not seem misplaced.

The modest scope of international treaties can also be explained in less sceptical and less cynical ways. The tendency towards minimalism in international human rights treaties is at least in part due to the fact that "problems of agreement, interpretation, and enforcement inhere even in the most minimalist formulations of human rights".¹²⁰ Kwame Anthony Appiah has described the basic, familiar dilemma as follows: "A conception of rights that's highly determinate in its application may not be thin enough to win widespread agreement; a conception of rights that's thin enough to win widespread agreement risks indeterminacy or impotence."¹²¹ One can safely assume a general wariness on the part of States when it comes to taking on extra commitments that are legally binding and enforceable.

The tailoring of a treaty's objectives to realistic prospects of their achievability also seems central here. On such reasoning, the more ambitious, complicated or contentious the content of a draft convention is, the more difficult it will prove to broker agreement for it amongst a wide range of States.¹²² The detailed treatment of highly specific issues is often among the primary casualties of such a tendency towards minimalism. Even if these initial obstacles are cleared, potential interpretative and enforcement difficulties remain to be faced.

This modesty of ambition in positive international law can readily be detected in the main human rights instruments under discussion here. The Universal Declaration of Human Rights – admittedly a Declaration, but nevertheless one that lays very strong claims to being part of customary international law – consciously styles itself as nothing more than "a common standard of achievement for all peoples and all nations". This implies that there are higher standards than the common one. Similarly, as noted *supra*, the drafters of the ECHR saw it as a general declaration of rights for immediate application: they kept open the possibility of building protection for other rights (most notably, minority rights) at an ulterior date.

When the content of rights – as formulated in the provisions of a treaty – is indeed minimalistic, or even merely not inclusive enough or robust enough, the interpretive techniques employed can either compound or reduce a treaty's textual shortcomings. Articles

¹¹⁸ This point is a paraphrase of a point made by Martti Koskenniemi in the specific context of the adoption by the UN General Assembly of a definition of "aggression": Martti Koskenniemi, "The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law", 65 *The Modern Law Review* (No. 2, March 2002), pp. 159-175, at 168. I also attempt to extend the application of Koskenniemi's observation to the drafting of international treaties generally.

¹¹⁹ Philip Allott, "The Concept of International Law", *EJIL* 10 (1999), pp. 31–50, at 43.

¹²⁰ Amy Gutmann, "Introduction", in Michael Ignatieff *et al.*, *Human Rights as Politics and Idolatry* (Princeton Uni. Press, Princeton, 2001), pp. vii-xxviii, at p. xii.

¹²¹ Kwame Anthony Appiah, *The Ethics of Identity* (Princeton and Oxford, Princeton University Press, 2005), pp. 263-264.

¹²² See, in this connection, the described difficulties in the unsuccessful efforts to draft an international Convention on freedom of religion (Chapter 1, p. 93); the "tortuous" negotiations leading to the adoption of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Chapter 1, p. 98), or indeed, in a European context, the Council of Europe Committee of Ministers' Declaration on freedom of political debate in the media.

31 and 32 of the Vienna Convention on the Law of Treaties are crucially important in this connection. They read:

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

Thus, the core text of a treaty, along with its preambular affirmations and annexes are of clear contextual importance for its interpretation (Article 31.2). So too are any agreements or (multilaterally accepted) unilateral instruments adopted in connection with the conclusion of the treaty (Article 31.2(a) and (b)). Other, extra-contextual, considerations of relevance are: any subsequent agreement between parties concerning interpretation or application (Article 31.3(a)) and any subsequent practice in application which points towards interpretative consequences (Article 31.3(b)). The broader matrix of international law is alluded to in Article 31.3(c). This is an important allusion in respect of human rights provisions in international law. It recognises the existence of an anterior body of inter-State commitments; a recognition which is often undergirded by explicit treaty stipulations that existing State obligations relating to human rights shall not be diminished in any way by obligations imposed by new treaties. In this connection, efforts to crystallise and distil “relevant rules of international law applicable in the relations between the parties” can therefore help to clarify important extraneous considerations for the interpretation of individual treaties.¹²³ According to Article 32, the *travaux* of a treaty and the circumstances of its conclusion are to be regarded as supplementary means of interpretation that can be relied upon in situations of ambiguity, etc., in order to determine the correct meaning of certain treaty provisions.

Whenever the text of a treaty reveals ambiguities, inconsistencies or absurdities, it must then turn unto itself in order to unlock its own inner, deeper, concealed meaning. A literalist

¹²³ See, for example, the Guidelines on the use of Minority Languages in the Broadcast Media (2003), *infra*.

approach may not always suffice and guidance may have to be sought from the (drafting) history (as provided for by Article 32) or the *telos* of the treaty. However, to rely solely on the historical interpretation of a treaty can also prove of limited utility, especially when such an interpretative approach places inordinate emphasis on the need to decipher the “original intent” of its drafters (which may be obscure or incoherent). Paraphrasing two well-known maxims in US Constitutional interpretation, reliance on history should be limited to “broad purposes, not specific practices” because a treaty “is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers”.¹²⁴

These two maxims point inexorably towards a teleological approach to treaty-interpretation, not least because its responsive character can render the treaty more enduring and “future-proof” than alternative interpretive techniques. Such an approach provides continuous, evolutive compensation for any lack of prescience on part of the original negotiating parties/drafters. By interpreting the original vision or intent in light of modern-day societal standards, it drags the original vision out of potential desuetude and helps to reduce uncertainty about original intent. Socio-political changes can dramatically alter the broader context in which law is applied; hence another reason to favour an interpretive technique that is reflective of such changes. As regards the media, the speed of technological change also pleads for interpretive flexibility if treaty formulations are to maintain a relevant grip on their subject matter (see further, ss. 8.1.3 and 8.1.4, *infra*). This logic has prompted specific calls for the adoption of a new General Comment on Article 19, ICCPR, to reflect how new technological capabilities and uses have re-shaped contemporary communicative realities.¹²⁵ The foregoing assertion of the general suitability of teleological interpretation for international treaties is admittedly partisan, but a thorough – and academically satisfactory – exploration of the competing merits of leading techniques of treaty/constitutional interpretation is beyond the scope of the present analysis.¹²⁶ One main justification for the preferential treatment of teleological interpretation in the present discussion is that it is the favoured interpretive technique of a number of international human rights adjudicative bodies.

For instance, Harris, O’Boyle and Warbrick have noted that the Strasbourg adjudicative authorities have only made “occasional use” of the *travaux préparatoires* for interpretive purposes. “This”, they explain, “is partly because the *travaux* are not often helpful and partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses where relevant upon current European standards rather than the particular intentions of the drafting states.”¹²⁷ Although allowing that differences of nuance are reflected by each, the notions of teleological, purposive and responsive interpretation can be described as roughly equivalent.

Although the European Court of Human Rights “generally eschews abstract theorising”,¹²⁸ it has characterised its interpretive technique in terms of the “living instrument” doctrine.¹²⁹

¹²⁴ Brennan, J., in *Marsh v. Chambers*, 463 US 783 (1983), at 816.

¹²⁵ See, for example, Jamie F. Metzl, “Information Technology and Human Rights”, 18 *Human Rights Quarterly* (No. 4, 1996), 705-746, at 742-743.

¹²⁶ One major critique of teleological interpretation is that it opens the door for judicial activism, a practice which in turn is susceptible to the politicisation of treaty/constitutional interpretation. For an overview of the contested nature of constitutional interpretation and the competing merits of various interpretive techniques, see: Post, Bork, etc.

¹²⁷ [footnotes omitted] D.J. Harris, M. O’Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London, Dublin, Edinburgh, Butterworths, 1995), p. 17.

¹²⁸ Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79, at 61.

Since the initial enunciation of the doctrine in *Tyrer v. UK*, the Court has consistently held that the ECHR is a “living instrument” which “must be interpreted in the light of present-day conditions”.¹³⁰ In its present state of development, the doctrine applies to both the substance and the enforcement processes¹³¹ of the Convention, and even to institutional bodies which did not exist and were not envisaged at the time of its drafting.¹³² This “dynamic and evolutive”¹³³ interpretive approach constitutes an important safeguard against the risk that the Convention would ever become – to import a phrase from US First Amendment doctrine – “static and lifeless”.¹³⁴

By its adherence to this particular interpretive technique, the Court has put in place the procedural wherewithal for emphasising in its judgments what has been termed “the dialectical relationship of the law to its ambient culture”.¹³⁵ Or “cultures”, to be more accurate, given the extant cultural heterogeneity throughout the 47 Member States of the Council of Europe. This allows for adaptive doctrinal development; an ability to respond (as deemed appropriate) to developing legal standards in Member States, particularly in instances of emergent consensual, cross-national trends.¹³⁶ This interpretive approach is subject to certain limitations,¹³⁷ however, the most important of which is that “any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection”.¹³⁸ In practice, judicial activism can also be checked by a certain caution/conservatism in its application.¹³⁹

5.2.3 Under-utilisation of treaty law

The problem of inadequate enforcement of existing international human rights instruments frequently draws the critical ire of commentators, and rightly so.¹⁴⁰ The substantive merit of a

¹²⁹ For an overview of the historical development of the “living instrument” doctrine (including recent developments) by the European Court of Human Rights, see: Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5:1 (2005), 57-79.

¹³⁰ *Tyrer v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 April 1978, Series A, no. 26, para. 31; *Matthews v. the United Kingdom*, Judgment of the European Court of Human Rights of 18 February 1999, para. 39.

¹³¹ *Loizidou v. Turkey*, Judgment of the European Court of Human Rights (preliminary objections) of 23 March 1995, Series A, no. 310, para. 71.

¹³² *Matthews v. the United Kingdom*, *op. cit.*, para. 39.

¹³³ *Stafford v. the United Kingdom*, Judgment of the European Court of Human Rights of 28 May 2002, para. 68; *Christine Goodwin v. the United Kingdom*, Judgment of the European Court of Human Rights of 11 July 2002, para. 74. Mowbray has pointed out that the Court has recently been making references to the “living instrument” doctrine and the “dynamic and evolutive” interpretive approach pretty much interchangeably: *op. cit.*, p. 64.

¹³⁴ Brennan, J., dissenting, in *Marsh v. Chambers*, 463 US 783, at 817.

¹³⁵ Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995), p. 17. It should be noted, though, that Post uses the term “responsive interpretation”.

¹³⁶ *Stafford v. the United Kingdom*, *op. cit.*, para. 68.

¹³⁷ See further, Mowbray, *op. cit.*, p. 67.

¹³⁸ *Pretty v. the United Kingdom*, Judgment of the European Court of Human Rights of 29 April 2002, para. 54.

¹³⁹ See, by way of example: *Sîrbu and others v. Moldova*, Judgment of the European Court of Human Rights (Fourth Section) of 15 June 2004. For analysis of this spurned opportunity to reflect the growth of freedom of information legislation at national level in the Court’s jurisprudence, see: Tarlach McGonagle, “Workshop Report: The Changing Hues of Political Expression in the Media”, in Susanne Nikoltchev, Ed., *IRIS Special: Political Debate and the Role of the Media - The Fragility of Free Speech* (Strasbourg, European Audiovisual Observatory, 2004), pp. 1-30, at p. 8.

¹⁴⁰ Philip Alston, “Conjuring up New Human Rights: A Proposal for Quality Control”, 78 *American Journal of International Law* 607-621 (1984); Gudmundur Alfredsson, “Concluding Remarks: More Law and Less

treaty can be seriously undermined by its procedural shortcomings, both on paper and in practice. Conor Gearty is vehemently critical of the “combination of rhetorical confidence and feeble implementation [which] means that we can all live in a culture apparently unparalleled in its commitment to human rights and equality, without having to make – or be forced to make – any of the sacrifices that would and should be required of us to make such a set of allegiance matter to anybody other than ourselves.”¹⁴¹ This gives rise to a phenomenon infecting human rights which he terms “Standards That Are Merely Mirages”.¹⁴²

The ultimate goal of international treaties is to ensure the faithful enshrinement and effective implementation of their principles and provisions in national law.¹⁴³ Adjudication and monitoring typically play complementary roles in ensuring the enforcement of international law at the national level. Adjudication is generally a more heavy-hitting measure of enforcement than monitoring, and can constitute the culmination of a monitoring exercise. In another sense, though, adjudication can be a form of monitoring, for example the work of the European Court of Human Rights has been described as “‘monitoring’ *par excellence*”.¹⁴⁴ In this sense, “*excellence*” is not an evaluative term of the quality of the Court’s work, but an indication of its juridical – and therefore legally binding - character.

In recent years, monitoring has had its name dragged around in the proverbial mud. The often ineffectual outcomes of the monitoring of humanitarian crises and conflict situations and the inability of monitoring mechanisms to avert or prevent the escalation of such crises and conflicts have contributed to a general undermining of faith in the usefulness of the entire monitoring enterprise. The practice tends to be inextricably associated with the ills it is supposed to observe. The point can be made wryly by quoting one proposed definition of “monitor”: “A verb meaning, To ignore, to do nothing about, to treat with apathy, as in ‘We are monitoring the situation on a 24-hour basis’”.¹⁴⁵ Such general cynicism should not,

Politics”, in Gudmundur Alfredsson *et al.*, Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 913-926.

¹⁴¹ Conor Gearty, “Is the idea of human rights now doing more harm than good?”, Paper delivered at the London School of Economics, 12 October 2004 (on file with author), p. 6 of transcript. See also: Conor Gearty, “Reflections on Civil Liberties in an Age of Counterterrorism”, 41 *Osgoode Hall L.J.* 185 (Summer/Fall, 2003); David Kennedy, “The International Human Rights Movement: Part of the Problem?”, 15 *Harvard Human Rights Journal* (Spring 2002), 101(?); Tom Campbell, Keith Ewing & Adam Tomkins, Eds., *Sceptical Essays on Human Rights* (Oxford University Press, 2001).

¹⁴² Actually, the metaphor he spins presents human rights “as a computer programme designed to do good”, which is being threatened by three viruses, including the acronymic STAMM (i.e., “Standards That Are Merely Mirages”) virus: Conor Gearty, “Is the idea of human rights now doing more harm than good?”, *op. cit.*, p. 5 of transcript.

¹⁴³ See further: Andrew Drzemczewski, “The European Human Rights Convention: Protocol No. 11 – Entry into Force and First Year of Application”, 21 *Human Rights Law Journal* (No. 1-3, 2000), pp. 1-17, at 10. For an overview of the incorporation of the ECHR into the national legal systems of Council of Europe Member States, see: Robert Blackburn & Jörg Polakiewicz, Eds., *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (England, Oxford University Press, 2001); for a more historical perspective, see: Andrew Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (United Kingdom, Clarendon Press, 1985).

¹⁴⁴ Committee of Wise Persons, Final Report to the Committee of Ministers, Doc. No. CM(98)178, 20 October 1998, para. 69. The firm, original context of this phrase was the sentence: “*In addition to the “monitoring” par excellence undertaken in the proceedings before the European Court of Human Rights, an important task of the Council of Europe is to ensure that every member state respects the values and the important system of norms and standards developed by the Organisation over the years and embodied in some 170 conventions and a great number of recommendations. [...]*” (italics per original).

¹⁴⁵ Provided by Miles Kingston, *The Independent*, London, 17 February 1998. Cited in Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: A Useful ‘Human Rights’ Mechanism?”, in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at 88.

however, be allowed to detract from the merits of specific monitoring exercises. For Philip Alston and J.H.H. Weiler, monitoring is “an indispensable element in any human rights strategy”.¹⁴⁶ They explain:

Systematic, reliable, and focused information is the starting point for a clear understanding of the nature, extent, and location of the problems which exist and for the identification of possible solutions. It is also a necessary element in any strategy to garner the support of civil society and the community at large for measures to promote and protect the human rights of vulnerable groups.¹⁴⁷

The mechanisms instituted by the European Charter for Regional or Minority Languages and the FCNM, for instance, represent good examples of the primarily preventive character of monitoring mechanisms within the Council of Europe, according to Andrew Drzemczewski.¹⁴⁸ A detailed evaluation of the effectiveness of these two monitoring mechanisms in respect of both conventions’ provisions on freedom of expression and the media, will now be provided.

5.3 – Emergence of differentiated protection for minorities’ right to freedom of expression

ECHR protection of the right to freedom of expression is guaranteed in the broader context of a particularly strong conception of democracy; one in which the principles of pluralism, tolerance and broadmindedness reign supreme.¹⁴⁹ It correctly perceives the right to freedom of expression, information and opinion as empowering and facilitative. Conceptually, it styles freedom of information as the “touchstone” of all other human rights;¹⁵⁰ a constitutive right which is instrumental in securing the realisation of other rights. This is a conception of democracy in which Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a dominant role:

Article 10 - Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹⁴⁶ Philip Alston & J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (New York, Oxford University Press, 1999), pp. 3-66, at p. 55.

¹⁴⁷ *Ibid.*

¹⁴⁸ Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (no. 43, 2000), pp. 385-428, at 401.

¹⁴⁹ *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

¹⁵⁰ United Nations General Assembly Resolution 59(1), 14 December 1946.

Of course, this reference to Article 10 includes not only the letters set in stone, but the vast and vigorous case-law that has been developed by the European Court of Human Rights on freedom of expression and information. This has been described as “one of the great glories of the European Court”.¹⁵¹ Whether one agrees fully with this description or not, there can be no denying that it does contain a substantial truth. Many important battles in the war of principles have been won, such as: the public’s interest in receiving information via responsible investigative media; in robust political debate, and in the free exchange of information or ideas “that offend, shock or disturb the State or any sector of the population”.¹⁵² It is likely that the next battles to be fought will be somewhat localised. This is not so much a reference to geographical localisation (although it remains a truism that more work on freedom of expression has to be done in some countries than in others); rather it refers to a kind of thematic localisation. Building on some of the advances already registered in the Article 10 case-law, issues such as technology, access and language are likely to feature more prominently on the Court’s agenda in the future. Just as they are likely to feature increasingly in the context of minority rights and therefore on the agenda of the Advisory Committee as well.

5.3.1 Framework Convention for the Protection of National Minorities

The linkage between Article 10, ECHR and Article 9, FCNM, is very explicit. The latter was cast in the mould of the former, and the resultant textual similarities are acknowledged in the Explanatory Report to the Framework Convention.¹⁵³

Article 9

1 The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

2 Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

3 The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

However, Article 9 is not simply a carbon copy of the European prototype for freedom of expression. In some respects, it builds on the original model and introduces greater specificity as regards dimensions to the right to freedom of expression that could be of particular

¹⁵¹ Gerard Hogan, “The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland”, 4 *The Bar Review* pp. 205-211 (No. 4, 1999), at p. 206.

¹⁵² *Handyside, op. cit.*

¹⁵³ See the Explanatory Report to the Framework Convention for the Protection of National Minorities, in particular, paras. 56 & 58.

importance for persons belonging to national minorities.¹⁵⁴ Article 9(4) foregrounds, in an explicit manner, issues that are clearly of relevance to freedom of expression and to national minorities, but which have hitherto been subsumed in more general aspects of the Article 10 jurisprudence of the European Court.¹⁵⁵ The goals of striving towards tolerance and cultural pluralism – outcrops of the Article 10 jurisprudence of the European Court – are clearly remindful of Article 6, FCNM,¹⁵⁶ which reads:

1 The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

2 The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

The main media-related provisions of the FCNM are summarised here in tabular form:

| Provision | Summary details |
|------------------|---|
| Article 6.1 | Encouragement of spirit of tolerance and intercultural dialogue; effective measures to promote mutual respect and understanding and cooperation among all persons, in particular ... in the media |
| Article 9.1 | Linguistic freedom and non-discriminatory access to media |
| Article 9.2 | Licensing of radio, television or cinema must be non-discriminatory and based on objective criteria |
| Article 9.3 | Freedom to create and use print media without hindrance; possibility to create and use own broadcast media outlets |
| Article 9.4 | States must adopt adequate measures to facilitate minorities' access to media and to promote tolerance and permit cultural pluralism |

It is interesting to note that during the drafting of the FCNM, the CAHMIN was “informed by the representative of the Steering Committee on the Mass Media (CDMM)¹⁵⁷ that the latter committee had initiated discussions on the revision of Article 10 ECHR, with a view to adding journalistic and editorial freedom, access by various groups in society to the media, and copyright.”¹⁵⁸ This was a reference to discussions based on a study commissioned by the CDMM as part of its contribution to the implementation of a Council of Europe project on “Human Rights and Genuine Democracy”. The Study was entitled “Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights” and it was written by Dirk Voorhoof.¹⁵⁹ The Study concluded as follows:

Analysis of the case law on Art. 10 makes clear that Art. 10 E.C.H.R. is not a static rule but a living instrument of human rights' protection. The indefiniteness and open character of the formulation and construction of the Article leads to an ever developing, dynamic and expanding influence of it. The future impact of Art. 10 on information law and media policy in Europe will,

¹⁵⁴ See, for example, *ibid.*, paras. 56 & 59.

¹⁵⁵ See, in particular, *ibid.*, para. 62.

¹⁵⁶ For commentary, see: Geoff Gilbert, “Article 6”, in Marc Weller, Ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford and New York, Oxford University Press, 2005), pp. 177-191.

¹⁵⁷ Author's footnote: The CDMM's representative was Frédéric Riehl (Office Fédéral de la Communication, Switzerland) – Steering Committee on the Mass Media (CDMM), Report on 35th Meeting, 9-12 November 1993, Doc. No. CDMM (93) 41 Addendum, Agenda Item 11, para. LXVII.

¹⁵⁸ CAHMIN (94) 5, 1 February 1994, 1st meeting 25 January – 28 January 1994, Meeting Report: para. 36.

¹⁵⁹ October 1993, Doc. No. CDMM (93) 36.

to a considerable extent, depend on the manner in which the European Commission and the European Court leave a narrow or a wide margin of appreciation to the contracting States with regard to the justification of the “pressing social need” and of the manner in which they take account of the various factors and dimensions involved in the freedom of expression and information.¹⁶⁰

Ultimately, the Bureau of the Council of Europe’s Steering Committee on Human Rights (CDDH-BU), citing the first two sentences of the above excerpt from the Study, endorsed Voorhoof’s conclusions and stated that it “therefore did not consider it appropriate, at this juncture, to redraft Article 10 of the ECHR”.¹⁶¹ Had the CDDH-BU not followed Voorhoof’s conclusions, it is a matter of speculation how far-reaching the proposed express provision for group access to the media might have been. Nevertheless, the very fact that the question was formally discussed at all could be taken as corroborating the observations *supra* that a paradigmatic development in thinking is beginning to emerge as regards freedom of expression. Qualitative considerations and the right to active participation in the media are likely to come increasingly to the fore.

Monitoring

(i) *General*

At the time of its inception, scepticism abounded about the Advisory Committee’s ability to overcome what seemed on paper to be formidable restrictions on the latitude within which it would have to operate.¹⁶² Since then, the Advisory Committee – through its own pro-activeness and the support of the Committee of Ministers – has managed to carve out increased operational autonomy for itself.

(ii) *Advisory Committee*

Thematic approach

When drafting the FCNM, the CAHMIN “considered that programme-type provisions should be included in the framework Convention establishing certain objectives without going into technical details”.¹⁶³ The final text of Article 9, FCNM, shows that this decision was indeed adhered to. This decision shifted the responsibility for examining the compatibility of “technical details” with the standards set out in Article 9 to the Advisory Committee. This shift in responsibility has at least two logical corollaries. First, it points up the need for the Advisory Committee to develop or at least have access to a high level of expertise concerning the nature of technical details, if it is to evaluate their impact in an effective manner. Second, both of these points underscore the need for the Advisory Committee to be able to maximise the potential knowledge and experience provided by external sources of information.

¹⁶⁰ *Ibid.*, p. 65.

¹⁶¹ Steering Committee on the Mass Media (CDMM), Secretariat Memorandum prepared by the Directorate of Human Rights, 11 May 1994, Doc. No. CDMM (94) 31. This document contains an excerpt from the Report of the 42nd Meeting of the Bureau of the CDDH-BU, including its Opinion on the Voorhoof Report.

¹⁶² See, for example, the Council of Europe Committee of Ministers Resolution (97) 10: Rules adopted by the Committee of Ministers on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, 17 September 1997 (especially paras. 29-32; 35-37).

¹⁶³ CAHMIN (94) 5, 1 February 1994, 1st meeting 25 January – 28 January 1994, Meeting Report, p. 8, para. 37, ECMI docs. Art. 9.1.

The Advisory Committee's Opinions are structured in such a way that consideration of Article 9 takes place under: 'Specific comments in respect of Articles 1-19'; 'Main findings and comments of the Advisory Committee',¹⁶⁴ and occasionally 'Concluding remarks' as well.

The treatment given to Article 9 as part of the article-by-article approach tends to be detailed and discursive and to offer a wealth of information about the prevailing situations in whatever country is under scrutiny. This information is wide-ranging in character: covering general context, legislation and its implementation and a miscellany of practical considerations. Or, to use the terminology of the Outline for the State reports: narrative, legal, state infrastructure, policy, factual.¹⁶⁵ As such, it reflects the numerous criteria, discussed *supra*, which affect the access of persons belonging to national minorities to the media, including in their own languages. The comprehensive treatment of country-specific situations in the Advisory Committee's Opinions is their great strength. Ironically, however, the specificity of the analysis can also be a limiting factor, at least to the extent that the scrutiny provided is *prima facie* deprived of a more general character.

However, one can still find a number of interpretative diamonds in the rough. With a little bit of cutting and polishing, excerpts from Advisory Committee Opinions such as those quoted *supra*,¹⁶⁶ could be of considerably greater worth, in a wider context than that of the individual circumstances under scrutiny. What is required for each substantive issue addressed is the elaboration of a strong formula with maximum reach and for it to be consistently applied across different country situations. Such an approach would have the merit of enhancing predictability and elevating country-specific analysis to a higher, more general plane on which it would achieve greater impact. Of course, the obvious subtext here is that the quest for consistency, predictability and generality should not be allowed to ride roughshod over the subtleties and sensitivities of specific country-situations. Like in the jurisprudence of Article 10, ECHR, the challenge here is to strike a careful balance between lofty ideals and the hard political and social realities of individual cases. If met squarely, this challenge could lead to immensely instructive and immensely rewarding results, not least for the future monitoring of the FCNM. It should not be shirked.

The evolution of standards from a somewhat lapidary text is crucial and this is another example of parallelism between Article 10, ECHR, and Article 9, FCNM. The focus, in the course of Chapters 6-8, on how the text of Article 9 of the Framework Convention has evolved in the Opinions of the Advisory Committee is therefore appropriate, given its contribution to our understanding of the full ambit of Article 9. This is particularly true in the continued absence of any other mechanisms for offering authoritative interpretations of the text of the Framework Convention, eg. direct justiciability before the European Court of Human Rights; the possibility of having recourse to the Court for advisory/interpretative opinions, or any kind of mechanism akin to the United Nations Human Rights Committee's capacity to issue General Comments on individual articles of the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁷ etc.

¹⁶⁴ In earlier Advisory Committee Opinions, the corresponding section was entitled 'Proposal for Conclusions and Recommendations by the Committee of Ministers'.

¹⁶⁵ Outline for reports to be submitted pursuant to Article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities, Appendix 3 (item 4.1), Committee of Ministers Resolution (97) 10, *op. cit.*

¹⁶⁶ The purpose of the quoted passages is merely illustrative; it does not in any way seek to give an exhaustive enumeration of points made by the Advisory Committee that could be easily applied beyond the immediate country-situation for which they were originally devised.

¹⁶⁷ See further, Article 40(4) of the ICCPR.

As a tailpiece to this sub-section, the importance of the precise usage of terminology ought to be reiterated. The Rapporteur for this session has already stressed the distinction between passive and active access to the media: two very different notions covered by the nebulous term “access”.¹⁶⁸ Sensitivity to conceptual and linguistic precision will also be determinative in the ongoing exercise of “filling in the frame” of Article 9, FCNM.

Intertextual references

Occasional references are made in the Opinions of the Advisory Committee to the Committee of Ministers Recommendation (97) 21 on the media and the promotion of a culture of tolerance.¹⁶⁹ It comes as a surprise that this is the only Committee of Ministers Recommendation dealing explicitly with the media to be referred to in an Advisory Committee Opinion’s consideration of Article 9, FCNM. It is submitted here that more frequent references in Advisory Committee Opinions to Committee of Ministers Recommendations on other topics could prove extremely useful: Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting; Recommendation No. R (99) 1 on measures to promote media pluralism, for example. Or, more ambitiously, this “import trade” would not even have to be limited to Committee of Ministers Recommendations.

The Preamble to the Framework Convention states that it was conceived of pursuant to the Declaration of the Heads of State and Government of the Member States of the Council of Europe adopted in Vienna on 9 October 1993. It goes on to list – “in a non-exhaustive way” – “three further sources of inspiration for the content” of the Framework Convention, i.e., the ECHR and various relevant United Nations (UN) and C/OSCE instruments containing commitments for the protection of national minorities.¹⁷⁰ The relevant documentary corpus within the UN and OSCE systems is by no means negligible (notwithstanding the fact that some documents are more political than legal in their coloration). But as already mentioned, the crucible of inspiration has a broader circumference than merely the span of the UN and OSCE systems. This point is of cardinal importance.

Thus, insofar as the practice of explicitly referring to international standards is concerned, pertinence should be the guiding principle, thereby inviting the invocation (where appropriate) of other types of “soft law”, for example, the Council of Europe Committee of Ministers Declaration on the Freedom of Expression and Information of 1982; the Oslo Recommendations Regarding the Linguistic Rights of Persons belonging to National Minorities or the international Guidelines on the Use of Minority Languages in the Broadcast Media.¹⁷¹ This could be a useful way of signposting exemplary or exhortatory standards elaborated in other fora, without having to incorporate large chunks of text from the same standards. In other words, this would involve an exercise of enrichment by reference or intertextuality. It has the further advantage of referring to standards already enjoying the endorsement of other international bodies and the authority that accrues from such endorsement.

¹⁶⁸ Karol Jakubowicz, *Persons belonging to National Minorities and the Media* (Workshop 2), Filling the Frame, Strasbourg 30-31 October 2003, pp. 17-18.

¹⁶⁹ For example, in the Opinions on Cyprus, Hungary, Norway and Romania.

¹⁷⁰ Explanatory Report to the Framework Convention, *op. cit.*, para. 23.

¹⁷¹ These Guidelines were elaborated by a group of international experts under the auspices of the OSCE High Commissioner on National Minorities and were first floated in public at a conference in Baden-bei-Wien, Austria, on 25 October 2003.

The merits of referring to the aforementioned Guidelines on the Use of Minority Languages in the Broadcast Media deserve particular attention here because their subject matter comprises a range of issues that are instrumental in protecting and promoting the interests of persons belonging to national minorities as regards their access to the media (especially in their own languages) (see further, ss. 5.4.1 and 8.3.1, *infra*). The Guidelines would be eminently suited to achieving synchronicity with the FCNM – at least in terms of their programmatic character. The greater specificity of the Guidelines could help to fill the gaps in the more general wording of Article 9, FCNM; gaps which are inevitably present as a result of the treaty’s broader, more sweeping thematic preoccupations. The complementarity quotient here is high.

Scope for use of more pro-active language

The ‘Main findings and comments of the Advisory Committee’ section of Advisory Committee Opinions also gives treatment to Article 9, FCNM. These findings sift through the extensive information provided in the article-by-article approach and this exercise facilitates the task of prioritising areas for further attention. The *forte* of each finding is that it does not limit itself to merely pointing out a situation or practice that is unsatisfactory. The Advisory Committee goes the extra mile on this: each finding is quickly followed by a suggested line of action for redressing the situation or practice in question. While this forward-looking approach is very laudable, again, with a little extra journeying, it could perhaps gain further in effectiveness. In a similar vein, the suggestions advanced for following up on the Advisory Committee’s findings tend to rely on calls to “examine”, give “particular attention to”, “identify”, “take the necessary measures”, “place emphasis”, “try to meet expectations”, etc.

An Irish proverb says that if you light the wick, you might as well burn the whole candle. By applying the proverb to this context, then, might it not be constructive to go further than identifying areas meriting attention or exploration or examination and to actually suggest possible ways in which such attention could be administered; such exploration or examination carried out? Of course, it would be imperative that such suggestions not be perceived by State representatives as being imposed as some kind of disguised *diktat*. Rather, the presentation of useful reference points (eg. identified best State practices) or palettes of options would be a preferred approach. Given the political acumen that has been displayed in the past by the Advisory Committee, confidence in its ability to rise to this challenge of persuasion would not be misplaced. Meetings with State representatives within the context of the monitoring process would afford the Advisory Committee ideal opportunities for prising open the very centre of pressing questions and situations (including those relating to access to the media) and for assuming a pro-active role in the open and constructive discussion of possible measures to be taken.

(iii) Committee of Ministers

As far as the monitoring of the FCNM is concerned, ultimate control and responsibility rests with the Committee of Ministers.¹⁷² This fact alone, is not unproblematic in many respects. Most fundamentally, the process is essentially about States monitoring their own activities and this inevitably gives rise to *prima facie* concerns for the independence and objectivity of

¹⁷² See Articles 24-26, FCNM.

the exercise.¹⁷³ The summary and often bland content of Committee of Ministers' country-specific Recommendations concerning the application of the FCNM (see further, *infra*), furthermore does little to dispel such concerns.

However, notwithstanding its officially ascribed role of "assistance" in the monitoring process, the Advisory Committee remains the *de facto* power-house for the monitoring activities. This is true by virtue of the extent of its procedural/administrative involvement; its sheer hard graft and its serious engagement with substantive matters. It is therefore imperative that the Committee of Ministers makes greater efforts to harness the full potential for involving the Advisory Committee "in the monitoring of the follow-up to the conclusions and recommendations on an *ad hoc* basis, as instructed by the Committee of Ministers".¹⁷⁴

Of the country-specific resolutions adopted by the Committee of Ministers in respect of its first monitoring cycle, 13 did not make specific reference to persons belonging to national minorities and the media.¹⁷⁵ However, of the country-specific Resolutions in which the media are mentioned, the relevant treatment of issues is rarely more than cursory. While it could be argued that the brevity of these Resolutions is par for the course because the Advisory Committee Opinions provide superior breadth and depth of analysis, it is nevertheless to be regretted that this opportunity for a more detailed approach to media-related (and other) issues has not been routinely seized by the Committee of Ministers.

Greater specificity is particularly required in the first part (conclusions) of the Committee of Ministers' country-specific Resolutions. While the recommendation in the second part of such Resolutions that the State Party take appropriate account of the various comments in the relevant Advisory Committee Opinion is laudable, there remains a danger – absent maximum specificity or maximum levels of detail – of individual concerns being inadvertently smothered in this blanket, catch-all approach. Finally, it cannot be gainsaid that the Committee of Ministers ought to bring increased political pressure to bear in relevant quarters in order to ensure a significant strengthening of the Advisory Committee's financial and human resources.

To conclude this analysis of the monitoring of the FCNM, it must be reiterated that there is clearly a need to derive general principles from specific country situations in a more systematic way. The germ of such principles is already contained in the Advisory Committee's Opinions and if the relevant statements were to be elevated to a higher plane of general application and to constitute a more distinct corpus, they would then offer invaluable interpretative clarity for (Article 9 of) the FCNM. The challenge here would be to marry the goals of showing particular deference to *couleur locale*, while at the same time striving for formulae that would tend towards universal relevance or application.

¹⁷³ This scepticism has been conveyed by Andrew Drzemczewski in the context of other, general monitoring work by the Committee of Ministers, when he posed the question: "Is consensus-based confidential monitoring – in which the State being monitored is itself involved in the decision-making process and in which issues are not put to the vote – not intrinsically 'defective' *ab initio*?" - Andrew Drzemczewski, "Monitoring by the Committee of Ministers of the Council of Europe: A Useful 'Human Rights' Mechanism?", in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at p. 88.

¹⁷⁴ Committee of Ministers Resolution (97) 10, *op. cit.*, para. 36.

¹⁷⁵ Check latest data. In order to avoid drawing disingenuous conclusions from statistics, it should be pointed out that the Resolutions in question on occasion give very summary treatment to the countries under scrutiny (particularly in the case of small countries, for which there may not even be any thematic treatment at all).

Similarly, there is a need for terminological precision, the clarification of concepts and more attention to explaining new or unfamiliar technological features. It is also necessary to undergird the findings of the Advisory Committee by making increased references to relevant international standards (including so-called “soft law”). A pro-active role for the Advisory Committee in making suggestions to States Parties on how to address issues of concern would also be useful.

References to media-related issues in Committee of Ministers country-specific Resolutions have, to date, been scant and when such references have been made, they have generally been found wanting in detail. A heightened role for the Advisory Committee in the monitoring process (with the backing of sufficient human and financial resources) could go some way towards offsetting the effect of this perceived shortcoming of Committee of Ministers Resolutions.

5.3.2 European Charter for Regional or Minority Languages

The European Charter for Regional or Minority Languages also brings together certain key aspects of the right to freedom of expression and minority rights.¹⁷⁶ However, before examining relevant focuses, it is useful to recall the rather unique character of the Charter. Its “chief distinguishing feature is its purpose: the protection it seeks to give a European cultural asset, namely the linguistic diversity represented by regional and minority languages”.¹⁷⁷ As such, it subjects contracting States to various legal obligations, but it does not set out to create rights for either individuals or groups. The extent to which rights for individuals or groups flow from, or are affirmed by, State obligations can therefore be regarded as incidental to the central purpose of the Charter. Article 11 is the Charter’s principal article concerning the right to freedom of expression; it reads as follows:

Article 11 – Media

- 1 The Parties undertake, for the users of the regional or minority languages within the territories in which those languages are spoken, according to the situation of each language, to the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field, and respecting the principle of the independence and autonomy of the media:
 - a to the extent that radio and television carry out a public service mission:
 - i to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or minority languages; or
 - iii to make adequate provision so that broadcasters offer programmes in the regional or minority languages;
 - b
 - i to encourage and/or facilitate the creation of at least one radio station in the regional or minority languages; or

¹⁷⁶ For a general commentary on the Charter, see: Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A critical commentary* (Strasbourg, Council of Europe Publishing, 2005). For commentary specifically on Article 11, see *ibid.*, pp. 200-214.

¹⁷⁷ *Ibid.*, p. 27.

- ii to encourage and/or facilitate the broadcasting of radio programmes in the regional or minority languages on a regular basis;
 - c
 - i to encourage and/or facilitate the creation of at least one television channel in the regional or minority languages; or
 - ii to encourage and/or facilitate the broadcasting of television programmes in the regional or minority languages on a regular basis;
 - d to encourage and/or facilitate the production and distribution of audio and audiovisual works in the regional or minority languages;
 - e
 - i to encourage and/or facilitate the creation and/or maintenance of at least one newspaper in the regional or minority languages; or
 - ii to encourage and/or facilitate the publication of newspaper articles in the regional or minority languages on a regular basis;
 - f
 - i to cover the additional costs of those media which use regional or minority languages, wherever the law provides for financial assistance in general for the media; or
 - ii to apply existing measures for financial assistance also to audiovisual productions in the regional or minority languages;
 - g to support the training of journalists and other staff for media using regional or minority languages.
- 2 The Parties undertake to guarantee freedom of direct reception of radio and television broadcasts from neighbouring countries in a language used in identical or similar form to a regional or minority language, and not to oppose the retransmission of radio and television broadcasts from neighbouring countries in such a language. They further undertake to ensure that no restrictions will be placed on the freedom of expression and free circulation of information in the written press in a language used in identical or similar form to a regional or minority language. The exercise of the above-mentioned freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
 - 3 The Parties undertake to ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media.

Article 11 is a derivative formulation of Article 10, ECHR; the debt of the former to the latter is acknowledged in the Explanatory Report to the Charter (para. 112). Indeed, Article 11(2) of the Charter incorporates Article 10(2), ECHR, almost verbatim. Like other substantive Articles of the Charter, it is governed by Article 2, which sets out the requirements for undertakings entered into by States Parties:

1. Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1.
2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.

No explanation is given either in the Charter proper or in the Explanatory Report thereto¹⁷⁸ as to why three paragraphs or sub-paragraphs must be chosen from Articles 8 (Education) and 12 (Cultural activities and facilities) and only one from Articles 9 (Judicial authorities), 10 (Administrative authorities and public services), 11 (Media) and 13 (Economic and social life). Even though the stipulated requirements are “minimum” and States are free to take on additional commitments *vis-à-vis* the media, the impression given by Article 2(2) is that the media belong to the poor(er) relations in the family of State obligations under the Charter. This impression is all the more puzzling when one considers the importance of the other, similarly designated “poor relations” (i.e., judicial and administrative authorities, public services, economic and social life). However, it must be added that any implicit belittlement of the role or importance of the media is offset by the Expert Committee’s repeated insistence in its country-specific Reports that the media have a determinative influence on the future of regional and minority languages.

Monitoring

(i) *General*

A purely textual analysis of the Charter prompts a number of sceptical remarks concerning the impact it is likely to have in raising the level of protection and promotion of minority languages in Contracting States. First, the confidence exuded by the preambular affirmations of the Charter do not carry through to its substantive provisions. There is a clear scale of onerousness present in the range of commitments offered within Articles 8-13 of the Charter. As long as States comply with the requirements set out in Article 2(2), they are free to choose the level of onerousness of the commitments they enter into. This panders – perhaps inordinately – to the discretion and therefore good faith of States. This temerity of approach may very well have been designed to encourage wider ratification of the Charter by States, but due to its apparent potential for low-level commitments, there is no guarantee that it will lead to the achievement of meaningful results at the national and sub-national levels.¹⁷⁹

It has been posited that the “*table d’hôte*” character of Charter’s commitments offers a measure of flexibility to States Parties, without which there would be considerably greater reluctance to ratify the Charter. Dónall Ó Riagáin, for instance, has argued that “A less flexible formula would not work because of the greatly differing language situations obtaining in Europe”.¹⁸⁰ The Charter’s modest ambition could be summed up in the working principle that half a loaf is better than no bread; or, to emphasise the meagreness of expectations it generates, the equivalent proverb in Dutch: half an egg is better than an empty shell! Nevertheless, the wisdom of this logic has yet to be borne out in practice: the Charter’s rate of uptake by States has been generally disappointing,¹⁸¹ with only 23 ratifications to date (1 May 2008).

¹⁷⁸ See, in particular, paras. 41-47 of the Explanatory Report.

¹⁷⁹ See further, Robert Dunbar, “Minority Language Rights in International Law”, 50 ICLQ (2001) 90-120, at 113.

¹⁸⁰ Dónall Ó Riagáin, “The Charter: An Overview”, in François Grin, *Language policy evaluation and the European Charter for Regional or Minority Languages* (Palgrave Macmillan, 2003) pp. 55-68, at 64.

¹⁸¹ See, for example, relevant remarks in the three Biennial reports by the Secretary General [of the Council of Europe] to the Parliamentary Assembly on the application of the European Charter for Regional or Minority Languages (3 September 2005 – Doc. 10659; 11 September 2002 – Doc. 9540; 18 October 2000 – Doc. 8879).

(ii) *Expert Committee*

Thematic approach

The Expert Committee investigates whether the State is upholding its obligations by comparing the factual information at its disposal to the particular commitments entered into. The Reports home in on specific commitments undertaken by States: they do not adopt a simple article-by-article approach. This means that the Expert Committee does not necessarily examine the same commitments in respect of every State Party. Nevertheless, its pronouncements on substantive matters are frequently of wider interest/relevance than merely to the particular State to which they are addressed. This is more obviously and more frequently true of the Expert Committee's evaluations than those of the Advisory Committee to the FCNM. Despite the fact that the Expert Committee does not always consider the same commitments in respect of each State, its occasional references to findings in respect of other States does make for greater overall consistency in the evaluative work of the Committee.

On paper, the asserted realism of the Charter could seem more like resigned defeatism, but in practice, the Expert Committee has been striving to achieve maximum returns on what is *prima facie* a restrictively-designed text. This is illustrated by how the specificity of commitments entered into by States has bred specificity of analysis by the Expert Committee. Those trends towards specificity created a need for the Expert Committee to develop expertise on various aspects of the media (especially broadcasting), such as its sociological dimension and the impact of technological developments. By and large, the Committee has risen to that challenge and delivered in kind. As a result, the use of technical terminology is noticeably cleaner and clearer than, for example, by the AC FCNM (but it should also be acknowledged that the text of Article 9 cannot boast exemplary clarity of formulation to start with). The Committee's comments have also borne out an awareness of the need for conceptual and linguistic precision.

Intertextual references

At least as regards Article 11, the Expert Committee has not tended to refer to other Council of Europe standard-setting texts, never mind other international instruments. The Preamble to the Charter considers "that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied" in the ICCPR and "according to the spirit" of the ECHR, and it also has "regard to" relevant CSCE work (in particular the Helsinki Final Act of 1975 and the Copenhagen Meeting of 1990). However these are courtesy nods; acknowledgements of the existence of other standards developed in other international fora. They do not – on any reading – amount to the sourcing of inspiration for the Charter. This is a significant difference from the Preamble to the FCNM. Perhaps, then, given that there is no *ab initio* grounding of the Charter in anterior international law, it should come as no surprise that the Expert Committee would rarely (if ever) refer to prevailing international legal (and non-legal) standards that are extraneous to the Charter itself.

This may be partly to do with the nature of the Charter and the lack of provision for cross-fertilisation by other international law texts. The absence of such a provision should not necessarily preclude the Expert Committee from tactically or systematically invoking relevant references; indeed its purposive approach to its evaluative task suggests that it would not be

adverse to doing so in the future. For the moment, though, its failure to enrich its own work by such invocations must be regarded as a missed opportunity, because, as was argued in connection with the AC to the FCNM, *supra*, it could be advantageous to regularly make such cross-linkage.

However, the Expert Committee does, on occasion, refer to the approach of the AC FCNM on matters of overlapping interest. Such cross-references are only made very sporadically and even then as parenthetical remarks seeking to confirm or re-affirm stand-points already taken by the Expert Committee on particular issues. This tactic shows welcome awareness of the activities of a sibling Council of Europe body and is important for fostering certain thematic consistency across Council of Europe approaches. At the same time, though, the tactic also boasts a certain, calculated temerity: a more assertive policy of cross-referencing could risk leading to the entanglement of nets.

Scope for use of more pro-active language

A general perusal of Expert Committee country-specific Reports suggests that the Committee is also less likely to fudge its words than the AC. When it feels that commitments are not being properly honoured, it is quick to say so and indeed, to offer suggestions on how States Parties might consider ameliorating the situation. There are at least two plausible explanations for this:

(a) The specificity of commitments narrows down the scope of enquiry and the evaluation of detailed factual information means that it generally is possible to ascertain whether States are genuinely upholding their undertakings. The Expert Committee is sensitive to dichotomies between the meeting of obligations in formal and in real terms, and its comments frequently reflect this. It also frequently finds that certain obligations are only being partially fulfilled and indicates how outstanding issues should/might be addressed. Where it is not in a position to draw relevant conclusions (eg. due to a lack of information, or ambiguous information or conflicting information), it tends to state as much and request that the subsequent State Report provide the necessary clarification.

(b) The Expert Committee appears to be considerably freer than its FCNM counterpart in its ability to gather information other than that provided through official State channels. This refers not only to the erstwhile convoluted restrictions of mandate under which the AC had to operate, but also – to an extent – the cautious mindset engendered by such a mindset.

(iii) Committee of Ministers

As with the FCNM, CM Recommendations on the application of the Charter in specific countries tend to be rather terse and do little to elucidate the content of the State obligations under scrutiny. This, as also stated in the context of the FCNM, is more of an observation than a criticism, as these Recommendations – by nature – are not intended as explanatory texts. Rather, one would expect the Reports of the Expert Committee, on which the CM Recommendations are based, to fulfil such an explanatory role. As with the FCNM, the CM relies very heavily on the detail and quality of the Expert Committee's Reports.

Moreover, CM Recommendations do not always refer to the media in any case. Four of the 13 Recommendations addressed to States Parties on the basis of their First Periodical Reports

contained no specific media-related recommendations.¹⁸² As regards the seven Recommendations adopted to date on the basis of States' Second Periodical Reports, two contained no specific media-related recommendations.¹⁸³ Such reductionism is disappointing, as a failure to mention issues relating to the media certainly does not mean that they are not pressing, nor is it necessarily in keeping with the findings of the Expert Committee.

(iv) Secretary General

A useful and rather unique innovation in the Charter monitoring mechanism is the requirement that the Secretary General of the Council of Europe “shall make a two-yearly detailed report to the Parliamentary Assembly on the application of the Charter”.¹⁸⁴ The usefulness of this provision is that it keeps the parliamentary organ of the Council of Europe directly informed of how the Charter is faring (note the stipulation that the report should be “detailed”), thereby facilitating discussion by the parliamentarians.

5.4 Conceptual over-stretch and non-treaty-based standard-setting

Sections 5.2.2 and 5.2.3 have dredged up the main observations concerning the limitations of generalist international law in terms of scope, content and enforcement. It is, of course, important not to understate the role that generalist international law does play in safeguarding the rights of persons belonging to minorities: piecemeal provisions and interventions can certainly make an impact.¹⁸⁵ Section 5.3, then, in turn, examined the role played by specialist international treaties in plugging the gaps in international law. In addition, it is also useful to reflect on the possible gap-filling or standard-setting role for instruments that are independent of treaty law.

Drawing on Sections 5.3 and 5.3 generally, it can be argued forcefully that stronger enforcement mechanisms and practices would stimulate improved implementation and reduce the need for supplementary and complementary treaties. Without wishing to detract from the undoubted merits of this argument, a rejoinder thereto might point out that the elaboration of other, non-treaty, supplementary and complementary instruments (whether legal, quasi-legal or political in character – and leaving aside for the moment any consideration of the extent of their binding effects) could prove useful to the extent that they would pursue specific strategic goals. Basic to such an approach is a faith placed in the ability of a rising normative tide to lift all boats. In other words, to strive for the realisation of specific aims by simultaneously employing diverse strategies, enhances the probability of those aims being attained. Different strategies lend themselves better to different circumstances and are ultimately capable of registering different gains.

But we need to proceed cautiously in our development of this line of thinking: standards that are inadequately anchored in human rights law can lead to rights inflation and devaluation. At the theoretical level, as posited by Frederick Schauer: “when a list of rights becomes coextensive with the list of wants, or even with the list of fundamental needs, we lose any

¹⁸² Hungary, Norway, Slovenia and Switzerland.

¹⁸³ The Netherlands and Norway.

¹⁸⁴ Article 16(5) of the Charter.

¹⁸⁵ See, generally, the discussions of various international instruments that are not specifically devoted to the protection of minority rights in: Council of Europe, *Mechanisms for the implementation of minority rights* (Strasbourg, Council of Europe Publishing, 2004).

strong sense of having a right”.¹⁸⁶ This is also one of Ronald Dworkin’s themes of predilection. He distinguishes between the infringement and inflation of a (moral) right by government, stating that the former involves the definition of a right “more narrowly than justice requires”, whereas in the latter case, a right is defined “more broadly than justice requires”.¹⁸⁷ He regards the infringement of a right as being more serious than its inflation, because infringement constitutes a wrong to an individual, and *a fortiori*, the special character of rights means that they should only be curtailed by other rights or “when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based”.¹⁸⁸ The adverse consequence of the inflation of a right is, to paraphrase Dworkin’s own words, that society is thereby cheated of some general benefit.¹⁸⁹

More concretely, though, Amy Gutmann has cautioned that:

A human rights regime still needs to avoid overextending itself beyond what are reasonable aspirations. But it also needs to avoid a minimalism so sparing that its enforcement would leave the most vulnerable people without what is (minimally) necessary to protect their ability to live a minimally decent life by any reasonable standards.¹⁹⁰

It is not obvious how these apparently antipodal objectives can be bridged in practice. A first step, however, might be to recognise that generally speaking, human rights instruments tend to vacillate between concrete, minimalist treaty law and more aspirational, exhortatory soft law (although treaties can and do have the latter characteristics as well). Both can be normative in character, of course, but they rest on very different kinds of legitimacy and their respective legal statuses should therefore not be confused.

“Soft law” is the catch-all rubric under which various kinds of standard-setting measures not directly related to treaty law are sometimes lumped together.¹⁹¹ The use of scare quotes when denoting “soft law” is deliberate and is an indication of the contested nature of the term.¹⁹² Many commentators are rightly critical of the term, firstly because its amorphous nature renders it pretty useless for the purposes of categorisation or meaningful analysis. A second and related criticism is that it masks a huge variety in the nature of the instruments and in the impact of those instruments on the development of international law. However, one should not throw the baby out with the bathwater. Rather, one should turn these criticisms to constructive ends. The relevance and importance of soft law can only be fully appreciated by exploring the full range of instruments that are included in its ambit. These instruments vary not only in character, as already mentioned, but also in terms of their legal status/significance.

The importance of their status can be determined by such factors as their purported objectives (interpretation or synthesis of existing standards; indicating emergent State practice in a

¹⁸⁶ Frederick Schauer, *Free Speech: A Philosophical Enquiry*, *op. cit.*, p. 56.

¹⁸⁷ P. 197.

¹⁸⁸ P. 200.

¹⁸⁹ P. 197.

¹⁹⁰ Xii.

¹⁹¹ See further: C.M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, 38 ICLQ (1989) pp. 850-866; Hartmut Hillgenberg, “A Fresh Look at Soft Law”, 10 EJIL (No. 3, 1999), pp. 499-515.

¹⁹² See, in this connection: Jan Klabbers, “The Redundancy of Soft Law”, 65 *Nordic Journal of International Law* (1996), pp. 167-182; Jan Klabbers, “The Undesirability of Soft Law”, 67 *Nordic Journal of International Law* (1998), pp. 381-391.

particular area of law; facilitation of bench-marking practices; setting of new standards;¹⁹³ application of existing standards to new points of focus, etc.); the nature and standing of the issuing body; procedures by which they are adopted; enforcement and monitoring mechanisms provided for; subsequent uptake (i.e., adoption and implementation) by States and/or other addressees as well as any relevant third parties.

Thus, the usefulness of soft-law documents as standard-setting documents, is best considered in non-legal terms. To consider them as primarily political is by no means to deprive them of legitimacy or impact. The lessons of standard-setting in the area of minority rights bear ample testimony to the normative potential and usefulness of overtly political approaches.¹⁹⁴ This is, however, subject to the proviso (discussed *supra*) that attempts should not be made to stretch the scope of human rights beyond its elastic limit, or to put it – literally - in Machiavellian terms, to avoid the “error” of men “of not knowing when to limit their hopes”.¹⁹⁵

While it is generally regarded as a fruitful and instructive exercise to compare inter-institutional approaches to identified topics, it can be equally fruitful and instructive to examine various intra-institutional approaches. This is especially true of the Council of Europe, given the multiplicity of different sources of standard-setting texts on issues affecting the freedom of expression rights of minorities, both directly and indirectly. The various approaches tend to admit different side-constraints on the right to freedom of expression, reflecting the inherent biases of their particularised mandates. Furthermore, the various approaches rely on different mechanisms of enforcement and monitoring (if any). Their norm-making importance is determined largely by a combination of their substantive provisions and procedural mechanisms. When evaluating the effectiveness of the impact of various bodies, awareness must be shown of constitutive and procedural variations between them. Subsequent chapters will draw on texts and initiatives by a number of Council of Europe bodies: the Committee of Ministers, Parliamentary Assembly, European Commission against Racism and Intolerance, Venice Commission, and others, as appropriate.

The Committee of Ministers, the executive organ of the Council of Europe, has contributed in no small measure to the organisation’s efforts to promote the diversification of opinion in the media,¹⁹⁶ with resultant benefits for minorities. It has, for instance, adopted a number of Recommendations and Declarations touching on relevant issues.¹⁹⁷ Such statements do not, however, legally bind Member States,¹⁹⁸ and as such, we can class them too under the broad rubric of “soft law”. Recommendations deal with matters for which the CM has agreed “a common policy”.¹⁹⁹ While these commitments may not be legally enforceable, they are

¹⁹³ This is possible function of soft law is controversial and the (generally) non-legal status of soft-law instruments should be stressed in no uncertain terms here.

¹⁹⁴ See further, Chapter 1, *supra*, including the upgrading of OSCE standards into legal norms at national and international levels.

¹⁹⁵ Cited in Daniel Bell, *The End of Ideology*, p. 393.

¹⁹⁶ The efforts of the Parliamentary Assembly of the Council should also be praised at this juncture, even though constraints of space prevent an in-depth analysis of the same.

¹⁹⁷ For a comprehensive overview of these and other international instruments, see Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)”, in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg, Council of Europe Publishing, 2004), pp. 113-138.

¹⁹⁸ Article 15(b), Statute of the Council of Europe.

¹⁹⁹ Pursuant to Article 20 of the Statute, the adoption of a Recommendation by the CM requires: “a unanimous vote of all representatives present” and “a majority of those entitled to vote”. However, in order to make their

politically authoritative and their implementation at the national level is monitored at the international level.²⁰⁰ The CM may ask States authorities “to inform it of the action taken by them” regarding Recommendations and it has formally emphasised the need for intergovernmental committees (steering committees and committees of experts) to improve their monitoring of the implementation of Recommendations and Resolutions.²⁰¹ One of the terms of reference for the Steering Committee on the Mass Media (CDMM) is to “monitor the implementation by member States of the non-binding instruments prepared under its authority”.²⁰² This certainly includes thematically relevant Recommendations and Declarations adopted by the Committee of Ministers.

In the context of the monitoring activities of the Council of Europe, Andrew Drzemczewski has stressed that: “There is a certain urgency to circumvent a potential turf-war that could undermine not only the work of both organs [i.e., the CM and the PACE] (and others) but also the credibility of the Organisation itself”.²⁰³ He has also called for “more in-house synergy” on the basis of very practical concerns, viz. the “real dangers of unnecessary duplication of work and unnecessary diversification of energies”.²⁰⁴ These cautionary words of advice are just as relevant to the duplicity of substantive, normative approaches to given issues as they are to the monitoring and miscellaneous follow-up processes. Efforts should be made to enhance consistency across the different approaches and to eliminate inter-sibling spats and rivalries. A centralised, uniform approach is not necessary, feasible or even desirable. Distinctive mandates preclude the possibility of uniformity, but they also furnish different angles of approach.

Despite the wary tone of the foregoing paragraphs, soft law can play a useful, but limited, role in relation to the development of international human rights law. For instance, it can have an interpretative function by fleshing out the details of hard-law provisions (which traditionally tend towards terseness) or it can be an indicator of emergent State practice in a particular area.

5.4.1 Guidelines on the use of Minority Languages in the Broadcast Media²⁰⁵

voting procedure more flexible, the Ministers’ Deputies reached a gentleman’s agreement at their 519bis meeting (November 1994) not to apply the unanimity rule to Recommendations.

²⁰⁰ Council of Europe Monitoring Processes: An Overview, Monitor/Inf (2004) 2, Document prepared by the Monitoring Department Directorate of Strategic Planning, Council of Europe, 5 April 2004 (replaces Monitor/Inf (2000) 1); Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (No. 43, 2000), pp. 385-428; Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: a useful ‘human rights’ mechanism?”, 2 *Baltic Yearbook of International Law* (2002), pp. 83-103; Andrew Drzemczewski, “Monitoring by the Council of Europe”, in Gudmundur Alfredsson *et al.*, Eds., *International Human Rights Monitoring Mechanisms* (Great Britain, Kluwer Law International, 2001), pp. 525-532.

²⁰¹ 405th Meeting of the Ministers’ Deputies, 1987. See also: Andrew Drzemczewski, “La prevention des violations des droits de l’homme: les mecanismes de suivi du Conseil de l’Europe”, 11 *Revue trimestrielle des droits de l’homme* (no. 43, 2000), pp. 385-428, at p. 397.

²⁰² At the time of writing, the revised terms of reference for the renamed Steering Committee on the Media and New Communication Services was not publicly available.

²⁰³ Andrew Drzemczewski, “Monitoring by the Committee of Ministers of the Council of Europe: A Useful ‘Human Rights’ Mechanism?”, in I. Ziemele, Ed., *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 83-103, at p. 88.

²⁰⁴ [footnote omitted] *Ibid.*, p. 102.

²⁰⁵ This section is an abridged version of a text which first appeared in Tarlach McGonagle, “OSCE High Commissioner on National Minorities: International Guidelines on Use of Minority Languages in Broadcast Media”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2004-1: 3.

A concrete example of the usefulness of a non-binding text on the rights and issues currently under discussion is provided by a set of international Guidelines on the Use of Minority Languages in the Broadcast Media launched in 2003.²⁰⁶ Elaborated by a group of experts under the auspices of the OSCE HCNM, the Guidelines draw inspiration from and seek to crystallise existing international legal and political standards dealing with the topic. Their usefulness derives from their elucidation of existing international standards and their suitability for benchmarking exercises by a variety of parties (including States authorities, IGOs and NGOs).

The Guidelines follow earlier standard-setting initiatives taken by the OSCE HCNM concerning specific aspects of minority rights. The initiatives in question led to the elaboration of The Hague Recommendations on the Education Rights of National Minorities (October 1996); the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February 1998), and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999).²⁰⁷ However, the character of the Guidelines on the Use of Minority Languages in the Broadcast Media is more programmatic than those of its forerunners, which explains why they are styled as Guidelines rather than Recommendations.

The first section of the Guidelines presents their underlying general principles: freedom of expression; cultural and linguistic diversity; protection of identity, and equality and non-discrimination.

The second section, entitled ‘Policy’, sets out that States should develop policy to address the use of minority languages in the broadcast media. The elaboration and application of such State policy should include the “effective participation” of persons belonging to national minorities. It ought to be supportive of public service broadcasting to the extent that such broadcasting caters, *inter alia*, for the linguistic needs of national minorities. State policy in this area should also “facilitate the establishment and maintenance by persons belonging to national minorities of broadcast media in their own language” (para. 8), and independent regulatory bodies should have responsibility for its implementation.

Regulation (including licensing) “must be prescribed by law, based on objective and non-discriminatory criteria and shall not aim to restrict or have the effect of restricting broadcasting in minority languages” (para. 9). States may not prohibit the use of any language in the broadcast media and any measures promoting one or more language(s) should not have restrictive repercussions for the use of other languages, or otherwise adversely affect the rights of persons belonging to national minorities. Furthermore, again drawing on the language of Article 10, ECHR, regulation must pursue a legitimate aim and be proportionate to that aim. The proportionality of regulation should be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available

²⁰⁶ For detailed commentary, see: Tarlach McGonagle, “Regulating minority-language use in broadcasting: international law and the Dutch national experience”, 16 *Mediaforum* (No. 5, May 2004), pp. 155-160; Tarlach McGonagle & Andrei Richter, “Regulation of Minority-Language Broadcasting”, *IRIS plus* (Supplement to *IRIS - Legal Observations of the European Audiovisual Observatory*), 2004-2; George Jones (Series Editor), Sally Holt & John Packer (Guest Editors), *Mercator Media Forum 8* (Cardiff, University of Wales Press, 2005); John Packer & Sally Holt, “The use of minority languages in the broadcast media: Introducing new guidelines”, *Helsinki Monitor* (2004, No. 2), pp. 103-126.

²⁰⁷ All available at: <http://www.osce.org/hcnm/documents/recommendations/>.

broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

The Guidelines stipulate that onerous translation requirements should not be imposed on minority-language broadcasting and that transfrontier broadcasting must not be restricted (on the basis of language). Moreover, the availability of foreign broadcasting in a minority language does not obviate the need for States to facilitate the domestic production of programmes in that language, “nor does it justify a reduction of the broadcast time in that language” (para. 13).

The fourth section of the Guidelines countenances a number of facilitative measures aimed at stimulating broadcasting in minority languages, both qualitatively and quantitatively. These include States providing access to broadcasting technology and infrastructure; creating financial assistance schemes; pursuing advantageous fiscal policies and maintaining particular licensing and administrative regimes; all with a view to achieving “effective equality” for broadcasters operating (to varying degrees) in minority languages. As elsewhere in the Guidelines, providing incentives for minority language broadcasting and teasing out various possibilities for its realisation, are approached distinctly from public service and private broadcasting perspectives. The importance of capacity-building (eg. technical support for the distribution of productions in minority languages; education and training of personnel for minority-language broadcasting) is also emphasised.

To conclude, the Guidelines can be described as representing a synthesis of existing relevant international legal and political standards. As such, their content should be familiar because they merely reflect a body of diverse commitments already undertaken by most European States in their miscellaneous international treaty obligations. The novelty of the Guidelines is that, for the first time, those diverse commitments are brought together in a document of exemplary clarity and coherence. The Explanatory Note to the Guidelines enhances the clarity offered by the Guidelines, by sourcing each element in precise, pre-existent international standards. Another strength of the Guidelines is their comprehensive nature. As described in the Explanatory Note, the Guidelines draw not only on international treaty law, but also on relevant jurisprudence elaborated pursuant to the same. They also draw on an array of relevant international texts which are not legally binding on States, but which are nevertheless of considerable normative and political importance.

A crucial process that fed into the elaboration of the Guidelines was the compilation of the study, *Minority-Language Related Broadcasting and Legislation in the OSCE*.²⁰⁸ It is a comprehensive survey of the regulation of minority-language use in the broadcasting sectors of each of the (then) 55 Participating States of the OSCE. The study provides keen insights into best relevant practices in operation at the national and sub-national levels across the sweep of OSCE Participating States. It is important to mention the study in order to demonstrate that vast first-hand research (comprising data and contextual analysis) also informs the Guidelines, thereby enhancing its credibility at the coal-face of human rights protection.

²⁰⁸ Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-Language Related Broadcasting and Legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities, carried out by the Programme in Comparative Media Law and Policy (PCMLP), Oxford University and the Institute for Information Law (IViR) of the University of Amsterdam, April 2003 (published: September 2003), available at: <http://www.ivir.nl/staff/mcgonagle.html>.

The Guidelines do not present a fixed blue-print for adoption in each and every European State. Rather, they offer a palette of options and examples which could usefully be adapted to meet the legal and cultural priorities and sensitivities of individual situations in individual States. The margin of appreciation for States is wide. As such, the drafting of the Guidelines was infused with the hope that they could constitute a proverbial rising tide which would lift at least some boats. Another intended purpose of the Guidelines is to map and clarify existing relevant legal and political standards at the international level.

While it can be difficult to assess the precise impact of non-binding texts such as these Guidelines, it is useful to document instances of their invocation or application. The OSCE HCNM has relied on the Guidelines in the course of his work²⁰⁹ and the Parliamentary Assembly of the Council of Europe has also formally addressed the objective of furthering take-up of the Guidelines in its Recommendation 1773 (2006) entitled “The 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance cooperation and synergy with the OSCE” (see also, s. 1.3.2(i), *supra*).²¹⁰ The Recommendation stresses the complementarity between CoE and OSCE instruments aiming to “guarantee that minorities can use their own languages and that these languages are broadcast by the media”. The operative part of the text recommends, *inter alia*, that the CoE’s Committee of Ministers:

- invite States “to ensure that people belonging to national minorities or using regional or minority languages have a balanced access to public broadcast media and an effective right to establish and use private broadcast media”, in accordance with Article 11, ECRML [entitled “Media”] and Article 9, FCNM [dealing with freedom of expression and access to the media], as elucidated by the work of both treaties’ competent monitoring bodies; relevant PACE Recommendations and Resolutions, and the Guidelines on the use of Minority Languages in the Broadcast Media, and
- “regularly” take the 2003 Guidelines “into account” in the monitoring of the implementation of the ECRML and FCNM.

These recommendations are important because they recognise the obvious overlap between the Guidelines, Article 11, ECRML, and Article 9, FCNM. The explicit encouragement of cross-referencing these texts in relevant treaty-monitoring and other fora should greatly enhance the consistency with which relevant standards are interpreted and applied (see further, s. 5.3.2(i), s-s. “Intertextual references”, *supra*, and s. 8.3, *infra*). Various cooperative and coordinating strategies and initiatives could be taken between relevant IGOs and between relevant bodies within relevant IGOs in order to generate further synergies in the promotion and application of the Guidelines. A number of possible measures are set out in PACE Recommendation 1773 (2006) and elsewhere.²¹¹

²⁰⁹ Eg. Georgia.

²¹⁰ The 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance cooperation and synergy with the OSCE, Recommendation 1773 (2006), Parliamentary Assembly of the Council of Europe, 17 November 2006. For an overview of the content of the Recommendation, see: Tarlach McGonagle, “Parliamentary Assembly: Recommendation on Minority Languages and Broadcasting and Inter-Institutional Cooperation”, *IRIS* 2007-2: 3.

²¹¹ Suggested strategies are set out more fully in Tarlach McGonagle, ‘Guidelines on the use of Minority Languages in the Broadcast Media: overview and prospects for further implementation’, Hearing on the use of minority languages in the broadcast media, Parliamentary Assembly of the Council of Europe - Sub-Committee on Rights of Minorities, Committee on Legal Affairs and Human Rights, Eerste Kamer der Staten-Generaal, The Hague, 28 April 2006 (unpublished text, on file with author).

Conclusions

Provisions in international law dealing pointedly with the right to freedom of expression of persons belonging to minorities are few and far between. This is particularly true of human rights treaties that are generalist in their thematic orientation, but also of treaties with a specialised focus. The effectiveness of relevant provisions, such as they are, is largely determined by the strength of their formulation, the clarity and detail of (official) interpretive texts and the rigour with which they are implemented, either by adjudicative or monitoring mechanisms and processes. In each of these respects, leading international instruments are to be found wanting.

Owing to the manifold sensibilities involved, formulations of minority rights in international treaties are rarely robust: the language in which they are formulated is usually heavily compromised by the deferential accommodation of relevant political and cultural sensitivities of States parties to the drafting processes. The same political sensitivities have also tended to limit the justiciability of minority rights under international treaties. In the same vein, the limiting effects of political sensitivities explain why, in specialised treaties such as the FCNM and the ECRML, the guarantees of freedom of expression extend only slightly beyond those explicitly provided for in generalist treaties.

The foregoing observations suggest that explicit provisions in international human rights treaties purporting to guarantee the right to freedom of expression for persons belonging to minorities are limited in terms of both scope and impact. Nevertheless, the generic obligation on States to ensure that all rights are secured for everyone also includes the right to freedom of expression for persons belonging to minorities. The latter obligation must therefore reinforce express provisions (however weakly worded) guaranteeing the right to freedom of expression for persons belonging to minorities to the extent necessary to render the exercise of the right effective in practice. This argument can be advanced by unparcelling the generic State duty to ensure the realisation of human rights into a tripartite typology of State duties to respect, protect and fulfil human rights, as originally developed in academic theory and subsequently applied under various international treaties. This typology allows for the introduction of greater nuance into the range of State obligations to ensure human rights than is possible under the traditional dichotomy between negative and positive State obligations. It also facilitates a more discerning approach to the right to freedom of expression for persons belonging to minorities by recognising that different expressive needs of minorities give rise to different types of duties for States, which in turn call for different levels of State action. The generic duty to ensure the realisation of the right in practice will only be discharged in a given situation when the requisite action has been taken.

By extrapolation from the CESCR's application of the tripartite typology of State duties to economic, social and cultural rights, this Chapter identifies a number of programmatic measures that could/should readily be adopted by States authorities in order to guarantee the effective exercise of the right to freedom of expression by persons belonging to minorities. The adoption of these measures is a duty for States that is inescapably implied by their generic duty to secure human rights for everyone. The fact that they are not always enumerated in international treaties does not mean that they are not applicable or necessarily of diminished relevance.

Generalist human rights treaties are also usefully supplemented by thematically-specific treaties, especially at the regional level. The true strength of guarantees for freedom of expression contained in treaties such as the FCNM and ECRML lies not in their actual wording (which, as noted above, are usually only minimal advances on the wording in generalist treaties), but in how they are interpreted by the treaties' designated monitoring bodies. The guarantees impose programmatic obligations on States, but the content of those obligations can be difficult to determine in the abstract. In practice, their real content must be elucidated through their operationalisation, i.e., their application to, or review in light of, concrete situations. This exercise ultimately helps to ascertain the precise nature and extent of State obligations to render the right to freedom of expression of persons belonging to minorities effective. What emerges from the monitoring exercise is a range of duties largely congruent with range of duties to respect, protect and fulfil the right to freedom of expression of persons belonging to minorities. These duties will be discussed in more detail in Chapters 6, 7 and 8.

Although already evident to varying degrees, the systematic inclusion of the following considerations in the monitoring of the FCNM and ECRML, would greatly enhance the theoretical coherence and depth of the monitoring processes:

- recognition of particular minorities and assessment of their particular needs, based on salient group characteristics and situational specificities (Chapter 1)
- comprehensive pluralistic tolerance as an operative public value (Chapter 2)
- interplay between freedom of expression, minority rights and other human rights (Chapter 3)
- enabling environment, societal considerations, media functionality, etc. (Chapter 4)

Standard-setting work extraneous to treaty and enforcement mechanisms should also be mindful of the foregoing.

Finally, to build on the conclusions to Chapter 4: it is imperative that the adjustment of relevant theories to reflect new communicative realities also informs the interpretive and monitoring processes of international instruments containing provisions dealing with freedom of expression. The ability of authoritative adjudicatory and monitoring bodies to meet this challenge is crucial for ensuring the “organic vitality” of relevant instruments. It is also crucial for ensuring that the right to freedom of expression is effective in practice – not only for persons belonging to minorities, but for everyone. It is therefore strongly recommended that the UN Human Rights Committee prioritise the drafting of a new General Comment on Article 19, ICCPR, which would reflect new realities affecting the exercise of the right to freedom of expression. It is also strongly recommended that the monitoring bodies of the FCNM and ECRML systematically factor considerations of media functionality and the impact of new technologies into their monitoring work. The same is true of the Committee of Ministers of the CoE, and other non-treaty-based standard-setting bodies, such as ECRI. The role that could be played by the European Court of Human Rights in this connection is discussed in detail in Chapter 8.

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- 6.1 Limits of permissible expression under international law
 - 6.1.1 Genocide Convention
 - 6.1.2 International Bill of Rights
 - 6.1.2(i) Universal Declaration of Human Rights
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- 6.2 “Hate speech”
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- 6.5 Theoretical foundations for an integrated approach to combating “hate speech”
- 6.6 An integrated approach in practice: the Council of Europe
 - 6.6.1 Framework Convention for the Protection of National Minorities
 - 6.6.2 Non-treaty-based approaches to hate speech
 - 6.6.2(i) Standard-setting by the Committee of Ministers
 - 6.6.2(ii) European Ministerial Conferences on Mass Media Policy
 - 6.6.2(iii) European Commission against Racism and Intolerance
 - 6.6.3 Assessment of integrated approaches to combating “hate speech”

Introduction

Having introduced the main international and European legal standards on freedom of expression in Chapter 5, and set out their general scope, the purpose of this chapter is to give an overview of States’ negative obligations. In other words, it will examine the extent to which relevant standards oblige States to limit the right to freedom of expression. More specifically, the focus will be on limitations which protect the rights of persons belonging to minorities either permissible international and European legal standards for combating racist (“hate”) speech.¹ Inevitably, then, this chapter aims to assess the main provisions of international law that frame the struggle against racist speech. It will consider the implementation or development of a number of those provisions, as well as the actual

¹ See also: Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (United Kingdom, ARTICLE 19/University of Essex, 1992); Stephanie Farrior, “Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech”, 14 Berkeley J. Int’l L. 1; Tarlach McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech”, (2001) 23 *Dublin University Law Journal* (ns) 21, pp. 21-54.

interplay between them. Relevant non-legal standards will be considered to the extent that they complete the broader normative picture.

UNITED NATIONS

A number of United Nations' treaties home in on various aspects of the right to freedom of expression and the imperative of combating racism. A selection of relevant provisions from those treaties will now be examined, commencing with the Genocide Convention because of the protection it seeks to secure for the *existence* of minorities.

6.1.1 Genocide Convention

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), 1948, defines "genocide" as:

- ... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Article III then lists the following five acts as being "punishable" under the Convention: "(a) genocide [as defined in Article II]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide".

Of the punishable acts, "direct and public incitement to commit genocide" is clearly the most relevant to freedom of expression. As noted by the International Criminal Tribunal for Rwanda (ICTR) in its *Akayesu* judgment, "Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*".² Before proceeding to dissect this formula and its potential for curbing freedom of expression in the name of protecting minority rights, a few general remarks concerning the Genocide Convention would be apposite.

In his dissenting opinion in *Gitlow v. New York*,³ Justice Oliver Wendell Holmes famously asserted that "[E]very idea is an incitement".⁴ While he may have overstated the point, the quip certainly does contain a grain of truth. Incitement does depend on the intensity with

² *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR (Chamber I) Judgment of 2 September 1998, para. 550. It should be noted that Streicher's conviction predated the elaboration of the Genocide Convention and was based on the notion of war crimes as described in the London Charter of the International Military Tribunal (which set out the laws and procedures governing the Nuremberg Trials), 1945.

³ 268 US 652 (1925); Justice Brandeis joined in Justice Holmes' dissenting opinion. In this case, the US Supreme Court upheld the constitutionality of a New York statute under which Benjamin Gitlow had been convicted of criminal anarchy for printing, publishing and knowingly circulating political writings calling, *inter alia*, for proletarian action to accomplish the Communist Revolution. The writings in question also favoured the replacement of the existing political order with a "proletarian dictatorship" and "the complete structure of Communist Socialism".

⁴ *Ibid.*, at 673.

which one seeks to cause a desired result to be achieved via the agency of a third party. This is borne out by Holmes' subsequent comments in that same Dissent: "[every idea] offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result".⁵

In keeping with Justice Holmes' assertion that "every idea is an incitement", notions such as advocacy and incitement could usefully be conceptualised as two points on a continuum of encouragement or persuasion.

Ordinarily, incitement is considered to be a so-called inchoate or preliminary offence (other examples of such offences are attempt and conspiracy).⁶ The rationale for the offence is described by one leading academic commentator as being that "someone who instigates or encourages another person to commit an offence should be liable to conviction for those acts of incitement, both because he is culpable for trying to cause a crime and because such liability is a step towards crime prevention".⁷ Furthermore, the "offence of incitement is committed irrespective of whether the person(s) incited respond by committing the offence concerned". Incitement is therefore an offence distinct from whatever offence it promotes. Indeed, whenever incitement proves successful and the person incited carries out the substantive offence intended by the inciter, the latter is then properly regarded as an accomplice to the substantive offence, which also leads to criminal liability (albeit of a different nature).

As with almost all other types of crime,⁸ incitement comprises a conduct element (the *actus reus*) and a fault element (the *mens rea*); the former involves "some form of encouragement or persuasion to commit an offence", while the latter involves intent that the substantive offence be committed. The nature and implications of both elements of the offence will be given separate consideration, *infra*.

Andrew Ashworth endorses the tendency to include inchoate offences within the criminal law, "both on the consequentialist ground of the prevention of harm and on the 'desert' ground that the defendant has not merely formed a culpable and harm-directed mental attitude but has also manifested it".⁹ He continues:

However, shifting the focus to the occurrence or non-occurrence of harm attributes too much significance to matters of chance. This may be appropriate in a system of compensation, but not in a system of public censure such as the criminal law. There is a respectable conception of fairness, connected to principles of individual autonomy, that favours penalizing people who tried and failed – even if, because of some fact unknown to them, their attempt was [469] bound to fail. The moral difference between those who fail and those who succeed in causing harm is too slender to justify exempting the former from criminal liability.¹⁰

The preventive and punitive features of the offence - thus sketched – argue persuasively for the appropriateness of its inclusion among the punishable acts enumerated in the Genocide Convention.

⁵ *Ibid.*

⁶ Andrew Ashworth, *Principles of Criminal Law* (Second Edition), (Oxford, Clarendon Press, 1995), p. 442.

⁷ *Ibid.*, p. 462.

⁸ With the notable exception of strict-liability offences, which do not require *mens rea*.

⁹ Andrew Ashworth, *Principles of Criminal Law* (Second Edition), *op. cit.*, p. 468.

¹⁰ *Ibid.*, pp. 468-469.

The Convention has not undergone the same organic growth as subsequent treaties elaborated under the auspices of the United Nations. Its failure to establish its own implementation machinery (notwithstanding the possibility for States to have recourse to the International Court of Justice under Article 9 of the Convention) has meant that it has not benefited from the interpretive development normally achieved through continuous monitoring scrutiny or adjudicative decisions. Similarly, unlike other treaties, it has no designated body to offer interpretive guidance, eg. by means of general comments, or to offer legal and technical advice to States regarding their implementation of the Convention's provisions. However, the direct incorporation of the Article III definition of genocide into the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Article 4.3) and the ICTR (Article 2.3) has re-actualised the definition of genocide in international law.¹¹ The ICTR, in particular, has made important contributions to contemporary interpretations of "direct and public incitement to commit genocide". For instance, the Tribunal has endorsed the International Law Commission's characterisation of "public" incitement as "communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large", by technical means of mass communication, such as by radio or television.¹² As for the definitional criterion of directness, it again followed the International Law Commission, stating that "The 'direct' element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement".¹³ The requirement of directness does not rule out the possibility that incitement can be coded or veiled, as long as the intended meaning of the message is clear to its target audience. "Camouflaged incitement"¹⁴ or "oblique incitement"¹⁵ can be devastatingly potent, as is clearly illustrated by the transcripts of, for example, *The Media Case*. Although writing from the context of the *Brandenburg* test (see further, *infra*), David Crump has compiled a test based on "eight evidentiary factors for determining whether an utterance is incitement",¹⁶ notwithstanding its camouflaged appearance:

1. The express words or symbols uttered;
2. The pattern of the utterance, including any parts that both the speaker and the audience could be expected to understand in a sense different from the ordinary;
3. The context, including the medium, the audience, and the surrounding communications;
4. The predictability and anticipated seriousness of unlawful results, and whether they actually occurred;
5. The extent of the speaker's knowledge or reckless disregard of the likelihood of violent results;
6. The availability of alternate means of expressing a similar message, without encouragement of violence;
7. The inclusion of disclaimers, and
8. Whether the utterance has "serious literary, political, or scientific value" (or, alternatively, whether it is "speech on a matter of public concern").¹⁷

¹¹ Article 4.3, Statute of the ICTY, as amended; Article 2.3, Statute of the ICTR, as amended; Rome Statute establishing International Criminal Court.

¹² *Ibid.*, fn. 126; *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze* (the Media case), Case No. ICTR-99-52-T, ICTR (Trial Chamber I) Judgment of 3 December 2003, para. 1011. This case is currently on appeal.

¹³ The *Akayesu* case, *op. cit.*, para. 557; the Media case, *op. cit.*, para. 1011.

¹⁴ David Crump, "Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test", 29 Ga. L. Rev. 1 (1994).

¹⁵ Larry Alexander, "Incitement and Freedom of Speech", in David Kretzmer and F. Kershman Hazan, Eds., *Freedom of Speech and Incitement Against Democracy* (The Netherlands, Kluwer Law International, 2000), pp. 101-118, at p. 106.

¹⁶ *Ibid.*, at p. 52.

¹⁷ *Ibid.*, at pp. 54-69.

Crump's test is useful, but it would require some tweaking before it could be applied to international law provisions. As already noted, whether actual events occur as a result of the incitement (point 4) is not relevant to the commission of the offence. In point 8, the first formulation is based on First Amendment jurisprudence and probably too parochial for wider international application, whereas the parenthetical alternative is closer to well-established concepts in the case-law of other international interpretative and adjudicative bodies, such as the European Court of Human Rights. Crump's test is one particular illustration of how carefully-devised methodologies for a case-by-case approach to "camouflaged incitement" (or, indeed, other kinds of contested expression) can unpack particular utterances as well as their illocutionary projects and determine whether, all things considered, they can legitimately be restricted. At the very least, adjudicative bodies should not be fixated on certain or particular words or formulae.

The relevant *mens rea* required for the crime of direct and public incitement was held by the ICTR to involve: "the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide [...]".¹⁸ It is frequently pointed out that the definitional requirement of specific intent can, in practice, be difficult to prove – certainly in comparison to a test based on a more objective central criterion. Nevertheless, the subjectivity of the intent is an important and distinguishing feature of the Convention.¹⁹ It is generally accepted that courts should be entitled to "infer the necessary intent from sufficient evidence",²⁰ and this view has indeed been borne out in practice.²¹ The notion of intent was preferred to that of "motive" by the drafters of the Convention.²²

It has been suggested that "the Convention's most conspicuous weakness is [perhaps] that it insufficiently formulates preventive measures" and that to meaningfully address that weakness, relevant "international short-term and long-term action would need to relate to different stages in the evolution of a genocidal process – anticipation of its happening; early warning of its commencement; and action to be taken at the outset of or during a genocide itself to stop it".²³ Any monitoring or early-warning work carried out on the basis of the Genocide Convention would necessarily have to reckon with "hate speech" as a contributory factor to genocidal events. It is widely recognised that various kinds of incendiary or inflammatory speech (commonly referred to as "hate speech") targeting specific groups which do not amount to "direct and public incitement to commit genocide" can nevertheless be

¹⁸ The *Akayesu* case, *op. cit.*, para. 560; the *Media* case, *op. cit.*, para. 1012.

¹⁹ Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/416, 4 July 1978, para. 100; Josef L. Kunz, "The United Nations Convention on Genocide", 43 *The American Journal of International Law* (No. 4, October 1949), pp. 738-746, at p. 743.

²⁰ Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, para. 39;

²¹ *Akayesu*, *op. cit.*, para. ?

²² Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, *op. cit.*, para. 38; Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *op. cit.*, paras. 101-106.

²³ Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, 2 July 1985, UN Doc. No. E/CN.4/Sub.2/1985/6 (see also the Corrigendum thereto: UN Doc. No. E/CN.4/Sub.2/1985/6/Corr.1), para. 78.

instrumental in exacerbating inter-group tensions and thereby creating the kind of social climate which is conducive to the perpetration of genocidal activities.

The term “hate speech” is commonly used in international politico-legal discourse, despite the fact that it is not authoritatively defined in any binding international treaty. As a consequence, the precise ambit of the term is uncertain (see further, *infra*). Whereas direct and public incitement to commit genocide could be considered a (very extreme) form of “hate speech”, the converse is not necessarily true, i.e., it cannot be assumed that “hate speech” amounts to direct and public incitement to commit genocide. A very exacting definitional threshold must be crossed for hate speech to constitute the latter. Nevertheless, hate speech remains of great concern in the context of the Convention because of its potential contribution to the creation of a climate of hatred in which genocidal activities are more likely to be carried out. William Schabas has referred to hate propaganda (which is also a definitional notch above ordinary hate speech) as the Convention’s “blind spot”.²⁴ This line of thinking prompts a number of important considerations, concerning, in particular: the reasons for the original omission of hate propaganda from the Genocide Convention; the extent to which other international legal instruments compensate for that omission, and the extent to which the potential negative effects of that omission are being overcome by current-day efforts to anticipate and prevent genocidal tendencies.

During the drafting of the Convention, an amendment was proposed that would have included in Article III a sub-paragraph rendering punishable as acts of genocide: “All forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide”.²⁵ The arguments deployed against the proposed amendment prevailed.²⁶ First, it was submitted that propaganda for genocide would in virtually all cases also amount to incitement to genocide, so the enumeration of a separate offence of making propaganda for genocide would be superfluous. Second, it was submitted that the punishment of propaganda “aimed at inciting racial, national or religious enmities or hatreds” would go beyond the remit of the Convention insofar as “the intention to destroy a specific group, which was an essential part of the definition of genocide, would be absent”.²⁷ The standard argument that measures seeking to punish propaganda might unduly encroach on freedom of expression was also invoked.

Although Schabas has identified the failure of the Genocide Convention to prohibit hate propaganda as its blind spot, he does readily concede that this failure has been corrected somewhat “by subsequent international human rights instruments dealing with racial discrimination”.²⁸ In fact, international human rights instruments comprise a wide panoply of provisions – both generalistic and dealing specifically with racial discrimination – which extensively address hate speech (see *infra*). As such, there are ample measures available to the international community for dealing with the broader phenomenon of hate speech, and if they are used properly, i.e., coherently/synergically - and perhaps also imaginatively, there should

²⁴ William A. Schabas, “Hate Speech in Rwanda: The Road to Genocide”, (2000) 46 McGill L.J. 141, at 162.

²⁵ Amendment (A/C.6/215/Rev.1), cited in Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *op. cit.*, para. 117. Ruhashyankiko also notes that the Secretary-General’s draft (E/447) “contained provisions whereby propaganda in favour of genocide was declared punishable” - *ibid.*

²⁶ For a description of the drafting process concerning this particular item, see William Schabas, “Hate Speech in Rwanda: The Road to Genocide”, *op. cit.*, at pp. 163-167.

²⁷ *Ibid.*, para. 119.

²⁸ William Schabas, “Hate Speech in Rwanda: The Road to Genocide”, *op. cit.*, at pp. 162-163.

be little ground for fears that hate speech which is unpunishable under the Genocide Convention would not be detected and dealt with under other international instruments.

To the extent that hate speech/propaganda is a relevant focus for early-warning mechanisms, the analysis needs to be both cautious and sophisticated. As noted by Benjamin Whitaker, any preventive international action “would need to relate to different stages in the evolution of a genocidal process – anticipation of its happening; early warning of its commencement; and action to be taken at the outset of or during a genocide itself to stop it”.²⁹ In this connection, it is imperative not only to condemn the causes of genocidal activities, but to be analytical of various processes of causation too.³⁰ The causal relationship between speech and action is complex and contentious at the best of times, but it seems intuitively sound to assume that the nature of that relationship (whatever it may be) will vary depending on the stage of the evolving genocidal process. Catharine MacKinnon sums up many of the complexities involved in her praise for the approach of the ICTR in *the Media Case*:³¹ “Instead of trying to shoehorn the relation between expression and action into a single formulation, the Tribunal, sticking close to the factual record, recognized the many dynamic connections between word and deed that a complex social conflagration like genocide expectably generates”.³² MacKinnon also perspicaciously notes that the relevance of “The strong but subtle principles articulated in *The Media Case*”³³ reaches beyond both the case at hand and the exceptional nature of (pre- or potentially) genocidal contexts. The principles in question are “applicable to many legal areas of speech regulation”³⁴ and are well-suited to the purposes of day-to-day adjudication and application.

The CERD declared its “determination to provide the Special Adviser on the Prevention of Genocide with timely and relevant information on laws, policies and practices that may indicate systematic or systemic discrimination based on race, colour, descent, or national or ethnic origin which may potentially result in violent conflict and genocide”.³⁵ For that purpose, it undertook “to develop a special set of indicators related to genocide, including the cultural and historic roots of genocide and the importance of recognizing the multicultural dimension of most societies”.³⁶

CERD then proceeded to develop a set of “key indicators” which could “serve as a tool for the Committee, when examining the situation in a State party under one of its procedures, to assess the existence of factors known to be important components of situations leading to conflict and genocide”.³⁷ It explained its proposed approach as follows: “If one or more of the following indicators are present, this should be clearly stated in the concluding observations or decision, and the Committee shall recommend that the State party report, within a fixed deadline, to the Committee under the follow-up procedure on what it intends to do to

²⁹ Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide, op. cit.*, para. 78.

³⁰ *Ibid.*, para. 80.

³¹ Note: at the time of writing, the full text of the Appeal Judgment in this case was not publicly available.

³² Catharine A. MacKinnon, “Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T”, 98 *The American Journal of International Law* (No. 2, April 2004), pp. 325-330, at 329.

³³ *Ibid.*, at 330.

³⁴ *Ibid.*

³⁵ Declaration on the prevention of genocide, Committee on the Elimination of Racial Discrimination, 17 October 2005, CERD/C/66/1, para. 3.

³⁶ *Ibid.*

³⁷ Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, Committee on the Elimination of Racial Discrimination, 14 October 2005, CERD/C/67/1.

ameliorate the situation”. The collective scope of the indicators is broad; with discrete focuses of attention including: the lack of legislative and institutional frameworks to prevent racial discrimination and provide redress for victims; “Systematic official denial of the existence of particular distinct groups”; systematic exclusion from participation in public life; serious patterns of targeted violence which is ethnically-motivated. The indicators focusing specifically on matters with implications for freedom of expression are the following:

5. Grossly biased versions of historical events in school textbooks and other educational materials as well as celebration of historical events that exacerbate tensions between groups and peoples.
8. Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media.
9. Grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority.

The underlying concerns of these focuses, *viz.* the portrayal of historical events (which in turn raises broader questions about collective memory), the corrosive impact of hateful propaganda (and broader questions concerning the role and responsibilities of the media as regards the same), and the far-reaching effects of hateful statements by public figures and the legitimacy conferred on those statements by the status of those figures, are recurrent in debates concerning freedom of expression and minorities. They will be considered in greater depth, *infra*. In anticipation of that discussion, it suffices here to note that the importance of these concerns stems not only from their identification as possible indicators of situations which could degenerate into conflict or genocide. Equally, they are good markers of situations in which the objective of comprehensive pluralistic tolerance (discussed in Chapter 3, *supra*) is not being attained. As such, these concerns routinely inform the monitoring process under the Framework Convention for the Protection of National Minorities, as will be demonstrated below. Similarly, the UN Independent Expert on minority issues has also adverted to the relevance of such indicators and stressed their importance for protecting the physical integrity of minorities (which she has identified as one of her main areas of concern).³⁸ CERD’s already-mentioned intention to act as an early-warning mechanism for the SAPG also implies that office’s engagement with the practical application of the indicators. It is interesting to note that the SAPG has, off his own bat, commissioned a comprehensive study on international human rights standards relating to incitement to genocide and racial hatred.³⁹ The convergence of different institutional interests in the CERD Guidelines is clear evidence of their value as a tool for wide application (i.e., by other interested parties and not just in the formal context for which they were developed by CERD).⁴⁰

Useful as these indicators are for monitoring and early-warning purposes, they should not be considered in isolation: their usefulness and importance would be greatly overstated if they were not assessed in light of the presence of other indicators and the overall contextual

³⁸ Specific Groups and Individuals: Minorities, Report of the independent expert on minority issues, Gay McDougall, Commission on Human Rights (62nd session, 6 January 2006), E/CN.4/2006/74, para. 71. See also in this connection, *ibid.*, paras. 50 (where the Independent Expert welcomes the CERD initiatives on genocide-prevention, discussed *supra*) and 22 (where she sets out the “four broad areas of concern relating to minorities around the world, based on the [UN] Declaration on the Rights of Minorities and other relevant international standards relating to minority rights”).

³⁹ Toby Mendel, “Study on International Standards Relating to Incitement to Genocide or Racial Hatred” for the UN Special Advisor on the Prevention of Genocide (April 2006), document not public, but on file with author.

⁴⁰ See further: William A. Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, 2006), p. 20.

situation. CERD has been very forthright in its recognition of the risk that the reliability of its indicators could be compromised if their assessment was not sufficiently contextually embedded:

As these indicators may be present in States not moving towards violence or genocide, the assessment of their significance for the purpose of predicting genocide or violence against identifiable racial, ethnic or religious groups should be supplemented by consideration of the following subset of general indicators:

1. Prior history of genocide or violence against a group.
2. Policy or practice of impunity.
3. Existence of proactive communities abroad fostering extremism and/or providing arms.
4. Presence of external mitigating factors such as the United Nations or other recognized invited third parties.

In order to summarise the essential points of the foregoing discussion, a number of penultimate overall observations will now be marshalled. First, as suggested by its full title, the Genocide Convention pursues the twin objectives of prevention and punishment of genocide. Measures seeking to advance its preventive remit – both tried and theoretical – necessarily have implications for other human rights, not least freedom of expression. The most obvious illustration of this involves offsetting the presumptive causal connection between incitement and virulent forms of “hate speech” and genocide against the presumptive interference with the right to freedom of expression that regulation of such forms of speech entails. The foregoing discussion has shown that this conundrum is not intractable, but that considerable circumspection is required for its resolution. Interpretive clarity as regards key legal terminology is indispensable, as is sensitive, contextualised analysis of impugned speech. Various specialised human rights mechanisms have undertaken formal action designed to prevent genocide; much of this action has been concerted and achieved in a spirit of cooperation, thereby demonstrating the conceptual proximity of the mandates in question and the interdependence of the rights they protect. Insofar as these measures deal with issues relating to freedom of expression, they have by and large tended to emphasise the positive, non-prescriptive role that media can play in this regard.

The only significant exception to this tendency is a practice known as “information intervention”.⁴¹ The term is perhaps deceptively euphemistic. The coiner of the term, Jamie Metzl, describes it as “a soft form of humanitarian intervention”⁴² or a form of intermediate action “between neglect and armed intervention”.⁴³ Its essence is the use by the international community of “information tactics” in an “aggressive manner” against a particular State or States “when this is justified on strong human rights grounds”.⁴⁴ Given the involvement of the international community and the implications such action would have for the sovereignty of a targeted State, the legitimacy of “information intervention” must be assessed in light of relevant provisions of the UN Charter.

As set out in Article 2(1) of the Charter, the UN is “based on the principle of the sovereign equality of all its Members”. Article 2(7) firms up this principle by stating:

⁴¹ Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, 76 *Foreign Affairs* (No. 6, November/December 1997), pp. 15-20.

⁴² Mark Thompson, “Defining Information Intervention: An Interview with Jamie Metzl”, in Monroe E. Price & Mark Thompson, Eds., *Forging Peace: Intervention, Human Rights and the Management of Media Space* (Edinburgh, Edinburgh University Press, 2002), pp. 41-65, at p. 41.

⁴³ Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, *op. cit.*, at p. 20.

⁴⁴ Mark Thompson, “Defining Information Intervention: An Interview with Jamie Metzl”, *op. cit.*, at p. 41.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII, for its part, is entitled: “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. Article 39 states that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. Articles 41 and 42 read as follows:

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

These are the main pillars of the legal framework within which “information intervention” would have to manoeuvre.⁴⁵ The sponsorship of “information intervention” by Metzl and others is clearly the product of disillusionment at how politicised, selective and ultimately ineffective the UN Security Council’s track record in humanitarian intervention has been. “Information intervention” is therefore presented as an alternative, but less radical, last-ditch attempt by the international community to prevent the outbreak of massive violence or genocide in a particular State or States. These are not measures which the present author would advocate lightly. They should only be countenanced in the most exceptional circumstances (eg., after the triggering of recognised early-warning mechanisms of legitimate international bodies with a mandate for genocide-prevention, or the concurrence of findings of a number of reputable independent expert bodies) and even then only after the most stringent legal safeguards have been met. Given the wide discretion of the Security Council for deciding what constitutes a “threat to the peace, breach of the peace, or act of aggression”, it is vital to insist on the need for stringent objective safeguards. Metzl himself is also alert to the need for circumspection in this regard; after spelling out the importance of maintaining “relative consensus”⁴⁶ about the international definition[s] of incitement and the interpretation of Article 20, ICCPR (see further, *infra*), he states:

As a precaution, there should be a strong presumption against jamming, with a narrowly defined and clearly delineated exception for broadcasts that constitute incitement where a genocidal act appears imminent. This determination could appropriately be made by the Security Council but might also be delegated to an international commission of political and human rights experts.⁴⁷

⁴⁵ See further in this connection: Alexander C. Dale, “Countering Hate Messages that Lead to Violence: The United Nations’s Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts”, 11 *Duke J. of Comp. & Int’l L.* 109.

⁴⁶ Jamie F. Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, 91 *The American Journal of International Law* (No. 4, October 1997), pp. 628-651, at p. 648.

⁴⁷ [footnote omitted] *Ibid.*, at p. 649.

In the past, techniques of information intervention have tended to focus on radio-jamming, a practice that has been defined as the deliberate interference with a broadcast “by transmitting *terrible noise* on the same frequency in order to make reception impossible”.⁴⁸ Needless to say, other existing definitions offer greater technological precision than “terrible noise”; for example: “the deliberate emission of electromagnetic (EM) radiation to reduce or prevent hostile use of a portion of the EM spectrum”.⁴⁹ This can involve introducing a “disrupting signal (causing just noise or ‘fuzz’) or an overriding signal (a different broadcast) into a specific frequency on the electromagnetic spectrum”.⁵⁰ A further distinction can be made between two further types of jamming. “Spot jamming” is a “pinpoint technique of jamming” whereby a receiver is used “to find the signal frequency transmitting the incendiary broadcasts and then tune a jamming signal to that frequency”.⁵¹ “Barrage jamming”, on the other hand, involves the simultaneous jamming of a large number of frequencies, thereby preventing targeted broadcasters from circumventing the jamming by frequency-hopping. Each of these jamming techniques have their pros and cons, in terms of costs, expediency and efficiency. Barrage jamming is clearly the more invasive, but it also has the potential to affect broadcasts that are not incendiary by virtue of its blanketing tendencies.

Although to date, the theory and practice of information intervention have primarily concentrated on radio-jamming, this would not preclude the application of qualitatively comparable measures to the Internet in the future. Indeed, examples/allegations of such Internet-based measures have already surfaced in various quarters.⁵² Such measures would conceivably include denial-of-service (DOS) attacks, which can take various forms. Two general forms of DOS attacks have been identified: (i) “Force the victim computer(s) to reset or consume its resources such that it can no longer provide its intended service”, and (ii) “Obstruct the communication media between the intended users and the victim so that they can no longer communicate adequately”.⁵³ Examples of DOS attacks include:

- attempts to “flood” a network, thereby preventing legitimate network traffic;
- attempt to disrupt a server by sending more requests than it can possibly handle, thereby preventing access to a service;
- attempts to prevent a particular individual from accessing a service;
- attempts to disrupt service to a specific system or person.⁵⁴

Finally, as regards technical details of DOS attacks, they take effect through the:

1. consumption of computational resources, such as bandwidth, disk space, or CPU time;
2. disruption of configuration information, such as routing information;
3. disruption of physical network components.⁵⁵

⁴⁸ (emphasis added) S. Leinwoll, cited in Arie Bloed & Pascale C.A.E. de Wouters d’Oplinter, “Jamming of Foreign Radio Broadcasts”, in Arie Bloed and Pieter van Dijk, Eds., *Essays on Human Rights in the Helsinki Process* (Dordrecht, Martinus Nijhoff Publishers, 1985), pp. 163-180, at p. 163.

⁴⁹ Don Herskovitz, cited in Alexander C. Dale, “Countering Hate Messages that Lead to Violence: The United Nations’s Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts”, *op. cit.*, at p. 115.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² See, for example, Ian Traynor, “Russia accused of unleashing cyberwar to disable Estonia”, *The Guardian*, 17 May 2007. Similar accusations have been made against Russia in respect of Georgia [source].

⁵³ “Denial-of-service attack”, *Wikipedia*, consulted on 12 February 2007.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

In order to ensure the effective implementation of information intervention in practice, Metzl has recommended the establishment, under the auspices of the UN, of “an independent information intervention unit with three primary areas of responsibility: monitoring, peace broadcasting, and, in extreme cases, jamming radio and television broadcasts”.⁵⁶ He envisages it as a “well-trained and equipped rapid information response team to address and challenge media activities in a given country when those activities are inciting people to commit mass abuses whose realization appears imminent”.⁵⁷

Finally, another issue with implications for freedom of expression concerns the status of genocide-denial. Under the Genocide Convention, this putative offence is not included among the enumerated “punishable” acts. Given that the prohibition of Holocaust denial is recognised as a legitimate restriction on freedom of expression, as guaranteed under international law, it is certainly a question deserving further exploration whether the scope of the Genocide Convention could or should be extended to include a more generic offence genocide-denial. This question is highly topical, both at international and national levels.⁵⁸ As will be seen below, only one international, legally-binding treaty countenances the criminalisation of the denial of genocides other than/as well as the Holocaust.⁵⁹

6.1.2 Universal Declaration of Human Rights and ICCPR

The Universal Declaration of Human Rights, 1948, as well as being imbued with the importance of human dignity and non-discrimination, contains a specific Article devoted to the right to freedom of expression, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. This right was subsequently enshrined – and indeed fleshed out – in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The only restrictions on the right countenanced by this article are those which are “provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”.

⁵⁶ Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, *op. cit.*, at p.17.

⁵⁷ Jamie F. Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, *op. cit.*, at p. 649.

⁵⁸ This is evidenced by the controversy generated by the passing at first reading by the French Assemblée Nationale of a Bill to prohibit the calling into question of the Armenian genocide (*Proposition de Loi tendant à réprimer la contestation de l’existence du génocide arménien*), 12 October 2006.

⁵⁹ Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems: see, in particular, Article 6.

Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It reads:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 20(2) is crucial for the purposes of the present analysis, but before dispensing with Article 20(1) as being of lesser relevance to our central concerns, it is useful to note that it contains yet two more instances of definitionally problematic terms, i.e., “war” and “propaganda”. To repeat a point made in respect of “hate speech”, the term, “propaganda”, is sufficiently broad to cover a range of different types of expression which vary in terms of the harmfulness of their content, the sophistication of their presentation and strategies of dissemination and the gravity of their effects. In order to avoid undue encroachment on the right to freedom of expression, it is necessary that States exercise great caution when circumscribing the ambit of the term in legislative prohibitions at the national level. This concern featured prominently in debates during the drafting process.⁶⁰

Turning, then, to Article 20(2), the obligation imposed on States can be essentialised as the adoption of the necessary legislative measures to prohibit the advocacy of national, racial or religious hatred when – and this is the crucial threshold – such advocacy amounts to incitement to discrimination, hostility or violence. As already explained in 6.1.1, advocacy must attain a certain degree of intensity before it can be considered to amount to incitement. It was also pointed out in that discussion that the nature of incitement is qualified by what is being incited. In the context of Article 20(2), “Incitement to ‘discrimination’ and ‘violence’ are legally defined (or definable) concepts”.⁶¹ The same cannot be said of “hostility” and this has led to serious interpretive difficulties. Moreover, the term, “hatred”, is also very difficult to define in legal terms, although one commendable attempt to do so describes hatred as “an active dislike, a feeling of antipathy or enmity connected with a disposition to injure”.⁶² Semantically, hatred is more intense than hostility, but the latter term (or at least some lexical variants thereof, eg. hostilities) does have a strong connotation of war. If Nowak’s insistence that Article 20 is unique among other substantive provisions of the ICCPR in terms of its clear responsiveness to the atrocities carried out by the Nazis and the general horrors of World War II⁶³ is to be taken seriously, the association of hostility with belligerent (inter-State) behaviour should not be ignored. However, other – more conventional – attempts to distinguish the meanings of “hatred” and “hostility” have also been put forward. Partsch, for instance, has suggested that “perhaps ‘hatred’ has a strong subjective element while ‘hostility’ suggests an attitude displayed externally”.⁶⁴ Unfortunately, neither the *travaux préparatoires* nor the HRC’s General Comment 11 (discussed *infra*) offer much guidance for deciphering the precise meaning of the terms and thereby unlocking the nature of their relationship. Interpretive difficulties concerning the qualifiers “national, racial or religious” did arise in the drafting of Article 20, but followed similar patterns to those in other comparable treaties and were not quite as problematic as hostility and hatred (and war and propaganda). Legal interpretive difficulties aside, these notions can also prove philosophically problematic. For instance, Michael Banton, drawing on the work of Karl Popper, rhetorically asks: “If

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⁶¹ Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, p. 228.

⁶² Karl Josef Partsch, “Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination”, *op. cit.*, at p. 26.

⁶³ Nowak (2005), *op. cit.*, p. 468 and 475.

⁶⁴ Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 228.

observable behaviour is the outward form of some inward condition, how can one be certain about the nature of that condition?”⁶⁵ Affective states cannot be detected or defined with medical objectivity; the determination is therefore necessarily subjective.

It is rarely disputed that Articles 19 and 20, ICCPR, are closely related. One leading commentator has even referred to Article 20 as being “practically a fourth paragraph to Article 19 and has to be read in close connection with the preceding article”⁶⁶ and another has written that it should be “understood as a *lex specialis* to” Article 19.⁶⁷ Indeed, during the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the contiguity of the two articles.⁶⁸ However, it is important to stress that the outcome of the drafting process was only achieved after much intense and divisive debate about the implications that restrictions such as those under discussion would be likely to have for the exercise of the right to freedom of expression. The intensity of States Parties’ ideological *prises de position* on this question can also be gauged from the tenor of the numerous reservations and interpretive declarations entered in respect of Article 20 upon ratification of the Covenant.⁶⁹ Similar ideological intensity flared up in the UN HRC during the preparation of its General Comment on Article 20 and appeared to jeopardise the practice of adopting consensual General Comments before necessary compromises were eventually brokered.⁷⁰

It is noteworthy that Article 20, unlike other substantive articles in the ICCPR, does not set out a right as such. Instead, it sets out further restrictions on other rights (most notably the right to freedom of expression), thereby prompting Nowak to label it “an alien element in the system of the Covenant”.⁷¹ It provides for further restrictions by explicitly requiring that certain conduct “shall be prohibited by law”.⁷² It does not prescribe “what kind of law” should assure prohibition at the national level and it would therefore appear that States enjoy some measure of discretion as to their choice of legislation.⁷³ It is clear, however, that some kind of law is required and that educational and purely administrative measures will not suffice to discharge the obligation of prohibition *by law*. The extent of the obligations created under Article 20 is often misinterpreted. It is therefore necessary to spell out that while Article 20(2) requires States to prohibit by law hatred that incites to discrimination, hostility or violence, it does not necessarily require States to criminalise such hatred.⁷⁴ This point, far from being of mere academic interest, has very practical consequences, as will be demonstrated in the discussion of State obligations under Article 4, ICERD, *infra*.

General Comment 11

⁶⁵ Michael Banton, *International Action Against Racism*, *op. cit.*, at p. 53.

⁶⁶ Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981), pp. 209-245, at p. 227.

⁶⁷ Nowak, *op. cit.* (2005), p. 477.

⁶⁸ Article 26 of the Human Rights Commission’s draft of 1954 had originally been positioned at the very end of the substantive provisions contained in the draft text. See further: Manfred Nowak, *op. cit.*, 2005, at p. 470; Marc Bossuyt, *op. cit.*, at p. 398?.

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⁷⁰ For an illuminating discussion of the preparation of General Comment, see: Dominic McGoldrick, *The Human Rights Committee*, *op. cit.*, pp. 484-490.

⁷¹ Nowak (2005), *op. cit.*, p. 468.

⁷² See further, Dominic McGoldrick, *The Human Rights Committee*, *op. cit.*, p. 480.

⁷³ Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 228.

⁷⁴ *Ibid.*, at p. 229. Draft versions of the article would have obliged States to make incitement to racial hatred a crime, but such an approach did not prevail: Nowak, *op. cit.*, (2005), at p. 470.

The UN Human Rights Committee (HRC) has attempted to elucidate the relationship between Articles 19 and 20 by declaring the required prohibitions enumerated in the latter to be “fully compatible” with the right to freedom of expression and indicating that such prohibitions are subsumed into the “special duties and responsibilities” upon which the exercise of the right (as *per* Article 19) is contingent.⁷⁵ It has also stated that “For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.⁷⁶

A number of apposite analytical remarks should be made in relation to Article 20. First, its provisions are mandatory and “States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein”.⁷⁷ Second, as pointed out by the UN Human Rights Committee’s General Comment 11, “these required prohibitions are fully compatible with the right to freedom of expression as contained in article 19”.⁷⁸ Moreover, as also pointed out by the same General Comment, there is an umbilical link between these required prohibitions and the “special duties and responsibilities” that inhere in (the exercise of) the right to freedom of expression.⁷⁹ Fourth, there is a transfrontier dimension to Article 20(2), as it covers “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.”⁸⁰

Analysis of HRC Jurisprudence

The jurisprudence of the HRC has, to date, provided only limited illumination of the relationship between Articles 19 and 20. For instance, in *J.R.T. and the W.G. Party v. Canada*,⁸¹ the dissemination of anti-Semitic messages by telephonic means was adjudged by the HRC to “clearly constitute the advocacy of racial or religious hatred” under Article 20(2).⁸² The HRC, in declaring the case inadmissible, concluded that was no apparent need to consider the nexus between Articles 19 and 20.

In this regard, Nowak takes issue with McGoldrick’s conclusion that “A prohibition established in accordance with the terms of article 20 cannot found a violation of article 19”.⁸³ The essence of Nowak’s argument is that “the obligation in Art. 20 may not be interpreted in such a way as to establish for a State party the right to restrict other Covenant rights to an extent going beyond permissible interference therein”.⁸⁴ This means that “legal prohibitions under Art. 20 are to be interpreted in conformity with the restrictions that are legitimate under Art. 19(3)”.⁸⁵ It is submitted here that Nowak’s argument is correct and that it is also without

⁷⁵ Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), General Comment 11, United Nations Human Rights Committee, 29 July 1983, para. 2.

⁷⁶ *Ibid.*

⁷⁷ UN Human Rights Committee, General Comment 11 – Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20) (19th session, 29 July 1983), para. 1.

⁷⁸ *Ibid.*, para. 2.

⁷⁹ *Ibid.*, para. 2.

⁸⁰ *Ibid.*, para. 2.

⁸¹ Communication No. 104/1981, Decision of 6 April 1983.

⁸² *Ibid.*, para. 8(b).

⁸³ Dominic McGoldrick, *The Human Rights Committee, op. cit.*, p. 491.

⁸⁴ Manfred Nowak (2005), *op. cit.*, p. 477.

⁸⁵ *Ibid.* This view is shared by Karl Josef Partsch; see: “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 230.

prejudice to the thesis that Articles 19 and 20 are contiguous (indeed, Nowak's subsequent arguments - to the effect that the "specific purposes for interference" set out in Article 20 could "easily be included under those in Article 19(3)" - confirm this⁸⁶). Article 20 obliges States Parties to prohibit certain conduct by law, but does not specify how they should do so. As such, there is – as the expression goes – plenty of room for a slip 'twixt the cup and the lip. In other words, the manner in which the prohibition is assured at the national level could give rise to an impermissible restriction on the right to freedom of expression, for example if disproportionate measures were employed. It therefore stands to reason that measures adopted pursuant to the obligation contained in Article 20 should also have to pass muster under Article 19(3).

The case of *Faurisson v. France*⁸⁷ is one example of where the HRC could have grasped the definitional nettle more firmly, but failed to do so. The case arose from the conviction of Robert Faurisson, an academic, for the contestation of crimes against humanity (i.e., Holocaust denial). Crucial to the HRC's finding that Faurisson's conviction was not a violation of Article 19 were submissions by the French authorities that revisionist theses amounting to the denial of a universally-recognised historical reality constitute the principal [contemporary] vehicle for the dissemination of anti-Semitic views. The restriction on Faurisson's freedom of expression was grounded in the deference pledged to the "respect of the rights or reputations of others" in Article 19(3) and was specifically intended to serve "the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."⁸⁸ While one Individual Opinion in the instant case posited that the statements on which Faurisson's conviction was based remained outside the boundaries of "incitement" as envisaged by Article 20(2), it is submitted here that the issue could have been probed further.⁸⁹

In *Ross v. Canada*,⁹⁰ the HRC held that the restrictions imposed on a school-teacher's freedom of expression did not violate Article 19, as they had the purpose of protecting the "rights or reputations" of persons of Jewish faith, in particular in the educational sphere. The teacher had been publishing anti-Semitic tracts outside of the classroom and was disciplined by being transferred to an administrative post. The HRC noted that "the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole".⁹¹ Citing its *Faurisson* decision, the HRC stated that "restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred", and that such restrictions "also derive support from the principles reflected in article 20(2) of the Covenant".⁹² The actual necessity of the restrictions was justified for the protection of "the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance".⁹³

⁸⁶ *Ibid.*

⁸⁷ Communication No. 550/1993, HRC Decision of 8 November 1996.

⁸⁸ *Ibid.*, para. 9.6.

⁸⁹ *Ibid.*, Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para. 4. The Individual (concurring) Opinion of Cecilia Medina Quiroga also concurred in Evatt and Klein's Individual Opinion, but the Individual (concurring) Opinion by Rajsoomer Lallah considers the suitability of applying Article 20(2).

⁹⁰ Communication No. 736/1997, HRC Decision of 18 October 2000.

⁹¹ *Ibid.*, para. 11.5.

⁹² *Ibid.*, para. 11.5.

⁹³ *Ibid.*, para. 11.6.

Article 20's relationship with other ICCPR rights

Article 20's connection with Article 19 is most obvious, but it is also connected to other articles in the ICCPR, even in fundamental ways. Article 20 can, for example, be "primarily conceived of as a special State obligation to take preventive measures at the horizontal level to enforce the rights to life (Art. 6) and equality (Art. 26)".⁹⁴ Because of the centrality of these two rights within the Covenant system, "it was decided to combat the roots of the main causes for their systematic violation (wars, as well as racial, national and religious discrimination) by way of preventive prohibitions in the area of formation of public opinion".⁹⁵ Article 20(2)'s connection with Article 26 is also of interpretive significance. Whereas Article 26 is concerned with the prohibition of, and provision of effective protection against, discriminatory acts, Article 20 is concerned with the prohibition of incitement to such acts.⁹⁶ This structural separation of incitement and principal acts reinforces the conceptual distinction between them which underscores the inchoate nature of incitement (see further, *supra*).

The restrictions set out in Article 20 can also have implications for other rights, such as freedom of religion, assembly and association, and minority rights. The link between Article 20 and Article 18 [the right to freedom of thought, conscience and religion] also merits scrutiny. The HRC has stated clearly that "no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".⁹⁷ Thus, advocacy of/incitement to such actions shall not be tolerated under the ICCPR, even if they are ostensible manifestations of religion or belief; in such circumstances, it is not only valid for States authorities to restrict the right to manifest religion or belief, they are obliged to do so.⁹⁸

Article 20(2) also contemplates measures that "constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups".⁹⁹ Although the UN Human Rights Committee is right to describe these safeguards as "important", it would be erroneous to seek to infer therefrom any putative right not to be offended in one's (religious) beliefs or sensibilities. This point is relevant to a broader argument to be developed *infra*.

There have been calls, including by the UN Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, for the Human Rights Committee to elaborate a new General Comment on Article 20 that would, *inter alia*, elucidate "the interrelations between freedom of expression, freedom of religion and non-discrimination".¹⁰⁰

Comparative perspective

⁹⁴ Manfred Nowak (2005), *op. cit.*, p. 468.

⁹⁵ *Ibid.*

⁹⁶ See further, *ibid.* (Partsch), at p. 229.

⁹⁷ UN Human Rights Committee, General Comment 22 – The right to freedom of thought, conscience and religion (Article 18) (48th session, 30 July 1993), para. 7.

⁹⁸ See further, *Ross v. Canada*, Communication No. 736/1997, paras. 11.5-11.8; Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised edition) (Germany, N.P. Engel, 2005), pp. 426-7; 430.

⁹⁹ *Ibid.*, para. 9.

¹⁰⁰ Report further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, *op. cit.*, at para. 61. See also, in this connection, *ibid.*, paras. 44-50 & 60.

For comparative purposes, it is interesting to consider how the similarly-inclined Article 13(5) of the American Convention on Human Rights (ACHR) has been crafted. Whereas Article 13(5), ACHR, borrows heavily from the wording of Article 20, ICCPR, it departs from that wording in one noteworthy respect: it recognises an explicit group element to general offences of hatred amounting to incitement to lawless violence or other similar illegal action:

Article 13(5)

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The focus of “incitement” here is on “lawless violence” or “any other similar illegal action”; the latter phrase is *prima facie* broad enough in scope to cover discrimination (specifically mentioned in Article 20(2), ICCPR), but it is doubtful whether it would also catch “hostility” (also specifically mentioned in Article 20(2), ICCPR), given the definition-resistant properties of the term and the resultant inconceivability that such a vague notion could be rendered illegal. Another significant difference is that Article 13(5), ACHR, refers to a non-exhaustive list of grounds for the advocacy in question. A structural difference between the two comparable provisions, which is not without substantive consequences, is that Article 13(5), ACHR, is incorporated into a more general article on the right to freedom of expression, thus explicitly recognising it as one of the permissible restrictions on that particular right. By way of contrast, Article 20, ICCPR, by virtue of its free-standing status, is applicable to other rights vouchsafed in the ICCPR as well (see further, *supra*).

6.1.3 ICERD

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is also a crucial reference point for any examination of the interaction between freedom of expression and the elimination of racism. It reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 4, ICERD, is rightly considered to be “one of the most difficult and controversial” articles of the entire Convention.¹⁰¹ Because it explicitly creates a range of obligations for

¹⁰¹ Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (2nd Edition) (Alphen aan den Rijn, The Netherlands, Sijthoff & Noordhoff, 1980), p. 43.

States Parties which entail far-reaching interference with the exercise of the right to freedom of expression (in particular), Article 4 presented “many difficulties in all stages of its drafting”.¹⁰² In that respect, it was no different to the corresponding article in the earlier UN Declaration on the Elimination of All Forms of Racial Discrimination (1963).¹⁰³ The complexity of the article is underscored by the varying nature of the obligations it creates.

The introductory paragraph to Article 4, ICERD, is condemnatory, but it also requires States to undertake to adopt certain “immediate and positive measures” and it contains the all-important “due regard” clause which, in effect, clarifies that the objectives set out in Article 4 must be pursued consistently with a wider range of human rights. The use of the term “racial hatred” gave rise to the same kind of debates as those triggered by the term “hatred” in the context of the drafting of Article 20, ICCPR, (*supra*). Again, the question of the feasibility of effectively addressing a mental or emotional state was central here, but as Lerner points out, the question became much more acute in the context of the drafting of Article 4(a), where the term “hatred” was put forward as a crucial element of what would become a punishable offence.¹⁰⁴ The requirement that States “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination” are not objectionable as such, but Theodor Meron has perceptively drawn attention to the largely under-scrutinised potential of the words “*inter alia*” which precede the specifically enumerated measures to be adopted by States to the aforementioned end.¹⁰⁵ However, as he sardonically also points out, “But even those measures which are enumerated pose problems”.¹⁰⁶

Before examining the enumerated measures, a few words on the “due regard” clause are in order. The clause was introduced by way of amendment by the Nigerian delegate in the Third Committee. The purpose of the amendment was to assuage widely-held fears among (especially Western) delegates that the envisaged State obligations would unduly encroach on the right to freedom of expression (and association). The generalised reference to the UDHR implicitly included Articles 19 (freedom of opinion and expression) and 20 (freedom of assembly and association), as well as Article 29 (limitations on the exercise of rights and freedoms), to which Articles 19 and 20 are subject. Article 29(2) is of particular relevance; it reads:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

¹⁰² *Ibid.*, at p. 47.

¹⁰³ Article 9 of the Declaration reads:

“1. All propaganda and organizations based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin with a view to justifying or promoting racial discrimination in any form shall be severely condemned.

2. All incitement to acts of violence, whether by individuals or organizations against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law.

3. In order to put into effect the purposes and principles of the present Declaration, all States shall take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organizations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin.”

¹⁰⁴ Natan Lerner, *op. cit.*, p. 48.

¹⁰⁵ Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination”, 79 *The American Journal of International Law* (No. 2, April 1985), pp. 283-318, at p. 298.

¹⁰⁶ *Ibid.*

Thus, it is clear that the principles embodied in the UDHR include not only substantive rights, but also the permissibility of limitations on the exercise of those rights in certain circumstances.¹⁰⁷ Had the “due regard” clause not been so astutely inserted into Article 4’s opening paragraph, most of the enumerated measures would have been deemed incompatible with the right to freedom of expression.

Article 4(a), the first of the Article’s three operative paragraphs, enjoins States *inter alia* to declare a number of offences punishable by law. Given the abstruse style of writing throughout the Convention, especially in Article 4, it is useful to itemise the relevant offences, as follows:

- all dissemination of ideas based on racial superiority;
- all dissemination of ideas based on racial hatred;
- incitement to racial discrimination;
- all acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts;
- the provision of any assistance to racist activities, including the financing thereof.

Questions about the nature and extent of State obligations under Article 4 are old, but recalcitrant. Differing interpretations of key terms and phrases have been advanced by various experts and the resultant confusion has been compounded by some astounding examples of drafting slippage by CERD itself. Whereas the individual offences which States are obliged to declare punishable by law have been unpacked here for the purposes of clarity, when CERD enumerated those offences in its General Recommendation No. 15 (“Organized violence based on ethnic origin” (Art. 4)), it failed to mention “incitement to racial discrimination”. Instead, it referred to “incitement to racial hatred” (para. 3), which simply does not figure in Article 4(a). Most unfortunately, this slippage was not a once-off occurrence. The mistake was repeated in General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (para. 4(a)). Although this appears to be a simple editorial error, its consequences are potentially significant. The purpose of General Recommendations (GRs) is to elucidate the text of ICERD on the basis of CERD’s accumulated experience of monitoring procedures. As such, GRs are increasingly relied upon as valuable points of reference by States Parties and indeed all other interested parties as well. For such an inaccuracy to slip into two separate GRs significantly increases the risk of misquotation (and therefore misunderstanding) of the actual obligation, as set out in the original text of the Convention. Indeed, this risk has already materialised: the EU Network of Independent Experts on Fundamental Rights has, for example, referred to the categories of misconduct that are to be penalized under Article 4(a), ICERD, by quoting (but without spotting) the inaccurate wording of GR XV¹⁰⁸ instead of the primary text of the Convention. Of course, typical disclaimers about GRs not being binding on States Parties and the primacy of the original text of the Convention do serve to mitigate the effect of these slippages, but

¹⁰⁷ For commentary, see: Torkel Opsahl, “Articles 29 and 30: The Other Side of the Coin”, in Asbjorn Eide, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof and Allan Rosas with the collaboration of Theresa Swinehart, Eds., *The Universal Declaration of Human Rights: A Commentary* (Norway, Scandinavian University Press, 1992), pp. 449-470.

¹⁰⁸ E.U. Network of Independent Experts on Fundamental Rights, *Combating Racism and Xenophobia through Criminal Legislation: The Situation in the EU Member States*, Opinion No. 5-2005, 28 November 2005, p. 27.

they certainly do not help the general problem of uncertainty about the precise obligations created by Article 4.

One final point to be made in this connection concerns the substantive offences which are the at the centre of the drafting errors in GRs XV and XXXI: the actual offence of “incitement to racial discrimination” and the interloper offence of “incitement to racial hatred”. The difference between these offences is by no means cosmetic, which underscores the seriousness of the drafting errors. As the UN High Commissioner for Human Rights succinctly put it when discussing relevant interpretive questions in a different context:

Unlike incitement to an act, it is almost impossible to prove whether hatred *per se* is or is not likely to result from the dissemination of certain statements. Regular evidentiary techniques may be employed to assess the risk of a particular illegal act occurring but these do not work well in assessing the risk of a purely psychological outcome. International courts have tended to avoid the issue and, instead, either simply conclude, perhaps after a cursory scan of the context, that the statements would be prone to have this result, or they focus on other factors, such as intent. (para. 69).

One key difference between the ICCPR and leading European treaties and other instruments which include measures for combating racism, on the one hand, and ICERD on the other hand, is that the latter requires that States render the dissemination of ideas based on racial superiority or racial hatred - without further explicit qualification – offences punishable by law. There is no requirement of intent, nor is there any requirement that harm or other concrete consequences would flow from the dissemination of such ideas. This is in striking contrast to other leading conventions and other non-treaty reference points in international law. For instance, the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems provides for certain acts to be criminalised “when committed intentionally and without right” (eg. Article 3.1); ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination also provides for the penalisation of certain acts “when committed intentionally”, as well as repeatedly emphasising that to penalise acts, they have to be committed “with a racist aim” (para. 18), and the as yet unadopted European Commission Proposal for a Council Framework Decision on combating racism and xenophobia provides for the criminalisation of certain “intentional conduct”, but also introduces some conditionalities relating to motive (“for a racist or xenophobic purpose”) and causation (“behaviour which may cause substantial damage to individuals or groups concerned”, “in a manner liable to disturb the public peace”) (draft Article 4).¹⁰⁹ Such requirements are important safeguards for the protection of the right to freedom of expression. The absence of such safeguards could rule out the possibility of examining any contextual situations (which could have a determinative impact on the consequences to which the impugned speech could lead). For example:

- Public debate: arguments advanced in the heat of debate and which unintentionally cause offence should not – normally speaking – be punishable, otherwise the vigour of public debate would be seriously jeopardised.
- Satire: by definition, satire and cartoons, etc., are irreverent and seek to challenge and provoke. In the absence of hatred or incitement, such types of expression clearly fall within the legitimate exercise of the right to freedom of expression.

¹⁰⁹ All of these texts are properly contextualised and discussed in greater detail, *infra*.

- Unintentionally harmful expression: there is a world of difference between misguided or thoughtless expression that is incidentally harmful and expression that is deliberately calculated to be abusive or is fuelled by some kind of *animus*.

Nevertheless, in the context of ICERD, the relevance of qualifications such as intent and harmful consequences have been roundly dismissed, both by a major report on the implementation of Article 4,¹¹⁰ and by CERD itself. As regards the former, José Inglés stated that “the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination, whether it be grave or insignificant”.¹¹¹ This has been borne out by CERD’s review of States reports. It is interesting to note that the original draft of Article 4(a) did include a consequentialist component, but that it was ultimately omitted from the final text after a divisive vote in the General Assembly.

As was recently pointed out by the UN High Commissioner for Human Rights, the absence of any requirement of intent or impact “may seem a subtle difference but it is significant in determining the scope of the law”¹¹² and, crucially, the manner of its formulation at the national level. ICERD in general and Article 4 in particular are not self-executing.¹¹³ The amount of discretion available to States for the transposition of ICERD’s obligations into their domestic (legal) orders varies according to the specificity of the obligation. Thus, Article 2.1(d) confers some discretion on States as to the fulfilment of their general obligations under the Convention. It reads: “each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”. The discretion – such as it is – stems from the import of the phrase “by all appropriate means” and from the clear suggestion that those means could include legislation “as required by circumstances”. Thus, the manner of implementation is not exclusively legal – other measures (which are often more effective for the attainment of specific goals in specific contexts) are also countenanced. Similarly, the adoption of new legislation is only required to the extent that existing legislation and other measures do not effectively fulfil relevant State obligations.

Nevertheless, Article 2.1(d) is only applicable to the extent that more specific obligations are not stipulated in individual articles, such as Article 4(a). Thus, the limited flexibility offered by Article 2.1(d) for the fulfilment of other State obligations is overridden by the explicit and more exacting requirement that States declare the acts enumerated in Article 4(a) “offences punishable by law”. As already intimated by the foregoing discussion, the phrase “punishable by law” is generally interpreted as obliging States to penalize or criminalize the offences in question. Furthermore, as with Article 4 in its entirety, the obligations created by Article 4(a) are mandatory in character.¹¹⁴ The Committee on the Elimination of Racial Discrimination has stated that in order to satisfy these obligations, “States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced”.¹¹⁵ It reasons:

¹¹⁰ José D. Inglés, CERD Special Rapporteur, Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, A/CONF.119/10, 18 May 1983.

¹¹¹ Inglés, *op. cit.*, at para. 83. This is shored up by similar individual references to all dissemination of ideas based on racial superiority (para. 93) and to all dissemination of ideas based on racial hatred (para. 96).

¹¹² *Op. cit.*, para. 39.

¹¹³ Michael Banton, *op. cit.*, at ...

¹¹⁴ See, for example: Legislation to eradicate racial discrimination (Art. 4), General Recommendation VII, Committee on the Elimination of Racial Discrimination, 23 August 2005, para. 1; Organized violence based on ethnic origin (Art. 4), General Recommendation XV, Committee on the Elimination of Racial Discrimination, 23 March 1993, para. 2.

¹¹⁵ CERD General Recommendation XV, *op. cit.*, para. 2.

“Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response”.¹¹⁶

According to one leading commentator, the rationale behind the “strongly preventive or proactive mode” of Article 4 “may be understood by reflecting on such phenomena as the discourses of dehumanisation that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that may flourish if unchecked against vulnerable minorities”.¹¹⁷

The mandatory nature of this requirement that States criminalise the enumerated acts, coupled with the lack of discretion available to States to make the punishability of the acts conditional on considerations such as the intent of its perpetrator or their (likely) harm-producing effects, is clearly very problematic from the perspective of freedom of expression. Even reliance on the “due regard” clause cannot resolve the potential frictions involved here as the utility of the clause lies in its reference to/invocation of prevailing standards of international law. However, the restrictions on freedom of expression provided for in Article 4(a), ICERD, go further than those countenanced in either the UDHR or the ICCPR.

In light of all the foregoing, Theodor Meron has concluded that in its interpretive approach to Article 4, CERD “appear[s] to endorse the notion that [Article 4] is based on absolute liability”.¹¹⁸ This conclusion is radical, but not without some validity. Whereas “strict liability” can be taken to mean “Liability for a crime that is imposed without the necessity of proving *mens rea* with respect to one or more of the elements of the crime”,¹¹⁹ Meron uses the term, “absolute liability”, which in some jurisdictions goes even further than strict liability and implies that “the only defences available [to the crime] are the basic ones of insanity, automatism, or necessity”.¹²⁰ Whether Article 4(a) does in fact rest on a notion of “strict” or “absolute” liability remains a moot question.

Article 4(a) also sits uneasily with certain other provisions in ICERD. The relationship between the limited flexibility as to the measures to be adopted by States under Article 2.1(d) and the strict requirement to declare certain acts “offences punishable by law” under Article 4(a) is not entirely coherent. One major incongruity is that “incitement to racial discrimination” is included under Article 4(a), meaning that it should be criminalized by States, whereas “racial discrimination” proper is covered by Article 2.1(d), meaning that it only has to be prohibited, but does not necessarily have to be criminalized, if other means are deemed more “appropriate” for bringing it to an end. Thus, provision is made for incitement to racial discrimination – an inchoate offence – to be more severely dealt with than racial discrimination – the principal offence being incited.¹²¹

¹¹⁶ *Ibid.*

¹¹⁷ (footnote omitted). Patrick Thornberry, “Confronting Racial Discrimination: A CERD Perspective”, 5 *Human Rights Law Review* (No. 2, 2005), pp. 239-269, at p. 253. He develops the point further: “Vulnerable groups well appreciate that the lines between thought, public discourse and oppressive action can be very thin”, *ibid.*

¹¹⁸ Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination”, *op. cit.*, at p. 303.

¹¹⁹ Elizabeth A. Martin, Ed., *A Dictionary of Law* (Fourth Edition) (Oxford, Oxford University Press, 1997).

¹²⁰ Andrew Ashworth, *Principles of Criminal Law* (Second Edition), *op. cit.*, p. 159.

¹²¹ See further, Karl Josef Partsch, “Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination”, *op. cit.*, at p. 27.

Notwithstanding the foregoing, it is crucially important to stress that the fulfilment by States Parties of their obligations under Article 4 must be achieved while having “due regard” to the principles embodied in the Universal Declaration of Human Rights and the rights explicitly set out in Article 5, ICERD.¹²² “The right to freedom of opinion and expression” is among those rights specifically enumerated at Article 5.¹²³

The Opinion of the Committee on the Elimination of Racial Discrimination in the case, *The Jewish Community of Oslo & others v. Norway*,¹²⁴ is highly revelatory of the Committee’s current thinking on the relationship between Articles 4 and 5, ICERD. The factual background to the case involved a march and speech in Askim (near Oslo) to commemorate Rudolf Hess. It was organised by a group known as the “Bootboys”. The applicants pointed to a number of instances of racist intolerance and racially-motivated attacks in the months subsequent to the march, which they attributed to the fact that the march had taken place at all. The conviction of the leader of the march (Mr. Sjolie) for violation of the Norwegian Penal Code (in particular the provision dealing with offences that may be summarised as “hate speech”) was eventually overturned by the Norwegian Supreme Court. The applicants then turned to the Committee on the Elimination of Racial Discrimination, claiming that as a result of the acquittal, “they were not afforded protection against the dissemination of ideas of racial discrimination and hatred, as well as incitement to such acts”¹²⁵ during the march and that they were not afforded a remedy against this conduct, as required by ICERD.

It fell to the Committee to decide whether the impugned statements by Mr. Sjolie would be protected by the “due regard” clause in Article 4. The Committee noted that “the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee’s own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”.¹²⁶ It further notes that:

the ‘due regard’ clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.¹²⁷

The Committee concluded that, given the “exceptionally/manifestly offensive character” of the impugned statements, they are not entitled to protection by the due regard clause and therefore Mr. Sjolie’s acquittal by the Norwegian Supreme Court had given rise to a violation of Article 4, ICERD.

In its General Recommendation XXX, “Discrimination Against Non Citizens”,¹²⁸ the Committee on the Elimination of Racial Discrimination sets out a number of general principles, on the basis of which it recommends that States Parties to ICERD, “as appropriate to their specific circumstances”, adopt various measures, including:

¹²² Article 4. The list of rights set out in Article 5 is non-exhaustive: Non-discriminatory implementation of rights and freedoms (Art. 5), General Recommendation XX, CERD, 15 March 1996, para. 1.

¹²³ Article 5(d)(viii).

¹²⁴ Communication No. 30/2003, CERD Opinion of 22 August 2005.

¹²⁵ *Ibid.*, para. 3.1.

¹²⁶ (footnote omitted) *Ibid.*, para. 10.5. It does not, however, refer to any specific examples.

¹²⁷ *Ibid.*

¹²⁸ Discrimination Against Non Citizens, General Recommendation XXX, CERD, 1 October 2004.

III. Protection against hate speech and racial violence

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;

12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

Article 4, ICERD, clearly includes restrictions on the right to freedom of expression that are additional to – and more far-reaching than – those set out in Articles 19 and 20, ICCPR. This is particularly true of the requirement that States “declare an offence punishable by law all dissemination of ideas based on racial superiority”. The Committee on the Elimination of Racial Discrimination is of the opinion that that requirement “is compatible with the right to freedom of opinion and expression”.¹²⁹ It seeks to ground its opinion in references to Article 29(2) of the Universal Declaration of Human Rights and Article 20, ICCPR. The reference to the former provision draws attention to the “duties and responsibilities” that right-holders must observe while exercising their rights and freedoms.¹³⁰ It is surprising, however, that no reference is made to Article 19(3), which contains an equivalent provision that is more specific to the rights to freedom of opinion and expression. The reference to Article 20, ICCPR, is specifically to the obligation on States to prohibit by law “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Regardless of how the Committee seeks to square this circle, the fact remains that Article 4, ICERD, is more restrictive of the right to freedom of opinion and expression than analogous provisions in the ICCPR.

On the basis of the brief foregoing analysis alone,¹³¹ it seems difficult to speak of a universal approach to “hate speech”.¹³² This is not surprising: different treaties and bodies pursue different objectives, within the constraints of different mandates, and employing different strategies in the process. The absence of a *universal* approach is not nearly as grave as the absence of *approximate* coherence across treaties would be.

6.1.4 UNESCO standards

¹²⁹ CERD General Recommendation XV, *op. cit.*, para. 4.

¹³⁰ Article 29(2) of the Universal Declaration of Human Rights reads: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

¹³¹ Constraints of space prevent a more detailed discussion, but see further: Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (The Netherlands/USA, Sijthoff & Noordhoff, 1980); Drew Mahalic & Joan Gambia Mahalic, “The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination”, 9 *Human Rights Quarterly* (No. 1, February 1987), pp. 74-101; Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination”, 79 *The American Journal of International Law* (No. 2, April 1985), pp. 283-318; Karl Josef Partsch, “Racial speech and human rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (United Kingdom, ARTICLE 19/University of Essex, 1992), pp. 21-28; Egon Schwelb, “The International Convention on the Elimination of All Forms of Racial Discrimination”, 15 *International and Comparative Law Quarterly* (October 1966), pp. 996-1068.

¹³² For further probing of this question, see: Toby Mendel, “Does International Law Provide Sensible Rules on Hate Speech?”, in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2008).

While not legally-binding on States, a number of international instruments adopted by UNESCO merit consideration, because of their general relevance to the freedom of expression/anti-racism interface and also their specific relevance to the role of the media in this area. For instance, Article 5.3 of the UNESCO Declaration on Race and Racial Prejudice (1978) reads:

The mass media and those who control or serve them, as well as all organized groups within national communities, are urged – with due regard to the principles embodied in the Universal Declaration of Human Rights, particularly the principle of freedom of expression – to promote understanding, tolerance and friendship among individuals and groups and to contribute to the eradication of racism, racial discrimination and racial prejudice, in particular by refraining from presenting a stereotyped, partial, unilateral or tendentious picture of individuals and of various human groups. Communication between racial and ethnic groups must be a reciprocal process, enabling them to express themselves and to be fully heard without let or hindrance. The mass media should therefore be freely receptive to ideas of individuals and groups which facilitate such communication.

This provision recognises the paradoxical potential of the media, both to curb and to exacerbate, racism and racial prejudice and highlights relevant responsibilities of media professionals. The provision is further bolstered, in particular, by Article 6.2¹³³ and Article 7¹³⁴ of the Declaration.

Another example is provided by Article 3.2 of UNESCO's Declaration of Principles on Tolerance (1995), which reads:

[...] The communication media are in a position to play a constructive role in facilitating free and open dialogue and discussion, disseminating the values of tolerance, and highlighting the dangers of indifference towards the rise in intolerant groups and ideologies.

Again, this is important recognition of the forum- and information-providing roles played by the media in pluralistic democratic society.

6.1.5 Other UN standards and mechanisms

6.1.5(i) World Conference against Racism

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in Durban, South Africa, from 31 August to 8 September 2001. The

¹³³ Article 6.2 reads: "So far as its competence extends and in accordance with its constitutional principles and procedures, the State should take all appropriate steps, inter alia by legislation, particularly in the spheres of education, culture and communication, to prevent, prohibit and eradicate racism – racist propaganda, racial segregation and apartheid and to encourage the dissemination of knowledge and the findings of appropriate research in natural and social sciences on the causes and prevention of racial prejudice and racist attitudes with due regard to the principles embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights."

¹³⁴ Article 7 reads: "In addition to political, economic and social measures, law is one of the principal means of ensuring equality in dignity and rights among individuals, and of curbing any propaganda, any form of organization or any practice which is based on ideas or theories referring to the alleged superiority of racial or ethnic groups or which seeks to justify or encourage racial hatred and discrimination in any form. States should adopt such legislation as is appropriate to this end and see that it is given effect and applied by all their services, with due regard to the principles embodied in the Universal Declaration of Human Rights [...]."

focus of the Declaration and Programme of Action of the World Conference¹³⁵ is broad and it reflects a diversity of thematic and regional priorities. The evident zeal of the language used in these documents augurs well for their effective implementation. While the stigmatisation and negative stereotyping of vulnerable individuals or groups of individuals are criticised in the Declaration (para. 89), it is simultaneously stressed that a possible antidote to such trends could lie in the robust exercise of the corrective powers of the media (para. 90). The promotion of multiculturalism by the media is a crucial ingredient of such an antidote (para. 88). These anxieties about the use and misuse of the media are equally applicable, if not moreso, to new technologies and in particular, the Internet (paras. 90-92). This is also borne out in the Declaration.¹³⁶

The Programme of Action, for its part, revisits these themes, but in a manner that is mindful of their practical application. To this end, it calls for the promotion of voluntary ethical codes of conduct, self-regulatory mechanisms and policies and practices by all sectors and levels of the media in order to forward the struggle against racism (para. 144). It also advocates, within the parameters of international and regional standards on freedom of expression, greater (and where applicable, concerted) State action to counter racism in the media (para. 145). The dissemination of racist speech and the perpetration of similar racist acts over the Internet and via other forms of new information and communications technologies should merit particular attention (para. 147).¹³⁷ A list of suggested practical approaches to relevant problems is then enumerated.¹³⁸

6.1.5(ii) Work of Special Rapporteurs on Freedom of Expression

Mention should also be made in passing to the relevance and value of the normative work being carried out by various Special Rapporteurs within the United Nations system to the issues under discussion in this paper. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance spring instantly to mind, but it would be remiss to disregard the work of the Special Rapporteur on freedom of religion and belief, and that of other specialised mandates, on the grounds of perceived irrelevance.

By way of final focus in this section, in their Joint Statement on Racism and the Media in 2001,¹³⁹ the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly

¹³⁵ See: Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, Doc. No. A/CONF.189/12.

¹³⁶ These issues are dealt with most extensively in paras. 86-94 of the Declaration.

¹³⁷ See further in this connection and in the context of follow-up activities to the Durban Declaration and Programme of Action: Yaman Akdeniz, "Stocktaking on efforts to combat racism on the Internet", Background Paper to High Level Seminar, UN Commission on Human Rights – Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, January 2006.

¹³⁸ All of these issues are dealt with primarily in paras. 140-147 of the Programme of Action. See further, Tarlach McGonagle, "World Anti-Racism Conference: Focus on Media", *IRIS – Legal Observations of the European Audiovisual Observatory*, 2002-2: 3.

¹³⁹ 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>

defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and hate speech laws have in the past been used against those they should be protecting.

In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

- no one should be penalised for statements that are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

The Joint Statement takes a multifaceted approach to the relationship between racism and the media and in addition to the civil, criminal and administrative measures detailed above, it emphasises the importance of freedom of information and of promoting tolerance (discussed in greater detail, *infra*). While not legally binding in any formal sense, the Joint Statement is of certain interpretive value, not least because it reveals current thinking by the three special mandates for protecting freedom of expression about relevant existing legal standards.

6.1.6 European Convention on Human Rights¹⁴⁰

The European Convention on Human Rights is the veritable centrepiece of human rights protection in Europe. Article 10, ECHR, reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As with corresponding provisions in other international treaties, Article 10 sets out the right to freedom of expression, while recognising that its exercise involves duties and responsibilities and that it may be restricted on a number of enumerated grounds.

In its seminal ruling in *Handyside v. the United Kingdom*, the European Court of Human Rights affirmed that freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the

¹⁴⁰ For an overview of the Council of Europe’s activities in this domain, see: *Activities of the Council of Europe with Relevance to combating Racism and Intolerance*, European Commission against Racism and Intolerance, Doc. CRI (2004) 7, February 2004.

demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society”.¹⁴¹ That ruling served to open up the critical space between types of expression that are inoffensive and therefore uncontroversially protected by Article 10 and types of expression that are excluded from its protection by virtue of Article 17.¹⁴² The question of whether, or to what extent, “hate speech” should be protected is particularly contentious.

The European Court of Human Rights first examined the interaction between freedom of expression and relevant provisions of ICERD in *Jersild v. Denmark*.¹⁴³ In this case, also known as the “Greenjackets” case, the Court found that the conviction of a journalist - for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group (“the Greenjackets”) – amounted to a violation of Article 10, ECHR. The Court’s consideration of Article 10, ECHR, in light of ICERD (and in particular Article 4 thereof)¹⁴⁴ was, however, regrettably summary and it failed to grapple with the substantive issues involved. It merely stated that it is not for the Court to interpret the “due regard” clause in Article 4, ICERD, but that “its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark’s obligations under the UN Convention”.¹⁴⁵ The Court held that Jersild’s conviction was not “necessary in a democratic society” and that it therefore violated his rights under Article 10, ECHR. This was largely due to considerations of context in (news) reporting and the importance of journalistic autonomy for the functioning of democracy. The positive obligations imposed on States Parties to ICERD by Article 4 were not deemed to have been contravened.¹⁴⁶

The Grand Chamber of the European Court of Human Rights affirmed in its *Nachova* judgment that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment”.¹⁴⁷ This is an important formulation of the robust stance consistently taken by the Court against racism in its manifold manifestations, including racist expression. In a long line of cases, the Court has consistently refused to grant any protection under Article 10 ECHR to racist speech¹⁴⁸ or to statements

¹⁴¹ *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

¹⁴² For extensive details of relevant case-law, see: Mario Oetheimer, “La Cour européenne des Droits de l’Homme face au discours de haine” (2007) 69(1) *Rev trim d h* 63; Anne Weber, “The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance” in European Commission against Racism and Intolerance (ECRI), *Combating racism while respecting freedom of expression*, *op cit*, 97.

¹⁴³ *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

¹⁴⁴ Cited *supra*.

¹⁴⁵ *Jersild v. Denmark*, *op. cit.*, para. 30. See also, paras. 21, 28, 29, 31.

¹⁴⁶ Also of note here is the divisiveness of the judgment: the Court found in favour of a violation of Article 10 by twelve votes to seven.

¹⁴⁷ *Nachova and others v Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145. See also: *Timishev v Russia*, Judgment of the European Court of Human Rights (Second Section) of 13 December 2005, para. 56; *D.H. and Others v the Czech Republic*, Judgment of the European Court of Human Rights (Grand Chamber) of 13 November 2007, para. 176.

¹⁴⁸ Recent examples include: *Seurot v. France*, Inadmissibility decision of the European Court of Human Rights (Second Section) of 18 May 2004, Appn. No. 57383/00; *Norwood v. United Kingdom*, Inadmissibility decision of the European Court of Human Rights of 16 November 2004, Appn. No. 23131/03, Reports 2004-XI.

denying, disputing or minimising the Holocaust.¹⁴⁹ By way of illustration, the *Seurot* case concerned the publication in a school bulletin of a text by a teacher deploring the overrunning of France by hordes of Muslims from North Africa: the sanctioning of the teacher was found not to violate Article 10, ECHR, because of the undeniably racist tone of the article and the duties and responsibilities of the applicant in his capacity as a teacher. In the *Norwood* case, the applicant, a regional organiser for the British National Party (an extreme right-wing political party) displayed in the window of his flat a poster depicting the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The applicant had been convicted of a public order offence by the domestic courts and the European Court of Human Rights agreed with the assessment of the domestic courts and concluded that his conviction did not breach Article 10, ECHR because:

[...] the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.

Cases involving claims for freedom of expression for racist, xenophobic or anti-Semitic speech,¹⁵⁰ Holocaust denial, or (neo-)Nazi ideas, are routinely held to be manifestly unfounded under Article 17 (‘Prohibition of abuse of rights’), ECHR, and thus declared inadmissible. Article 17 was designed as an in-built safety mechanism to prevent the Convention from being subverted by those whose motivation is contrary to its letter and spirit.¹⁵¹ It reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Elements of Nazi ideology or activities inspired by Nazism have figured strongly in the bulk of the aforementioned batch of inadmissibility decisions. The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the European Commission for Human Rights in *H., W., P. and K. v. Austria*: “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17.”¹⁵² The Court took its most trenchant stance against hate speech to date in the *Garaudy v. France* case,¹⁵³ which involved a challenge to the French Courts’ conviction of the applicant for the denial of crimes against humanity, the publication of racially defamatory statements and incitement to racial hatred. The European Court of Human Rights held that:

¹⁴⁹ Recent examples include: *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Appn. No. 65831/01, Reports 2003-IX. See further, Tarlach McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech” (2001) 23 *DULJ* 21.

¹⁵⁰ See, by way of recent example, *Ivanov v. Russia*, Inadmissibility decision of the European Court of Human Rights (First Section) of 20 February 2007, Appn. No. 35222/04.

¹⁵¹ See further, Tarlach McGonagle, “Protection of Human Dignity, Distribution of Racist Content (Hate Speech)”, in Susanne Nikoltchev, Ed., *Co-Regulation of the Media in Europe, IRIS Special* (European Audiovisual Observatory, Strasbourg, 2003), pp. 43-46, at 46.

¹⁵² Inadmissibility decision of the European Commission of Human Rights, Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1.

¹⁵³ *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No. 65831/01.

[...] There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...] ¹⁵⁴

A more problematic case, perhaps, as far as the boundaries of freedom of expression are concerned, was *Lehideux and Isorni v. France*.¹⁵⁵ The case concerned an advertisement in a national newspaper, *Le Monde*, as part of a campaign for the rehabilitation of the memory of General Philippe Pétain: the advertisement presented the General's life in a selective and positive manner, with certain dark chapters of the General's life being conspicuous by the absence of any reference thereto. In this case, the European Court again confirmed that protection would be withheld from remarks attacking the core of the Convention's values.¹⁵⁶ However, the impugned advertisement (as it did not amount to Holocaust denial or any other type of expression that would have prevented it from wriggling through the meshes of the Article 17 net) was held to be one of a class of polemical publications entitled to protection under Article 10.¹⁵⁷

The above-cited judicial pronouncements have, both individually and collectively, usefully helped to clarify the status of performative speech¹⁵⁸ which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in international human rights treaties.¹⁵⁹ As the relevant corpus of case-law from the European Court of Human Rights continues to grow, so too does the illumination of this rather grey area. *Gündüz v. Turkey*, for instance, also contributes to our understanding of where relevant lines are likely to be drawn by the Court. The case arose out of the participation of the applicant – the leader of an Islamic sect – in a live studio debate on topics such as women's clothing, Islam, secularism and democracy. The applicant was convicted by the Turkish Courts for incitement to hatred and hostility on the basis of a distinction founded on religion. However, the European Court of Human Rights held:

[...] Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case

¹⁵⁴ *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

¹⁵⁵ *Lehideux & Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions, 1998-VII.

¹⁵⁶ *Ibid.*, para. 53. See also *Jersild v. Denmark*, *op. cit.*, para. 35.

¹⁵⁷ *Ibid.*, paras. 52, 55.

¹⁵⁸ For a general exploration of "performative speech", see: J. L. Austin, *How to do things with words* (Oxford/New York/Toronto/Melbourne, Oxford University Press, Repr., 1980).

¹⁵⁹ See, in particular, Article 20 of the International Covenant on Civil and Political Rights, which reads:

"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

should be seen in a very particular context. Firstly, as has already been noted [...], the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.¹⁶⁰

The foregoing paragraphs present the broad lines of the European Court of Human Rights' main principles governing (various kinds of) racist and hateful expression; this discussion is continued and expanded in s. 6.2, *infra*, when the finer details of relevant case-law will be explored and the contours of protected expression traced more sharply.

6.1.7 Other relevant Council of Europe treaties

Needless to say, a considerable number of Council of Europe treaties other than its flagship ECHR also contain important provisions designed to counter and prohibit racism. A few of the most relevant treaty provisions will now be considered.

6.1.7(i) Cybercrime Convention and its Additional Protocol

One of the fiercest criticisms of the Council of Europe's Convention on Cybercrime¹⁶¹ in the latter stages of its drafting and subsequent to its opening for signature in November 2001 concerned its failure to address acts of racism and xenophobia committed through computer systems.¹⁶² This *lacuna* was swiftly filled, however, by the drafting of an Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.¹⁶³ The Additional Protocol concerns "acts", and not just "expression", although the latter is the type of act likely to receive the most attention. The Preamble to the Additional Protocol equates racist and xenophobic acts with "a violation of human rights and a threat to the rule of law and democratic stability". Also of importance for present purposes is the preambular recognition that the Protocol "is not intended to affect established principles relating to freedom of expression in national legal systems".

The goal of the Additional Protocol – to supplement the Convention as regards racist and xenophobic acts committed through computer systems (Article 1) – entails States Parties enacting appropriate legislation and ensuring that it is effectively enforced.¹⁶⁴ Article 2(1) of the Additional Protocol states that:

"racist and xenophobic material" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or

¹⁶⁰ *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.

¹⁶¹ ETS No. 185, entry into force: 1 July 2004.

¹⁶² See, *inter alia*, Opinion No. 240 of the Parliamentary Assembly of the Council of Europe: "Draft additional protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems", 27 September 2002.

¹⁶³ ETS No. 189, entry into force: 1 March 2006.

¹⁶⁴ See further, Explanatory Report to the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems, adopted on 7 November 2002, para. 9.

violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.¹⁶⁵

A major section of the Additional Protocol concerns measures to be taken at the national level. In this regard, States are obliged to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system” (Article 3(1)). Central to this definition is the presence of intent or *mens rea*, which is a basic requirement for the establishment of criminal law generally. The corollary of this provision is that Internet Service Providers (ISPs) should not attract criminal liability for the dissemination of impugned material where it has merely acted as conduit, cache or host for such material.¹⁶⁶

States are, however, given certain leeway not to criminalise relevant acts where the material “advocates, promotes or incites discrimination that is not associated with hatred or violence, *provided that other effective remedies are available*” (Article 3(2): emphasis added). This constitutes an important gesture towards - and endorsement of - the efficacy and value of, for example, self- and co-regulatory complaints and sanctioning mechanisms.

Article 4 requires States Parties to criminalise the following conduct when it is committed “intentionally and without right”: “threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics”. This spans both public and private communications, unlike the target of the similarly-worded Article 5 (‘Racist and xenophobic motivated insult’), which is only concerned with public communications. The conduct to be criminalised under Article 5 is: “insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics”.

The decision to cast the utterance of insults as a criminal act could potentially grate with the established Article 10 case-law of the European Court of Human Rights. The cause of concern here is that the definitional threshold for “insult” could be deemed to be rather low and thus potentially open to abuse. As discussed, *supra*, according to the seminal principle laid down in the *Handyside* case (and consistently followed by the Court ever since), freedom of expression extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.

Article 6 of the Additional Protocol (‘Denial, gross minimisation, approval or justification of genocide or crimes against humanity’) introduces a novel focus into international human rights treaty law. For the first time, the scope of the offence has been extended to apply to genocides other than the Holocaust. Article 6 reads:

¹⁶⁵ See further, *ibid.*, paras. 10-22.

¹⁶⁶ *Ibid.*, para. 25. Similarly, pursuant to Article 7 (‘Aiding and abetting’), ISPs are also shielded from liability in the outlined circumstances: *ibid.*, para. 45.

1 Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2 A Party may either

a require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b reserve the right not to apply, in whole or in part, paragraph 1 of this article.

6.1.7(ii) European Convention on Transfrontier Television

Article 7(1) of the European Convention on Transfrontier Television¹⁶⁷ insists that broadcast material must (in its presentation and content) “respect the dignity of the human being and the fundamental rights of others”. It also states that programmes shall not “give undue prominence to violence or be likely to incite to racial hatred”.

6.1.7(iii) Framework Convention for the Protection of National Minorities

Despite its failure to specifically mention the term “hate speech”, the Framework Convention for the Protection of National Minorities (FCNM)¹⁶⁸ has nevertheless elaborated a comprehensive strategy for tackling intolerance, hatred and (other) various contributory causes of hate speech.¹⁶⁹ The strategy focuses on the twin goals of facilitating and creating expressive opportunities for minorities and of promoting intercultural dialogue, understanding and tolerance. The strategy derives from the interplay between Articles 6 and 9, FCNM, and is considered in detail in a separate section, *infra*.

6.1.8 European Union standards¹⁷⁰

6.1.8(i) General

¹⁶⁷ ETS No. 132 (entry into force: 1 May 1993), as amended by a Protocol thereto, ETS No. 171, entry into force: 1 March 2002.

¹⁶⁸ ETS No. 157, entry into force: 1 February 1998.

¹⁶⁹ See further, Tarlach McGonagle, “The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities”, in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2008).

¹⁷⁰ The author is grateful to Wouter Gekiere and Ilze Brands Kehris for helpfully identifying and locating documents consulted for the preparation of this section.

The struggle against racism is informing public and judicial policy to an unprecedented extent in a European Union (EU) whose erstwhile goals were primarily economic cooperation and the consolidation of peace through trade.

Article 1 of the Charter of Fundamental Rights of the European Union stresses the inviolability of human dignity. That the Charter should begin with a focus on human dignity is not merely of symbolic importance; it also lays down one of the document's main ideological cornerstones.¹⁷¹ It has been argued that Article 1 constitutes not only a fundamental right in itself, but the "real basis" of other fundamental rights.¹⁷² Following this line of argumentation, Article 1 necessarily informs other rights enshrined in the Charter, such as Article 11 (Freedom of expression and information), which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

In terms of interpretative clarity, it is important to note that Article 11 of the Charter has deliberately been very closely aligned with Article 10, ECHR. The alignment is usefully synthesised in the Commentary of the Charter of Fundamental Rights of the European Union, as follows:

[...] according to the non-binding explanation of the Praesidium, pursuant to Article 52(3) of the Charter,¹⁷³ the meaning and scope of this right are the same as those guaranteed by the ECHR. Therefore the limitations which may be imposed on it, shall not exceed those provided for in Article 10(2) of the Convention, without any prejudice to any restrictions which Community law may impose on Member States' rights, for instance on the right to introduce the licensing arrangements referred to in Article 10(1) of the ECHR.¹⁷⁴

Article 1 also informs Article 20 (Equality before the law), which is reinforced by Article 21 (Non-discrimination). It is also easy to detect its relevance to the Charter's in-built safety mechanism, i.e., its prohibition of abuse of rights clause (Article 54).¹⁷⁵

In 1996, a Joint Action (96/443/JHA) concerning action to combat racism and xenophobia was adopted on the basis of Article K.3 of the Treaty on the European Union.¹⁷⁶ The Joint Action sought to ensure effective legal cooperation between Member States in combating racism and xenophobia. It aimed for Member States to make certain listed types of racist and xenophobic behaviour punishable as criminal offences, or to derogate from the principle of double criminality in respect of such behaviour. Following the first assessment of the Joint

¹⁷¹ Article 1 reads: "Human dignity is inviolable. It must be respected and protected." See also the Charter's preambular reference to human dignity, which identifies it as one of the "indivisible, universal values" on which the European Union is founded (Recital 2).

¹⁷² Wolfgang Heyde, "Article 1 – Human Dignity", in *The Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, at p. 25. See also: Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, Doc. No. CHARTE 4473/00, Brussels, 11 October 2000, p. 3.

¹⁷³ Author's footnote: Article 52 of the Charter is entitled "Scope of guaranteed rights".

¹⁷⁴ Gabor Halmay, "Article 11 – Freedom of expression and information", in *The Commentary of the Charter of Fundamental Rights of the European Union*, *op. cit.*, at p. 122.

¹⁷⁵ It reads: "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

¹⁷⁶ Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ L 185 of 24 July 1996.

Action in 1998, the European Commission proceeded in 2001 to put forward a Proposal for a Council Framework Decision on combating racism and xenophobia.¹⁷⁷ Progress towards the adoption of the Proposal has been stymied by deep-seated concerns among certain Member States about the implications of the Proposal for freedom of expression.¹⁷⁸

These concerns persisted despite the Proposal's preambular assurance that "[T]his Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof".¹⁷⁹ The impasse that resulted from certain Member States' concerns prompted the European Commission to request the EU Network of Independent Experts on Fundamental Rights "to submit an opinion on existing legislation on racism and xenophobia and in particular, on the issues surrounding the borderline between freedom of expression and the repression of racism and xenophobia",¹⁸⁰ which it duly did.

In 2006, Italy (which had strongly opposed the Commission's 2001 Proposal) withdrew its reservations to the text. That development enabled debate to be recommenced within the Council on the basis of a compromise proposal put forward during the Luxembourg Presidency in 2005.¹⁸¹ Subsequently, in 2007, the Council reached a political agreement on the text and it was submitted to Parliament for renewed consultation.¹⁸² The text was considered by the European Parliament in its legislative resolution of 29 November 2007.¹⁸³

The main purposes of the Framework Decision can be gleaned from selected Recitals in its Preamble.¹⁸⁴ For instance, it is styled as a response to the need to define a common criminal law approach to racism and xenophobia within the EU, "in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences" (Recital 5). However, its focus on criminal law "is limited to combating particularly serious forms of racism and xenophobia" and should be seen as one part of a broader framework of measures to counter racism and xenophobia

¹⁷⁷ COM(2001) 664 final, Brussels, 28 November 2001. However, see also in this connection: Council of the European Union Interinstitutional File: 2001/0270 (CNS), Brussels, 27 May 2005.

¹⁷⁸ "No agreement on the framework decision on combating racism and xenophobia at the Justice and Home Affairs Council", Press release of the Luxembourg Presidency of the Council of the European Union, 2 June 2005. See also, in this connection: the EU Annual Report on Human Rights – 2005, Doc. No. 12416/05, 28 September 2005, at p. 108; "The Need for a Unified Stance in Combating Racism and Xenophobia", Speech by Vice-President of the European Commission Frattini, Vienna, 22 June 2006.

¹⁷⁹ Recital 15, COM(2001) 664 final, *op. cit.*

¹⁸⁰ Combating Racism and Xenophobia through Criminal Legislation: the Situation in the EU Member States, Opinion No. 5-2005, EU Network of Independent Experts on Fundamental Rights, 28 November 2005, p. 5.

¹⁸¹ For further details of the chronology of the Proposal, see: Explanatory Statement to Draft Report on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)), Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Martine Roure), 19 September 2007.

¹⁸² General Secretariat of the Council, Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Doc. No. 11522/07, n.d.

¹⁸³ European Parliament legislative resolution of 29 November 2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)), Doc. No. P6_TA-PROV(2007)0552.

¹⁸⁴ The dual aims of the draft Framework Decision were stated more succinctly in Article 1 of the Commission's 2001 Proposal: to lay down "provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia".

(Recital 6). Furthermore, owing to extant differences between Member States' cultural and legal traditions, "full harmonisation of criminal laws is currently not possible" (Recital 6). In other words, only a limited level of harmonisation is envisaged. It claims that the "[A]pproximation of criminal law should lead to combating racist and xenophobic offences more effectively, by promoting a full and effective judicial cooperation between Member States" (Recital 12). Finally, in this connection, Recital 13 is also important:

Since the objective of ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties cannot be sufficiently achieved by the Member States individually, as rules have to be common and compatible, and since this objective can be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 TEU and as set out in Article 5 TEC. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary to achieve those objectives.

The terms "racism and xenophobia" are of pivotal importance to the proposed Framework Decision. Nevertheless, neither term is defined in the latest draft of the text.¹⁸⁵ The Framework Decision's most important provisions are contained in its draft Article 1, which is entitled "Offences concerning racism and xenophobia". It reads as follows:

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point a) by public dissemination or distribution of tracts, pictures or other material;

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

(e) For the purpose of paragraph 1 Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

(f) For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

2. Any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement that it will make punishable denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d), only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court or by a final decision of an international court only.

¹⁸⁵ The terms were defined in draft Article 3 of the Commission's 2001 Proposal, as follows: "the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups".

Draft Article 2 enjoins Member States to take the measures necessary to ensure that aiding and abetting in the commission of, and the instigation of, conduct covered by draft Article 1, is punishable. Also of note is that draft Article 4 requires Member States to ensure that for offences other than those covered by draft Articles 1 and 2, racist and xenophobic motivation is considered an aggravating factor, or that such motivation may be taken into consideration by the courts in the determination of penalties for offences.

The current draft text contains repeated statements of deference to the right to freedom of expression, as enshrined in the ECHR and the Charter of Fundamental Rights of the European Union, and as developed in the constitutional and legal systems of Member States. Recitals 15 and 16 of the Preamble and Article 7 of the Framework Decision all profess this deference.¹⁸⁶ The clear repetition involved here can be explained as an endeavour to allay the fears of certain Member States that the Framework Decision would reduce the protection afforded to the right to freedom of expression, as discussed *supra*. A final provision meriting mention because of its direct implications for the right to freedom of expression is draft Article 9, entitled “Jurisdiction”. Express consideration is given to relevant conduct committed through information systems. More specifically, draft Article 9(2) provides:

When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:

- (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;
- (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

This provision is highly significant as it fills a gap left by older texts which did not anticipate the complex jurisdictional issues that would be raised by the subsequent advent of the Internet and Internet-based communicative techniques. As such, it reduces the possibility of offences committed through information systems remaining unpunished due to jurisdictional vacuums.

The Proposal is comprehensive in scope and if adopted, it is sure to prove the mainstay of future anti-racism action within the EU, not least because it would replace (and lead to the repeal of) Joint Action 96/443/JHA (discussed *supra*).¹⁸⁷ Although the Proposal has yet to be adopted, it has nevertheless already been relied upon by various bodies as an important point of reference.¹⁸⁸

6.1.8(ii) The “Television without Frontiers” and Audiovisual Media Services Directives

¹⁸⁶ Article 7

Constitutional rules and fundamental principles

1. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty establishing the European Union.

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from the constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

¹⁸⁷ Article 11. See also Recital 14.

¹⁸⁸ The European Court of Human Rights (Nachova case (Grand Chamber Judgment of 6 July 2005), *op. cit.*, para. 81); Network of Independent Experts on the EU Charter; ECRI... UN High Commissioner?

The “Television without Frontiers” (TWF) Directive devotes surprisingly little attention to measures to be taken to prevent the broadcasting of hateful content. The sole provision dealing *directly* with the issue is Article 22a, which reads:

Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

Another relevant provision, however, is Article 12, which applies to advertising and teleshopping. It reads:

Television advertising and teleshopping shall not:

- (a) prejudice respect for human dignity;
- (b) include any discrimination on grounds of race, sex or nationality;
- (c) be offensive to religious or political beliefs;

[...]

Under the new Audiovisual Media Services Directive (AVMSD), Article 22a, TWF, has been deleted, only to be reconfigured as Article 3b, which reads:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

The new wording alters little in terms of the substance of the provision. However, it is noteworthy that it explicitly links the issues of “incitement to hatred” and “jurisdiction”. The tightening-up of the provisions on jurisdiction¹⁸⁹ was one of the major impulses in the process leading to the proposed revision of the Directive. A number of cases involving the broadcasting by satellite of “hate speech” into Europe have also conditioned regulatory thinking on this issue. It is also interesting to note that the initial formal proposal from the European Commission to revise the TWF Directive would have expanded the scope of the reference to incitement to hatred. It targeted incitement to hatred based on “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.¹⁹⁰ That proposed revision would have directly incorporated the impermissible grounds of discrimination set out in Article 13 of the EC Treaty (see further, *supra*), but it would also have juxtaposed notions of “hatred” and “discrimination”. The conceptual and practical implications of treating both notions in the same way have already been outlined in the context of ICERD, *supra*, and are also relevant here. The European Parliament proposed a number of amendments to the

¹⁸⁹ See further: Berend Jan Drijber, “Jurisdictie in de Richtlijn audiovisuele mediadiensten”, 20 *Mediaforum* (Themanummer Richtlijn Audiovisuele Mediadiensten, Nr. 2, februari 2008), pp. 62-27; Egbert Dommering, [Chapter on Jurisdiction] in Oliver Castendyk, Egbert Dommering & Alexander Scheuer, Eds., *European Media Law* (Alphen a/d Rijn, Kluwer Law International, forthcoming 2008); Tarlach McGonagle & Ad van Loon, *IRIS Special: Jurisdiction over Broadcasters in Europe - Report on a Round-table Discussion*, (Strasbourg, European Audiovisual Observatory, 2002); Thomas Gibbons, “Jurisdiction over (Television) Broadcasters: Criteria for Defining ‘Broadcaster’ and ‘Content Service Provider’”, in A. Rossnagel, Ed., *Die Zukunft der Fernsehrichtlinie/The Future of the ‘Television without Frontiers’ Directive* (Baden-Baden, Germany, Nomos, 2005), pp. 53-60; André Lange & Susanne Nikoltchev, “Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects”, Background Paper, Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union, Dublin and Drogheda, 1-3 March 2004.

¹⁹⁰ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (13 December 2005).

Commission's initial text, including the introduction of references to human dignity and integrity.¹⁹¹ Those proposed amendments were ultimately not adopted in the final text.

For its part, Article 12, TWF, has been transmuted into Article 3e(c), AVMSD. It reads:

audiovisual commercial communications shall not:
(i) prejudice respect for human dignity;
(ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
[...]

Its first prong (human dignity) remains unchanged; its second prong is extended to read “include or promote” and the range of bases for impermissible discrimination is expanded along the lines¹⁹² proposed by the European Parliament for audiovisual media services and audiovisual commercial communications alike. As was shown in the preceding paragraph, the proposed expansion of the range of bases for impermissible discrimination was not adopted in respect of audiovisual media services. Finally, the reference to offensiveness to religious or political beliefs, contained in the third prong to Article 12, TWF, has been dropped. This is a significant omission, especially when considered in the context of the legal permissibility of offensive expression, as discussed at length, *infra*.

The question of banning/blocking (particular kinds of) broadcasts from other countries is neither new nor unique.¹⁹³ It raises a number of questions which are ideologically and legally troublesome.¹⁹⁴ Interestingly, one viewpoint aired during the drafting of Article 19 of the Universal Declaration of Human Rights, was that the phrase, “regardless of frontiers” implied ideological barriers and geo-political ones.¹⁹⁵ In Europe, the search for appropriate answers to relevant questions has become pressing,¹⁹⁶ but the general preoccupation is less with ideological concerns (as the broadcasts in question are measured against the yardstick of the

¹⁹¹ Amendment 44: Article 3e (Directive 89/552/EEC), Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, European Parliament Committee on Culture and Education, Rapporteur: Ruth Hieronymi, 22 November 2006, Doc. No. A6-0399/2006 (final); Amendment 107: Article 3e (Directive 89/552/EEC), European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646-C6-0443/2005-2005/0260(COD)) (Codecision procedure – first reading), 13 December 2006 (Doc. No. P6_TA-PROV(2006)0559).

¹⁹² Note that the European Parliament did not include “nationality” in its list of bases for impermissible discrimination, but that it was included in Article 3e(c) (ii), AVMSD.

¹⁹³ See *supra* in the context of the discussion of the Genocide Convention. For a European perspective, see also: Arie Bloed and Pascale C.A.E. de Wouters d'Oplinter, “Jamming of Foreign Radio Broadcasts”, in Arie Bloed and Pieter van Dijk, Eds., *Essays on Human Rights in the Helsinki Process* (Dordrecht, Martinus Nijhoff Publishers, 1985), pp. 163-180.

¹⁹⁴ See further, David Goldberg, “The most vexed question? Europe bans satellite television channels ‘inciting hatred’”, in Peter Molnar, Ed., *Hate Speech and its Remedies, op. cit.*, forthcoming 2008.

¹⁹⁵ The view was put forward by the Filipino delegate, Mr Aquino. For commentary, see: Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l'homme* (Louvain, E. Warny, 1964), p. 190; Lauri Hannikainen and Kristian Myntti, “Article 19”, in Asbjorn Eide *et al.*, Eds., *The Universal Declaration of Human Rights: A Commentary, op. cit.*, pp. 275-286, at pp. 277-278.

¹⁹⁶ The issue has been described as “absolutely and urgently” requiring closer cooperation between relevant regulatory authorities throughout the EU, in candidate countries and in the European Economic Area. Conclusions of the High-level Group of Regulatory Authorities in the Field of Broadcasting - Incitement to hatred in broadcasts coming from outside of the European Union : European Broadcasting Regulators coordinate procedures to combat hate broadcasts in Europe, 17 March 2005.

main international legal norms) than with the legalistic/jurisdictional and technological complexities involved.¹⁹⁷ This is reflected in the focuses of the ongoing attempts of European regulatory authorities to consolidate existing cooperation between them, specifically with a view to combating incitement to hatred disseminated by (satellite) broadcasting.¹⁹⁸ The catalyst for these consolidation initiatives was a growing concern about the difficulties in regulating content that incites to racial and religious hatred which is broadcast from non-EU countries, as exemplified by the cases in which the French authorities banned the channels, *Al Manar*¹⁹⁹ and *Sahar 1*.²⁰⁰ The channels were prohibited on account of the (violent) anti-Semitic content of their programming. Although both channels were subsequently also banned in other countries, eg. The Netherlands, their programming has continued to be available online.²⁰¹

The above-cited prohibition on incitement to hatred contained in Article 22a, TWF, applies to all broadcasters established in EU Member States (Article 2(2) and (3)). In accordance with the criteria set out in Article 2(2) and (4), TWF, it also applies to third-country broadcasters if they use: a frequency granted by a Member State; a satellite transmission capacity appertaining to a Member State, or a satellite up-link located in a Member State.

It should also be noted in passing that an earlier precedent for such concerns was the *Med TV* saga.²⁰² In 1999, the former British Independent Television Commission (ITC) suspended and subsequently revoked the satellite television licence of *Med TV* (a service targeting a Kurdish audience) for repeated breaches of the terms of its licence agreement and the ITC Programme Code. More specifically, the ITC found that *Med TV* had broadcast material “likely to encourage or incite to crime or lead to disorder”.²⁰³ In another case involving a Kurdish television station, *ROJ TV*, the Turkish Embassy in Denmark (where *ROJ TV* was based) submitted a complaint to the Danish Radio and Television Board alleging that the station had links with illegal organisations and that some of its programming amounted to incitement to hatred. The Danish Radio and Television Board considered the complaint and concluded that the impugned elements of *ROJ TV*'s programming did not amount to incitement to hatred, as

¹⁹⁷ In the post-World War II period, however, the political debate about banning/blocking broadcasts was overtly ideological. In the debate, States positioned themselves on predictable sides of the usual Cold-War battle-lines. Whereas Western States promoted the principle of a free flow of information with minimal restrictions, the Soviet Bloc advocated principles of State sovereignty and non-intervention. This led to what has been termed an “Electronic War between East and West”: Arie Bloed and Pascale C.A.E. de Wouters d’Oplinter, “Jamming of Foreign Radio Broadcasts”, *op. cit.*, at p. 165. The debate was firmly polarised and particularly bitter, as can be gauged from relevant discussions which took place in the CSCE context: see further the account provided in *ibid.*

¹⁹⁸ Tarlach McGonagle, “European Commission: Broadcasting Regulators Fight Incitement to Hatred”, *IRIS* 2005-5: 5; Mara Rossini, “European Commission: Broadcasting Regulators Encouraged to Reinforce Cross-border Cooperation under the Television without Frontiers Directive”, *IRIS* 2006-5: 7.

¹⁹⁹ See further: Amélie Blocman, “FR – CSA Calls on Courts for Immediate Stop to Broadcasting by Unapproved Foreign Satellite Channel”, *IRIS* 2004-9: 11; Amélie Blocman, “FR – *Al Manar* TV Soap Opera Continues”, *IRIS* 2005-1: 12 and Amélie Blocman, “FR – Eutelsat Must Stop Broadcasting *Al Manar* TV”, *IRIS* 2005-2: 12; Philippe Achilléas, “La diffusion par satellite de programmes illégaux – L’affaire *Al Manar*”, *Communication – Commerce électronique* (Février 2005), pp. 39-42; “La régulation des chaînes extra-communautaires et la lutte contre le racisme et l’antisémitisme”, *La Lettre du CSA* (No. 185, June 2005), p. 15.

²⁰⁰ See further: Amélie Blocman, “FR – CSA Serves another Formal Notice on Eutelsat”, *IRIS* 2005-3: 11; Amélie Blocman, “FR – *Conseil d’Etat* Upholds the Formal Notice Served on Eutelsat”, *IRIS* 2005-4: 9.

²⁰¹ See further: Rosa Hamming, “NL – Satellite Broadcasts Disseminating Hatred Blocked”, *IRIS* 2006-3: 17.

²⁰² See further: Stefaan Verhulst, “United Kingdom: MED-TV Receives Suspension Order”, *IRIS* 1999-4: 13; Tony Prosser, “United Kingdom: Regulator Revokes Licence of Satellite Broadcaster”, *IRIS* 1999-7: 12.

²⁰³ ITC News Release of 22 March 1999.

set out in relevant legislative provisions, and therefore was not in breach of the same provisions.²⁰⁴

The need for maximum coordination and cooperation between regulatory authorities is particularly evident concerning jurisdictional questions.²⁰⁵ The case of *Extasi TV* usefully illustrates the point.²⁰⁶ The UK authorities banned the television service *Extasi TV* because it had been broadcasting violent pornography and had thereby “manifestly, seriously and gravely” infringed Article 22 of the TWF Directive.²⁰⁷ The European Commission identified “uncertainty as to which Member State had jurisdiction over [Extasi TV]” as a complicating factor in the case.²⁰⁸ It could therefore be suggested that enhanced coordination between relevant regulatory authorities might have served to dispel some of the uncertainty in question. One of the tangible consequences of the case was the inclusion of an identification requirement for audiovisual media service providers in Article 3a of the AVMS Directive.²⁰⁹

The need for coordination and cooperation between regulatory authorities is by no means limited to States within the “European audiovisual area”; recognition of the importance of intercultural dialogue has been a catalyst for the establishment of contact groups and meetings between European and non-European regulatory authorities.²¹⁰

6.1.9 OSCE standards

The Organization for Security and Co-operation in Europe (OSCE) also boasts a range of politically-binding commitments dealing with human rights generally and the promotion of tolerance and non-discrimination in particular. The bulk of these commitments have emerged

²⁰⁴ For a full summary of the decision, see: Elisabeth Thuesen, “DK – Complaint of the Turkish Embassy against the Kurdish ROJ TV”, *IRIS* 2005-7: 10.

²⁰⁵ See generally, Joan Botella I Corral and Emmanuelle Machet, “Co-ordination and Co-operation between Regulatory Authorities in the Field of Broadcasting” in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules*, *op. cit.*, pp. 13-20.

²⁰⁶ See: David Goldberg, “GB – Government and Media Regulator Act Against Unacceptable Satellite TV Services and Programming”, *IRIS* 2005-3:12.

²⁰⁷ Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM(2006) 49 final, 10 February 2006, p. 5. See further: The Foreign Satellite Service Proscription Order 2005, S.I. No. 220, 7 February 2005 (entry-into-force: 21 February 2005)

http://www.culture.gov.uk/NR/rdonlyres/809B372B-4A20-449C-A10A-3036CCD9F12C/0/Foreign_Satellite_Service_Proscription_Order.pdf

Regulatory Impact Assessment: The Foreign Satellite Service Proscription Order 2005, available at:

<http://www.culture.gov.uk/NR/rdonlyres/F86F1C6F-0D35-4B24-A532-C1C8501FFDC7/0/extasiriafinal.pdf>;

Explanatory Memorandum to the Foreign Satellite Service Proscription Order 2005, 2005 No. 220, available at: http://www.opsi.gov.uk/si/em2005/uksiem_20050220_en.pdf.

²⁰⁸ COM(2006) 49 final, *op. cit.*, p. 5.

²⁰⁹ Article 3a now reads:

“Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

- (a) the name of the media service provider;
- (b) the geographical address at which the media service provider is established;
- (c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;
- (d) where applicable, the competent regulatory or supervisory bodies.”

²¹⁰ See further, Karol Jakubowicz, “Implementation and Monitoring: Upholding Human Rights and Cultural Values” in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules*, *op. cit.*, pp. 35-44.

from the so-called “human dimension” of the OSCE’s work.²¹¹ They have been developed at successive Summits of Heads of State or Government, beginning with the Helsinki Final Act (1975), through the Charter of Paris for a New Europe (1990), “The Challenges of Change” – Helsinki (1992), “Towards a Genuine Partnership in a New Era” – Budapest (1994), the Lisbon Document (1996) and the various documents of the Istanbul Summit (1999). Relevant declarations and documents have also resulted from other meetings.

Specialised institutions within the OSCE apparatus deserve particular mention, including: the Office for Democratic Institutions and Human Rights (ODIHR), the Office of the Representative on Freedom of the Media (RFOM), the Office of the High Commissioner on National Minorities (HCNM). Each of these offices has been responsible for important normative work concerning the interface between freedom of expression and anti-racism. In 2003, ODIHR was asked by the OSCE Ministerial Council to act as a collection point for information related to tolerance and non-discrimination on the basis of information received from Participating States, civil society and intergovernmental organisations.

Particular themes addressed in the context of the OSCE’s work on tolerance and non-discrimination include: anti-Semitism, freedom of religion or belief, gender-based discrimination, hate crime, hate on the Internet, homophobia, intolerance against Muslims, racism and xenophobia, Roma, Sinti and Travellers.²¹² Ample references to the importance of protecting and promoting the right to freedom of expression, as such, are also to be found throughout OSCE documents pertaining to human rights and democracy.

6.2 “Hate speech”²¹³

The term, “hate speech”, which enjoys widespread and largely uncontested currency nowadays, does not lend itself easily to legal definition. Intuitively, there can be no objection to Bhikhu Parekh’s condemnation of “hate speech” as “objectionable for both intrinsic and instrumental reasons, for what it is and what it does”.²¹⁴ However, we should be wary of the disarming and deceptive familiarity of the term, and of reflexive calls for the banning of “hate speech” because “hate speech” is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.²¹⁵ In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term.

The shift from moral condemnation to legal regulation (or prohibition) inevitably calls for greater definitional refinement than has hitherto been provided by any international, legally-binding treaty or related adjudicative authority. As one commentator has put it:

The multiple forms of anti-egalitarian expression that exist are neither equally harmful nor performative; we must not, therefore, lose sight of the link between the norm that the state is

²¹¹ There are three main “dimensions” to the OSCE’s work: the politico-military dimension, the economic and environmental dimension and the human dimension.

²¹² See further, the OSCE/ODIHR Tolerance and Non-discrimination Information System: < <http://tnd.odihhr.pl/>>.

²¹³ The author is grateful to Dirk Voorhoof, Toby Mendel, Ilze Brands Kehris and Mario Oettheimer for helpful exchanges on this topic.

²¹⁴ Bhikhu Parekh, “Hate speech: Is there a case for banning?”, 12 *Public Policy Research* (No. 4, December 2005-February 2006), pp. 213-223, at p. 217.

²¹⁵ J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, OUP, 1998), p. 11.

drafting and the broader public policies involved when identifying [sic] the specific forms of anti-egalitarian expressions to discourage.²¹⁶

The *precise* term “hate speech” is not enshrined in any of the leading international legally-binding instruments. It is used by the European Court of Human Rights, but it is not organic to the European Convention on Human Rights. It is an imported product – and a fairly recent import at that. The *precise* term was never used by the Court (or the now-defunct European Commission of Human Rights) before 1999.²¹⁷ Prior to that, the vocabulary was different, even if the targeted mischiefs were pretty much the same.²¹⁸ The Court has not yet defined the term and in some judgments, it sometimes even uses it in inverted commas (scare quotes).²¹⁹ One cannot help but wonder whether this indicates a certain unease with the concept?

It should be noted that the Court does not use the term, “hate speech”, systematically. It is perhaps still too early to say what added value or clarity the introduction of the term has brought to the Court’s jurisprudence relating to Articles 10 and 17, ECHR – at least in the absence of its own definition of the term. The Court sometimes refers to the Council of Europe’s Committee of Ministers’ Recommendation (97) 20 on “Hate Speech”, which *describes* the term (albeit for the purposes of the application of the principles set out in the Appendix to the Recommendation) as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.²²⁰ This description is helpful, but only in a limited way, because the Recommendation is not legally-binding on States. Similarly, the gradual development and consolidation of relevant jurisprudence also help to further our understanding of the term, or at least of the Court’s interpretation of the term. The Court’s judgment in *Gündüz v. Turkey*, discussed *supra*, illustrates the point.

“Hate speech” has already been described as an imported term. It was initially propelled to international prominence primarily by critical race scholarship originating in the United States (see further, *infra*). Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim’s perspective are given pride of place (see further, s. 6.2.2, *infra*).²²¹ It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism].

²¹⁶ Jean-François Gaudreault-DesBiens, “From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide”, (2000) 46 McGill L.J. 121, at p. 133. See also in this connection, Bhikhu Parekh, “Hate speech: Is there a case for banning?”, *op. cit.*, at p. 222.

²¹⁷ It would appear that the term was first used in the cases, *Sürek v. Turkey (No. 1)* and *Sürek & Özdemir v. Turkey*, Judgments of the European Court of Human Rights of 8 July 1999. See: para. 62 and para. 63, respectively.

²¹⁸ For details of relevant case-law, see: Anne Weber, “The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance”, in ECRI publication (title?), (Strasbourg, Council of Europe Publishing, forthcoming, 2007); Mario Oetheimer, “La Cour européenne des Droits de l’Homme face au discours de haine”, 69 Rev. trim. dr. h. (No. 1, 2007), pp. 63-80.

²¹⁹ See, for example, *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51 (quoted, *infra*).

²²⁰ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “hate speech” (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister’s Deputies), Appendix.

²²¹ See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2nd Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004).

There are some important lessons to be learned from critical race theory. Prompted partly by its central theses, and partly by an integrated conceptualisation of human rights, I would argue for a purposive definitional approach to hate speech and not a restrictive one. The guiding question should be “what harms ought to be prevented?” To paraphrase Kevin Boyle and Anneliese Baldaccini, the focus should be on the “core mischiefs at which the struggle against racism is aimed”.²²² Those “core mischiefs” are the various ways in which hate speech interferes with other rights or “operative public” values: dignity, non-discrimination and equality, (effective) participation in public life (including public discourse²²³), expression, association, religion, etc. The prevention of particular harms suffered by victims should also be considered: psychic harm, damage to self-esteem, inhibited self-fulfilment, etc.²²⁴ All in all, the range of harms to be prevented is varied and complex. The challenge is therefore to identify “which criteria allow us to distinguish between harms that justify restrictions and those that do not”.²²⁵

Partly in recognition of the complexity of relevant harms, different treaties and bodies have different approaches (conceptual and practical) to the question of legitimate restrictions on freedom of expression.²²⁶ The right to freedom of expression, as vouchsafed by international law, comprises the right to hold opinions and to seek, receive and impart information. As such, it covers extremely dynamic processes which typically involve not only speakers and listeners, but also, very often, third parties who are not directly targeted by particular instances of expression, but for whom that expression may nonetheless have implications. The importance of the consequences of expression should therefore be stressed, as well as the need to develop suitable methodological tools for the evaluation of such consequences. This prompts questions about negative reporting on and stereotyping of certain groups in society: what are their cumulative effects on the rest of society? Does their wider dissemination via mainstream media make them more influential of public opinion, more corrosive of societal values or more subliminally effective than full-blown extremism circulated in fringe fora?

Such questions cannot be answered *in abstracto*.²²⁷ As Robert Post has noted, “Audiences always evaluate communication on the basis of their understanding of its social context”.²²⁸ When applying their normative principles to specific factual circumstances, adjudicative bodies should give sufficient weighting to factors such as the intent of the speaker and “contextual variables”.²²⁹ The latter could include the nature and impact of the medium used to convey the expression; audience-related considerations; socio-political factors; the nature and severity of the sanction imposed (when the adjudicative body is acting in a review capacity), etc.

²²² Kevin Boyle & Anneliese Baldaccini, “A Critical Evaluation of International Human Rights Approaches to Racism”, in Sandra Fredman, Ed., *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, New York, 2001), pp. 135-191, at p. 152.

²²³ For a thorough analysis of this topic, see: Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, 32 Wm. & Mary L. Rev. 267 (1991).

²²⁴ See generally, Mari Matsuda *et al.*, *Words that Wound*, *op. cit.*

²²⁵ David Kretzmer, “Freedom of Speech and Racism”, 8 Cardozo L. Rev. 445 (1987), at p. 478.

²²⁶ See further, *supra*.

²²⁷ See further: David Kretzmer, “Freedom of Speech and Racism”, *op. cit.*, at p. 462.

²²⁸ Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, *op. cit.*, at p. 307.

²²⁹ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 Cardozo L. Rev. 1523 (2003), at 1565.

Because so many rights and values are potentially affected by hate speech and because there are divergent legally-based interpretations of the legitimacy of limitations on freedom of expression, it is not enough to concentrate exclusively on *negative* State obligations for countering hate speech. It is not simply a case of drawing a line that would mark the *ne plus ultra* of permissible expression. Rather, a more comprehensive and nuanced approach is required. Such an approach would necessarily include the facilitation of expression and the promotion of pluralism and tolerance. The media are vital – in different ways - to the effectiveness of such an approach.

The role of the media as the Fourth Estate or democratic watchdog is well-documented (see s. 4.4.1, *supra*), but their importance for democracy is by no means limited to their checking function *vis-à-vis* the organs of State. Of increasing importance is their contribution to public debate by providing fora for expression and communication. In an ever-changing technological context, the level of moderation of expressive fora is also highly relevant. By way of illustration, the moderation of online fora points to control of content, whereas the absence, or reduced levels, of moderation suggest a more open debate. The responsibility of media for content, especially in interactive communicative fora online, is becoming increasingly tied to these and related considerations. Responsibility also extends to the conditions of access to the media because of the gate-keeping function they perform.

In its current state of development, international law does not recognise a freedom of forum or an individual or group right of access to particular media (absent any mitigating circumstances such as monopoly ownership in the broadcast sector). However, the ability to exercise the right to freedom of expression in an effective manner is contingent on the availability and accessibility of viable expressive/communicative opportunities and fora. Expressive opportunities cannot be considered viable if discriminatory practices prevail in relation to access to the media or other expressive fora. Thus, the right to non-discrimination/equality and the right to effective participation in public life are implicated here, along with the right to freedom of expression. This means that a powerful triumvirate of rights are brought to bear on the issue of access to the media, thereby demonstrating the synergic interplay between different rights, as stressed in the introduction to this paper.

Under international human rights law, it is possible to detect a significant emphasis on State obligations to facilitate expression, both for its own sake and also specifically because of its instrumental importance for promoting pluralism and tolerance. The Durban Declaration and Programme of Action²³⁰ and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating “hate speech” and anti-egalitarian speech by targeting the hatred and intolerance from which they spawn.²³¹ Central to their strategies is the promotion of counter-speech, or more accurately, increased/enhanced expressive opportunities, especially via the media. The promotion of tolerance and of intercultural understanding and dialogue is similarly prioritised. Measures advocated include specialised training for journalists on intercultural themes, ensuring access to media for minorities or other groups, funding of various initiatives promoting ethical journalism and programme production, etc.²³² Crucially, a sense of deference to principles of

²³⁰ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001: Declaration and Programme of Action.

²³¹ See further, Tarlach McGonagle, “The international and European legal standards for combating racist expression”, *op cit*.

²³² See further, Tarlach McGonagle, “The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities”, in Peter Molnar, ed., *Hate Speech and its Remedies*, *op cit*.

media autonomy/editorial freedom is consistently advocated in respect of these measures. Encouragement, not prescription, is the strategy to be employed.²³³

Lee C. Bollinger brings tolerance and hate speech together in his tolerance principle of free speech, the starting-point of which is “an understood commitment to extraordinary self-restraint; coupled [...] with a willingness to be sensitive to context.”²³⁴ He states that the “strong presumption in favor of toleration [...] can be overcome only after it is determined that the society has little or nothing to gain” from exercising tolerance, “and, by comparison, a great deal to lose.”²³⁵ This is an allusion to the theory that hate speech – despite its moral repugnancy – *can* have some, limited, instrumental value to society.²³⁶ Wojciech Sadurski, for instance, remarks that “hate speech” can, occasionally, sensitise the public to prevailing currents of racism in society, thus prompting a redoubling of efforts to eradicate it through educational and other initiatives.²³⁷ He also notes that legal tolerance of such speech could allow us to challenge our closest-held convictions. Exposure to extremist view-points, the Mill-inspired argument runs, challenges us and forces us to re-examine our understandings, ideas and values by jolting us out of our unthinking complacency.²³⁸ These liberal-minded, admittedly abstract theories, must not be lightly discounted. However, in the cut and thrust of policy formulation, they are often drowned out by clamouring for the prioritisation of consequentialist arguments.

Such arguments often explore, as Richard Delgado²³⁹ has done, the far-reaching effects of hate speech targeting (racial) minorities: including the internalisation of insults by victims (leading to a colouration of societal values and attitudes); negative psychological responses to stigmatisation (leading to humiliation, isolation and emotional distress); the reinforcement of social stratification, etc. And it *is* minorities who are the real victims of hate speech as it is generally thought that the privileges flowing from the entrenched, socially-advantageous position of the majority protect its members from hate speech. By analogy, Lilliputian arrows are unable to hurt a social Gulliver.

Any abstract analysis of Bollinger’s tolerance of free speech principle fails to address many practical issues which would have to be scrupulously examined for the drafting of a legal framework to deal with hate speech. These would include: individual sensitivities to hate speech (in the event of the creation of a new tort for hate speech, should an egg-shell-skull rule or some other threshold apply?); group libel; whether a speech-action distinction should be recognised, or whether all expression (including symbolic speech) should be considered together, by virtue of its communicative impact.

6.2.1 The effectiveness of “hate speech” laws

Scepticism abounds concerning the effectiveness of so-called ‘hate speech’ laws, so much so that it has even been suggested that blanket prohibitions on racially-motivated hate speech, far

²³³ See the Council of Europe’s Committee of Ministers’ Recommendation (97) 21 on the media and the promotion of a culture of tolerance.

²³⁴ *Op.cit.*, p. 197.

²³⁵ *Ibid.*

²³⁶ R. Dworkin, *op. cit.*, p. 200.

²³⁷ W. Sadurski, *op. cit.*, p. 78.

²³⁸ F.S. Haiman, *Speech and Law in a Free Society* (USA, University of Chicago Press, 1981), p. 99.

²³⁹ R. Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling”, 17 *Harvard Civil Rights-Civil Liberties Law Review* (1982), pp. 133-181.

from being a “noble innovation”, might amount to no more than a “quixotic tilt at windmills which belittles great principles of liberty.”²⁴⁰ This is due in no small measure to the infinite variety of forms, the “endlessly variegated shades of meaning,”²⁴¹ of racist speech. The circumvention of laws prohibiting or restricting speech has never been a problem for those intent on doing so.²⁴² “All regulation encourages evasion, but the very ambiguity of speech that makes law such a crude response further facilitates evasion,” Richard Abel avers.²⁴³

He continues: “[R]acists translate hate into pseudo-science, substituting regression analyses for vulgarities.”²⁴⁴ It is relatively easy for a skilled polemicist to appropriate an entirely new lexicon in order to avoid legal prosecution for the dissemination of ideas deemed noxious to society. Codified terms become common currency. Gloves of velvet are worn on iron claws of hatred. The platitudes of political correctness are a mere smokescreen for more sinister intent. The nature of discourse is altered and it will be as esoteric or as exoteric as the level of complicity between speaker and listener will dictate. Talk of “cultural coherence”, “traditional values”, “the erosion of a core identity” and “preservation of national unity” are all loaded terms: they are the sheathed daggers of racist and xenophobic mentalities.²⁴⁵

The inventiveness of this verbal chameleonism cannot be matched by any legislation, as legislation, by definition, must be clear and precise. This fundamental imbalance in the conflict between law and racism goes a long way towards explaining the ineffectiveness of hate speech laws designed to promote equality and to eradicate discrimination in all of its many ugly guises. “If suppression is directed only at the crudest or most “odious” messages, it will be dealing with the most superficial aspects of the problem of group prejudice and hatred, for the most odious are likely to be the least effective in accomplishing their purposes,” according to Franklyn S. Haiman.²⁴⁶ “[G]roup prejudice and hatred when packaged in subtle or sophisticated communication wrappings,”²⁴⁷ are not usually, therefore, susceptible to legal sanction.

Doubt may be cast over the effectiveness of hate speech laws for two reasons other than the recent trend towards deceptively sanitised racist speech. Firstly, it is very difficult to gauge the deterrent value of lending increased severity to legal sanctions when they involve an element of racial animus. Secondly, and more crucially, as Sandra Coliver argues on the basis of very comprehensive evidence, administrative and other informal measures targeting prevention and redress are often better-suited than legal remedies for the promotion of tolerance and non-discrimination. This thesis is bolstered by the observation that “[T]he

²⁴⁰ A. Bickel, *op. cit.*, p.71, quoting Jackson J. in *Kunz v. New York* 340 U.S. 290 (1951).

²⁴¹ R. Post, *op. cit.*, p.293; T. I. Emerson, *op. cit.*, p. 398: “Conflicts between groups will never be settled in litigation over the question whether one group has been defamed. The tactics of arousing racial, religious or class hatred are too subtle to be bound by such controls. The effort to use the judicial process for this purpose merely diverts attention and energies from far more important measures essential to resolve the underlying grievances.”

²⁴² In her examination of censorship from a historical perspective, Sue Curry Jansen shows this to have been the case throughout the ages: “The language of Aesop became the *lingua franca* of the new republic [Republic of Athens]... They used the slippery edges of language to comply with the letter of the law of Inquisition, while boldly defying its spirit.”, *op. cit.*, p. 69.

²⁴³ R. Abel, *Speech and Respect* (London, Stevens & Sons/Sweet & Maxwell, 1994), p. 98.

²⁴⁴ *Ibid.*, p. 100.

²⁴⁵ These terms take “the place of outright appeals to racial prejudice; but although the language is softer and spoken more often than not by persons [...] innocent of consciously malign motives, it still serves racist ends in relation to which it stands as a code.” – S. Fish, *op. cit.*, p. 13.

²⁴⁶ F. S. Haiman, *op. cit.*, p. 94.

²⁴⁷ *Ibid.*, p. 88.

flagrant abuse of laws which restrict hate speech by the authorities at precisely those times when an even-handed approach to conflict is crucial provides the most troubling indictment of such laws.”²⁴⁸ Thus, she posits, “equality and dignity rights, as well as free speech rights, are best advanced by the narrowest of restrictions on hate speech” and “[t]he possible benefits to be gained by such laws simply do not seem to be justified by their high potential for abuse”.²⁴⁹

Stereotyping, particularly in the media, has invidious and attritive effects on the groups selected as its victims. The denigratory quotient of stereotyping is high: “press attacks on black people defy the very existence of a culture. At a minimum they redefine that culture in terms of deprivation, atrophy, and destruction.”²⁵⁰ Notwithstanding the tendency of stereotyping to perpetuate existing societal inequalities and reinforce prejudices, warnings against the dangers of censoring such practices are not misplaced.²⁵¹ Any legislative provisions seeking to address a concept as definitionally elusive as stereotyping would, by necessity, be grounded in vagueness. Dangers inhere in any policy that would seek to punish generally derogatory media portrayals of groups (in contradistinction to incitatory speech) or take action against overt and subliminal racism in the media. Heed should therefore be paid to the cautionary note sounded by T. I. Emerson: “repression has no stopping place. Once begun, it can quickly move all the way to a totalitarian system.”²⁵²

The mainstream media – as well as the partisan, hateful organs of propaganda - are quite capable of peddling negative images of particular groups, or racist ideas. There can be no doubt whatever as to the incredible power wielded by the mass media.²⁵³ For some commentators, this power is so great, and the role of the media of such importance to the democratic paradigm, that there exists a compelling case for a radical reappraisal for Montesquieu’s tripartite division of State powers²⁵⁴ which would see the institutionalisation of the media as a fourth organ of government. This model of the media is sometimes referred to as ‘The Fourth Estate’.²⁵⁵ A corollary of the power of the media is that the judiciary in many national and international jurisdictions shows itself to be deferential to the notion of media

²⁴⁸ S. Coliver, “Hate Speech Laws: Do They Work?”, in S. Coliver (Ed.), *op. cit.*, pp. 363-373, at 373.

²⁴⁹ *Ibid.*, p. 363.

²⁵⁰ C. Ginsburg, “Destruction of Local Cultures Through Mass Communications”, K. Mahoney & P. Mahoney (Eds.), *Human Rights in the Twenty-first Century: A Global Challenge* (Part 2) (Netherlands, Kluwer Academic Publishers, 1993), pp. 777-781, at 780.

²⁵¹ See further, O. O’Neill, *op. cit.*, p.164.

²⁵² T. Emerson, *op. cit.*, p. 724. See also Salman Rushdie’s comment: “You think you can give away one per cent of your freedom and you’ve still got 99 per cent, but actually, once you give away the first one per cent it’s very remarkable how fast the other 99 per cent goes”, S. Rushdie, *op. cit.*, p. 29.

²⁵³ Noam Chomsky and Edward Herman’s propaganda model considers the societal purpose of the media being “to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state. The media serve this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises.” – E.S. Herman & N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994), p. 298. Stephen Sedley highlights the information- and communication-based power of the media: “[T]he mass media too have possession of large funds of information, and their power to manipulate or withhold it is no less than that of government. [...] There are today repositories of corporate power as capable as any State of invading the rights of individuals” – S. Sedley, “The First Amendment: A Case for Import Controls?”, in I. Loveland (Ed.), *op. cit.*, pp. 23-28, at 26.

²⁵⁴ More commonly known as the doctrine of separation of powers, this model for the division of State powers was first enunciated by Charles de Secondat, Baron de Montesquieu, in *De L’esprit des lois* (*The Spirit of the Laws*), 1748. According to this doctrine, liberty is best safeguarded by the division of the legislative, executive and judicial functions of government between separate independent organs.

²⁵⁵ One of its main proponents is Lucas A. Powe Jr. See, for example, his book, *The Fourth Estate and the Constitution: Freedom of the Press in America* (USA, University of California Press Ltd., 1992).

autonomy and self-regulation. The extensive jurisprudence of the European Court of Human Rights is the prime example of this deference.²⁵⁶

Spasmodic, and alas, systemic outpourings of racism have precipitated unprecedented media awareness of, and sensitivity to, the issue of race. This sensitivity, in its turn, has prompted the incorporation into journalistic codes of practice, ethics and house-style guides of principles and objectives aimed at ensuring a responsible treatment of subjects with potential for sparking social conflagrations.²⁵⁷ The deleterious effects of negative stereotyping, prejudiced reporting and outright hatred have informed the drafting of these provisions. Heightened consciousness is equally being reflected in international norms that have been devised over the past few years, with the Johannesburg Principles being an obvious example.²⁵⁸

It is incontestable that the power of the media can be used towards egregious ends. Rabid, racist rants targeting asylum-seekers and members of minority groups feature all-too-regularly in public life and in the media with varying degrees of prominence. Equally incontestable is the fact that the media *can* play a role in the dissemination of hate speech, with *Radio Mille Collines* in Rwanda being an example of just how devastatingly influential propaganda can be in fomenting incitement to hatred and genocide.²⁵⁹ Indeed, three key media figures (two from *Radio Mille Collines* and one from the *Kangura* newspaper) were convicted for “genocide, incitement to genocide, conspiracy, and crimes against humanity, extermination and persecution” by the International Criminal Tribunal for Rwanda in December 2003.²⁶⁰ It is no surprise that Article 20, ICCPR, and Article 3 of the Genocide Convention (see *supra*) explicitly prohibit such incitement.

Policy preoccupations that are so manifest on the international scene are also replicated at the national level. Without seeking to diminish in any way the social imperative of eliminating racism, it must be stated that legislative intervention ought to be mindful of the potentially adverse effects any new and aggressive wording could have on the right to freedom of

²⁵⁶ See, for example, *Jersild v Denmark*, *op. cit.*; *Thorgeirson v Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A, No. 204; *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria*, Judgment of the European Court of Human Rights of 26 February 2002.

²⁵⁷ Typifying the approach of national journalistic codes of ethics, Article 10 of the NUJ’s Code of Conduct reads as follows: “A journalist shall only mention a person’s race, colour, creed, illegitimacy, marital status (or lack of it), gender or sexual orientation if this information is strictly relevant. A journalist shall neither originate nor process material which encourages discrimination, ridicule, prejudice or hatred on any of the above-mentioned grounds.” A specific section of the International Federation of Journalists, International Media Working Group Against Racism and Xenophobia (IMRAX), is responsible for conducting most of its anti-racism work.

²⁵⁸ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information – Principle 4. Prohibition of discrimination: “In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.”

²⁵⁹ Aryeh Neier, “Clear and present danger”, 27 *Index on Censorship* 57 (1/1998), at 59. See generally, *Broadcasting Genocide: Censorship, propaganda and state-sponsored violence in Rwanda, 1990-1994* (ARTICLE 19, England, 1996), *Deadly Marionettes: State-sponsored violence in Africa* (ARTICLE 19, England, 1997) and also M. Lenkova (Ed.), *‘Hate Speech’ in the Balkans* (Athens, International Helsinki Federation for Human Rights, 1998).

²⁶⁰ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment of Trial Chamber 1 of the International Criminal Tribunal for Rwanda of 3 December 2003, available at: <http://www.ictr.org/>.

expression. The danger that the vigour of public debate could be asphyxiated by pandering excessively to societal sensitivities or exaggerated concerns for political correctness must be guarded against.²⁶¹ The uninhibited exercise of the right to freedom of expression can allow it to play a crucial role in the furtherance of anti-racism strategies. This is widely recognised.²⁶² Only when there is a direct and incontrovertible nexus between particular forms of expression and actual harm or distress, should there be contemplation of curbing or, *a fortiori*, sanctioning, that expression.

Legislation requires a very clear exposition of the policy objectives which inform it, accompanied by lucid, thoughtful and watertight definitions of all relevant terminology. A connection between expression and harm or other alleged negative consequences cannot simply be presupposed. Rather, a very strong causal link between particular instances of expression and evident adverse, proximate consequences ought to be proved as a prerequisite for punishing expression by the law. Thus, a crucial consideration will be the “nature and imminence”²⁶³ of the impugned expression, which will necessarily vary from case to case.

As argued *supra*, racist speech comprises an entire spectrum of negatively-motivated discourse. Its chameleon qualities afford it a flexibility which legislation cannot match. Thus, nuanced, subtle, subliminal racism is always likely to wriggle its way through the meshes of any legal definition. Given the increased sanitisation of racist language, its infinitely variegated hues and potential for sophisticated packaging, it is important to resist the obvious temptation to have recourse to the blanket-banning of racist speech (which could only be sure of sanctioning the crudest, vilest forms of racism in any case).

It is important to realise that one single statute simply cannot be a panacea for all the outpourings of hatred in a given society. One piece of legislation cannot simultaneously be the alpha and the omega of an entire nation’s war against racism; nor should it entertain any ambition to fulfil such a role. Greater attention should be paid to the wider context in which key pieces of legislation operate; greater reliance should be placed on (complementary) non-legal measures which aspire to the realisation of the same broad aims. Education must top the list of non-legal measures, owing to its potential for stimulating greater public consciousness of racism and empathy towards its victims. Billowing black smoke does not warrant societal intolerance or legislative repression, for this is too little, too late. Rather, the focus should be on fire prevention.

6.2.2 Critical race theory

Section 6.2, *supra*, explored the incompatibility of “hate speech” with the most fundamental tenets of democracy and how international human rights law has consistently interpreted such speech to be unworthy of legal protection. It is also very important to analyse “hate speech”, or forms of expression tending towards “hate speech”, in terms of the impact – both potential and real – which it has on expressive and communicative opportunities generally. A growing body of interdisciplinary scholarship known as critical race theory deals precisely with this

²⁶¹ See generally, Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, in A.W. Hins and A.J. Nieuwenhuis, Eds., *Van zender naar ontvanger* (Amsterdam, Otto Cramwinckel, 2003), pp. 89-108.

²⁶² The most recent formal acknowledgement of this observation on the international plane is, perhaps, the World Declaration (see, in particular, paras. 88, 90, discussed *supra*).

²⁶³ R. Gavison, “Incitement and the Limits of Law”, in R. C. Post (Ed.), *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, The Getty Research Institute for the History of Art and the Humanities, 1998), pp. 43-66, at p. 52.

topic.²⁶⁴ In short, this scholarship derives from critical theory proper, which has been described as “a normative reflection that is historically and socially contextualized”.²⁶⁵ By way of further elucidation: “Critical theory presumes that the normative ideals used to criticize a society are rooted in experience and reflection on that very society, and that norms can come from nowhere else”.²⁶⁶

Critical race theory, then, pursues a more specific, subjective agenda. For instance, it “challenges ahistoricism and insists on a contextual/historical analysis of the law. Current inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear.”²⁶⁷ Furthermore, it “insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society.”²⁶⁸

It is frequently asserted by critical race theorists – and indeed others who position themselves outside that branch of scholarship - that engrained prejudicial, discriminatory and hateful attitudes towards particular societal groups and the cumulation of institutional and societal practices reflecting those attitudes lead to the erosion of self-esteem of members of affected groups, thereby ultimately resulting in a foreclosure of their speech. In a social climate where discrimination prevails, viewpoints of members of certain minority groups are regarded as being of inferior value in deliberative processes. The “silencing” argument – also frequently deployed by feminist scholars as an argument for the prohibition of pornography – is causal. Hate speech used by members of dominant societal groups becomes a tool of degradation and subordination. Hate speech does not simply result from that discriminatory climate – it actually contributes to its creation.

Two important penultimate observations about critical race theory must be made, both of which are prompted by the fact that the US has always been – and continues to be - the fountainhead of critical race theory and activism. This is important, first of all, because it points to a very particular cultural context and history of racism. It is important, secondly, because of its implicit acknowledgement that the development of critical race theory took place against the back-cloth of a particular constitutional ethos and system “in which free speech is given an especially exalted jurisprudential status [...]”.²⁶⁹ In other words, critical race theory was largely born out of a distinctive set of circumstances and then shaped by a distinctive constitutional tradition. These observations go a long way towards explaining the polarised, black-and-white character of debates concerning critical race theory. The approach to racist speech that predominates in European and international law is much more straightforward. Freedom of expression is less absolutist, less hubristic, less gung-ho and commensurately more receptive to the accommodation of other societal imperatives, in particular the elimination of racism. The express recognition that the exercise of the right to freedom of expression is subject to certain limitations and that it carries with it “special duties

²⁶⁴ See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2nd Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004).

²⁶⁵ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, 1990), p. 5.

²⁶⁶ *Ibid.*

²⁶⁷ Mari J. Matsuda *et al.*, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, p. 6.

²⁶⁸ *Ibid.*

²⁶⁹ Kenneth Lasson, “To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment”, *op. cit.*, at 283.

and responsibilities” greatly facilitates the task of reconciling critical race theory with freedom of expression values.

Nevertheless, despite the entrenched, opposing positions of proponents of critical race and First Amendment theories, some commentators have sought to demonstrate that the two standpoints are not irredeemably polarised. Mari Matsuda, for instance, has argued that racist speech could be actionable without violating the essence of contemporary understanding of the First Amendment. She takes the view that “racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.”²⁷⁰ She puts forward three characteristics that distinguish “the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech”,²⁷¹ which would allow for prosecution of the former. Those “identifying characteristics” are:

1. The message is of racial inferiority
2. The message is directed against a historically oppressed group
3. The message is persecutory, hateful, and degrading²⁷²

Immediately after enumerating the characteristics, Matsuda insists that “Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship”.²⁷³ It is instructive to lift Matsuda’s characteristics out of their immediate First Amendment context and to consider them in terms of prevailing international law. It is submitted here that the mere fact that a message is “persecutory, hateful, and degrading” would presumptively, i.e., absent any particular and unusual mitigating circumstances, be sufficient reason to deny that message protection under Article 10(2), ECHR, Article 19(3), ICCPR, or *a fortiori*, Article 4 *juncto* 5, ICERD. The communication of a message of “racial inferiority” would clearly contravene Article 4(a), ICERD. The targeting of a “historically oppressed group” is, of itself, clearly an insufficient reason to deny protection to a particular message, but its redolence of Article 27, ICCPR, could help to usefully bolster a claim based on either of the other two arguments.

Although it may at times appear that the values promoted by critical race theorists and First Amendment scholars are antipodal, Matsuda’s attempt to reconcile the would-be opposites is but one example of how that myth could be debunked. There are surely others. The relationship between critical race theory and international law is fraught with discernibly less tension. Indeed, as will be outlined below, critical race theory is largely congruent with the essential thrust of generalist international human rights law. The main source of tension that could be identified is a source of tension that characterises the relationship between Articles 19 and 20, ICCPR, on the one hand, and ICERD (especially Articles 1, 4 and 5) on the other hand.

²⁷⁰ Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, pp. 17-51, at 35.

²⁷¹ *Ibid.*, p. 36.

²⁷² *Ibid.* It is interesting to note that in an earlier enumeration of these “identifying characteristics”, the third characteristic was formulated differently: “The message endorses or implements persecution, hatred, or degradation of the group” - Mari J. Matsuda, “Outsider Jurisprudence: Toward a Victim’s Analysis of Racial Hate Messages”, in Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech*, *op. cit.*, pp. 87-120, at 101.

²⁷³ *Ibid.*

6.3 Limits of permissible expression under international law

This section analyses the validity of these assertions and the limits and general suitability of the law for addressing the harms in question.

There is no doubt that the myriad questions surrounding the regulation of hate speech collectively represent a very perplexing moral, legal and socio-political conundrum. The apparent intractability of the whole often seems to be captured in T.S. Eliot's image of squeezing "the universe into a ball" and rolling it "towards some overwhelming question".²⁷⁴ Yet, the conundrum need not be so intractable, actually. Just how overwhelming and intractable the question may seem will depend on the frame of enquiry in which it is placed: philosophical, political, legal or some combination or offshoot of the foregoing. The frame chosen here is international human rights law and necessarily its animating principles of democracy and justice.

Before exploring that frame of enquiry, however, a few cursory remarks plucked from a couple of time-honoured texts of political philosophy seem apposite for the purposes of contextualisation. It should be noted, for instance, that even seminal treatises such as Locke's *A Letter Concerning Toleration* and Mill's *On Liberty*, purposely fix principled boundaries for what is societally tolerable in terms of public expression. Locke sought to demarcate the zone of toleration in similar terms: "No opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate."²⁷⁵

It is often overlooked that Mill, for his part, clearly countenanced the denial of legal protection to certain types of expression due to the moral repugnancy of its content. Indeed, Mill's whole treatise is sprinkled with important recognitions of exceptions to the sanctity of his truth-championing rationale for freedom of expression. For instance, he acknowledges the legitimacy of restricting the principle of freedom of expression on the basis of considerations such as "harm to others"²⁷⁶ and "injury to others".²⁷⁷ He continues in a more explicit vein: "Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."²⁷⁸

The foregoing sections have analysed the limitations on freedom of expression explicitly set out in international treaty law, as interpreted by the competent adjudicative bodies established by relevant treaties. This section explores the nature and scope of limitations on freedom of expression that have been inferred from treaty law. These are limitations that do not match prevailing understandings of "hate speech" and thus fall to be considered separately.

From the foregoing, it is clear that the regulation of "hate speech" – owing to its moral repugnancy and probable harm to others – is hardly in dispute. The preferred frame of enquiry

²⁷⁴ The full citation is: "To have squeezed the universe into a ball/To roll it towards some overwhelming question", T.S. Eliot, "The Love Song of J. Alfred Prufrock", in T.S. Eliot, *The Complete Poems and Plays* (England, Faber & Faber, 1969), pp. 13-17, at 15.

²⁷⁵ John Locke, *A Letter Concerning Toleration*, pp. 14-56, in John Horton & Susan Mendus, Eds., *John Locke A Letter Concerning Toleration in Focus* (London, Routledge, 1991).

²⁷⁶ *Ibid.*, p. 62.

²⁷⁷ *Ibid.*, p. 63.

²⁷⁸ *Ibid.*, p. 91.

here, *viz.* international human rights law, is even more dispositive of the question. By virtue of the – by now – well-entrenched “abuse of rights” doctrine in positive international human rights law, proponents of hate speech are, absent extraordinary mitigating factors, precluded from relying on international instruments in order to defend their putative right to freedom of speech. A detailed discussion of the operation of this doctrine in relation to “hate speech” under the European Convention on Human Rights is provided in Chapter 2, *supra*. Here, it is sufficient to recall that the doctrine is regularly relied upon to prevent the proverbial hijacking of relevant instruments for purposes that are contrary to their letter and spirit.²⁷⁹

If the regulation or prohibition of hate speech is relatively uncontroversial from the perspective of international human rights law, the same cannot be said of the question of defining hate speech. When international adjudicative bodies assess the necessity of measures deemed to constitute an interference with the right to freedom of expression, there should be systematic examination of a number of considerations, such as: intent of speaker, context (including form of expression), demonstrable harmful impact. The systematic examination of these considerations would necessarily have to show sensitivity to “contextual variables”,²⁸⁰ such as “the particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved”.²⁸¹

If impugned speech does not amount to hate speech or is unlikely to lead to violence, there remains one further angle of enquiry to be explored. This involves prising open the nature of the protection afforded “the reputation or rights of others” by Article 10(2). This leads to a particularly difficult – and subjective – judgment-call. The explicit protection of reputational and other rights of other persons (and the permissibility of certain restrictions on the exercise of the right to freedom of expression, when adequately based on those grounds) – is difficult to square with one of the central and constant principles of the European Court’s jurisprudence, *i.e.*, that protection of freedom of expression, as guaranteed by Article 10, ECHR, extends to information or ideas “that offend, shock or disturb the State or any sector of the population”.

Freedom of expression is generally regarded as concerning “speakers, recipients (listeners, readers, and viewers), and of the general public”,²⁸² and how the respective (and sometimes competing) rights and interests of each of the interested parties measure up to one another cannot viably be determined *in abstracto*, but only on a case-by-case basis.²⁸³ The difficulty of reconciling the rights of others with the protection of offensive speech brings the third-listed (and often neglected) category – the general public – into analytical prominence. In certain cases, it is the rights of a particular sub-set of the general public, *i.e.*, the non-target

²⁷⁹ By way of aside, though, it is interesting to note Fred Schauer’s philosophical challenge to the notion of “abuse” of the right to freedom of expression. He reasons that “the proper use of ‘abuse’ implies that the conduct referred to is within the scope of the right, and that is consistent with [the argument that] that conduct is outside that scope”: Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 146. See also, pp. 145 and 147.

²⁸⁰ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

²⁸¹ *Ibid.* This list is not intended to be exhaustive.

²⁸² Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 6; see also, Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 49. Alternative configurations are, of course, possible: for instance, T.M. Scanlon refers to the interests of participants, audience and bystanders: T.M. Scanlon, “Freedom of expression and categories of expression”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 84-112, at 86-93.

²⁸³ See further, Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 105.

audience or bystanders,²⁸⁴ that seem most jeopardised by offensive speech. T.M. Scanlon has posited that the interests of bystanders in restricting speech are in: (i) “avoiding the undesirable side effects of acts of expression” (eg. traffic jams, noise and litter, etc.), and more importantly, (ii) “the effect expression has on its audience”, i.e., “harmful changes in audience belief and behavior” towards (particular) bystanders, eg. minorities.²⁸⁵ Regulation of expression in order to meet the second objective is *prima facie* considerably more far-reaching than the “time, place and manner” restrictions that would typically be entailed by the former. The reason is that it requires the prevention of the “effective communication of an idea”.²⁸⁶

The reconciliation exercise is much more complicated than pitting critical race theory against a hard-nosed version of individualistic liberalism. Critical race theory holds that offence directed at a participant in a public debate on account of his/her membership of a particular group can qualitatively affect his/her ability to participate in that debate. This view has been vigorously contested in other quarters, however. Ronald Dworkin, for one, pays short shrift to the idea that individuals are (or even should be) entitled to be insulated from speech that would adversely affect their self-esteem (or self-respect) or the esteem (or respect) in which others hold them. He argues: “People of a thousand different convictions or shapes or tastes understandably feel ridiculed or insulted by every level of speech and publication in every decent democracy in the world.”²⁸⁷ He then continues:

A culture of independence almost guarantees that this will be so. Certainly, we should be decent to one another, and bigotry is despicable. But if we really came to think that we violated other people’s rights whenever we reported sincere views that denigrated them in their own or others’ eyes, we would have compromised our own sense of what it is to live honestly. We must find other, less suicidal, weapons against racism and sexism. We must, as always, put our faith in freedom, not repression.²⁸⁸

If there is no *general* right not to be offended – and it is submitted here that there is not – to what extent can the virtue of pluralistic tolerance be taken to cover the protection of respectfulness towards members of other ethnicities, religious persuasions, etc.? The forthcoming analysis will reveal the existence of a circumspect right not to be offended in certain, particular circumstances – namely where racism and religious beliefs are directly concerned – and even then only when the offence attains a certain level of intensity. Racist expression and other types of “hate speech” and has been amply dealt with *supra*. The forthcoming analysis will therefore deal with the even greyer area of religious beliefs.

It is both surprising and disappointing that the case of *I.A. v. Turkey*²⁸⁹ has yet to be subjected to significant critical scrutiny. The central feature of the case – a conviction arising out of “an abusive attack on the Prophet of Islam” – could hardly be more topical and one could legitimately have expected the European Court of Human Rights to have provided instructive guidance on the interplay of relevant principles in the case. This was not to be, however. The Second Section of the Court held that there had been no violation of Article 10, but the judgment was split (by four votes to three)²⁹⁰ and the joint dissenting opinion was unusually

²⁸⁴ T.M. Scanlon, “Freedom of expression and categories of expression”, *op. cit.*, at 92-93.

²⁸⁵ *Ibid.*, p. 92.

²⁸⁶ *Ibid.*, p. 93.

²⁸⁷ Ronald Dworkin, *Freedom’s Law* (Oxford University Press, New York, 1999), p. 259-260.

²⁸⁸ (footnote omitted) *Ibid.*, p. 260.

²⁸⁹ Judgment of the European Court of Human Rights (Second Section) of 13 September 2005.

²⁹⁰ Judges Baka, Turmen, Ugrekhelidze and Mularoni subscribed to the majority opinion, whereas Judges Costa (Section President), Cabral Barreto and Jungwiert issued a joint dissenting opinion.

forthright in its suggestion that “the time has perhaps come to ‘revisit’” the case-law on which the instant case was based. Nevertheless, the case was not referred to the Grand Chamber under Article 43 of the European Convention on Human Rights (hereinafter, ECHR)²⁹¹ and as a result, we have been left none the wiser as to the workings of the murky doctrinal interface between the rights to freedom of expression and religion.

The Court, as is its wont, re-emphasised the central importance of freedom of expression in democratic society and recalled that, subject to Article 10(2), “it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb”.²⁹² The exercise of the right, however, comes with concomitant duties and responsibilities, including – in the context of religious beliefs – “a duty to avoid expressions that are gratuitously offensive to others and profane”. In consequence, “as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration”.²⁹³

In the absence of any “uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions”, Member States are afforded a wide margin of appreciation when addressing “matters liable to offend intimate personal convictions within the sphere of morals or religion”.²⁹⁴ Although it may be legitimate for a State to adopt measures aimed at repressing certain activities, including the dissemination of information and ideas, when such activities are judged to be incompatible with Article 9, ECHR, the European Court of Human Rights is the final arbiter of whether or not such measures are consistent with the ECHR. In that capacity, the Court assesses whether, in the circumstances of a particular case, the interference in question corresponds to a “pressing social need” and is “proportionate to the legitimate aim pursued”.²⁹⁵ The Court also recalled that in the spirit of pluralism, tolerance and broadmindedness that is constitutive of democratic society, members of religious groups “cannot reasonably expect to be exempt from all criticism”: “They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”.²⁹⁶

After setting out the foregoing principles (as well as certain details of its own *modus operandi*), the Court then proceeded to apply them to the circumstances of the case at hand. It did so in just one paragraph:

However, the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: “Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner

²⁹¹ Article 43 (‘Referral to the Grand Chamber’) reads as follows:

“1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.”

²⁹² *Ibid.*, para. 23.

²⁹³ *Ibid.*, para. 24.

²⁹⁴ *Ibid.*, para. 25.

²⁹⁵ *Ibid.*, para. 26.

²⁹⁶ *Ibid.*, para. 28.

and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.”²⁹⁷

It then found that the measures interfering with the applicant’s freedom of expression aimed to offer protection against offensive attacks on matters regarded as sacred by Muslims and as such, corresponded to a “pressing social need”.²⁹⁸ It affirmed that the Turkish authorities had not overstepped their margin of appreciation and that the stated reasons for the impugned restrictions were “relevant and sufficient”.²⁹⁹ As regards the proportionality question, the Court referred to the fact that copies of the book had not been seized and also to the “insignificant” nature of the fine imposed.³⁰⁰

Joint dissenting opinion

The joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert is rather forceful, particularly in its candid criticism of the doctrinal precedents on which the instant judgment relies so heavily (see further *infra*). Their dissent raises a number of highly pertinent concerns about the Court’s application of key general principles gleaned from its jurisprudence to the specific facts of the instant case.

The joint dissenting opinion begins by cautioning against being *blasé* about the Court’s seminal pronouncement in *Handyside* (cited, *infra*), or using it in a merely sloganistic way.³⁰¹ It emphasises the “limited practical impact on society of the author’s statements”³⁰² and points out that the likelihood that unorthodox religious views would “offend or shock the faith of the majority of the population” is an insufficient reason “in a democratic society to impose sanctions on the publisher of a book”.³⁰³ It readily acknowledges that the attacks on Muhammad contained in the passage from the book quoted *supra* “may cause deep offence to devout Muslims, whose convictions are eminently deserving of respect.” In the same vein, it also refers to the “sacred” status of the Prophet in Islam.³⁰⁴ Nonetheless, it rejects the idea that an entire book be condemned and its publisher criminally sanctioned on the basis of isolated passages in the book. It particularly rues the institution of criminal proceedings by the public prosecutor – and not by an offended member of the public - in the present case.³⁰⁵ The dissenting judges also took issue with the perceived proportionality of the sanctions imposed on the applicant. They insist that any criminal conviction gives rise to a chilling effect and leads to increased incidence of self-censorship.³⁰⁶

The joint dissenting opinion also advances three main critiques of the *Otto-Preminger*³⁰⁷ and *Wingrove*³⁰⁸ cases, on which the present case draws extensively. First, there is the crucial difference between the impact that is likely to be achieved by a novel (in the instant case) and

²⁹⁷ *Ibid.*, para. 29.

²⁹⁸ *Ibid.*, para. 30.

²⁹⁹ *Ibid.*, para. 31.

³⁰⁰ *Ibid.*, para. 32.

³⁰¹ Joint dissenting opinion, *ibid.*, para. 1.

³⁰² Joint dissenting opinion, *ibid.*, para. 2.

³⁰³ Joint dissenting opinion, *ibid.*, para. 3.

³⁰⁴ Joint dissenting opinion, *ibid.*, para. 4.

³⁰⁵ Joint dissenting opinion, *ibid.*, para. 5.

³⁰⁶ Joint dissenting opinion, *ibid.*, para. 6.

³⁰⁷ *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, no. 295-A.

³⁰⁸ *Wingrove v. United Kingdom*, Judgment of the European Court of Human Rights of 25 November 1996, Reports of Judgments and Decisions, 1996-V.

a film (in *Otto-Preminger*) and a short experimental video (in *Wingrove*). Second, it points out that in both cases, the Court occasioned a *volte-face* from the decisions of the Commission³⁰⁹ and that the final Court judgments were themselves divided.³¹⁰ Finally, the real thunder-clap of the dissenting opinion bursts open: “the time has perhaps come to ‘revisit’ this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.”³¹¹

Broadly speaking, apart from one – potentially significant - discrepancy, there is little amiss with the Court’s normative principles concerning permissible limits to freedom of expression when the exercise of the right interferes with the religious beliefs and convictions of others (summarised *supra*). Where the Court’s approach misfires, and has repeatedly misfired in the past, is in its application of those principles to specific factual situations.

Relevant case-law

The critical discharge of the joint dissenting opinion in the *I.A.* case was aimed specifically at the cases of *Otto-Preminger-Institut v. Austria* and *Wingrove v. United Kingdom*.

In *Otto-Preminger*, the applicant association (a private film-house) claimed (ultimately unsuccessfully) that its rights under Article 10, ECHR, had been violated by the seizure and forfeiture of a film (*Das Liebeskonzil*) it had planned to screen. The domestic Austrian courts found the characterisations of God, Jesus and Mary in the film to come within the definition of the criminal offence of disparaging religious precepts. Before it could actually be shown, the film was seized by the relevant national authorities in the context of criminal proceedings against the manager of the applicant association concerning the film.

At issue in the *Wingrove* case was the rejection by the British Board of Film Classification of an application for a classification certificate for the applicant’s film, *Visions of Ecstasy*. The film, a short experimental video work, portrayed Saint Teresa engaging in acts of an overtly sexual nature, including with the body of the crucified Christ.³¹²

Other relevant cases that were not explicitly targeted by the dissenting judges in *I.A.*, but which will be referred to in passing *infra*, include: *Gay News Ltd. & Lemon v. United Kingdom*,³¹³ *Müller & others v. Switzerland*,³¹⁴ *Choudhury v. United Kingdom*,³¹⁵ *Murphy v. Ireland*³¹⁶ and *Giniewski v. France*.³¹⁷

³⁰⁹ For example, in the *Otto Preminger* case, the Commission voted by nine votes to five that there had been a violation of Article 10 as regards the seizure of the film, and by 13 votes to one that there had been a violation of Article 10 as regards the forfeiture of the film. The Opinion of the Commission is appended to the Judgment of the Court, *op. cit.*

³¹⁰ In *Otto Preminger*, the Court held by six votes to three that there had been no violation of Article 10 in respect of either the seizure of the film or its forfeiture. In *Wingrove*, the Court held by seven votes to two that no breach of Article 10 had taken place.

³¹¹ Joint dissenting opinion, *ibid.*, para. 8.

³¹² Paras. 9, 61.

³¹³ *X. Ltd. & Y. v. United Kingdom*, Application No. 8710/79, Decision of inadmissibility of the European Commission of Human Rights of 7 May 1982, 28 D.R. 77 (November 1982). The case involved a conviction for blasphemy arising out of the publication of a poem, “The Love that Dares to Speak its Name” by Prof. James Kirkup, in a magazine called *Gay News*. According to the headnote of the House of Lords’ decision in the case, the poem “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.” – cited in *ibid.*, para. 1.

Rough coherence of principles

Pluralism and tolerance are among the most powerful of the ECHR's animating principles. Time and again, the Court has averred in its case-law on freedom of religion that [societal] pluralism has been hard-won over the ages and that it is indissociable with democratic life. In the same vein, the Court has consistently held in its case-law on freedom of expression that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. Pluralism entails diversity and divergence, which in turn can often involve a certain amount of contention and even antagonism.³¹⁸ This is all part of the democratic experiment,³¹⁹ the cut and thrust of debate that is free, robust and uninhibited.³²⁰ Thus, as famously stated in the *Handyside* case, information and ideas which "offend, shock or disturb the State or any sector of the population" must be allowed to circulate in order to safeguard the "pluralism, tolerance and broadmindedness" that underpin "democratic society".³²¹ In principle, this vigorous conception of freedom of expression applies to all matters of general public interest, including religious beliefs and affairs.³²²

But the concepts of pluralism and tolerance, as developed by the European Court of Human Rights, are clearly contiguous. Indeed, we could perhaps – without any sleight of hand -

³¹⁴ *Müller & others v. Switzerland*, Judgment of the European Court of Human Rights of 24 May 1988, Series A, No. 133. In this case, the applicant artists were convicted and their paintings confiscated on the grounds that the latter were obscene; the Court found that the measure served the legitimate aim of protecting public morals and held that Article 10 had not been violated.

³¹⁵ *Choudhury v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Application No. 17439/90. The applicant "sought to have criminal proceedings brought against the author and publisher of "Satanic Verses" in order to vindicate his claim that the book amounted to a scurrilous attack on, inter alia, his religion" – *ibid.*, para. 1.

³¹⁶ Judgment of the European Court of Human Rights (Third Section) of 10 July 2003. In this case, the applicant (a pastor affiliated to the Irish Faith Centre – "a bible based Christian ministry in Dublin" *ibid.*, para. 7) argued unsuccessfully that the refusal to broadcast an advertisement for the Irish Faith Centre, pursuant to a legislative prohibition on the broadcasting of religious advertising in Ireland, violated his rights under Articles 9 and 10, ECHR. Although the case was not *prima facie* about offence to the religious beliefs of others, the issue was considered in the Court's judgment.

³¹⁷ *Giniewski v. France*, Judgment of the European Court of Human Rights (Second Section) of 31 January 2006. This case involved the conviction of a journalist (however, he was acquitted on appeal, but ordered to pay nominal damages and to foot the bill for the publication of the appellate decision in one national newspaper) for defamation in respect of an article he had written criticising a Papal Encyclical and exploring possible links between a particular doctrine and the origins of the Holocaust. The European Court of Human Rights found that the applicant's right to freedom of expression had been violated because his article did not set out to attack religious beliefs, but to contribute to an ongoing debate on topics of interest to the general public.

³¹⁸ *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 19 April 1993, para. 33; *Metropolitan Church of Bessarabia and others v. Moldova*, Judgment of the European Court of Human Rights of 13 December 2001, para. 123; *Hasan & Chaush v. Bulgaria*, Judgment of the European Court of Human Rights of 26 October 2000, para. 78; *Serif v. Greece*, Judgment of the European Court of Human Rights of 14 December 1999, para. 49; *Agga v. Greece*, Judgment of the European Court of Human Rights of 17 October 2002, paras. 53, 56; *Manoussakis v. Greece*, Judgment of the European Court of Human Rights of 29 August 1996, para. 44; *Supreme Holy Council of the Muslim Community v. Bulgaria*, Judgment of the European Court of Human Rights of 16 December 2004, para. 93.

³¹⁹ Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

³²⁰ Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³²¹ *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

³²² However, a crucial caveat to this general proposition will be entered *infra*.

merge the concepts into one and speak more meaningfully about pluralistic tolerance,³²³ a notion that implies a certain degree of reciprocal respect between the different constituent groups of any democratic society. Pluralistic tolerance can be well served by robust protection for freedom of expression, for example, when offensive expression advances discussions on matters of public interest. As posited by Robert Post: “Outrageous speech calls community identity into question, practically as well as cognitively, and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life”.³²⁴ However, the operative definition of “outrageous speech” is crucial here and would have to be qualified. In any case, if the right to freedom of expression is to be interpreted consistently with the notion of pluralistic tolerance, the protection of the rights of others must be borne in mind.

In this respect, Article 10(2) refers explicitly to the “duties and responsibilities” on which the exercise of the right to freedom of expression is contingent, and also the legitimacy of restricting the exercise of the right in order to protect the rights of others. As regards the application of these considerations to religious beliefs and affairs, the Court recognises the need to protect the deepest feelings and convictions of “others” from substantial or serious offence.³²⁵ Similarly, it considers that the “respect for the religious feelings of believers as guaranteed in Article 9 [...] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance [...]”.³²⁶ This is because the beliefs in question are qualitatively different to other types of beliefs. One commentator has explained that qualitative difference by observing that “The recognition of what is ‘sacred’ involves an affirmation of what is believed to be of ultimate value in experience, and of what is of deepest concern in life”.³²⁷ That is the transformative factor that legitimates the special consideration for earnestly and deeply held religious beliefs.

Having said that, it is imperative that the exceptional regard in which religious beliefs can be held not be used as a convenient excuse for stifling debate on matters of interest to the public.³²⁸ Again, to cite David Edwards: “The determination of spiritual value is a matter of persuasion, of exposition, and (perhaps) argument, and in any such process there must be the possibility of contradiction, condemnation and offence”.³²⁹

Niggling definitional discrepancy

In the *Otto-Preminger-Institut* case, the European Court of Human Rights held that “in the context of religious opinions and beliefs”, the duties and responsibilities which accompany the right to freedom of expression, may legitimately include:

³²³ Joseph Raz sometimes uses the term “pluralist toleration”, which seems to have essentially the same meaning: Joseph Raz, “Free Expression and Personal Identification”, 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 322.

³²⁴ Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995), p. 139.

³²⁵ *Wingrove v. United Kingdom*, *op. cit.*, para. 58.

³²⁶ *Otto-Preminger-Institut v. Austria*, *op. cit.*, para. 47.

³²⁷ David Edwards, “Toleration and the English blasphemy law”, in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen & Co., 1985), pp. 75-98, at 84.

³²⁸ See, in this respect, *Giniewski v. France*, *op. cit.*, paras. 50 & 51.

³²⁹ *Ibid.*, p. 82.

an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.³³⁰

Whether by accident or design, the reformulation of this principle in *Wingrove v. United Kingdom* and in *Murphy v. Ireland* differs from its original articulation in *Otto-Preminger*. This is not a problem in itself; indeed, many principles are reworked and refined by the Court in the course of subsequent applications. In this case, however, some unexplained shifts of definitional emphasis appear to have been introduced. Instead of referring to expressions that are gratuitously offensive to others *and* an infringement of their rights *and* worthless from the perspective of public debate, the Court uses the more terse, alternative formula, “gratuitously offensive to others and profanatory”.³³¹ No explanation is offered as to why the cumulative elements of the infringement of rights of others and the absence of any contribution to public debate were dropped. Nor is any attempt made to tease out the definitional scope of the notion of profanity, although it could be deduced from *Wingrove* that the “degree of profanation” would have to be “high” and the extent of insult to religious feelings “significant”.³³² As a result of this inconsistent use of phraseology in the Court’s approach to offensiveness in the context of religious opinions and beliefs, it is not possible to state with much confidence or precision what the official barometer actually is.

Frederick Schauer has claimed that in previous and ongoing efforts to elucidate the scope of the right to freedom of expression, “there has been too much distillation and not enough dissection”.³³³ The *I.A.* case illustrates Schauer’s point perfectly. The essence of the Court’s judgment in that case is a distillation of the main principles from its relevant case-law, but its application of those principles to the facts of the case is limited to one paragraph.³³⁴ In other words, what is missing is the dissection of key principles through their application to a set of specific factual circumstances.

When the Court applies its normative principles to specific factual circumstances, it should systematically examine whether sufficient weighting has been given to factors such as: the intent of the speaker; “contextual variables”,³³⁵ and the demonstrably harmful impact of the impugned expression. The Court has repeatedly stressed the importance of a context-sensitive approach, but as will presently be shown, it does not always practise what it preaches. The intent or motivation of the speaker is important as it can have significant bearing on how expression that is offensive to religious convictions is evaluated. There is a world of difference between misguided or thoughtless expression and that which is deliberately calculated to be offensive or which is fuelled by some kind of *animus*. Therefore, proof of an element of *scienter* (i.e., knowledge that the expression will or is likely to cause offence)

³³⁰ *Op. cit.*, para. 49; *Giniewski v. France, op. cit.*, para. 43.

³³¹ *Wingrove v. United Kingdom, op. cit.*, para. 52. The formulation, “gratuitously offensive to others and profane”, was used in *Murphy v. Ireland, op. cit.*, para. 65.

³³² *Wingrove v. United Kingdom, op. cit.*, para. 60.

³³³ Frederick Schauer, *Free speech: a philosophical enquiry* (New York, Cambridge University Press, 1982), p. 85.

³³⁴ The paragraph in question is para. 29. It reads: “However, the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: “Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.”

³³⁵ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

should be required in order for liability to attach in civil proceedings,³³⁶ and proof of *mens rea* in criminal proceedings.³³⁷ Contextual variables could include the nature and impact of the medium used to convey the expression; audience-related considerations; socio-political factors; the nature and severity of the sanction imposed, etc. The requirement of “demonstrably harmful impact” is a safeguard measure that insists on the establishment of a clear causal link between the impugned expression and the alleged resultant harm to others (eg. gratuitous offence to their religious convictions). Other authors have employed different terminology (such as “appreciable”³³⁸) to create comparable safeguards, but those terms are suggestive of weaker forms of probabilism and are therefore liable to unduly restrict the right to freedom of expression.

Limited impact of publication

The joint dissenting opinion in *İ.A.* emphasises the likely impact of the publication. It had a limited,³³⁹ once-off print-run, and the evidence before the Court did not indicate how many people actually read the book. The dissenting judges deduce from the fact that the book was not reprinted that the number of actual readers was small. Thus, one of the frequently-invoked rationales for regulating or restricting expression, *viz.* the impact/influence argument, offers a rather weak justification for interfering with the applicant’s right to freedom of expression in the circumstances of the present case. Furthermore, as pointed out by the same Section of the Court just a few months before it returned its *İ.A.* judgment, the novel as a medium is “a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media”.³⁴⁰ By counterpoising a novel with the “mass media”,³⁴¹ the Court seeks (albeit with clumsy wording) to distinguish between different media on the basis of their circulation, and by extension, their potential reach and impact.³⁴² The specificity of a particular medium and its potential impact on the public are rightly considered by the Court to be relevant contextualising factors in many cases.³⁴³ For instance, as the Court has repeatedly pointed out, “the audiovisual media have often a much more immediate and powerful effect than the print media”.³⁴⁴

³³⁶ By analogy, the *scienter* element is quite a common feature of (campus) hate speech codes: see further, Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004), p. 115.

³³⁷ It should however be noted in passing that the European Commission of Human Rights found the strict liability nature of the crime of blasphemous libel unobjectionable in the facts of *Gay News Ltd. & Lemon v. United Kingdom*, *op. cit.*, para. 12.

³³⁸ George Kateb writes: “[...] expression is harmful when its long-term tendency or indirect but appreciable result is the invasion of rights or fundamentally immoral conduct on a significant scale.” - George Kateb, “The Freedom of Worthless and Harmful Speech”, in Bernard Yack, Ed., *Liberalism without Illusions* (Chicago, Uni. of Chicago Press, 1996), pp. 220-240, at p. 228.

³³⁹ Note that para. 5 of the Court’s judgment refers to a print-run of 2,000 copies, whereas para. 2 of the joint dissenting opinion refers to 2,500. The correct figure would appear to be 2,000 copies, as the original French-language versions of the judgment and joint dissenting opinion both refer to 2,000 copies.

³⁴⁰ *Alinak v. Turkey*, Judgment of the European Court of Human Rights (Second Section) of 29 March 2005, para. 41.

³⁴¹ One could, for instance, argue that a novel could be included in a definition of “mass media”; it is submitted here that the Court actually intended to distinguish between novels on the one hand, and newspapers and broadcasting on the other.

³⁴² The Court has also taken this approach in other cases: see, for example, *Arslan v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999, para. 48.

³⁴³ *Murphy v. Ireland*, *op. cit.*, para. 69.

³⁴⁴ *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, no. 298, para. 31; *Murphy v. Ireland*, *op. cit.*, para. 69; *Radio France v. France*, Judgment of the European Court of

For present purposes, it should additionally be noted that there can be no suggestion of a captive audience here, and that members of the public would have had to buy the book in order to be confronted with its content. However, arguments such as these have not had a particularly happy history before the adjudicative organs of the ECHR, or at least not in the context of offence to religious beliefs. They do not, for instance, correspond to the approach taken by the European Commission of Human Rights in the *Gay News Ltd. & Lemon v. United Kingdom*.³⁴⁵ In that case, the Commission observed that “The issue of the applicants’ journal containing the incriminated poem was on sale to the general public, *it happened to get known in some way or other* to the private prosecutor who was so deeply offended that she decided to take proceedings against the publication of this poem [...]”³⁴⁶.

Although the case of *Müller v. Switzerland* involved (sexual) morals rather than offence to religious convictions, it offers a useful analogy on the question of the public’s exposure to potentially offensive material. In that case, a crucial consideration for the Court was that the impugned paintings were:

painted on the spot - in accordance with the aims of the exhibition, which was meant to be spontaneous - and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large.³⁴⁷

Another – little-known – case, *S. v. Switzerland*,³⁴⁸ also concerning the display of obscene material to the general public, is analogously useful as well. The European Commission of Human Rights concluded from the facts of the case that “There was no danger of adults being confronted with the film against or without their intention to see it” and that it was undisputed “that minors had no access to the film” either.³⁴⁹ The Commission continued by stating that “since no adult was confronted unintentionally or against his will with the film [...] there must be particularly compelling reasons justifying the interference at issue”.³⁵⁰

In its *Otto-Preminger* judgment, the Court observed that access to the (proposed) screening of the film was subject to an admission fee and an age-limit. As “the film was widely advertised”, “There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature”. The Court then offers a baffling *non sequitur*: “for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently ‘public’ to cause offence”.³⁵¹ This finding goes against the grain of the relevant reasoning relied upon in *Müller, supra*. The dissenting judges reached a very different conclusion, *viz.* that the advance publicity material issued by the applicant

Human Rights of 30 March 2004, para. 39, and (for very similar wording) *Purcell et al. v. Ireland*, Decision of inadmissibility of the European Commission of Human Rights of 16 April 1991, Application No. 15404/89.

³⁴⁵ *Op. cit.*

³⁴⁶ (Emphasis added), *ibid.*, para. 12. The poem in question was: “The Love that Dares to Speak its Name”, written by Prof. James Kirkup. It appeared in a magazine called *Gay News*. According to the headnote of the House of Lords’ decision in the case, the poem “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.” – cited in *ibid.*, para. 1.

³⁴⁷ *Op. cit.*, para. 36.

³⁴⁸ *S. v. Switzerland*, Report of the European Commission of Human Rights of 14 January 1993, Application No. 17116/90, para. 62.

³⁴⁹ *Ibid.*, para. 62.

³⁵⁰ *Ibid.*, para. 65.

³⁵¹ *Op. cit.*, para. 54.

cinema: (i) aimed to warn the public about the critical way in which the film dealt with the Roman Catholic religion, and (ii) actually “did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away”. These conclusions prompted two further conclusions of note by the dissenting judges: (i) there was “little likelihood” of “anyone being confronted with objectionable material unwittingly”, and (ii) the applicant association had acted “responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film”.³⁵² It is submitted here that the dissenting opinion is more convincing than the majority opinion on this particular point.

In the *Wingrove* case, the European Commission had placed considerable store by the probability that a short experimental video work would have a very limited reach and impact. The Delegate of the Commission submitted to the Court that “The risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution”.³⁵³ The possibility of further restricting distribution of the video to licensed sex shops was mooted and it was also pointed out that the boxes containing the video cassettes would have included a description of its content.³⁵⁴ The Court, however, responded by pointing out that once available, videos can be “copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities”.³⁵⁵ Thus, it found the consideration of the UK authorities that the film “could have reached a public to whom it would have caused offence” to be “not unreasonable” in the circumstances of the case.³⁵⁶

Specificity of genre

A novel should ordinarily be “entitled to be judged by the criteria relevant to that genre including a considerable freedom of imaginative exploration”.³⁵⁷ The applicant argued in domestic proceedings that the impugned novel should have been analysed by literary specialists. This argument does not appear to have been pursued by the applicant before the European Court, which limited itself to acknowledging that the author’s views were conveyed in a “novelistic style”, without probing the matter any further. The joint dissenting opinion, likewise, failed to adequately pick up on the argument. In its case-law, the Court has consistently held that Article 10 “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed”.³⁵⁸ It is submitted here that in order to adequately protect the substance of ideas and information expressed in a novel, the Court ought to give due consideration to stylistic and other specificities that are relevant to the genre. Indeed, this is the thrust of one of its main lines of reasoning in the aforementioned *Alinak* case.³⁵⁹

³⁵² *Ibid.*, Joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para. 9.

³⁵³ *Ibid.*, para. 62.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*, para. 63.

³⁵⁶ *Ibid.*

³⁵⁷ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (New York, Palgrave Macmillan, 2006), p. 320. Parekh’s supporting example relates specifically to Salman Rushdie’s novel, *The Satanic Verses*, but it is nevertheless illustrative of a broader range of possibilities: he points out that “The offensive passages occur within the dream of a demented man, and hence not in the same category as unambiguous expressions of abuse and ridicule by the author”, *ibid.*

³⁵⁸ See, amongst other authorities, *De Haes & Gijssels v. Belgium*, Judgment of the European Court of Human Rights of 24 February 1997, Reports of Judgments and Decisions 1997-I, para. 48.

³⁵⁹ *Op. cit.*, paras. 41-45.

By selecting the passages in the book that were deemed to be the most offensive, isolating them and examining them out of context, the conclusion that they were unacceptably abusive was a foregone one. The same conclusion might very well have been reached if the passages had been examined in their original context (as intended by the author), but the conclusion would have been all the stronger for having been subjected to such an embedded analysis. As it stands, without the benefit of any insights that might have been generated by such an analysis, the Court's conclusion may be intuitively correct from a moral perspective, but it lacks methodological rigour. It should be noted, by way of contrast, that the Court's finding of a violation of Article 10 in its *Patuarel* judgment was partly due to the fact that the French Courts had convicted the applicant on the basis of impugned extracts from a written work which had been assessed out of the context of the work as a whole and without acknowledging the documentary materials which had been provided in the work in support of the impugned passages.³⁶⁰ The importance of reading impugned passages in their original context is recurrently emphasised in the Court's case-law,³⁶¹ which makes it all the more puzzling that its *IA* decision deviated from that norm.

Proportionality of sanctions

The Court has frequently observed that “the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference”,³⁶² especially when the penalty in question risks creating a chilling effect on discussion of matters of public interest.

In the present case, the Court takes cognisance, first of all, of the fact that the domestic authorities did not seize the book. Puzzlingly, this seems tantamount to praising the Turkish authorities merely for abstaining from a course of action that is generally regarded as anathema to freedom of expression. As a measure effectively constituting prior restraint, the seizure of the impugned novel would rightly have been regarded as a very far-reaching infringement of the applicant's freedom of expression. However, in the stream of case-law currently under discussion, prior restraint has encountered considerably less resistance than in other types of Article 10 cases. In *Otto-Preminger*, neither the seizure nor the forfeiture of the film was found to amount to a violation of Article 10. However, the dissenting judges in that case did warn that “There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends”.³⁶³ In *Wingrove*, the ban on the video was total, a fact which prompted the Court to acknowledge that the prior restraint involved in the case called for “special scrutiny”.³⁶⁴ In the heel of the hunt, the measure of “special scrutiny” required was arguably not forthcoming, as the Court professed its satisfaction at the “high threshold of

³⁶⁰ Case of *Patuarel v. France*, Judgment of the European Court of Human Rights (First Section) of 22 December 2005, para. 50.

³⁶¹ See, amongst other examples, *Abdullah Aydin v. Turkey (No. 2)*, Judgment of the European Court of Human Rights (Third Section) of 10 November 2005, para. 25.

³⁶² *Süreker v. Turkey (No. 1)*, Judgment of the European Court of Human Rights of 8 July 1999, Reports of Judgments and Decisions, 1999-IV, para. 64.

³⁶³ *Op. cit.*, Joint dissenting opinion, para. 4.

³⁶⁴ *Ibid.*, para. 58, following its earlier findings in *Observer & Guardian v. United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, no. 216, para. 60. See also in this connection the dissenting opinions of Judges De Meyer and Lohmus in the *Wingrove* case.

profanation embodied in the definition of the offence of blasphemy under English law” and ceded a wide margin of appreciation to the national authorities in the matter.³⁶⁵

Secondly, the Court also takes cognisance of the [monetary] insignificance of the fine imposed. The joint dissenting opinion concedes that the fact that the prison sentence was commuted into a modest fine is significant, but the fears of the dissenting judges have not been completely allayed: “Freedom of the press relates to matters of principle, and any criminal conviction has what is known as a ‘chilling effect’ liable to discourage publishers from producing books that are not strictly conformist or ‘politically (or religiously) correct’.”³⁶⁶ The same argument was also applied by the Court in its unanimous finding of a violation of Article 10 in the *Tatlav* case.³⁶⁷

Generally-speaking, the Court’s approach to the dissuasive impact of a criminal sanction tends to vary according to the circumstances of the case.³⁶⁸ The least that could be said about the Court’s handling of the issue in the present case is that it should have been less perfunctory.

Conclusion

It is most unlikely that the Court will formally take the bold step of severing its own doctrinal chain, as it was urged to do by the dissenting judges in the *İ.A.* case. But perhaps such a radical step, with all the political and face-losing consequences it would likely entail, is not entirely necessary in order to reshape relevant case-law in its future judgments. To the extent that the principle of *stare decisis* “creates a chain of cases, in which each decision is an interpretation of immediately prior decisions”, it offers the flexibility of distinguishing between the application of relevant principles in previous and new sets of circumstances.³⁶⁹ As has been argued throughout this note, the relevant principles are – by and large – sound; it is the application of those principles that has been a source of disappointment. As the principles are not objectionable, there is no pressing need to repudiate them; rather, the focus should be on ensuring that whenever the Court applies relevant principles in the future, it does so in a way that distinguishes unsatisfactory precedents set by the mis-application of principles in its earlier case-law. The recent case of *Giniewski* provides useful relevant examples of how this can be done: it distinguishes, *inter alia*, certain contextualising elements of the *Otto-Preminger* and *İ.A.* cases, from the circumstances with which it was faced.³⁷⁰ A recurrent problem in the relevant case-law of the Court is the inadequate attention it has tended to give to contextualising factors when assessing whether impugned practices measure up to its principles. Contextualising factors can often have a relativising (or occasionally, even a transformative) impact on the interpretation of the bare facts of a case, and the Court should pay increased attention to the importance of contextualising factors in the future.

³⁶⁵ *Ibid.*, para. 61.

³⁶⁶ Joint dissenting opinion, *İ.A. v. Turkey*, *op. cit.*, para. 6.

³⁶⁷ *Aydın Tatlav v. Turkey*, Judgment of the European Court of Human Rights (Second Section) of 2 May 2006, para. 30.

³⁶⁸ Contrast, for example, *Sürek v. Turkey (No. 1)*, *op. cit.*, paras. 63 and 64 and *Chauvy & Others v. France*, Judgment of the European Court of Human Rights (Second Section) of 29 June 2004, para. 78, with *Jersild v. Denmark*, *op. cit.*, para. 35 and *Giniewski v. France*, *op. cit.*, para. 55.

³⁶⁹ Robert Post, “Theories of Constitutional Interpretation”, in Robert Post, Ed., *Law and the Order of Culture* (California, University of California Press, 1991), pp. 13-41, at 20.

³⁷⁰ *Op. cit.*, para. 52.

Margin of appreciation

The foregoing section details specific examples of contextualising factors that have been under-explored in the relevant case-law of the Court. Finally – to round off the foregoing critical dissection with further critical distillation – another lingering problem with *Otto Preminger* and its jurisprudential progeny must be addressed, or at least flagged for more thorough discussion at a later stage. The problem concerns the lax and seemingly unquestioning manner in which the Court has tended to apply the margin of appreciation doctrine in relevant cases.

It cannot be gainsaid that religious affairs have an immense inherent capacity for contentiousness. It is also generally true that States authorities are in the best position to take the measure of local religious sensitivities (but whether they can be trusted to do so fairly and objectively is another matter entirely). Nevertheless, the margin of appreciation doctrine must not be allowed to become a smoke-screen behind which States and the European Court can hide, instead of facing up to complex, divisive issues. In a number of the cases analysed in detail, *supra*, the Court has readily endorsed States authorities' justifications of measures restricting the right to freedom of expression.

Those justifications have often included the preservation of religious peace and harmony and the avoidance of societal divisions – even when those goals do not seem to be particularly threatened by the impugned expression.³⁷¹ For example, it seems both implausible and incongruous that the broadcasting of an informative, inoffensive advertisement for a particular minority religious group would lead to “unrest” in contemporary Ireland. That argument, however, was factored into the Court’s reasoning in the *Murphy* case.³⁷² The question of religious advertising was made the subject of a public consultation conducted by the Irish Department of Communications, Marine and Natural Resources in 2003. The public consultation was concluded after the European Court had found that the statutory prohibition on broadcasting religious advertising *as applied to the facts in the Murphy case* did not amount to a violation of Article 10. Upon the conclusion of the public consultation, it was announced at the beginning of 2004 that there would be no change to the *status quo*.³⁷³ Interestingly, apart from acknowledging that the subject is “very emotive”, the Minister did not rely on the argument of divisiveness which had struck such a loud chord with the European Court in the *Murphy* case. Rather, he stated his preoccupying concern to be the intrusiveness of religious advertisements when broadcast to captive audiences and the principle of equality of arms.³⁷⁴

The outcome, in each case, has been in favour of majoritarian or orthodox or conventional religious beliefs. Quite simply, as David Richards has pointed out, “the measure of constitutional protection for conscientiously dissenting speech could not be the dominant orthodoxy that it challenged, for that would trivialize the protection of free speech to whatever

³⁷¹ For further exploration of this point, see: Tarlach McGonagle, “Commercial expression – the usefulness of an imperfect notion?”, in Eoin O’Dell, Ed., *Freedom of Expression* (Dartmouth, forthcoming).

³⁷² *Murphy v. Ireland*, *op. cit.*, paras. 73 *et seq.*

³⁷³ “Dermot Ahern Retains Ban on Religious Advertising”, Press Release of the Department of Communications, Marine and Natural Resources, 29 January 2004.

³⁷⁴ The Minister’s press release stated: “Advertising on radio and television is significantly more intrusive than advertising in other media given the pervasive nature of the media. I don’t believe that Irish people would want, on balance, that religious interests should be able to buy air-time to deliver an unchallenged message – one which other interests through lack of resources might not be able to match or counter.”

massaged the prejudices of dominant majorities.”³⁷⁵ Greater critical engagement with the particular circumstances of individual cases is required in order to ensure that the Court’s judgments in this area are realistic and convincing.

Context may not be everything (although an old platitude of literary criticism tells us otherwise), but if the European Court of Human Rights continues to ignore the importance of contextualising factors in its jurisprudence, it will surely do so at its peril.

6.4 Specific current controversies

Having analysed the relevant jurisprudence of the European Court of Human Rights at length, and before closing the discussion on the scope of the heavily qualified right not to be offended, three current controversies merit close attention: denial or trivialisation of genocide and other crimes against humanity; “defamation” of religions; protection of founders of religions.

6.4.1 Denial or trivialisation of genocide and other crimes against humanity

Debates centring on whether or not free speech principles should afford any protection for the denial or trivialisation of genocide and other crimes against humanity remain topical and heated.³⁷⁶ Nevertheless, international human rights law consistently refuses to extend protection to such types of expression, as will presently be demonstrated.

6.4.1(i) The Holocaust/Negationism

Holocaust denial is a *sui generis* type of hate speech. It is morally reprehensible for a number of reasons: it is a common and convenient vehicle for conveying anti-Semitic sentiments; it denies survivors recognition of the dignity-stripping devastation which defines the Holocaust; it minimises the suffering and ultimate fate of those who were murdered in pursuit of the Nazis’ programme of elitarian-inspired hatred; it amounts to hatred directed against a group and against individual members of that group and it reinforces trends of discrimination and persecution. And this is true of every group that was subjected to systematic annihilation under the Nazi regime – Jews, Communists, Gypsies, the Mentally and Physically Disabled and others. In light of the harm caused by Holocaust denial, the case for legal prohibitions on such speech would appear to be socially imperative. The thesis that Holocaust denial should automatically be proscribed, irrespective of considerations such as intent, the time, place and manner of its delivery or its actual impact, is built on the premise that to allow Holocaust denial is, *ipso facto*, to confer a certain legitimacy on the content of this kind of speech.³⁷⁷

³⁷⁵ David A.J. Richards, *Free Speech and the Politics of Identity* (New York, Oxford University Press, Inc., 1999), p. 197.

³⁷⁶ David Irving’s conviction in Austria; the extradition of Ernest Zundel for trial; initial plans during German Presidency of EU to extend prohibition of Holocaust Denial; the draft French law prohibiting the denial of the Armenian genocide; political debate in the Netherlands about the desirability of prohibiting the denial of all crimes against humanity.

³⁷⁷ A. Bickel, *op. cit.*, p. 73; R. Eatwell, “The Holocaust Denial: a Study in Propaganda Technique”, in L. Cheles, R. Ferguson & M. Vaughan (Eds.), *Neo-Fascism in Europe* (New York, Longman Inc., 1991), pp. 120-146, at 123.

It is often the wont of so-called ‘revisionist historians’ and (extreme) right-wing politicians to seek to dress up their work or statements in the emperor’s clothing of “academic freedom” and “freedom of speech”. Neither claim is of immediate relevance, however. Myriad sound bites seek to strike high-minded chords: the truth is unattainable; our conceptions thereof are doomed to relativity; no facts should be immune to challenge, to vigorous questioning, as this is a vector for the advancement of society; no belief should be allowed to be sclerotised in accordance with the prevailing currents of any time or creed. The high road to self-righteousness is paved with such platitudes, perversely chosen in the hope that their rhetorical resonance will distract from the main issues involved.

But these are no more than empty sound bites and their echo *is* hollow, for not all disputes concerning the veracity of established facts are of a similar nature. People of this ilk are often quick to liken their contestations of orthodox accounts of the history of the Second World War to Galileo’s dissent from the catholic, conventional wisdom of yesteryear which dictated that the sun revolved around the earth. However, the primordial difference between Holocaust denial and Galileo’s celebrated refusal to recant (“*eppur si muove!*”) is that the issue of hatred was not central to the debate in which the principles of modern astronomy finally triumphed. Doubting and questioning with a view to stimulating reflection and debate are laudable, but not when their propelling force is hatred.

Such is the emotive content of any expression merely evoking the Shoah,³⁷⁸ that the delicate judicial balancing of seemingly antipodal interests will be necessarily deferential to the rights and reputations of those affected by the harmful tendencies of such speech. Echoing the argument from truth³⁷⁹ and Justice Holmes’s dissent in *Abrams*,³⁸⁰ Stanley Fish concedes that “although we ourselves are certain that the Holocaust was a fact, facts are notoriously interpretable and disputable; therefore nothing is ever really settled, and we have no right to reject something just because we regard it as pernicious and false.”³⁸¹ However, he continues, “when it happens that the present shape of truth is compelling beyond a reasonable doubt, it is our moral obligation to act on it and not defer action in the name of an interpretative future that may never arrive.”³⁸² In aggregate, this is recognition that conceptions of truth can only ever be relative and that ideas *can* be suppressed on the basis of their harmful content. The upshot of Fish’s assertion is that the memory of those who perished in the Holocaust should never be jettisoned in favour of a cargo of spuriously-motivated arguments about the fallibility of any so-called ‘truth’.

There are discernible similarities in the material facts of most of the negationist cases to have been brought before the European Commission for Human Rights. The applicants all sang from the same heinous hymn-sheet. Holocaust denial was their common refrain, but there were slight variations in the specific cadenzas of this distasteful orchestra, including: allegations that the Holocaust was invented for the purposes of extorting monetary compensation from the German authorities; aggressive advocacy of the reinstatement of National Socialism and the racial discrimination inherent in its philosophy; various Nazi-

³⁷⁸ See, for instance, the controversy (misplaced accusations of trivialisation of the Holocaust) which surrounded ‘La vita è bella’ (Italy, 1997), the Roberto Benigni film which won the Grand Prix at the Cannes Film Festival in 1998 and the Academy Award for Best Foreign Language Film in the same year. See further in this connection, Anne-Marie Bacon, *The Shoah on screen – Representing crimes against humanity* (Volume I) (Strasbourg, Council of Europe, 2006).

³⁷⁹ Attributable to both Milton and Mill, as well as forming the basis for Scanlon’s Millian Principle.

³⁸⁰ C.f. quote *supra*, especially the section referring to how “time has upset many fighting faiths...”

³⁸¹ S. Fish, *There’s No Such Thing as Free Speech and it’s a Good Thing, Too* (New York, OUP, 1994), p. 113.

³⁸² *ibid.*

inspired activities; the sinister, spurious questioning of the scientific feasibility of mass gassing.

In *X v. FRG*,³⁸³ it was held that to prohibit an individual from displaying pamphlets alleging that the Holocaust was “a lie” and a “zionistic swindle” “is a measure necessary in a democratic society for the protection of the reputation of others.” The Commission focused not only on the pamphlets’ distortion of relevant historical facts, but also on the attack they contained on the “reputation of all those who were described as liars or swindlers, or at least as persons profiting from or interested in such lies or swindles.”³⁸⁴ The conviction of a journalist for the publication of pamphlets aggressively advocating the reinstatement of National Socialism and the racial discrimination inherent in its philosophy, was held, in *Kühnen v. FRG*,³⁸⁵ to be necessary in democratic society “in interests of national security and public safety and for protection of rights of others.”³⁸⁶ Similarly, in *Rebhandl v. Austria*,³⁸⁷ the Commission upheld the conviction of the applicant for, *inter alia*, distributing “publications denying in particular the existence of the gassing of Jews in the concentration camps under the Nazi regime” on the basis of the public interest in the prevention of crime and disorder and the protection of reputations and rights. This, too, was the logic applied by the Commission in *Witzsch v. Germany*,³⁸⁸ a case involving a conviction for disparaging the dignity of the dead. In this case, the language employed was more open-ended, as it spoke of “the requirements of protecting the interests of the victims of the nazi regime”.

*H., W., P., and K. v. Austria*³⁸⁹ dealt with convictions for acts performed by the applicants in connection with their membership of and leadership in Aktion Neue Rechte (ANR). The Commission held that legal prohibitions on activities inspired by National Socialism *are* “necessary in a democratic society in the interests of national security and territorial integrity and for the prevention of crime.”³⁹⁰ It is perhaps noteworthy that the activities of the applicants involved the preparation and publication of pamphlets which described the Holocaust as a lie; propagated theories about alleged biological differences between races, principles of elitarianism and endorsements of Lebensraum and other National Socialist doctrines which constituted part of their own party’s manifesto. The most significant feature of this case was the Commission’s observation that “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17.”³⁹¹ This is a very candid and important recognition of the hateful ideology that forms the bedrock of Nazism. It is, in effect, the equation of membership of the National Socialist Party with an espousal of all of its ideals. *Ochensberger v. Austria*³⁹² was another case challenging a conviction for National Socialist activities and was declared inadmissible on much the same grounds.

³⁸³ Appn. No. 9235/81, 29 DR 194 (1982).

³⁸⁴ *Ibid.*, p. 198.

³⁸⁵ Appn. No. 12194/86, 56 DR 205 (1988).

³⁸⁶ *Ibid.*, p. 205.

³⁸⁷ Appn. No. 24398/94.

³⁸⁸ Appn. No. 41448/98.

³⁸⁹ Appn. No. 12774/87, 62 DR (1989) 216.

³⁹⁰ *Ibid.*, p. 216.

³⁹¹ *Ibid.*, pp. 220/1. See p. 216 for almost identical language, and also *Nachtmann v. Austria*, Appn. No.

36773/97. This unsuccessful application was taken by the head of editorial staff of a periodical that published an article which grossly denied and minimised National Socialist genocide and other National Socialist crimes.

Nigh-identical language is also employed in *Schimanek v. Austria*, Appn. No. 32307/96.

³⁹² Appn. No. 21318/93, 18 EHRR-CD, pp. 170-172.

The Commission's finding in *Honsik v. Austria*³⁹³ is a carbon-copy of its finding in the *H., W., P. and K. v. Austria* application as exactly the same reasons are offered in attesting to the necessity of the conviction for social democracy. Furthermore, the incompatibility of National Socialism with democracy and human rights is reiterated. The conviction in the instant case was “pour avoir nié dans une publication la réalité du génocide perpétré dans les chambres à gaz des camps de concentration sous le régime national-socialiste.”³⁹⁴

In *Walendy v. Germany*,³⁹⁵ the Commission refused to admit a complaint by the applicant about a search and the seizure of an unlawful publication containing an article which amounted to a denial of the systematic annihilation of Jews under the Third Reich. This, the Commission held, “constituted an insult to the Jewish people and at the same time a continuation of the former discrimination against the Jewish people.”³⁹⁶ In *E.F.A. Remer v. Germany*,³⁹⁷ the applicant's suggestions that “le sort des Juifs sous le régime national-socialiste avait été ‘inventé’ de toutes pièces à des fins d’extorsion”³⁹⁸ ensured that his attempt to challenge his conviction for incitement to hatred and to racial hatred was declared inadmissible.

Notwithstanding the Commission's repeated refusals even to countenance speech involving Holocaust denial, or by extension, speech used by proponents of National Socialism in furtherance of their stigmatised brand of politics, one case which did manage to slip through the net and was duly considered by the Court in 1998 was *Lehideux & Isorni v. France*, discussed *supra*.³⁹⁹ This judgment was a rare instance of freedom of expression outweighing the perceived harms of discourse which is colourably negationist, anti-Semitic or totalitarian, when these two potentially countervailing concerns were balanced on the judicial scales. Other highly-publicised cases centring on Holocaust denial have also originated in France.⁴⁰⁰

The application in *Marais v. France*,⁴⁰¹ declared manifestly unfounded by the Commission, arose out of an article entitled ‘La chambre à gaz homicide du Struthof-Natzweiler, un cas particulier’ (‘The homicidal gas chamber of Struthof-Natzweiler, a particular case’; author's translation) written by the applicant for the periodical *Revision*. The Commission considered the content of the article to question “l'existence et l'usage de chambres à gaz pour une extermination humaine de masse.”⁴⁰² The conviction of Marais was pursuant to “l'article 24bis de la loi du 29 juillet 1881” (otherwise known as “la loi Gaysot”, 13 July 1990). A wave of anti-semitism swept through France in 1990, culminating in the desecration of tombs in a Jewish cemetery at Carpentras in August of that year. The Government's response to this

³⁹³ Appn. No. 25062/94, 83-B DR 77 (1995).

³⁹⁴ “[F]or having denied in a publication the reality of the genocide perpetrated in the gas chambers of the concentration camps under the National-Socialist regime” (author's translation). *Ibid.*, p. 77.

³⁹⁵ Appn. No.21128/92, 80-A DR 94.

³⁹⁶ *Ibid.*, p. 99.

³⁹⁷ Appn. No. 25096/94, 82-A DR 117.

³⁹⁸ “[T]he fate of the Jews under the National-Socialist regime had been ‘invented’ purely for the purposes of extortion” (author's translation). *Ibid.*, p. 122.

³⁹⁹ Reports, 1998-VII.

⁴⁰⁰ These include (albeit only in the national courts) the conviction of Jean-Marie Le Pen, leader of the extreme right-wing party, *Le Front national*, for describing the Nazi gas chambers as “un point de détail” in the history of the Second World War. He was found guilty by the Cour de cassation (the French equivalent of the Supreme Court) in 1989 for the banalisation of constitutive acts of crimes against humanity (“banalisation d'actes constitutifs de crimes contre l'humanité”). See further, J.-Y. Camus, *Le Front National* (Toulouse, Editions Milan, 1998), p. 41.

⁴⁰¹ Appn. No. 31159/96, 86-A DR 184 (1996).

⁴⁰² “[T]he existence and use of gas chambers for mass human extermination” (author's translation). *Ibid.*, p. 190.

surge in anti-Semitism was the enactment of the so-called Gayssot Act. Also the fulcrum of the aforementioned case, *Faurisson v. France*, the Gayssot Act was intended to be a main plank in the French Government's programme against racism and anti-Semitism; a hefty legislative sandbag to counter the rising tide of intolerance.

The so-called "revisionist historian", David Irving, was mentioned in an application which was rejected by the European Commission – *Nationaldemokratische Partei Deutschlands Bezirksverband Munchen-Oberbayern v Germany*.⁴⁰³ At issue in the case was an imposition on the organisers of a meeting (at which Irving was due to speak) of an obligation to take appropriate measures to ensure that the Nazi persecution of Jews would not be denied or called into question during the meeting.

If it is accepted that Holocaust Denial is a legitimate and proportionate, and indeed, necessary restriction on freedom of expression, this begs the question whether the same should be the case for speech seeking to minimise, trivialise or deny the occurrence of other genocides. This question is problematic as Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) does not include genocide-denial as one of its five enumerated "punishable" acts.⁴⁰⁴ These acts are: "(a) genocide [as defined in Article 2]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide." As documented *supra*, various aspects of the crime of incitement were the subject of protracted wrangling during the drafting of the Genocide Convention, but genocide-denial as such was not dwelt upon.⁴⁰⁵

It is certainly a question deserving further exploration whether the scope of the Genocide Convention could be extended to include genocide-denial. It is difficult to envisage different standards being applied to different genocides: international law would surely be above the egregious practice of hierarchising horror. In any event, the definition of genocide would have to be stringently applied, for as posited by William Schabas: "There is no magic threshold past which ethnically motivated killing becomes genocide. The real test lies in the intent of the perpetrator."⁴⁰⁶ Genocide is defined by Article 2 of the Genocide Convention as:

- ... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Once the definitional criteria of "genocide" have been met, a further question comes a-begging: should temporal restrictions attach to a putative offence of genocide-denial. How recent would the genocide have to be in order to merit its classification as an offence punishable by law? Of course, the debate surrounding the criminalisation of genocide-denial

⁴⁰³ Appn. No. 25992/94, 84-A DR 149 (1996).

⁴⁰⁴ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 3: "The following acts shall be punishable: (a) genocide [as defined in Article 2]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide."

⁴⁰⁵ See generally, William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide", 46 *McGill Law Journal* 141 (2000), at pp. 141-171.

⁴⁰⁶ *Ibid.*, p. 144.

need not be the sole preserve of the Genocide Convention. However, other international law instruments have been slow to meet the issue head on. In fact, the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (mentioned *supra*) is the only international treaty to date which seeks to tackle the issue of the denial of genocides other than/as well as the Holocaust (and it has yet to enter into force). The operative provision of the Additional Protocol reads as follows:

Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

1 Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2 A Party may either

a require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b reserve the right not to apply, in whole or in part, paragraph 1 of this article.

While the text of Article 6 is silent on possible temporal restrictions to the recognition of genocides for the purpose of penalising their denial, one can extrapolate from the Explanatory Report to the Additional Protocol that the focus is primarily on genocides perpetrated in the latter half of the twentieth century up to the present day. The basis of this reading of the text is the following passage:

[...] The drafters agreed that it was important to criminalize expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945. This owing to the fact that the most important and established conducts, which had given rise to genocide and crimes against humanity, occurred during the period 1940-1945. However, the drafters recognised that, since then, other cases of genocide and crimes against humanity occurred, which were strongly motivated by theories and ideas of a racist and xenophobic nature. Therefore, the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2nd World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.). Such courts may be, for instance, the International Criminal Tribunals for the former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This Article allows to refer to final and binding decisions of future international courts, to the extent that the jurisdiction of such a court is recognised by the Party signatory to this Protocol.⁴⁰⁷

⁴⁰⁷ Explanatory Report to the Additional Protocol to the Convention on Cybercrime, *op. cit.*, para. 40.

Where would this leave the French Bill on the calling into question of the Armenian Genocide?⁴⁰⁸ The French Bill is a topical example of broader, recrudescing questions. For instance, to what extent (if any) is it legitimate for a State to use the coercive force of its laws to mandate particular interpretations of historical events?⁴⁰⁹ The same question could be asked in relation to the objective of sustaining particular versions of a population's collective identity or memory. It is submitted here that States proposing such legislation would have to discharge a very heavy burden of proof to show that the proposed measures would not constitute an illegitimate interference with the exercise of the right to freedom of expression under prevailing international legal standards.

The European Court of Human Rights has considered questions such as these on a number of occasions. The case of *Odabasi and Koçak v. Turkey* concerned the conviction by the Turkish courts of an author and publisher for having defamed the memory of Atatürk.⁴¹⁰ The Court concluded that the convictions constituted a violation of Article 10, ECHR, and the key part of its reasoning reads as follows:

En l'occurrence, la Cour ne peut négliger qu'Atatürk, père fondateur de la Turquie, est une figure emblématique de la Turquie moderne. En sanctionnant les requérants, les autorités turques ont voulu agir pour empêcher que la société turque, attachée à cette figure, ne se sente attaquée dans ses sentiments de manière injustifiée. Cependant, lorsque l'on examine les affirmations litigieuses dans leur ensemble, force est de constater qu'elles ne visaient pas directement et personnellement Atatürk, mais l'idéologie «<kémaliste>>. Dès lors, la Cour observe que les requérants n'ont pas porté de jugement de valeur et se sont contentés de relater certains faits sous la forme introductive, invitant le lecteur, et plus précisément la gauche turque, à y répondre. [...]»⁴¹¹

The cited passage provides cause for concern. First, the Court points out that the impugned statements did not target Atatürk directly and personally. Instead they targeted Kemalist ideology. The cause for concern here is the apparent implication of the Court's remarks, namely that if the impugned statements had targeted Atatürk directly and personally that there may have been grounds to restrict the applicants' right to freedom of expression. Notwithstanding Atatürk's "emblematic status in modern Turkey", he was a political figure. Thus, any suggestion that he or his (posthumous) reputation should benefit from additional protection, is surely at odds with one of the most consistent lines in the Court's Article 10 case-law, namely that in democratic society, and especially in the context of public or political debate, politicians ought to withstand robust criticism. Second, the Court places store by the fact that the applicants did not make value-judgments, but limited themselves to introducing certain facts and inviting the reader and more specifically, the political left, to respond to the same. Again, the cause for concern lies in what the remark could seem to imply, i.e., that if the applicants had made value-judgments that they might not have benefited from the same level of protection. This would clearly have been out of kilter with the Court's settled case-law on value-judgments, which are an integral part of public debate and journalistic activity. Protection for value-judgments can only be contested when they have no factual grounding and are made maliciously. This was patently not the case here. A third

⁴⁰⁸ A Bill to prohibit the calling into question of the Armenian genocide (Proposition de Loi tendant à réprimer la contestation de l'existence du génocide arménien), 12 October 2006. The Bill was passed at first reading by the French Assemblée Nationale.

⁴⁰⁹ For further discussion, see: Lawrence Douglas, "Policing the Past: Holocaust Denial and the Law", in Robert C. Post, Ed., *Censorship and Silencing: Practices of Cultural Regulation* (USA, The Getty Institute for the History of Art and the Humanities, 1998), pp. 67-87; Eric Stein, "History Against Free Speech: The New German Law Against The 'Auschwitz' - And Other - 'Lies'", 85 Mich. L. Rev. 277 (1986).

⁴¹⁰ Judgment of the European Court of Human Rights (Fourth Section) of 21 February 2006.

⁴¹¹ *Ibid.*, para. 23.

cause for concern lies in a statement by the Court in paragraph 24 of its judgment, which immediately follows the above-cited excerpt. It concludes that the impugned passages in the book do not incite to violence, armed resistance or uprising and that they do not amount to hate speech. However, further explanation of this conclusion is not forthcoming and in the absence of a firm definition of “hate speech”, our understanding of relevant issues is not elucidated in any way.

A second example of the Court engaging with such issues concerns historical events and collective memory. In *Chauvy & Others v. France*, the Court took the view that, aside from “the category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17”:

[...] it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issue, which is part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.⁴¹²

The case required the balancing of two competing interests, *viz.*, the public interest in being informed of the circumstances in which Jean Moulin, a leading figure in the French Resistance against the Nazi occupation in the Second World War, was arrested, and the need to protect the reputation of Mr and Mrs Aubrac, two other important members of the Resistance. It had been suggested in a book that the latter had been in some way responsible for the arrest, suffering and death of Moulin. In exercising its supervisory function, the European Court of Human Rights found that the approach and reasoning in the French courts’ decisions constituted “relevant and sufficient reasons” for the convictions imposed in the domestic legal system. It therefore concluded that Article 10 had not been violated.

The judgment did, however, contain a couple of other statements which potentially have relevance beyond the facts of the instant case. Most importantly, for present purposes, was the Court’s acceptance to the French courts’ finding that “the author had failed to respect *the fundamental rules of historical method* in the book and had made particularly grave insinuations”.⁴¹³ The reference to the fundamental rules of historical method can be taken as a concrete example of the duties and responsibilities that accompany the exercise of the right to freedom of expression in the context of historical debate. As such, it is a rare reference by the Court to specific duties pertaining to a particular profession other than journalism or politics.

Prima facie, a judicial focus on Holocaust denial may seem slightly anachronistic, as World War II and its atrocities very gradually recede into the collective memory and younger generations succeed previous generations, whose lives were closer to the tragedies and suffering of those years. Such an observation would, however, be simplistic. The heyday of Nazism did indeed span a fixed and finite period. However, its spectre continues to haunt modern times and the supposed values, or more accurately, the counter-values, of Nazism are immutable. These are counter-values against which society must always guard vigilantly. As noted by the writer William Faulkner: “The past is never dead. It’s not even past.”⁴¹⁴

These perspectives resonate in one of the theses advanced by Lawrence Douglas, namely that “the problem that the Holocaust poses to the law today is less one of assigning responsibility than one of preserving responsible memory [...] The law has been enlisted in the project of

⁴¹² *Chauvy & Others v. France*, Judgment of the European Court of Human Rights of 29 June 2004, para. 69.

⁴¹³ (emphasis added). *Ibid.*, para. 77.

⁴¹⁴ William Faulkner, *Requiem for a Nun* (New York, Vintage Books, 1975), Act I, Scene III, (Stevens), p. 80.

safeguarding historical truth.”⁴¹⁵ This is one rationale for the continued existence and enforcement of Holocaust-denial laws; the second is that consistently advanced by the French Government in defence of the Gayssot Act (considered *supra*). Defamation of the dead and insulting of survivors lies somewhere in-between these two rationales, given that it approximates towards the “intentional infliction of emotional distress”.⁴¹⁶ Douglas’s synthesis of these rationales is insightful:

[...] criminalizing Holocaust denial anticipates a time when the event will no longer remain alive in the memory of survivors, as the group of plaintiffs who could claim emotional distress will have died off. The law thus prepares us for a rapidly approaching future in which the Holocaust will have become an artifact of history. [...] Why then do we need the law to secure the Holocaust in responsible memory, when we do not need a law to remind us that the earth revolves around the sun or that Napoleon’s armies fought at Waterloo? Part of the answer seems to lie in a fear of the spread of the disbelief that Primo Levi notes first greeted news of the camps. The very extraordinary nature of Nazi genocide, it is argued, renders it vulnerable to a campaign of scepticism.⁴¹⁷

He continues by extending the logic of his own analysis to a broader plane:

Perhaps, then, it can be argued that Holocaust denial does not so much offend a particular group or history itself as it insults the very notions of meaning upon which the liberal concept of public discourse is predicated. This claim is far more foundational, for it does not insist that Holocaust denial can be silenced because it insults codes of civil behavior and speech; rather, it contends that because Holocaust denial makes a mockery of conventions of truth-testing and good faith conversation, it violates the most basic norms that make intelligible the concept of public discourse.⁴¹⁸

This analysis would appear to underlie the European Commission’s finding in *Rebhandl v. Austria* (discussed *supra*) that “the applicant’s publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination.”⁴¹⁹ According to this school of thought, Holocaust denial is but one, specific form of attack on justice, peace, equality, harmony and other venerated values of democracy. However, the case which offers the clearest elucidation yet of the rationales governing the Court’s approach to Holocaust denial is the recent *Garaudy v. France* judgment.⁴²⁰ The following extract from the judgment is revelatory of the Court’s reasoning:

[...] There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and

⁴¹⁵ Lawrence Douglas, “Policing the Past: Holocaust Denial and the Law”, in Robert Post, [...], pp. 67-87, at p. 68.

⁴¹⁶ *Ibid.*, p. 69, quoting Elie Wiesel.

⁴¹⁷ *Ibid.*, p. 70.

⁴¹⁸ *Ibid.*, p. 71.

⁴¹⁹ The same reasoning and language were employed by the Commission in *D.I. v. Germany*, Appn. No. 26551/95; a case in which the applicant “historian”’s denial of the existence of gas chambers at Auschwitz had led to his conviction by the German courts under the relevant sections of the German Penal Code, for insult and for blackening the memory of the deceased.

⁴²⁰ *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 4 July 2003 (?), Application No. 65831/01.

anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...] ⁴²¹

The various rationales for prohibiting negationism, as discussed in the preceding paragraphs, are broadly congruent. They focus on the protection of the rights of others, namely their dignity and good name, as well as non-discrimination and equality. Next to those rationales, however, other rationales have been advanced, but they do not fit easily into the aforementioned congruence. For instance, William Schabas has noted that negationism has been described “as a form of incitement to genocide”. It is respectfully submitted here that this suggestion appears to rest both on a *non sequitur* and on a misrepresentation. As to the former: it is difficult to conceive of circumstances in which negationist statements *per se* would readily be interpreted as inciting new genocidal offences. However egregious the minimalisation or trivialisation or denial of previous genocides, in particular the Holocaust, may be, in the absence of other determinant factors, negationism on its own, cannot be assumed to constitute the intensity of advocacy necessary to meet the definitional criteria of incitement to genocide (which, under Article III of the Genocide Convention, would have to be “direct and public” incitement anyway).

As to the misrepresentation: Schabas attributes the description of negationism as a form of incitement to genocide to Benjamin Whitaker, who was the Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities charged with the task of preparing a major report “on the question of the prevention and punishment of the crime of genocide” in the mid-1980s.⁴²² The alleged source of the description - para. 49 of Whitaker's report - does not make any reference to incitement, let alone incitement to genocide. Rather, the paragraph notes the plans of the German Government to criminalise attempts to deny or minimise the truth about Nazi crimes. It then acknowledges that different States have different views and policies on those questions, as well as the sincerity in the “differences of opinion [...] as to whether this problem is best dealt with by education and constant vigilance or by the influence of legislation”. Nor is negationism described as incitement to genocide in either of the two preceding paragraphs that make up the relevant section (“Propaganda in favour of genocide”) of the report. In para. 47, Whitaker notes the suggestion that “public propaganda aimed at promoting the commission of acts of genocide, or attempts to rewrite history so as either to falsify the truth about or to glorify its occurrence, of which there are examples in more than one country today, should be brought within the terms of the Convention”,⁴²³ but ultimately does not take a stand on the question. In para. 48, he writes that “it can be argued that propaganda for genocide should not be considered as any less grave than propaganda for war, prohibited by Article XX(1) of the Covenant on Civil and Political Rights, or propaganda in favour of racial superiority, prescribed by Article IV of the Convention on the Elimination of All Forms of Racial Discrimination”. This is a reasonable argument, but again, it cannot be construed as bracketing together negationism and incitement to genocide. It is important to scotch the suggestion that Whitaker described negationism as a

⁴²¹ *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

⁴²² Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, 2 July 1985, UN Doc. No. E/CN.4/Sub.2/1985/6 (see also the Corrigendum thereto: UN Doc. No. E/CN.4/Sub.2/1985/6/Corr.1).

⁴²³ Emphasis added.

form of incitement to genocide because of the *de facto* or political imprimatur that could be perceived as attaching to such a description by virtue of the official capacity in which his report was written.

6.4.2 “Defamation” of religions

In the final years of the UN Commission on Human Rights’ existence, the topic, “Combating defamation of religions”, became a recurrent agenda item. Every year, since 1999, the Commission adopted a Resolution on the topic – sponsored by individual States (usually Pakistan) on behalf of the Organization of the Islamic Conference.⁴²⁴ In December 2005, the UN General Assembly followed suit by adopting an identically-titled Resolution.⁴²⁵ In December 2006⁴²⁶ and December 2007,⁴²⁷ the UNGA again adopted identically-titled Resolutions. In March 2007, the UN Human Rights Council which replaced the Commission, adopted an identically-titled Resolution too.⁴²⁸ These texts strongly resemble each other; any differences are minor, with one exception (see further, *infra*).

The Resolution can be roughly divided into four main focuses: a preamble; provisions that identify and criticise particular practices that do or could plausibly relate to the alleged offence of “defamation” of religions (although the text makes no attempt to define the alleged offence); provisions that identify and criticise practices that do not appear to be even of penumbral relevance to the alleged offence, and suggested measures to be undertaken in order to combat “defamation” of religions.

Of greatest interest here are the second and third categories. Among the practices that would or could fall within the presumptive definitional ambit of “defamation” of religions are:

- “negative stereotyping of religions [...]”⁴²⁹
- “intensification of the campaign of defamation of religions”⁴³⁰
- “Islam is frequently and wrongly associated with human rights violations and terrorism”⁴³¹
- “programmes and agendas pursued by extremist organizations and groups aimed at the defamation of religions, in particular when supported by Governments”⁴³²
- “in the context of the fight against terrorism and the reaction to counter-terrorism measures, defamation of religions becomes an aggravating factor that contributes to

⁴²⁴ UN Human Rights Commission Resolutions 1999/82 of 30 April 1999, 2000/84 of 26 April 2000, 2001/4 of 18 April 2001, 2002/9 of 15 April 2002, 2003/4 of 14 April 2003, 2004/6 of 13 April 2004 and 2005/3 of 12 April 2005. See further, Kevin Boyle, “The Danish Cartoons”, 24 *Netherlands Quarterly of Human Rights* (No. 2, 2006), pp. 185-191.

⁴²⁵ “Combating defamation of religions”, UN General Assembly Resolution 60/150 of 20 January 2006 (60th session, agenda item 71 (b)), Doc. No. A/Res/60/150.

⁴²⁶ “Combating defamation of religions”, UN General Assembly Resolution 61/164, 19 December 2006 (61st session, agenda item 67(b)), Doc. No. A/61/PV.81.

⁴²⁷ “Combating defamation of religions”, UN General Assembly Resolution 62/154, 18 December 2007 (62nd session, agenda item 70(b)), Doc., No. A/Res/62/154.

⁴²⁸ Report to the General Assembly on the Fourth Session of the Human Rights Council (Vice-President and Rapporteur: Mr. Mousa Burayzat), 12 June 2007, Doc. No. A/HRC/4/123.

⁴²⁹ Res. 60/150 & Res. 61/164: para. 1; Res. 62/154: para. 2.

⁴³⁰ Res. 60/150 & Res. 61/164: para. 3; Res. 62/154: para. 6.

⁴³¹ Res. 60/150 & Res. 61/164: para. 4; Res. 62/154: para. 5.

⁴³² Res. 60/150 & Res. 61/164: para. 5; Res. 62/154: para. 4 (where “condoned” is used instead of “supported”).

the denial of fundamental rights and freedoms of target groups, as well as their economic and social exclusion⁴³³

Taken together, these provisions prompt a number of conceptual criticisms. The most fundamental of those criticisms is that religions do not have any “right”, as such, to be protected from criticism, no matter what level of intensity that criticism may reach. One could, however, argue that the duties and responsibilities that accompany the exercise of the right to freedom of expression require those exercising that right to abstain from engaging in criticism of religions that is abusive towards their adherents. But that is not at all the same thing as to imply the existence of a reputational right for religions. Nor does it imply a specific right for aggrieved adherents of those religions. One can only validly speak of an actual right not to have one’s freedom of religion interfered with.

As already signalled, the Resolution addresses a number of concerns that are only tangentially related to the alleged offence of “defamation” of religions (if at all):

- “[...] manifestations of intolerance and discrimination in matters of religion or belief [...]”⁴³⁴
- “physical attacks and assaults on businesses, cultural centres and places of worship of all religions as well as targeting of religious symbols”⁴³⁵
- “the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001”⁴³⁶
- “the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion”⁴³⁷

Manifestations of intolerance and discrimination in matters of religion or belief are best dealt with under existing provisions against discrimination. Likewise, the problem of ethnic and religious profiling also falls squarely under existing provisions and mechanisms against discrimination.

The focus on attacks on premises is conceptually unsatisfying too. First, the conventional meaning of “assault” under criminal law is an attack (or imminent/impending attack) on a person (not on buildings or artefacts as suggested in the Resolutions). Second, attacks on, or the causation of damage to, property are best dealt with under standard criminal law provisions.

Similar objections must be raised to paragraph on the media. First, violence, xenophobia or related intolerance and discrimination can, by definition, only take place against persons – not doctrines. By extension, the same must apply to incitement to such actions. Furthermore, as an offence, incitement is very distinct from defamation. The former is undue inducement to commit certain (in this context, prohibited) acts; the latter concerns causation of damage to reputational interests.

⁴³³ Res. 60/150, Res. 61/164 & Res. 62/154: para. 7.

⁴³⁴ Res. 60/150 & Res. 61/164: para. 1; Res. 62/154: para. 2.

⁴³⁵ Res. 60/150 & Res. 61/164: para. 2; Res. 62/154: para. 3.

⁴³⁶ Res. 60/150 & Res. 61/164: para. 3; Res. 62/154: para. 6.

⁴³⁷ Res. 60/150 & Res. 61/164: para. 6; Res. 62/154: para. 8.

Looking beyond a purely textual analysis of the Resolutions, the ostensible aim of this initiative is clear: to curb (harsh) criticism of religions, particularly Islam. Its motivation is brazenly partisan: as reflected by the texts, the concern is primarily for the protection of Islam, and extends only secondarily to other religions. Such partisanship and hierarchisation of religions are difficult to justify, especially in a text with aspirations to universal application. Non-Muslim States would probably be less resistant to the aims of this initiative if it were to be calibrated in a more religion-neutral manner, eg. if it were to seek to curb the “defamation” of all religions in a more egalitarian way.⁴³⁸ Incidentally, a similar criticism could be levelled at other comparable IGO initiatives that seek to prioritise the interests of specific religions.⁴³⁹ Absent convincing and pressing reasons for such a confessional hierarchisation, the practice should be avoided.

The use of scare quotes in this study when referring to the “defamation” of religions is a deliberate ploy to alert the reader to the conceptual confusion engendered by the term. Defamation, traditionally and conventionally, is centrally about the protection of an individual’s good name and reputation; the esteem in which s/he is held by other (right-thinking) members of society.⁴⁴⁰ Definitions of defamation abound and the one followed here is taken from ARTICLE 19’s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.⁴⁴¹ According to these principles:

Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals – or of entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.⁴⁴²

Another relevant definitional criterion for defamation, which is not expressly mentioned in the foregoing citation, but which is generally implicit in *Defining Defamation*, is that it consists of the wrongful publication of a *false* statement about a person.⁴⁴³ This explains the legitimacy of “proof of truth” as a defence in defamation actions. It also points up the unsuitability of defamation actions as a mechanism for seeking to legally restrict or punish expressions of opinion. By definition, the truth of statements of opinion (or “value-judgments”) is not susceptible to proof, and as such, they must be distinguished from statements of fact, the truth of which can ordinarily be proven (to some level of satisfaction, at least).⁴⁴⁴

The regular scope of defamation is also subject to a couple of further delimitations, both of which are captured well by *Defining Defamation*. Principle 2(b) reads:

⁴³⁸ See further, Kevin Boyle, “The Danish Cartoons”, *op. cit.*

⁴³⁹ See, for example, the OSCE’s initiative “on Combating Racism, Xenophobia and Discrimination, also focusing on Intolerance and Discrimination against Christians and members of other religions”.

⁴⁴⁰ See generally, Marie McGonagle, *Media Law* (Second Edition) (Dublin, Thomson Round Hall, 2003), Chapter 4 – “Defamation”, pp. 64-149; for the essential features of the offence and an historical overview of its development, see in particular, pp. 64-74.

⁴⁴¹ London, ARTICLE 19, 2000. These Principles are part of ARTICLE 19’s International Standards Series; they “are based on international law and standards, evolving state practice (as reflected, inter alia, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations. [...]”, “Introduction”, *ibid.*, p. 1.

⁴⁴² *Ibid.*, Principle 2: Legitimate Purpose of Defamation Laws: (a).

⁴⁴³ See, for example, Bryan McMahon & William Binchy, *Irish Law of Torts* (3rd Edition), (Dublin, Butterworths, 2000), p. 882.

⁴⁴⁴ *Lingens v. Austria*, Judgment of the European Court of Human Rights of 8 July 1986, Series A, No. 103, para. 46.

Defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit, or to protect the ‘reputations’ of entities other than those which have the right to sue and to be sued. In particular, defamation laws cannot be justified if their purpose or effect is to:

[...]

ii. protect the ‘reputation’ of objects, such as State or religious symbols, flags or national insignia;

[...]

v. allow individuals to sue on behalf of a group which does not, itself, have status to sue.

Because the notion of “reputation” is at the very core of defamation, its extension to “religions” is problematic. Religions *qua* belief systems do not have reputations in the same sense that individuals do. This distinction is implicitly recognised by the European Court of Human Rights: in the *Giniewski* case (see further, *supra*), the Court upheld the legitimacy of the aim of the challenged interference with the applicant’s right to freedom of expression, which it summarised as being “to protect a group of persons from defamation *on account of their membership of a specific religion*”.⁴⁴⁵ The Court held that this aim corresponded to the protection of “the reputation or rights of others” (Article 10(2), ECHR). Crucially, the focus was on defamation of (*a group of*) persons, not religions, as such. It is more apt to speak of the (cognitive and affective) associations made by individuals in relation to religions, but it would involve considerable semantic stretch to characterise such associations as reputational. This particular analogy is therefore limited. The analogy of group defamation, on the other hand, is more viable, because it is concerned with a group – necessarily comprising a body of individuals – and not a creed or any other inanimate object.⁴⁴⁶

This conceptual reservation about the transferability of defamation leads into the second relevant delimitation of the scope of defamation, announced *supra*. Principle 2(c) of *Defining Defamation* reads:

Defamation laws also cannot be justified on the basis that they serve to protect interests other than reputation, where those interests, even if they may justify certain restrictions on freedom of expression, are better served by laws specifically designed for that purpose. In particular, defamation laws cannot be justified on the grounds that they help maintain public order, national security, or friendly relations with foreign States or governments.

Clearly, therefore, defamation is not the malleable concept that some people would like to believe. A useful addendum to Principle 2(c) is that defamation is equally unsuited to protecting the very vague notion of “dignity”, a concept with which reputation has a certain affinity.⁴⁴⁷

When these general principles are applied to the aforementioned initiative within the UN, “Combating defamation of religions”, the conceptual premises of that initiative – just like its political motivation (see *infra*) - are revealed to be shaky. It represents an attempt to extend the scope of defamation to cover a subject for which it is ill-suited. If that subject is deserving of protection, alternative means to ensure that protection should be explored. My own view is

⁴⁴⁵ (emphasis added) *Giniewski v. France*, *op. cit.*, para. 40.

⁴⁴⁶ For comprehensive treatment of group defamation, see: Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence* (USA, Greenwood Press, 1995). See, in particular, Louis Henkin, “Group Defamation and International Law”, *ibid.*, pp. 123-134. See also: Natan Lerner, *Group Rights and Discrimination in International Law* (2nd Edition) (The Hague, Martinus Nijhoff Publishers, 2003); Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998).

⁴⁴⁷ See further: Marie McGonagle, *Media Law*, *op. cit.*, at 64; Eric Barendt, “What is the point of Libel Law?”, *52 Current Legal Problems* (1999) 110, at 117.

that while religions are not entitled to protection *per se*, persons who do hold religious beliefs are entitled not to have those beliefs abused or outraged. The distinction is perhaps a fine one, but it is not necessarily unworkable, and the definition of abusive expression developed by Gaudreault-DesBiens and discussed *supra*, could be applied here. I would also contend that no new measures are required to safeguard such a right: adequate mechanisms are already at hand. The ECHR is well-poised to deal dispositively with the issue (see further, *supra*), as is the ICERD – at least to the extent that the abuse of religious beliefs could be considered a proxy for racial discrimination. In this connection, caution has been urged not to confuse “a racist statement and an act of defamation of religion”,⁴⁴⁸ but given the amount of conceptual confusion that inheres in the latter, it is plausible that certain types of abusive expression (in the sense set out by Gaudreault-DesBiens) could come within the scope of ICERD’s attentions. As noted by Conor Gearty, some religions have a “powerful ethnic tinge” and “[i]n such situations, the concept of religious intolerance must stand or fall apart from ethnicity in a way that is not altogether unproblematic”.⁴⁴⁹

If the true purpose of “defamation of religions” is the protection of religious sensitivities, then a different calculus necessarily applies. As stated by the UN Special Rapporteur on freedom of religion or belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

The right to freedom of expression can legitimately be restricted for advocacy that incites to acts of violence or discrimination against individuals on the basis of their religion. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion protected from all adverse comment.⁴⁵⁰

Notwithstanding this clarification of the actual scope of relevant provisions of international law, the latest two UNGA Resolutions on “Combating defamation of religions” (i.e., Res. 61/164 and Res. 62/154) and the Human Rights Council’s Resolution 4/9, also entitled, “Combating defamation of religions”, misrepresent the legal reality. The misrepresentation takes place in the following paragraph:

Emphasizes that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs⁴⁵¹

⁴⁴⁸ Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3, para 49.

⁴⁴⁹ Conor A. Gearty, “The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (Oxford University Press, New York, 1999), pp. 327-358, at 337.

⁴⁵⁰ Report further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, *op. cit.*, para. 37.

⁴⁵¹ (Italics per original text; underlining added for emphasis) UNGA Res. 61/164, para. 9 and UN Human Rights Council Resolution 4/9, para. 10. The equivalent paragraph in UNGA Res. 62/154, para. 10, is worded slightly differently, but the misrepresentation remains the same. It reads: “*Emphasizes* that everyone has the right to hold opinions without interference and the right to freedom of expression, and that the exercise of these rights carries with it special duties and responsibilities and may therefore be subject to limitations as are provided for by law and are necessary for respect of the rights or reputations of others, protection of national security or of public

The limitations on the right to freedom of expression listed in the cited paragraph are consistent with those explicitly enumerated in Article 19(3), ICCPR, except for the underlined limitation – “respect for religions and beliefs”. That limitation is without any basis in international human rights law and it is hard to avoid the conclusion that it has been included in a deliberately stealthy manner in order to further the objectives of the Resolution as a whole. It is a serious misrepresentation, all the more so because of its repetition (in UNGA Res. 62/154 and Human Rights Council Res. 4/9).

A third and closely related objection to “defamation of religions” is that its chilling effect on the discussion of religious issues which are of public interest is potentially huge. It is important to be eternally vigilant against attempts to legally enshrine measures that would have the effect of cordoning off religious beliefs and preventing them from being a subject of debate, or of criticism, for that matter. In the absence of any explicit or ulterior racist or discriminatory motives, hatred or incitement, it is perfectly legitimate to criticise religions and religious beliefs – even in virulent terms. Such are the demands of pluralism, tolerance and broadmindedness without which there would be no democratic society, to use the formulae of the European Court of Human Rights.

The defilement of religions – a comparable notion, but one that does not carry the same baggage of conceptual confusion as defamation of religions – is also gradually beginning to make inroads into the case-law of the European Court of Human Rights (again, see further, *supra*). The Court considered the offence in *Aydin Tatlav v. Turkey*,⁴⁵² but held that the impugned book did not amount to a defilement of Islam, despite its strong criticism of that religion in the socio-political sphere. Crucial to the Court’s reasoning was its finding that the tone of the book was not insulting and that it did not constitute an abusive attack against sacred symbols. It is not yet clear whether the offence of defilement of religions will develop over time into a type of protection that is qualitatively different from the existing, heavily qualified, protection afforded to the religious beliefs of others under the ECHR.

Having considered the conceptual shortcomings of “defamation of religions”, attention can now be switched to the political ramifications of the campaign. As already noted, one of the major instigators and sponsors of the campaign is the Organization of the Islamic Conference. The campaign must be understood as an attempt to counter the undeniable intensification of Islamophobia in the wake of 11 September 2001.⁴⁵³ However, notwithstanding whatever sympathy European States may have with the objective of combating Islamophobia, they have overwhelmingly opposed the campaign to combat “defamation” of religions in the General Assembly. This is evident from voting patterns in the GA on Resolutions 60/150, 61/164 and 62/154, both of which were approved by convincing majorities.⁴⁵⁴ Of the (then) 55

order, public health or morals and respect for religions and beliefs” (Italics per original text; underlining added for emphasis).

⁴⁵² Judgment of the European Court of Human Rights (Second Section) of 2 May 2006, Application No. 50692/99.

⁴⁵³ See for example, European Monitoring Centre on Racism and Xenophobia, “Muslims in the European Union: Discrimination and Islamophobia” (2006).

⁴⁵⁴ Resolution 60/150 was adopted by a recorded vote of 101 in favour to 53 against, with 20 abstentions (source: Official Records of UN General Assembly Sixtieth session, 64th plenary meeting, 16 December 2005, Doc. A/60/PV.64, p. 11); Resolution 61/164 was adopted by a recorded vote of 111 in favour to 54 against, with 18 abstentions (source: Official Records of UN General Assembly Sixty-first session, 81st plenary meeting, 19 December 2006, Doc. A/61/PV.81, p. 19).

Participating States of the OSCE, only nine voted in favour of the former Resolution.⁴⁵⁵ One State abstained⁴⁵⁶ and the remainder⁴⁵⁷ voted against the Resolution. Votes cast by European States in respect of the subsequent two Resolutions were exactly the same.⁴⁵⁸ On each occasion, the nature of the vote was such that no prior debate took place in the GA plenary meeting. However, after the recorded vote, delegations were invited to give explanations of their votes. On neither occasion did any European State take the floor in its own right and interventions made on behalf of the European Union by delegates representing the States holding the EU Presidency at the operative time (i.e., the United Kingdom and Finland, respectively) focused on Resolutions other than ‘Combating defamation of religions’. Given that the EU Member States voted *en bloc* against the Resolution, it is perhaps surprising that no formal statement was made outlining collective European concerns about the Resolution. On the other hand, such concerns had to some extent already been aired in relevant Third Committee sessions preceding the plenary meeting.⁴⁵⁹

There is another very impelling reason why the conceptual shortcomings of “defamation of religions” must be assessed in political terms. This concerns “the principle of the ratchet”, which has been developed elsewhere by Michael Banton.⁴⁶⁰ According to that principle, when particular concepts or formulations are agreed upon in international fora and are consequently included in official texts, they can serve as a basis for the achievement of further political gains at a later stage. This is because they can be re-affirmed and strengthened in subsequent texts (such is the nature of progress in political discussions⁴⁶¹). Conversely, though, it can prove very difficult to dislodge concepts and terminology once they become embedded in official texts. Depending on the nature of the texts in question, those concepts and terminology could form the basis of obligations for States. As regards General Assembly Resolutions such as those concerning “defamation of religions”, the relevant obligations are political rather than legal in character, but that does not rule out the possibility that a future convention (which would be legally binding on all States acceding to it) would not draw on the language of such resolutions on the basis that they are the expression of agreement among a majority of States on a specific topic. The reference to the ratchet is explained by the ease with which particular formulations can move up a notch and the concomitant difficulties in brining them back down again. Banton illustrates the practical operation of the principle as follows:

A group of states takes an initiative, secures agreement on a particular action, and then tries to use this as a foundation for a further step forward whenever an opportunity presents itself. Once a form of words has been accepted it can be used again [/80] or moved up a notch; this is the function of

⁴⁵⁵ Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

⁴⁵⁶ Armenia. It should be noted that no European States were absent when the vote was taken.

⁴⁵⁷ The only OSCE Participating State which is not a member State of the United Nations is The Holy See. It does enjoy observer status at the UNGA, but it does not have voting rights.

⁴⁵⁸ The only difference was that whereas Serbia & Montenegro voted against the Resolution in 2005, only Serbia did so in 2006. Following the dissolution of Serbia & Montenegro as a unitary political entity and the establishment of Montenegro as an independent State, Montenegro was accepted as a UN Member State on 28 June 2006 by virtue of GA Resolution A/RES/60/264. However, there is no mention of Montenegro having participated in the relevant GA vote, or as having been absent at the operative time. Not yet represented in the GA at that time? Check status. In 2007, both Serbia and Montenegro voted against Res. 62/154.

⁴⁵⁹ Insert details.

⁴⁶⁰ Michael Banton, *The International Politics of Race*, *op. cit.*, pp. 77, 79-80.

⁴⁶¹ He writes: “If a discussion leads to a conclusion such that the next discussion starts from the position reached on the previous occasion, then some progress has been made. At the UN such a conclusion is usually expressed in the form of a resolution, which can sometimes move on to a General Assembly declaration and eventually to a convention.” - Michael Banton, *International Action Against Racial Discrimination*, *op. cit.*, at p. 48.

rhetoric in official conferences. It is difficult to disengage a ratchet and undo a previous agreement. Opportunities for tightening a ratchet and taking that further step may arise after a disaster when there is a feeling that ‘something must be done’, or when a special meeting – like a world conference – is convened to consider a particular problem.

It is certainly plausible that highly volatile incidents such as the Danish Cartoons affair could further galvanise an already very potent political alliance within the UNGA, spearheaded by the OIC but with many fellow-travellers rightly riled at the intensification of Islamophobia in Western States and continued US-led intervention in Iraq, Afghanistan and elsewhere. In such a scenario, it is most likely that the language of the three existing UNGA Resolutions on “combating defamation of religions” would be built upon, ratchet-like, in order to further the campaign. Indeed, the ratchet has already been engaged, insofar as the follow-up measures envisaged by the Resolutions have required the High Commissioner on Human Rights and a number of the Special Rapporteurs to address the issue and report their findings to the Human Rights Council.⁴⁶² The legitimacy conferred on the concept of “defamation of religions” by virtue of its inclusion in successive UNGA Resolutions has allowed it to seep into other branches of the UN and seek further legitimation there. This has the effect of familiarising and consolidating the concept through extra exposure.

6.4.3 Protection of founders of religions

The drafting process of the UN draft Convention on Freedom of Information (see further, Chapter 3, *supra*) provides an interesting aside to the present discussion. It will be recalled that in 1959, the Third (Social, Humanitarian and Cultural) Committee of the UN General Assembly began a detailed discussion of a draft text of the proposed Convention. “Article 2, dealing with permissible restrictions on the exercise of the freedom of information, was widely regarded in the Third Committee as the heart of the draft Convention.”⁴⁶³ Relevant official documentation from the United Nations reveals that there was concern within the Third Committee that “if far-reaching limitations were made permissible, the Convention would be transformed into an instrument for restricting freedom of information”.⁴⁶⁴ On 2 December 1960, the Third Committee adopted Article 2 as a whole and as amended.⁴⁶⁵ The adopted version of the Article read:

Article 2

1. The exercise of the freedoms referred to in article 1 carries with it duties and responsibilities. It may, however, be subject only to such necessary restrictions as are clearly defined by law and applied in accordance with the law in respect of: national security and public order (*ordre public*); systematic dissemination of false reports harmful to friendly relations among nations and of expressions inciting to war or to national, racial or religious hatred; attacks on founders of religions; incitement to violence and crime; public health and morals; the rights, honour and reputation of others; and the fair administration of justice.
2. The restrictions specified in the preceding paragraph shall not be deemed to justify the imposition by any State of prior censorship on news, comments and political opinions and may not be used as grounds for restricting the right to criticize the Government.

Of particular significance for present purposes is the uncommon inclusion of “attacks on founders of religions” as an explicit, permissible ground for restricting the right to freedom of

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⁴⁶³ *Yearbook of the United Nations 1960*, p. 335.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ This involved a roll-call vote of 50 to 5, with 19 abstentions.

expression. This limitation is distinguishable from the more common – and generic – limitation “expressions inciting to [...] national, racial or religious hatred”. The inclusion of the limitation protecting the founders of religions was proposed by the Pakistani representative and it was accepted by the Third Committee by 22 votes to nine, with 47 abstentions.

As this draft Convention was ultimately never adopted, any assessment of its provisions will be, at best, speculative. Nevertheless, it is useful to dwell on the significance of the limitation on freedom of expression that had been envisaged for the founders of religions. It is perhaps facile to suggest that if the draft Convention had been adopted, the recent Danish cartoons controversy could have been resolved very summarily by international law. However, without the benefit of interpretative aids, it is difficult to say with any degree of precision how the terms “religions” and “founders” would have been defined. The stringency with which draft Article 2(2) would have been applied would also surely have been instructive.

The issue of protection for founders of religions has also been explored in ongoing discussions of recent controversies. For example, Egbert Dommering has drawn a distinction between the Church (as an institution) and Faith (as personified by a religious deity).⁴⁶⁶ The former is a legitimate target of scrutiny, criticism and parody, he argues, whereas the latter is at least a more problematic, if not an illegitimate, target of such treatment. This distinction could be usefully considered alongside other contextualising factors⁴⁶⁷ wherever relevant, or most topically, in the recent Danish cartoons affair. Such factors could include the:

- (i) motivation of the newspaper in deciding to publish the cartoons
- (ii) context in which the cartoons were published
- (iii) manner in which the cartoons were published (i.e., how they were presented)
- (iv) subsequent behaviour of the newspaper
- (v) subsequent behaviour of other newspapers⁴⁶⁸
- (vi) unrest and violence in *alleged* reaction to the publication of the cartoons

One problematic and inescapable question concerning any legally-enshrined protection for the founders of religion arises from the growing number of belief systems recognised as religions. The founders of some of those religious movements will inevitably continue to be responsible for the spiritual leadership and guidance of their congregations. Could the protection of founders of religion insulate such religious leaders from the kind of criticism to which politicians are expected to withstand by virtue of the public nature of their functions? The question is of great practical importance. There is a real danger that any would-be right to protection for such religious leaders, unless very carefully circumscribed, would serve as a shield against legitimate criticism.

Another conundrum that arises from the related question of whether religious deities generally (whether they are also recognised as the founders of religions or not) should be entitled to

⁴⁶⁶ Egbert Dommering, “Mohammed in cartoons” [n.d., text on file with author]. See further: E.J. Dommering, “De Deense beeldenstorm”, 11 *NJB* (17 March 2006) 634-638.

⁴⁶⁷ For a more detailed analysis of the importance of contextualising factors generally, see further, *infra*. For an exploration of contextualising elements specifically in the Danish cartoons affair, see: Kevin Boyle, “The Danish cartoons”, *op. cit.*

⁴⁶⁸ It should be noted that an application concerning the republication of the “Danish cartoons” in France has been lodged with the European Court of Human Rights: *Le Conseil régional musulman de Champagne-Ardenne v. France*, Appn. No. 7071/06. See also, in this connection, the verdict in the *Charlie Hebdo* case, in which the weekly paper, *Charlie Hebdo*, reprinted the cartoons, along with additional ones.

protection from severe criticism. It is submitted here that the same reasoning outlined in the previous paragraph in respect of founders of religions should also be applied here. Religions which recognise multiple deities would require careful and particular consideration in this connection. It would, in any event, be inappropriate for States authorities to purport to distinguish between deities or rank them in terms of sacredness.⁴⁶⁹

These questions must be considered in the broader context of the discussion, *supra*, about the extent to which particular types of expression are actually capable of interfering with the religious rights of others. More specifically, attention should focus on the extent to which disparagement of, or insult to, religious leaders could actually interfere with ability of their followers to effectively hold or manifest their religious beliefs. In *Choudhury v. the United Kingdom*, the European Commission of Human Rights found that the causal link between the expression in question (Salman Rushdie's novel, *The Satanic Verses*) and an interference with the religious rights of others had not been established.⁴⁷⁰ It found that in the circumstances of the case at hand, Article 9, ECHR, did not guarantee a right to institute criminal proceedings "against those who, by authorship or publication, offend the sensitivities of an individual or a group of individuals". In its decision in *Dubowska & Skup v. Poland* (concerning "the distorted publication of sacred images" of worship of a particular religious group),⁴⁷¹ the Commission was more willing to countenance the possibility that expression could interfere with the religious rights of others and that States are accordingly obliged to ensure that means of legal redress are available to ensure that "an individual will not be disturbed in his worship by the activities of others". However, in the specific circumstances of the case, the necessary link was not established to the satisfaction of the Commission. The reasoning behind the need to establish a clear link between offensive expression and the violation of religious rights must also apply, *mutatis mutandis*, to any would-be protection for the founders of religions.

6.5 Theoretical foundations for an integrated approach to combating hate speech

This section will examine and evaluate the theory – variously conceived – that a policy of "more speech" or "counter-speech" can be an effective means of combating hate speech. It is sometimes posited that effective opportunities to respond to hate speech – to meet it head-on – can help to reduce its impact or expose its frailties. However, this proposition is open to challenge, especially in the context of individual situations where the "inflammatory words [are] spit out nose-to-nose"⁴⁷² and the target of hate speech is in a position of subjugation or intimidation *vis-à-vis* the speaker.

Critical race theorists are very dismissive of the alleged usefulness of "more speech" as a particularised remedy for hate speech, for a number of reasons. First, the utterance of hate speech in an individualised situation is frequently likened to a slap in the face rather than an

⁴⁶⁹ For an enlightening discussion of these and related questions, see: David Edwards, "Toleration and the English blasphemy law", in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen & Co., 1985), pp. 75-98, esp. at 84 *et seq.*

⁴⁷⁰ *Choudhury v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90.

⁴⁷¹ *Dubowska & Skup v. Poland*, Decision of inadmissibility of the European Commission of Human Rights of ... Appn. Nos. 33490/96 and 34055/96.

⁴⁷² Kenneth Lasson, "To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment", in Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence* (USA, Greenwood Press, 1995), pp. 267-306, at 267.

invitation to engage in rational, reasonable discourse.⁴⁷³ As explained by Charles R. Lawrence III:

The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. [...] The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of [...] protection because the perpetrator's intention is not to discover truth or initiate dialogue, but to injure the victim.⁴⁷⁴

Thus styled, the speech act is much more performative than propositional. It clearly falls in the category of socially worthless epithets that are “not in any proper sense communication of information or opinion [...]” deserving of protection. Its performative character is abusive and assaultive. Instead of eliciting a verbal response from the target, a more probable reaction would be “flight rather than fight”.⁴⁷⁵ Such a response is in itself problematic because “Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict”.⁴⁷⁶ The psychic effects of assaultive, racist speech can be far-reaching, especially when the harm they occasion tends to be internalised.⁴⁷⁷ Furthermore, from the perspective of criminal law: “Lack of a fight and admirable self-restraint then defines the words as nonactionable”.⁴⁷⁸

Its contribution to a discussion on matters of public interest or to an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people” is nil. In fact, given the intimidatory context in which it is uttered, it is pre-emptive of further discussion. The intimidatory element can be reinforced by broader contextual circumstances, such as the doctrine of historical inequities and their continuing effects (discussed in Chapter 3, *supra*) or general “structural injustice”. David Richards has defined this term as “a cultural pattern and practice that abridge the human rights of an entire class of persons on inadequate grounds of dehumanizing stereotypes of religion or race or gender or gendered sexuality”.⁴⁷⁹

As posited by Lawrence: “Each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous”.⁴⁸⁰ Lawrence may have overstated the point here, but nevertheless, it does seem highly plausible that in a society where racism or hostility towards (particular) minorities is deep-seated and prevalent, the sense of vulnerability ordinarily felt by persons belonging to minorities would be compounded. Patterns of discriminatory practices or persecution against specific groups are inevitably going to colour the personal experiences of their individual members, as well as their participation in public life.

⁴⁷³ Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004), p. 207.

⁴⁷⁴ Charles R. Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus”, in Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993), pp. 53-88, at 68.

⁴⁷⁵ Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, *Words That Wound*, *op. cit.*, pp. 17-51, at 35.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ See further, Richard Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling”, 17 *Harvard Civil Rights-Civil Liberties Law Review* (1982), pp. 133-181, and the more in-depth discussion of this topic in Chapter 2, *supra*.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ David A.J. Richards, *Free Speech and the Politics of Identity* (New York, Oxford University Press, Inc., 1999), p. 240.

⁴⁸⁰ Charles R. Lawrence III, “If He Hollers Let Him Go”, *op. cit.*, at 68-69.

The arguments of the foregoing paragraphs can also be merged into a more complex – but perhaps also more tenuous - argument, *viz.* that hate speech can also be performative of discrimination.⁴⁸¹ In other words, because of its perlocutionary effects,⁴⁸² an expression of hate speech could be considered an act of discrimination. An analogous argument has regularly been deployed in feminist literature claiming that pornography is an act of discrimination and subjugation and should not therefore be regarded as a category of expression that is entitled to any kind of constitutional protection. This argument has proved highly controversial in academic circles, not least because of the evidentiary difficulty involved: it can be very difficult to establish – to the satisfaction of a court of law - a causal relationship between a precise utterance and precise discriminatory consequences. Such a case is usually built on empirical evidence. Regardless of how far this argument can be pushed, it does provide a useful additional point of reference. Lee C. Bollinger has - without even referring to the anti-pornography or analogous arguments - given a rather clear-worded formulation to one of their essential upshots: “The general point is not only that free speech sometimes involves situations where minorities are being injured (by the speech), but also that the implementation of free speech protection may itself become implicated in that injury, thus reinforcing or stimulating other (non-speech) discrimination.”⁴⁸³

Hitherto, the focus has been on the harm occasioned by hate speech on individuals and on the groups of which they are members. A further dimension also deserves mention: the broader public. Although society is not directly harmed (eg. in a psychic sense) by individual instances of hate speech, it is adversely affected.⁴⁸⁴ Hate speech has broader repercussions than those visited on its immediate victims: prevailing societal attitudes could conceivably be affected by the prevalence of hate speech (particularly if such a phenomenon is met with official impunity or unchecked by societal resistance); community relations could deteriorate due to heightened tensions brought on by a hardening of public discourse; norms of civility and mutual respect could be damaged, etc. On the other hand, though, it is also conceivable that a rising spiral of hate speech in a given community could galvanise its members into taking concerted (informal) action against the phenomenon.

In conclusion, when elevated from the micro- to the macro-level,⁴⁸⁵ however, the “counter-speech” theory against hate speech becomes more promising, although it does remain somewhat resistant to empirical verification. The institution of counter-speech at societal level prompts a reconceptualisation of counter-speech as not merely a reactionary force against hate speech (with limited effect), but as a pre-emptive force (with considerable potential) as well. As such, it is a longer-term strategy that places considerable faith in the empowering and

⁴⁸¹ See further, Wojciech Sadurski, “Racial Vilification, Psychic Harm, and Affirmative Action”, in Tom Campbell & Wojciech Sadurski (Eds.), *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 77-94; Rae Langton, “Speech Acts and Unspeakable Acts”, 22 *Philosophy & Public Affairs* 293; Wojciech Sadurski, “On ‘Seeing Speech Through an Equality Lens’: A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography”, 16 *Oxford Journal of Legal Studies* (No. 4, Winter 1996), pp. 713-723.

⁴⁸² For an influential exploration of locutionary, illocutionary and perlocutionary acts, see: J.L. Austin, *How to do things with words* (Great Britain, Oxford University Press, 1980 (reprint of second edition)), esp. Chapters VIII *et seq.*

⁴⁸³ Lee C. Bollinger, “Notes Toward an Idea: Freedom of Speech and Minorities in the United States”, in Y. Dinstein & M. Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 171-185, at 180.

⁴⁸⁴ See further: Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998), p. 89.

⁴⁸⁵ See generally in this connection, Katharine Gelber, *Speaking Back: The free speech versus hate speech debate* (John Benjamins Publishing Company, Amsterdam, 2002).

identity-sustaining properties of speech. It also implicitly endorses the importance of egalitarian public debate and dialogical interaction as prerequisites for pluralistic tolerance.

6.6 An integrated approach in practice: the Council of Europe

This section will offer an analysis of how the twin goals of facilitating and creating expressive opportunities and of promoting intercultural dialogue and understanding are becoming increasingly prominent in the Council of Europe's approaches to the protection of minority rights. The Council of Europe's flagship convention dealing with minority rights, the Framework Convention for the Protection of National Minorities (FCNM), contains provisions which provide for freedom of expression (including rights of access to various types of media) and for the promotion of tolerance. These provisions are expressly linked in the FCNM and their interaction to date has proved instructive. The coupling of freedom of expression and the promotion of tolerance has also been a feature of other Council of Europe standard-setting measures, with varying results.

6.6.1 Framework Convention for the Protection of National Minorities

What is instructive about the FCNM's approach to the protection of minorities against hate or discriminatory speech is the synergic interaction of Articles 6 and 9. For instance, Article 6(2) has been described as providing "negative reinforcement" for *inter alia* Article 9.⁴⁸⁶ The synergies generated represent a particularly promising strategy for countering hate speech on a long-term basis. They seek to address the problem before it actually spawns, by emphasising the need to foster improved inter-ethnic and intercultural (the terms are used interchangeably in AC Opinions) understanding and tolerance through the development of dialogical relationships between communities. As will be seen below, a key role has been identified for the media in this preventive strategy: one which involves the harnessing of their communicative potential for the promotion of tolerance and intercultural understanding.

An important caveat ought to be entered at this juncture: the media should in no way be compelled to serve the goal of promoting tolerance and intercultural understanding. Such compulsion (as opposed to encouragement) – by legal or other means – would presumptively fall foul of the principle of media autonomy, which is protected under the more general right to freedom of expression. Any commitments by the media to pursue such objectives must therefore be undertaken voluntarily. As explained in a different, but not entirely dissimilar, context:

As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.⁴⁸⁷

⁴⁸⁶ Geoff Gilbert, "Article 6", in Marc Weller, Ed., *The Rights of Minorities in Europe*, *op. cit.*, at p. 191.

⁴⁸⁷ Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", *op. cit.*, para. 12. This was the reasoning behind the decision for the Committee of Ministers to adopt two separate Recommendations on relevant issues, one dealing with the negative role which the media may play in the propagation of hate speech, and the other dealing with the positive contribution which the media can make to countering such speech (see further, *supra*).

As will be shown below, this caveat is consistently heeded in the FCNM monitoring process.

6.6.1(i) Studying the chemistry between Articles 6 and 9

Although there are two main prongs to the process of monitoring the implementation of the FCNM at national level, *viz.*, the adoption of Opinions by the AC and Resolutions by the Committee of Ministers, the emphasis in this section will be on the former. The reason is that the vastly superior level of detail in AC Opinions is more conducive to the formulation of an overall FCNM strategy against hate and discriminatory speech than the comparative terseness of corresponding Committee of Ministers' Resolutions. Moreover, it is easier to discern the contours of an overall strategy where issues and responses are most fully explored. The format of Committee of Ministers' Resolutions is (necessarily) summary and reflective of the follow-up functions for which such Resolutions are intended.

The AC's approach to the promotion of tolerance, intercultural dialogue, respect and understanding is comprehensive and considered. It recognises: (a) the media *can* play an influential role in shaping societal attitudes and behaviour (for better or for worse); (b) societal attitudes and behaviour are shaped by a multitude of factors (of which the media are only one), and (c) attitudinal and behavioural patterns in society are highly complex and composite in character (and they in turn influence the environment in which the media operate).

(a) Media influence

Among the main preoccupations of the AC is the ability of the media to contribute to the promotion of tolerance and intercultural understanding, as well as to the elimination of negative stereotyping and negative portrayal of minorities. These objectives are clearly intertwined, both in theory and in practice. Unsurprisingly, they have consistently been flagged as issues of concern in the majority of AC Opinions.⁴⁸⁸

The agenda-setting role of the media can have great importance for the validation of the cultures, languages, lifestyles and other central concerns of minorities. In this context, the following questions gain in pertinence: Is coverage of minority issues quantitatively and qualitatively adequate? Is that coverage responsive to the informational, cultural, linguistic and other needs of its target minority audiences? Are representatives of minorities involved to a meaningful extent in the selection of the topics and the production of the programmes? Are such programmes broadcast in mainstream or minority media? To what extent are minority issues covered by the public service broadcasting system? Is coverage assured during primetime or merely during off-peak slots? These – and a gamut of other related - questions have occasionally surfaced in connection with Article 6, but they fall more squarely within the ambit of Article 9.⁴⁸⁹

⁴⁸⁸ Unless stated otherwise, references to specific AC "Opinions" designate Opinions adopted by the AC in the course of the First Monitoring Cycle. Opinions adopted in the course of the Second Monitoring Cycle will be explicitly described as such.

⁴⁸⁹ See further in this connection, Tarlach McGonagle, "Commentary: Access to the media of persons belonging to national minorities", in *Filling the Frame, op. cit.*, pp. 144-159.

Nevertheless, their relevance to the promotion of intercultural understanding, in particular, cannot be gainsaid. For instance, as stated by the AC: “In order to facilitate mutual understanding and dialogue and to increase public awareness about minorities, the public television service should find ways to provide more convenient time-slots for minority programmes”.⁴⁹⁰ The transmission of minority-centred programmes can expose wider *tranches* of society to minority perspectives and cultures, thereby raising the profile of minority cultures and their prestige outside of minority groups themselves. These are important arguments for the transmission and legitimisation of minority cultures. They give considerable credence to the argument that “more speech” can, in certain circumstances, amount to an effective, pre-emptive strategy against hate speech. The nature and extent of media coverage are related to, but also logically prior to, the problem of negative reporting on, and stereotyping of, minorities.

Various responses have been proposed by the AC to the problem of negative reporting, many of which centre on the promotion of balanced and accurate reporting;⁴⁹¹ adherence to journalistic codes of ethics and standards, etc.⁴⁹² The AC has consistently placed heavy emphasis on the importance of special training initiatives and programmes for journalists on minority issues.⁴⁹³ The goal is to familiarise journalists with minority issues and pertinent sensitivities that are likely to arise in the course of their coverage of those issues. Exchange programmes for journalists have also been considered, with the same goals in mind.⁴⁹⁴ Related strategies also include the establishment of ethnically diverse training courses in journalism,⁴⁹⁵ with a view to increasing the number of persons from different ethnic, religious and other groups entering the media sector in professional capacities.⁴⁹⁶ These emphases are part of a rather comprehensive approach to counter negative reporting.⁴⁹⁷

The AC often calls for vigilance by State authorities towards negative reporting as a suitable counter-measure to the same. However, those calls are accompanied by standard reminders of the need to show deference to the principle of (editorial) independence of the media, and also, on occasion, by reminders of the need to observe overarching principles of freedom of expression as well.⁴⁹⁸ For example:

The Advisory Committee *finds* that in the field of media, certain widely read newspapers continue, when reporting on subjects concerning immigration and asylum, to adopt an approach which contributes to the feelings of hostility and rejection against immigrants, refugees and asylum seekers and to strengthening the stereotypes associated with Roma. The Advisory Committee

⁴⁹⁰ AC’s Second Opinion on Romania, adopted on 24 November 2005, para. 120. See also the AC’s Second Opinion on the Czech Republic, adopted on 24 February 2005, paras. 108 and 193.

⁴⁹¹ See, for example, AC’s Opinion on Slovakia, adopted on 22 September 2000, Section: “In respect of Article 6”.

⁴⁹² Of particular importance in this connection is the practice of only mentioning the ethnic origin of subjects of reporting when strictly relevant: see, for example, AC’s Opinion on the United Kingdom, adopted on 30 November 2001, para. 53.

⁴⁹³ See, for example, AC’s Opinions on Albania, adopted on 12 September 2002 (para. 98), Lithuania, adopted on 21 February 2003 (para. 45), Spain, adopted on 27 November 2003 (para. 63), Sweden, adopted on 20 February 2003 (paras. 34, 78), Ukraine, adopted on 1 March 2002 (para. 39).

⁴⁹⁴ AC’s Opinion on Slovakia, *op. cit.*, Section: “In respect of Article 6”.

⁴⁹⁵ AC’s Second Opinion on Denmark, adopted on 9 December 2004, para. 95.

⁴⁹⁶ *Ibid.*, para. 103.

⁴⁹⁷ AC’s Opinion on the Russian Federation, adopted on 13 September 2002, para. 135.

⁴⁹⁸ AC’s Second Opinion on Italy, adopted on 24 February 2005, para. 82.

considers that the Austrian authorities should pursue their efforts to impress on the media, without encroaching on their editorial independence, the need to report fairly on minorities.⁴⁹⁹

On a related tack, it is significant that the AC resists any temptation to endorse a hypodermic media model. Rather, it recognises – correctly – that while the media do *influence* public opinion, they do not simply *determine* it. While media coverage may perpetuate, reinforce⁵⁰⁰ or exacerbate negative societal attitudes and prejudices towards minorities, they can only be charged with having generated those prejudices in the first place in very exceptional circumstances. This presumption can be brought under intense scrutiny when the culpability of the media in fomenting inter-ethnic tensions and unrest is blatant, for example in the much-publicised riots in Kosovo in March 2004.⁵⁰¹

In the same vein, the AC recognises that the media are not the only actors involved in the influencing of public opinion. For instance, it frequently draws attention to the roles and special responsibilities of law enforcement agents and the judiciary in combating racism. The AC regularly brings politicians and public officials under scrutiny on account of racist views and utterances. Importantly, it does not do so in a blanket or mantra-like way: it tends to specify the levels at which or sectors in which the emergence of discrimination or racist views and practices are most acutely in evidence (eg. *local* public authorities⁵⁰² and politicians⁵⁰³).

(b) The shaping of societal attitudes and behaviour

The previous sub-section broached the issue of how the media can contribute to the shaping of societal attitudes and behaviour. Obviously, the media can usefully provide fora where diverse societal groups can build up awareness and understanding of one another, but by the same token, other non-media fora can also prove very effective for such purposes. The general importance of raising mutual cultural awareness among various groups in society is consistently prioritised in the AC's approach;⁵⁰⁴ this applies not only to majority-minority relations (including between States authorities and relevant NGOs⁵⁰⁵), but also between various minorities.⁵⁰⁶ Awareness is implicitly taken to be a stepping-stone to intercultural understanding. Recommended awareness-raising measures can be either general in character, or can relate to specific groups or events or issues (eg. the Holocaust⁵⁰⁷). Thus viewed, awareness helps to ground the dialogical processes that lead to the achievement of greater

⁴⁹⁹ (emphasis per original) AC's Opinion on Austria, adopted on 16 May 2002, para. 85. See also, AC's Opinion on "the former Yugoslav Republic of Macedonia", adopted on 27 May 2004, para. 55.

⁵⁰⁰ AC's Second Opinion on Estonia, adopted on 24 February 2005, para. 73.

⁵⁰¹ AC's Opinion on Kosovo, adopted on 25 November 2005, para. 58. This Opinion does not fall squarely within the regular monitoring work of the AC; rather, it was adopted pursuant to the Agreement between the Council of Europe and the United Nations Interim Administration Mission in Kosovo (UNMIK) on the Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, concluded on 23 August 2004. See further, Tarlach McGonagle, "Advisory Committee on the Framework Convention for the Protection of National Minorities: Media-specific Provisions in Opinion on Kosovo", *IRIS – Legal Observations of the European Audiovisual Observatory*, 2006-4: 3; Robert Gillette, "Kosovo: Media and the Riots of March 2004", in Susanne Nikoltchev, Ed., *IRIS Special – Political Debate and the Role of the Media: The Fragility of Free Speech* (Strasbourg, European Audiovisual Observatory, 2004), pp. 101-103.

⁵⁰² AC's Second Opinion on the Czech Republic, *op. cit.*, para. 11.

⁵⁰³ AC's Second Opinion on Croatia, adopted on 1 October 2004, para. 80.

⁵⁰⁴ See, for example, AC's Opinions on Bosnia & Herzegovina, adopted on 27 May 2004 (para. 138), Ireland, adopted on 22 May 2003 (para. 67), Slovenia, adopted on 12 September 2002 (para. 91).

⁵⁰⁵ AC's Second Opinion on Moldova, adopted on 9 December 2004, para. 58.

⁵⁰⁶ See, for example, AC's Opinion on "the former Yugoslav Republic of Macedonia", *op. cit.*, para. 122.

⁵⁰⁷ AC's Second Opinion on Romania, *op. cit.*, para. 86.

societal tolerance. The AC has tentatively teased out this philosophy on several occasions, such as in the following specific situation in the Slovak Republic:

[...] the Advisory Committee is convinced that a fuller understanding of Roma culture by the public at large and by officials, which can only be gained if Roma themselves are willing to provide input, would help to counter discriminatory acts and attitudes. In this connection, the Advisory Committee also notes that studies suggest that the attitudes of the majority towards the Hungarian minority are most positive in the regions where Hungarians constitute a relatively high proportion of the population and where there is constant interaction between the majority and the said minority. [...]⁵⁰⁸

The AC has also developed this philosophy in respect of the often inextricable nature of culture, language and identity. It has, for instance, warned that “Over-insistence on the homogeneity of the Polish population may have an adverse effect on the rights of persons belonging to national minorities to assert their identity”.⁵⁰⁹ This implies a sense of concern that a level playing pitch would exist for minorities to define themselves on their own terms at the national level.

Communicative engagement is essential for the purpose of building inter-group awareness and understanding. This implies a need for opportunities for the sharing of information and perspectives. Opportunities for self-definition are crucial for minorities, especially given the corrective potential of such opportunities *vis-à-vis* dominant or prevalent societal attitudes regarding them. The AC has rightly recognised the centrality of prevalent, negative attitudes towards (discrete) minorities in the larger picture of societal tolerance and intercultural understanding. Such attitudes are often a product of ignorance, fear and long-held prejudices (eg. anti-Semitism and anti-Roma sentiment),⁵¹⁰ but they can also be coloured by specific situations (eg. regional agitations – or overflow therefrom,⁵¹¹ ongoing conflicts⁵¹²) or happenings (eg. increased Islamophobia in the wake of the terrorist attacks of 11 September 2001⁵¹³).

Various examples of societal attitudes hardening around specific religious and linguistic differences between discrete groups in society are also considered by the AC. A recurrent source of contention in different countries is the adequacy of facilities for religious minorities to worship. As noted by the AC, such disputes can escalate to the point of potentially “undermining intercultural dialogue with persons belonging to the Muslim faith”⁵¹⁴ (to give one concrete example). Disagreements about language-related matters have also been known to spawn intolerance.⁵¹⁵ Aside from confrontations over religious and linguistic differences, the latter can also form a purely practical obstacle to inter-group communication and

⁵⁰⁸ AC’s Opinion on Slovakia, *op. cit.*, para. 25.

⁵⁰⁹ AC’s Opinion on Poland, adopted on 27 November 2003, para. 48.

⁵¹⁰ Respectively: AC’s Opinions on Switzerland, adopted on 20 February 2003, para. 40, and Ukraine, *op. cit.*, para. 91.

⁵¹¹ AC’s Second Opinion on Hungary, adopted on 9 December 2004, para. 61, which refers to certain consequences in Hungary of unrest in the Balkans.

⁵¹² Eg. Chechnya – AC’s Opinion on the Russian Federation, *op. cit.*, paras. 57, 65, 138; Transnistria – AC’s Second Opinion on Moldova, *op. cit.*, para. 60.

⁵¹³ AC’s Opinions on Norway, adopted on 12 September 2002 (para. 36), Sweden, *op. cit.* (para. 37), the United Kingdom, *op. cit.* (para. 51).

⁵¹⁴ In this particular example, the dispute surrounded the absence of any “full-scale mosque in Denmark”: AC’s Second Opinion on Denmark, *op. cit.*, para. 88. For similar facts and assessment/prognosis, see also, AC’s Second Opinion on Slovenia, adopted on 26 May 2005, para. 98.

⁵¹⁵ AC’s Opinions on Moldova, adopted on 1 March 2002 (paras. 45, 106, 107), Norway, *op. cit.* (para. 35) and Ukraine, *op. cit.* (paras. 35, 90); AC’s Second Opinion on Moldova, *op. cit.* (paras. 17, 59).

understanding. This helps to explain the AC's finding in its First Opinion on Estonia that "further efforts are needed to counter excessive division in the media environment between the media consumed by the majority population and that followed by the minority population".⁵¹⁶ The "excessive division" referred to was largely along linguistic lines. The AC also advocated support for bilingual initiatives in the media sector, which "should be seen as a central element of integration efforts in Estonia, where many persons belonging to national minorities continue to follow to a large extent the media based in the Russian Federation".⁵¹⁷

(c) The complex and composite character of societal attitudes and behaviour

The comprehensive approach of the AC to Article 6 facilitates an examination of the many influences that contribute to the shaping of societal attitudes. Prime examples of such influences include recent patterns of immigration and migration or other demographic shifts;⁵¹⁸ recent or ongoing armed conflict;⁵¹⁹ swells in racist sentiment and surges in racist crimes.⁵²⁰ Sensitivities surrounding historical symbols can also cause tensions to flare up.⁵²¹ The AC is right to dwell on these factors as their explanatory power is considerable. When a general "climate of hostility" (eg. towards immigrants) prevails in a given society, or when a "strong seam of intolerance" can readily be detected, it is hardly surprising that such attitudes would be expressed in the media as well, thereby contributing to a vicious opinion-shaping circle.⁵²²

Mention of hostility towards immigrants prompts a very important aside. The protection afforded by the FCNM is, as its title suggests, restricted to "national minorities". Perplexingly, as noted *supra*, this term is neither defined nor adequately explained in either the text of the FCNM or in its Explanatory Report. The precise meaning of the term is highly contestable.⁵²³ Nevertheless, the AC has repeatedly insisted that Article 6 "has a wide personal scope of application, covering also asylum seekers, migrants and other persons belonging to groups that have not traditionally inhabited the country concerned".⁵²⁴ While the language varies from Opinion to Opinion (eg. sometimes reference is made instead to "immigrants and refugees"⁵²⁵ coming within its scope), the essential point remains the same: the objectives set out in Article 6 are to be strived for also in respect of new or non-traditional minorities, or in other words, "all persons living on the territory"⁵²⁶ of a Contracting State.⁵²⁷

⁵¹⁶ AC's Second Opinion on Estonia, *op. cit.*, para. 70.

⁵¹⁷ *Ibid.*, para. 19. See also, para. 72.

⁵¹⁸ See, for example, AC's Opinions on Ireland, *op. cit.* (paras. 58, 115), Italy, adopted on 14 September 2001 (para. 40), "the former Yugoslav Republic of Macedonia", *op. cit.* (para. 57).

⁵¹⁹ See, for example, AC's Opinions on Bosnia & Herzegovina, *op. cit.* (para. 135) and "the former Yugoslav Republic of Macedonia", *op. cit.* (para. 121).

⁵²⁰ See, for example, AC's Opinions on Hungary, *op. cit.* (Section: "In respect of Article 6"), the Russian Federation, *op. cit.* (para. 137), Slovakia, *op. cit.* (para. 27).

⁵²¹ AC's Second Opinion on Italy, *op. cit.*, para. 75.

⁵²² AC's Second Opinion on Denmark, *op. cit.*, paras. 20, 77, 80, 96.

⁵²³ For discussions of conflicting interpretations of the meaning of the term, see *inter alia*: Geoff Gilbert, "The Council of Europe and Minority Rights", 18 *Human Rights Quarterly* (1996) pp. 160-189, at pp. 165-166 and pp. 169-170; Heinrich Klebes, "The Council of Europe's Framework Convention on National Minorities", *op. cit.*, p. 93; Rosalyn Higgins, "Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System", in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers (Vol. III)* (Dordrecht, Martinus Nijhoff Publishers, 1994), pp. 195-209, at p. 202.

⁵²⁴ AC's Opinion on Ireland, *op. cit.*, para. 61.

⁵²⁵ AC's Opinion on Spain, *op. cit.*, para. 49.

⁵²⁶ AC's Second Opinion on the Czech Republic, *op. cit.*, para. 87.

In this sense, the personal scope of Article 6 is more far-reaching than that of most other provisions of the FCNM.⁵²⁸ This would suggest that whenever tolerance and intercultural understanding are threatened – as they would be by hate or discriminatory speech, persons belonging to *all* minorities would stand to benefit from the FCNM’s provisions.

Attitudes that prevail in society inevitably seep into institutional frameworks too. The effects of embedded, institutionalised racism and discrimination are highly exclusionary. They foreclose opportunities for effective participation in deliberative processes. They erode trust and respect for the organs of the State. Systematic or routine police brutality against specific minorities illustrates the point most sharply. The AC has found that such practices “have disastrous psychological effects on the persons concerned and are bound to undermine the community’s confidence in the police”.⁵²⁹ The AC has pointed firmly towards the role to be played by State authorities to curb such practices.

Next to institutional practices and culture, a State’s constitutional and legislative culture is also of cardinal contextual importance. The AC has frequently homed in on the problem of inadequate enforcement of (legislative) provisions designed to curb racist activities. The problem has many facets. In the first place, there is the problem of under-reporting and -recording of racist incidents⁵³⁰ and the inadequate availability of data on racist or ethnically-motivated crimes generally.⁵³¹ Second, there is the problem of lax enforcement of existing legislation, which results in few prosecutions being initiated and even fewer prosecutions being successfully concluded. Third, these factors combine to undermine the deterrent and symbolic value assigned to relevant legislation. The dangers for society accruing from a culture of lax enforcement or impunity are great, even if they are not obviously immediate and tangible. A kind of “slow-burn” principle can apply. As the AC has cautioned:

Even though there are not always individually identifiable victims or economic interests at stake [...] the possible effects on the spirit of tolerance, mutual respect and understanding among all persons, irrespective of their ethnic, cultural or religious identity, must not be underestimated.⁵³²

6.6.1(ii) Affirmation of the AC’s approach

At the beginning of the previous section, the importance of Committee of Ministers’ Resolutions in shaping a distinct FCNM strategy against hate and discriminatory speech was somewhat relativised and downplayed. However, the intention was not to write the Committee of Ministers out of the script altogether. Although its Resolutions do not ordinarily provide extra elucidation of concepts or issues, the Committee of Ministers has meaningfully picked up on a number of the themes explored in the foregoing paragraphs. If nothing else, this has at least helped to affirm and consolidate the strategy pursued by the AC, particularly

⁵²⁷ Another slight variant on the formulation crops up in the context of the AC’s Second Opinion on Italy, adopted on 24 February 2005, where the scope of Article 6 is stated as applying to all persons living on the [national] territory, including “asylum-seekers, refugees and persons belonging to other groups that have not traditionally inhabited the country concerned”: para. 77. The usefulness of this particular wording lies in its neatly suggested coverage for immigrants and migrants alike.

⁵²⁸ See also, in this connection, Article 4, FCNM, which concerns equality and non-discrimination.

⁵²⁹ AC’s Opinion on Romania, adopted on 6 April 2001, para. 41. The causes that contribute to the erosion of confidence in State institutions such as the police and the courts are captured well in the AC’s Second Opinion on the Czech Republic, *op. cit.*, para. 98.

⁵³⁰ AC’s Opinion on the United Kingdom, *op. cit.*, para. 113.

⁵³¹ AC’s Opinion on Spain, *op. cit.*, para. 55.

⁵³² AC’s Opinion on Poland, *op. cit.*, para. 57.

as regards the need for States Parties to encourage media engagement in the promotion of intercultural dialogue and in combating discrimination, negative stereotypes, intolerance and xenophobia.⁵³³

6.6.1(iii) Conclusions

The coupling of freedom of expression and the promotion of tolerance is a feature of various Council of Europe standard-setting measures, most notably the Committee of Ministers' twin Recommendations on "Hate Speech" and on the media and the promotion of a culture of tolerance.⁵³⁴ What is distinctive about the FCNM is the extent to which its monitoring process has facilitated an exploration of the actual interplay between freedom of expression and the promotion of tolerance.

Crucially, that exploration highlights the interconnectedness of diverse factors which tend to engender circumstances in which hate and discriminatory speech can flourish. By insisting on the need to pre-emptively address those contributory causes of hate speech, the FCNM seeks to reduce the incidence of manifestations of intolerance and hatred (including hate speech).

The root-and-branch nature of the approach adopted in the FCNM monitoring process boasts two key strategic strengths: (i) it facilitates preventive, pre-emptive measures for combating hate speech; (ii) it does not preclude or even prejudice the possibility of ultimate recourse to tighter, punitive measures against hate speech (if and when dictated by the urgency of circumstances). As such, it is submitted here that the approach merits increased consideration by law- and policy-makers alike.

6.6.2 Non-treaty-based approaches to hate speech

The Council of Europe actively engages in a wide range of standard-setting activities which are not based on specific treaties.

6.6.2(i) Standard-setting by the Committee of Ministers

Resolution 68 (30)

The primary aim of Resolution 68 (30), entitled, "Measures to be taken against incitement to racial, national and religious hatred",⁵³⁵ is to press Member States of the Council of Europe to sign, ratify and subsequently give domestic legal effect to ICERD.⁵³⁶ It requests governments to affirm the importance of the schemes of human rights protection offered by both the Universal Declaration of Human Rights and the ECHR when depositing their instruments of

⁵³³ The terms used here have been cherry-picked from a number of country-specific Resolutions adopted by the Committee of Ministers, most specifically: Resolution ResCMN(2005)5 on the implementation of the FCNM by Croatia, 28 September 2005; Resolution ResCMN (2006)5 on the implementation of the FCNM by Italy, 14 June 2006; Resolution ResCMN(2005)8 on the implementation of the FCNM by Moldova, 7 December 2005, and Resolution ResCMN(2006)6 on the implementation of the FCNM by Slovenia, 14 June 2006. All of these Resolutions pertain to the Second Monitoring Cycle.

⁵³⁴ *Op. cit.*

⁵³⁵ Adopted by the Ministers' Deputies on 31 October 1968.

⁵³⁶ *Ibid.*, para. A.1.

ratification of ICERD.⁵³⁷ It urges States authorities to bring their influence to bear on the United Nations to push for the successful completion of work on a draft convention for the elimination of all forms of intolerance and of discrimination based on religion or belief.⁵³⁸ As can be seen from its first three substantive provisions, Resolution 68 (30) was very much a product of its time.⁵³⁹ Under the Resolution's fourth substantive provision, governments are asked to "review their legislation in order to ensure that it provides for effective measures on the matter of prohibition of racial discrimination as well as on the related question of the elimination of all forms of intolerance and discrimination based on religion or belief".

Recommendations

One of the two main points in Recommendation (92) 19 on video games with a racist content is that States authorities should: "review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content".⁵⁴⁰

Recommendation (97) 20 on "Hate Speech"⁵⁴¹ deserves special attention for the forthright manner in which it seeks to provide "elements which can help strike a proper balance [between fighting racism and intolerance and protecting freedom of expression], both by the legislature and by the administrative authorities as well as the courts in the member States".⁵⁴² The seriousness with which it was prepared is also noteworthy: this involved the instruction - by the Steering Committee on the Mass Media - of a Group of Specialists on media and intolerance "to examine, *inter alia*, the role which the media may play in propagating racism, xenophobia, anti-Semitism and intolerance, as well as the contribution they may make to combating these phenomena".⁵⁴³ The Group examined existing international legal instruments, the domestic legislation of Member States of the Council of Europe and various relevant studies,⁵⁴⁴ including a specially-commissioned study on codes of ethics dealing with media and intolerance.⁵⁴⁵

It is clear from the Preamble to the Recommendation that it is anchored in the prevailing standards of international law as regards both freedom of expression and anti-racism. It is not

⁵³⁷ *Ibid.*, para. A.2.

⁵³⁸ *Ibid.*, para. A.3.

⁵³⁹ For example, the decision to prioritise the preparation of a UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted in 1981) in effect eventually led to the (indefinite) abandonment of plans to elaborate an international convention on the same themes. See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", *op. cit.*, at 63-64; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", *op. cit.*, at 918.

⁵⁴⁰ Recommendation No. R (92) 19 of the Committee of Ministers to Member States on video games with a racist content (adopted by the Committee of Ministers on 19 October 1992, at the 482nd meeting of the Ministers' Deputies), para. a.

⁵⁴¹ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies).

⁵⁴² Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", para. 23.

⁵⁴³ *Ibid.*, para. 8.

⁵⁴⁴ Special mention is given to the study prepared for ECRI by the Swiss Institute of Comparative Law: *Legal measures to combat racism and intolerance in the member States of the Council of Europe*, Doc. CRI (95) 2 (Strasbourg, 2 March 1995). See further: *ibid.*, para. 9.

⁵⁴⁵ Doc. MM-S-IN (95) 21, also published as: Kolehmainen/Pietilainen, "Comparative Study on Codes of Ethics Dealing with Media and Intolerance" in Kaarle Nordenstreng, Ed., *Reports on Media Ethics in Europe* (University of Tampere, Finland, Series B 41, 1995). See further: *ibid.*, para. 10.

coy about the need to grapple with “all forms of expression which incite to racial hatred, xenophobia, antisemitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism”. It also recognises and draws attention to a number of the central paradoxes involved, eg. that the dissemination of such forms of expression via the media can lead to their having “a greater and more damaging impact”, but that there is nevertheless a need to “respect fully the editorial independence and autonomy of the media”. These are circles that are not easily squared in the abstract, hence the aim of the Recommendation to provide “elements” of guidance for application in specific cases.

The operative part of the Recommendation calls on national governments to: take appropriate steps to implement the principles annexed to the Recommendation (see further, *infra*); “ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes”; where States have not already done so, “sign, ratify and effectively implement” ICERD in their domestic legal orders, and “review their domestic legislation and practice in order to ensure that they comply with the principles” appended to the Recommendation.

The principles in question address a wide range of issues. Principle 1 points out that public officials are under a special responsibility to refrain from making statements – particularly to the media – which could be understood as, or have the effect of, hate speech.⁵⁴⁶ Furthermore, it calls for such statements to be “prohibited and publicly disavowed whenever they occur”. According to Principle 2, States authorities should “establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or rights of others”. It suggests detailed ways and means of achieving such ends. Principle 3 stresses that States authorities should ensure that within their legal frameworks, “interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria”.

Principle 4 affirms that some particularly virulent strains of hate speech might not warrant any protection whatsoever under Article 10, ECHR. This is a reference to the import of Article 17, ECHR, and to existing case-law on the interaction of Articles 10 and 17 (see further, *supra*). Principle 5 highlights the need for a guarantee of proportionality whenever criminal sanctions are imposed on persons convicted of hate speech offences.

Principle 6 harks back to the *Jersild* case, calling for national law and practice to clearly distinguish “between the responsibility of the author of expressions of hate speech on the one hand and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand”. The reasoning behind this Principle is that “it would unduly hamper the role of the media if the mere fact that they assisted in the dissemination of the statements engaged their legal responsibility or that of the media professional concerned”.⁵⁴⁷

⁵⁴⁶ The Appendix to the Recommendation begins by clarifying the scope of “hate speech”: “For the purposes of the application of these principles, the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

⁵⁴⁷ Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 38.

Principle 7 develops this reasoning by stating that national law and practice should be cognisant of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10(1), ECHR, and may only be restricted in accordance with Article 10(2);
- when examining the necessity of restrictions on freedom of expression, national authorities must have proper regard for relevant case-law of the European Court of Human Rights, including the consideration afforded therein to “the manner, contents, context and purpose of the reporting”;
- “respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.”

Whereas combating hate speech may be considered a defensive or reactionary battle, the promotion of tolerance – an objective to which it is intimately linked – is more pro-active.⁵⁴⁸ Recommendation (97) 21 on the media and the promotion of a culture of tolerance⁵⁴⁹ was conceived of as the logical complement to the Recommendation on “Hate Speech”. It was decided to prepare two separate Recommendations, one dealing with the negative role which the media may play in the propagation of hate speech, and the other dealing with the positive contribution which the media can make to countering such speech. The main reasoning behind this decision was explained as follows:

As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.⁵⁵⁰

The Recommendation urges governments of Member States to raise awareness of the media practices it promotes in all sections of the media and to remain open to supporting initiatives which would further the objectives of the Recommendation. The list of recommended professional practices is non-exhaustive. It is suggested that initial and further training programmes could do more to sensitise (future) media professionals to issues of multiculturalism, tolerance and intolerance. Reflection on such issues is called for among the general public, but crucially also within media enterprises themselves. It is also pointed out that it would be desirable for representative bodies of media professionals to undertake “action programmes or practical initiatives for the promotion of a culture of tolerance” and that such measures could viably be complemented by codes of conduct.

Broadcasters, especially those with public service mandates, are encouraged to “make adequate provision for programme services, also at popular viewing times, which help

⁵⁴⁸ It should also be mentioned that the European Commission against Racism and Intolerance frequently refers to the need to assure minority groups effective access to the media, *inter alia*, in order to counter negative stereotypes of their cultures and lifestyles, and more generally to promote inter-community understanding and tolerance.

⁵⁴⁹ Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies).

⁵⁵⁰ Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities”. They are also encouraged to promote the values of multiculturalism in their programming, especially in their programme offer targeting children. Finally, the Recommendation mentions the benefits of advertising codes of conduct which prohibit discrimination and negative stereotyping. It equally mentions the usefulness of engaging the media to actively disseminate advertising campaigns for the promotion of tolerance.

The purpose of Recommendation (2000) 4 on the education of Roma/Gypsy children in Europe⁵⁵¹ is to attempt to set right the entrenched disadvantages affecting Roma/Gypsy children in the education sector. The Recommendation therefore addresses structural and content-related matters; recruitment and training of teachers; quality control and review; consultation and coordination.

As its title suggests, Recommendation (2001) 6 on the prevention of racism, xenophobia and racial intolerance in sport,⁵⁵² aims to eradicate racism in sporting circles. Its point of departure is a broad definition of racism and it focuses on coordination and the sharing of responsibilities between relevant authorities and other parties. It proposes numerous legislative measures and pays particular attention to the possible mechanics of their implementation. It also countenances other, non-legislative measures to be taken in sports grounds, as well as at local and institutional levels.

While Recommendation (2001) 8 on self-regulation concerning cyber content⁵⁵³ does not contain any provisions dealing specifically with racism or racist speech, its Preamble recalls the relevance of such issues to self-regulation of online content. It refers to, *inter alia*, Recommendation (92) 19 on video games with a racist content, Recommendation (97) 20 on “Hate Speech” and Article 4, ICERD.

For its part, Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting⁵⁵⁴ emphasises in its preambular section “the need to safeguard essential public interest objectives in the digital environment, including freedom of expression and access to information, media pluralism, cultural diversity, the protection of [...] human dignity [...].” In the Appendix to the Recommendation, this emphasis is placed on a more substantive footing by a call for “[T]he protection of [...] human dignity, and non-incident to hatred and violence, notably that of racial and religious origin” to “continue to

⁵⁵¹ Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (Adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers’ Deputies).

⁵⁵² Recommendation Rec (2001) 6 of the Committee of Ministers to member states on the prevention of racism, xenophobia and racial intolerance in sport (adopted by the Committee of Ministers on 18 July 2001 at the 761st meeting of the Ministers’ Deputies).

⁵⁵³ Recommendation Rec (2001) 8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services) (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers’ Deputies).

⁵⁵⁴ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of Ministers’ Deputies).

receive particular attention in the digital convergence environment”.⁵⁵⁵ It is by no means superfluous to insist on the continued relevance of these fundamental values in the context of the digitisation of the media, as they tend to often be eclipsed by technology-related discussions.

Declarations

A number of the Committee of Ministers’ (political) Declarations also contain provisions that deal with the perpetration of racist offences via various forms of mass media. For instance, its Declaration on a European policy for new information technologies calls on States:⁵⁵⁶

- to ensure respect for human rights and human dignity, notably freedom of expression, as well as the protection of minors, the protection of privacy and personal data, and the protection of the individual against all forms of racial discrimination in the use and development of new information technologies, through regulation and self-regulation, and through the development of technical standards and systems, codes of conduct and other measures;
- to adopt national and international measures for the effective investigation and punishment of information technology crimes and to combat the existence of safe havens for perpetrators of such crimes;
- [...]
- to enhance this framework of protection, including the development of codes of conduct embodying ethical principles for the use of the new information technologies.

While the Declaration on freedom of communication on the Internet⁵⁵⁷ does not zone in specifically on racism, its Preamble does refer to several principles and international instruments which treat relevant issues extensively. As such, it is a document which is of clear – but only indirect and general – relevance.

The Preamble to the Declaration on freedom of political debate in the media⁵⁵⁸ recalls the Committee of Ministers’ earlier Recommendation on hate speech and emphasises “that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance”. In the substantive part of the Declaration – under the heading ‘Remedies against violations by the media’ – it is stated that:

[...] Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

⁵⁵⁵ Appendix to the Recommendation, para. 9.

⁵⁵⁶ Declaration on a European policy for new information technologies (1999) (Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session), Section (v), ‘With respect to Protection of rights and freedoms’.

⁵⁵⁷ Council of Europe Committee of Ministers Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies).

⁵⁵⁸ Council of Europe Committee of Ministers Declaration on freedom of political debate in the media (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies).

The Declaration on freedom of expression and information in the media in the context of the fight against terrorism⁵⁵⁹ “invites” media professionals “to consider” suggestions such as:

- to bear in mind the significant role which they can play in preventing “hate speech” and incitement to violence, as well as in promoting mutual understanding;
- to be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;
- to bear in mind the importance of distinguishing between suspected or convicted terrorists and the group (national, ethnic, religious or ideological) to which they belong or to which they claim to subscribe;
- to set up training courses, in collaboration with their professional organisations, for journalists and other media professionals who report on terrorism, on their safety and the historical, cultural, religious and geopolitical context of the scenes they cover, and to invite journalists to follow these courses.

Terrorism is a highly flammable topic, both in terms of political policy and debate, as well as in media coverage of the same. Its flammability increases the risk of emotionally-fuelled treatment of relevant issues. Hence the importance of specific provisions aiming to ensure that the depiction of certain groups remain within the bounds of the temperate, despite the flammability of the subject matter. Responsible, value-sensitive journalism is the lodestar here, but the aim is followed in a non-coercive way, thereby respecting the principle of media autonomy. The Declaration’s promotion of responsible journalism concerns professional practice and training programmes: this is evidence of a simultaneous commitment to the immediate and longer-term goals of countering hate speech.

The Declaration on human rights and the rule of law in the Information Society, adopted in May 2005,⁵⁶⁰ was submitted as a Council of Europe contribution to the Tunis Phase of the World Summit on the Information Society (WSIS)⁵⁶¹ in November 2005.

The first section of the Declaration is entitled “Human rights in the Information Society”. Its treatment of “the right to freedom of expression, information and communication” includes the assertion that existing standards of protection should apply in digital and non-digital environments alike and that any restrictions on the right should not exceed those provided for in Article 10 of the European Convention on Human Rights (ECHR). It calls for the prevention of state and private forms of censorship and for the scope of national measures combating illegal content (eg. racism, racial discrimination and child pornography) to include offences committed using information and communications technologies (ICTs). In this connection, greater compliance with the Additional Protocol to the Cybercrime Convention is also urged.

The second section of the Declaration sets out a “multi-stakeholder governance approach for building the information society”. Of most relevance for present purposes is the following prescription:

⁵⁵⁹ Declaration on freedom of expression and information in the media in the context of the fight against terrorism (Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies).

⁵⁶⁰ Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society, 13 May 2005, CM(2005)56 final.

⁵⁶¹ The WSIS is an initiative organised by the International Telecommunication Union (ITU), a UN agency under the auspices of which “governments and the private sector coordinate global telecom networks and services”. The Summit is being held in two phases: the first took place in Geneva in 2003 and the second is due to take place in Tunis later in 2005. See further: <http://www.itu.int/wsis/>.

With regard to self- and co-regulatory measures which aim to uphold freedom of expression and communication, private sector actors are encouraged to address in a decisive manner the following issues:

- hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
- [...]
- the difference between illegal comment and harmful comment.

6.6.2(ii) European Ministerial Conferences on Mass Media Policy

The first three European Ministerial Conferences on Mass Media Policy and the sixth such Conference did not examine the issues of hate speech or tolerance and intolerance in the media sector in any direct or meaningful way. Their thematic preoccupations lay elsewhere.⁵⁶²

In the 4th European Ministerial Conference on Mass Media Policy,⁵⁶³ however, these issues were broached in two of the texts adopted during the Conference. In Resolution No. 2: Journalistic Freedoms and Human Rights, Principle 7(f) sets out generally that the “practice of journalism in a genuine democracy” implies “avoiding the promotion of any violence, hatred, intolerance or discrimination based, in particular, on race, sex, sexual orientation, language, religion, politics or other opinions, national or regional origin, or social origin.” In the Declaration on media in a democratic society, the Ministers of participating States condemn, “in line with the Vienna Declaration, all forms of expression which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism”.⁵⁶⁴ They also affirm “that the media can assist in building mutual understanding and tolerance among persons, groups and countries and in the attainment of the objectives of democratic, social and cultural cohesion announced in the Vienna Declaration”.⁵⁶⁵ These two principles again reflect the conceptual bifurcation between curbing hate speech and promoting understanding and tolerance – a distinction that has (by and large) consistently been adhered to throughout relevant Council of Europe instruments. Relatedly, in the Action Plan adopted at the Conference, it was proposed that the Committee of Ministers of the Council of Europe “**Study**, in close consultation with media professionals and regulatory authorities, possible guidelines which could assist media professionals in addressing intolerance in all its forms”.⁵⁶⁶

It was the 5th European Ministerial Conference on Mass Media Policy⁵⁶⁷ that paid the greatest attention to relevant issues to date. Paras. 11 and 12 of the Political Declaration adopted at that Conference refer in general terms to the potential offered and risks posed by new communications and information services for freedom of expression and other rights and values. In a similar vein, Resolution No. 1: The impact of new communication technologies on human rights and democratic values, emphasises the Ministers’ condemnation of the use of

⁵⁶² 1st European Ministerial Conference on Mass Media Policy (Vienna, 9-10 December 1986): *The future of television in Europe*; 2nd European Ministerial Conference on Mass Media Policy (Stockholm, 23-24 November 1988): *European Mass Media Policy in an international context*; 3rd European Conference on Mass Media Policy (Nicosia, 9-10 October 1991): *Which way forward for Europe’s media in the 1990s?*; 6th European Ministerial Conference on Mass Media Policy (Cracow, 15-16 June 2000): *A media policy for tomorrow*.

⁵⁶³ Prague, 7-8 December 1994: *The media in a democratic society*.

⁵⁶⁴ Principle 7.

⁵⁶⁵ Principle 8.

⁵⁶⁶ (emphasis per original) Action Plan setting out strategies for the promotion of media in a democratic society addressed to the Committee of Ministers of the Council of Europe (Point 6 – “Media and intolerance”).

⁵⁶⁷ Thessaloniki, 11-12 December 1997: *The Information Society: a challenge for Europe*.

new technologies and services “for spreading any ideology, or carrying out any activity, which is contrary to human rights, human dignity, and democratic values”, as well as their resolve to “combat such use”.⁵⁶⁸

Resolution No. 2: Rethinking the regulatory framework for the media, calls on participating States to give domestic effect to the principles enshrined in the Committee of Ministers’ Recommendations on, *inter alia*, “hate speech” and on the media and the promotion of a culture of tolerance.⁵⁶⁹ It also calls on States authorities “to ensure that measures for combating the dissemination of opinions and ideas which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance through the new communications and information services duly respect freedom of expression and, where applicable, the secrecy of correspondence”.⁵⁷⁰ The reinforcement of cooperation within the Council of Europe, while liaising with other IGOs and “interested professional organisations”, is also advocated.⁵⁷¹ Such cooperation should have standard-setting aspirations, initially for Europe and later for further afield too. The suggested focus is on “problems of delimiting public and private forms of communication, liability, jurisdiction and conflict of laws in regard to hate speech disseminated through the new communications and information services”.⁵⁷²

The Conference’s Action Plan calls for study of “the practical and legal difficulties in combating the dissemination of hate speech, violence and pornography via the new communications and information services, with a view to taking appropriate initiatives in a common pan-European framework”. As already mentioned *supra*, it also calls for the “periodical evaluation” of Member States’ “follow-up” to the Committee of Ministers’ Recommendations on, *inter alia*, “hate speech” and on the media and the promotion of a culture of tolerance. In addition, it seeks a periodical evaluation of the implementation of Article 7, ECTT, by Member States, particularly as regards the “responsibilities of broadcasters with regard to the content and presentation of their programme services”. Finally, it provides for an examination – “as appropriate” – of the “advisability of preparing in addition other binding or non-binding instruments”.

Finally in this section, the relevance of the 7th European Ministerial Conference on Mass Media Policy, which was held in Kyiv (Ukraine) in March 2005, should also be flagged.⁵⁷³ At the conference, the ministers of participating States undertook, *inter alia*, to: “step up their efforts to combat the use of the new communication services for disseminating content prohibited by the Cybercrime Convention and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.”⁵⁷⁴

6.6.2(iii) The European Commission against Racism and Intolerance (ECRI)

⁵⁶⁸ Para. 9. See also, para. 19(i), where these points are reiterated in very similar language.

⁵⁶⁹ Para. 8(i).

⁵⁷⁰ Para. 8(ii).

⁵⁷¹ Para. 8(iii).

⁵⁷² Para. 8(iii).

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⁵⁷⁴ Resolution No. 3, “Human rights and regulation of the media and new communication services in the Information Society”, para. 18. See further, Tarlach McGonagle, “Ministerial Conference on Mass Media Policy”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2005-7: 2.

The Council of Europe's commitment to the advancement of the struggle against racism is by no means restricted to the ECHR and its other legal conventions.⁵⁷⁵ The European Commission against Racism and Intolerance (ECRI), for instance, was established in 1993, and it was under its auspices that the preparations in Europe for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) were largely coordinated.

ECRI's work has three main focuses: its so-called "country-by-country" approach (which involves the ongoing monitoring of relevant issues in Member States⁵⁷⁶) and work on general themes (which includes the elaboration of general policy recommendations, as well as the collection and promotion of examples of "good practice" in the struggle against racism), and engagement with civil society. More specifically, its objectives have been listed as follows:

- to review member states' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness;
- to propose further action at local, national and European level;
- to formulate general policy recommendations to member states;
- to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.⁵⁷⁷

The challenge of combating racism and intolerance in a way that is duly respectful of the right to freedom of expression is a recurrent issue in both ECRI's country-monitoring work and its work on general themes.⁵⁷⁸ In order to take stock of and evaluate appropriate legal and policy measures for the realisation of this aim, ECRI has actively engaged with civil society, most notably by organising a multi-party expert seminar on the topic at the end of 2006.⁵⁷⁹ While it is too early yet to assess (or even predict) the impact of that seminar on ECRI's strategies for meeting the challenge, it can be observed that its engagement with relevant issues to date has produced mixed results.

The different focuses of ECRI's work cast it in different roles which entail different responsibilities. In its country-monitoring work, ECRI's role is essentially that of a watchdog. It monitors and analyses ongoing developments and periodically issues specific recommendations tailored to specific problems. The exercise presents and processes information about (especially problematic) developments with a view to facilitating their ultimate resolution. In its work on general themes, on the other hand, ECRI assumes a more explicit and general standard-setting role. By virtue of its normative intentions in this respect, its responsibilities are greater. The elaboration of recommendations designed for general application by all States requires greater care and precision than the formulation of specific problem-solving recommendations focusing on specific issues in specific States. This is not to downplay the importance of the latter task; rather, it seeks to make an epistemological relativisation, the importance of which will become apparent in the following analysis. The relativisation in question is this: in light of their purported wider applicability and (presumably) longer durability, the ability of general policy recommendations to withstand

⁵⁷⁵ Relevant texts issued by the Committee of Ministers and Parliamentary Assembly of the Council of Europe will be discussed throughout this thesis in appropriate contexts.

⁵⁷⁶ This is a report-based system.

⁵⁷⁷ Article 1, Appendix to Resolution (2002)8 Statute of the European Commission against Racism and Intolerance (ECRI).

⁵⁷⁸ Explanatory Note to ECRI Expert Seminar on combating racism while respecting freedom of expression, Strasbourg, 16-17 November 2006, p. 1.

⁵⁷⁹ The publication of the proceedings of the expert seminar is forthcoming: Heike Klempa/ECRI, Ed., ... (Strasbourg, Council of Europe Publishing, 2007).

strict scrutiny in terms of their conceptual and terminological precision is more important than in the case of issue-/situation-specific recommendations. As will be demonstrated, occasional lapses in conceptual and terminological precision could serve to undermine the credibility of ECRI's standard-setting role in respect of certain key issues.

The following analysis will analyse how the challenge of combating racism and intolerance in a way that is duly respectful of the right to freedom of expression has been dealt with, first in ECRI's most recent country-monitoring work and then in its work on general themes.

Country-monitoring work

On the basis of the third (and ongoing) round of ECRI's country-monitoring work, there is clear evidence that ECRI espouses a root-and-branch approach, similar to that pursued by the Advisory Committee on the FCNM, to the imperative of countering racist expression and intolerance. There is also clear evidence that ECRI's approach, again like that of the AC, is mindful of the importance of the right to freedom of expression and the differential roles of the media in this context. As such, the overall pattern that emerges from the country reports surveyed includes recommendations for both punitive and preventive measures, the most salient of which will now be discussed.

In terms of punitive measures, a recurrent general recommendation is that States authorities strengthen existing legislative provisions prohibiting incitement to hatred,⁵⁸⁰ or ensure that existing provisions are vigorously implemented.⁵⁸¹ Similarly, ECRI regularly recommends particular vigilance in identifying and prosecuting cases of incitement to or dissemination of hatred by media professionals.⁵⁸² In cases where racist articles have been published, ECRI often calls for the perpetrators to be prosecuted and punished.⁵⁸³ Curiously, in the reports surveyed, ECRI has focused on the *publication* of racist *articles* and not made any comparable recommendation about the dissemination of racist expression via the broadcast media. Some of the recommendations for punitive measures specifically concern racist and xenophobic material on the Internet, however.⁵⁸⁴ The specificity of such a focus demonstrates the growing nature of the problem, yet such recommendations are by no means systematic in ECRI's country reports. This begs the question of whether the problem is equally pressing in all States.

Alongside its recommendations for prosecution and punishment in a system built around legislation and the courts, other recommendations call for the adoption⁵⁸⁵ and/or implementation⁵⁸⁶ by the media sector of self-regulatory codes which would include

⁵⁸⁰ Denmark, para. 92; Norway, para. 101; Former Yugoslav Republic of Macedonia, para. 95.

⁵⁸¹ Lithuania, para. 62.

⁵⁸² Czech Republic, para. 65; Luxembourg, para. 77; Romania, para. 113; Russia, para. 120; Sweden, para. 9.

⁵⁸³ Bulgaria, para. 63; Croatia, para. 82; Estonia, para. 115 (the phrase, "duly prosecuted", is used here instead of the reference to "prosecute and punish"); Greece, para. 98; Poland, para. 79; Turkey, para. 100. It could cynically be observed that given the preponderance of prosecutions in Turkey for speech-related offences, often loosely based on anti-racism provisions, the fact that ECRI "strongly encourages the Turkish authorities to make every endeavour to prosecute and punish those responsible [for the publication of racist articles]" seems irrelevant.

⁵⁸⁴ Finland, para. 91; France, para. 107; Germany, para. 111; Lithuania, para. 64; Portugal, para. 92; Sweden, para. 83.

⁵⁸⁵ Albania, para. 70; Austria, para. 73; Czech Republic, para. 65; Germany, para. 78; Turkey, para. 100.

⁵⁸⁶ Austria, para. 73; Belgium, para. 59; Germany, para. 78; Hungary, para. 85; Norway, para. 80; Former Yugoslav Republic of Macedonia, para. 94.

provisions on racism, discrimination and responsible reporting on minorities. The frequency with which this kind of recommendation is made is indicative of ECRI's awareness of, and deference to, the principle of media autonomy which is a central principle of the Council of Europe's approach to freedom of expression. ECRI's commitment to this principle is even more obvious in its regular encouragement of the State authorities to: "impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups".⁵⁸⁷ Slight, mainly negligible, variations in wording occur,⁵⁸⁸ but a more significant variation involves instances in which particular minority groups are specified.⁵⁸⁹ In the report on the United Kingdom, the authorities are furthermore encouraged to impress on the media (without encroaching on their editorial independence) "the need to play a proactive role in countering such an atmosphere".⁵⁹⁰

In respect of certain countries, the wording does change in ways that (possibly/presumably) reflect certain contextual specificities of those countries. In the case of Ireland, for instance, "ECRI recommends that, while fully respecting the principle of freedom of expression and editorial independence, the authorities encourage fairness when issues pertaining to ethnic minority groups, asylum seekers, refugees and immigrant communities are discussed by the media".⁵⁹¹ In the report on Germany, the focus of attention is on "the need to ensure that reporting does not perpetuate racist prejudice and stereotypes".⁵⁹² These emphases on fairness and on racist prejudice/stereotypes are more particularised than the more open-ended formula, "atmosphere of hostility and rejection", thus suggesting a more pointed, situation-specific approach by ECRI (as opposed to a sound, but vague, recommendation that could uncontroversially be applied to any country situation). Another, somewhat blander, variant on the general theme is that States authorities alert the media (i.e., professionals and organisations) to "the dangers of racism and intolerance".⁵⁹³ It is unclear why this less demanding recommendation is preferred to the more robust formula discussed in the current and previous paragraphs for some countries.

It is significant to note that this particular recommendation is systematically accompanied by the further recommendation that States authorities should: "engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved".⁵⁹⁴ An exception to the rule is found in the report on the Russian Federation and it is submitted that

⁵⁸⁷ See, for example, Cyprus, para. 90; Finland, para. 90.

⁵⁸⁸ See, for example, Austria, para. 73; Portugal, para. 87.

⁵⁸⁹ For example, in the report on Iceland, members of "immigrant, Muslim or Jewish communities" are singled out for attention (para. 80); in the report on Italy, the "minority groups" are explicitly considered to include "non-EU citizens, Roma, Sinti and Muslims" (para. 79); in the report on Lithuania, members of the "Jewish, Roma and Chechen communities" are expressly mentioned (para. 63); in the report on Portugal, the specification involves "immigrants and Gypsies" (para. 87); in the report on the Russian Federation, "visible minority groups" (the formula that is used instead of "any minority groups") are stated as "including Roma, Chechens and other Caucasians, as well as citizens from CIS countries" (para. 121); in the report on Spain, particular reference is made to "the Roma, Muslims and immigrants" (para. 86); in respect of the United Kingdom, the atmosphere of hostility and rejection to be avoided is described as being "towards asylum seekers, refugees and immigrants or members of any minority group, including Roma/Gypsies, Travellers and Muslims" (para. 79).

⁵⁹⁰ United Kingdom, para. 79; see also, Germany, para. 78.

⁵⁹¹ Ireland, para. 112.

⁵⁹² Germany, para. 78.

⁵⁹³ Bulgaria, para. 63; Croatia, para. 82; Greece, para. 98; Hungary, para. 85 (here, the reference is to "the danger of negative reporting"); Poland, para. 79; Switzerland, para. 60 (here, the point is styled as further sensitisation to the need to report on asylum-seekers and refugees in a more balanced fashion, "without resorting to language and propaganda which are likely to exacerbate public prejudice and hostility"); Turkey, para. 100.

⁵⁹⁴ Cyprus, para. 90; Finland, para. 90; Iceland, para. 80; Italy, para. 79; Lithuania, para. 63; Slovenia, para. 87.

that was a missed opportunity to underscore the importance of civil society participation in media policy formulation in a country where weak traditions of such participation need to be strengthened.⁵⁹⁵ Again, slight, mainly negligible variations in wording arise in this respect,⁵⁹⁶ but in the report on the United Kingdom, ECRI recommends that “any successful initiatives developed at local level in this field, be reproduced on a broader scale at national level”.⁵⁹⁷ In the report on Spain, the need for measures at the local and national levels is also adverted to.⁵⁹⁸ In the report on Portugal, the authorities are encouraged to “hold discussions with the media and other relevant civil society players [...]”⁵⁹⁹ and it is submitted that the reference to discussions is preferable to the more consistently used reference to “debate”, which has the connotation of a more confrontational encounter.

As already mentioned, ECRI has also shown its awareness of the potential role that freedom of expression can play in countering racist speech. It has sought to harness that potential by encouraging (rather than prescribing, again out of deference to the principle of media autonomy) more and better media coverage of minority issues,⁶⁰⁰ a goal which could be advanced in a number of ways. For example, it recommends more State support for training schemes for media professionals on issues such as reporting in a diverse society;⁶⁰¹ human rights, racism, racial discrimination⁶⁰² and anti-Semitism.⁶⁰³ Another way of advancing the goal of more and better media coverage of minority issues is by seeking to ensure greater representation of persons from immigrant backgrounds in the media profession.⁶⁰⁴ This approach is explicitly based on the assumption that the enhanced representation of immigrants in media structures will have a positive impact on the representation of immigrants in media output.

ECRI also underscores the importance of access to electronic and print media for persons belonging to minorities, generally,⁶⁰⁵ as well as the specific importance of ensuring the “adequate availability of electronic media in the language of national minorities”.⁶⁰⁶ The promotion via the media of minority identities⁶⁰⁷ and of “an atmosphere of appreciation of diversity”⁶⁰⁸ are also recommended, as is the creation of a shared forum in which separate linguistic communities can receive the same information, with a view to strengthening inter-group relations.⁶⁰⁹

⁵⁹⁵ Russian Federation, para. 121.

⁵⁹⁶ See, for example, Portugal, para. 87.

⁵⁹⁷ United Kingdom, para. 79.

⁵⁹⁸ Spain, para. 86.

⁵⁹⁹ Portugal, para. 87.

⁶⁰⁰ Albania, para. 71; Austria, para. 74; Former Yugoslav Republic of Macedonia, para. 137.

⁶⁰¹ Austria, para. 73; Germany, para. 78;

⁶⁰² Denmark, para. 108; Estonia, para. 115; Romania, para. 112 (“national and local media training courses on combating discrimination”); Slovakia, para. 91 (this provision is directed at “professionals”, presumably including, although without specifying, “media” professionals).

⁶⁰³ Luxembourg, para. 77.

⁶⁰⁴ Austria, para. 73; Belgium, para. 60; France, para. 105 (and see also para. 104 for details of a positive initiative in this connection); Germany, para. 78; Norway, para. 80. In these examples, references to “the press” are presumably expansive, i.e., to the press as an institution. It is submitted here that “the media” would have been a more suitable term.

⁶⁰⁵ Albania, para. 72.

⁶⁰⁶ Austria, para. 74.

⁶⁰⁷ Slovenia, paras. 73-74.

⁶⁰⁸ Albania, para. 70.

⁶⁰⁹ Estonia, para. 114.

The striking similarities between the approaches taken by ECRI and the AC FCNM augur well for the further development and consolidation of a broadly consistent approach by the various bodies of the Council of Europe to the perennial problem of effectively combating racist and discriminatory speech without circumscribing the right to freedom of expression beyond the legitimate restrictions on the right which are recognised under international law.

Work on general themes

ECRI's General Policy Recommendations (GPRs) are the mainstay of its work on general themes. They are as follows:

1. Combating racism, xenophobia, antisemitism and intolerance (1996)
2. Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (1997)
3. Combating racism and intolerance against Roma/Gypsies (1998)
4. National surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998)
5. Combating intolerance and discrimination against Muslims (2000)
6. Combating the dissemination of racist, xenophobic and antisemitic material [*sic*] via the Internet (2000)
7. On national legislation to combat racism and racial discrimination (2002)
8. On combating racism while fighting terrorism (2004)
9. On the fight against antisemitism (2004)
10. On combating racism and racial discrimination in and through school education (2006)
11. On combating racism and racial discrimination in policing (2007)
12. On combating racism and racial discrimination in sports (forthcoming, September 2008)

The most self-evident *forte* of ECRI's thematic approach is the opportunity it affords to ring-fence particular issues and grapple with their specifics in much more detail and with much more rigour than would be possible in general texts. Its focuses on the Internet and on the fight against terrorism are illustrative of such detailed treatment. However, its handling of these issues is not without flaws.

In GPR No. 6, the credibility of ECRI's single-minded pursuit of the goal of eliminating racist and xenophobic content online is compromised somewhat by its failure at any stage to acknowledge and weigh up relevant freedom of expression interests. In the preambular section, reference is made to GPR No. 1, and a supporting citation is provided, as follows:

Recalling that, in its general policy recommendation No 1, ECRI called on the governments of Council of Europe member States to ensure that national criminal, civil and administrative law expressly and specifically counters racism, xenophobia, antisemitism and intolerance

Stressing that, in the same recommendation, ECRI asked for the aforementioned law to provide in particular that oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question;

This citation of GPR No. 1 in GPR No. 6 is, however, abridged, although no indication is given that this is the case. The omitted section of the full, original text is italicised below; in the relevant part of GPR No. 1, ECRI recommends States governments to:

Ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance, inter alia by providing:

[...]

- that, in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights,

oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question;

This omission pushes the language employed in GPR No. 6 away from the wording of existing international law standards. And it does so to a significant extent. Articles 10 (Freedom of expression) and 11 (Freedom of assembly and association), ECHR, both contain limiting – or so-called “claw-back” - clauses (which could easily be invoked, and are in practice, to counter racist expression and activities); similar limitations govern the exercise of the rights to freedom of expression and association as guaranteed by the International Covenant on Civil and Political Rights; ICERD contains a crucial “due regard” clause, which requires a balancing of anti-racist objectives with other fundamental human rights. It is therefore very remiss of ECRI to fail to consider its own immediate objectives in the context of existing human rights as provided for by international law, especially the right to freedom of opinion, expression and information. This failure to square up to the potential interaction (and incidental friction) between rights is apparent in ECRI’s other GPRs too.

While GPR No. 6 does acknowledge the Internet’s potential for combating racism, *inter alia*, through self-regulatory measures, the transfrontier sharing of information concerning “human rights issues related to anti-discrimination”, and the (further) development of educational and awareness-raising networks, the absence of references to freedom of expression and other pertinent rights conveys the impression of a document that is somewhat skewed in terms of the range of its sources of inspiration.

GPR No. 8,⁶¹⁰ which examines how anti-racism could be integrated into the fight against terrorism, also departs from the tried and trusted formulae of “hard” international law, albeit to a lesser extent. In its Preamble, it stresses that “the response to the threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice, the rule of law, human rights and humanitarian law that it aims to safeguard, nor should it in any way weaken the protection and promotion of these values”. This recognition of relativism is welcome. However, it could also be submitted that this statement would have been all the more forceful if it had been more firmly rooted in international human rights treaties. The verbal phrase, “encroach upon”, is vague and invites subjective interpretation. If the statement had been aligned more closely to the language employed in specific provisions of, for

⁶¹⁰ ECRI general policy recommendation no. 8 on combating racism while fighting terrorism, adopted on 17 March 2004.

example, the ECHR, or if it had clearly referred to such provisions, the degree of subjectivity would have been reduced. Closer conceptual and linguistic alignment with the ECHR would automatically point to a body of relevant judicial pronouncements, thereby offering authoritative interpretative clarity.

Furthermore, GPR No. 8 refers to “certain visible minorities”, a term which is not used in any (well-known) international (legal or political) instruments.⁶¹¹ The problems of defining and categorising minorities have proved vexed enough under international law,⁶¹² without muddying the waters further by introducing novel terms of uncertain scope. Indeed, no multi-lateral European-, or global-level, treaty contains a definition of “minority”. For their part, the drafters of the FCNM conceded the impossibility of forging “a definition capable of mustering general support of all Council of Europe member States”.⁶¹³ It would appear that the appeal of the term “certain visible minorities” lies in the alleged flexibility it offers ECRI in the course of its work.⁶¹⁴ However, that argument, as well as the claim that the notion of visibility can cover linguistic and religious minorities,⁶¹⁵ is unconvincing.

To suggest that linguistic and religious minorities are categories of “visible minorities” seems to confuse visibility with identifiability. Visibility refers to features that can be seen, i.e., physical and superficial details, and it is only by serious doctoring (if not corruption) of the ordinary meaning of visibility that it could be extended to linguistic and religious characteristics. Granted, the outward manifestation of religious beliefs can often be visible (eg. particular types of clothing, symbols or other details of self-presentation), but not always. Furthermore, the argument that linguistic specificity can also be visible is, at best, somewhat strained. In short, it is reductionist to seek to describe (the expression of) identity-related specificities as visible; the reality of their existence and expression is much more complex and multi-dimensional. Finally, in this connection, the term “certain visible minorities” has considerable exclusionary potential. Whatever protection is intended by the term would appear to be limited by the cumulative qualifiers, “certain” and “visible”. On the basis of such wording, “certain other” visible minorities, as well as “invisible” minorities, are implicitly excluded from the protection on offer.⁶¹⁶ For this reason, use of the term has been discouraged in certain circles, eg. the English judiciary.⁶¹⁷ Given the problematic nature of the focus on “certain visible minorities”, it is difficult to agree with the suggestion that it boasts superior flexibility to alternative formulations of equivalent notions that are more ingrained in international legal and political discourse.

A second *forte* of ECRI’s thematic approach is that it enables more generous attention to be given to specific groups, for example those groups which have traditionally suffered - and

⁶¹¹ The term is, however, used by some commentators (eg. Ted R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, United States Institute of Peace, 2000), at p. 165) and in conventional political discourse in some countries (eg. Canada).

⁶¹² See generally: Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (New York, United Nations, 1979), esp. p. 96, para. 568; John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell and Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 223-273; Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *Human Rights Quarterly* (1996), pp. 160-189.

⁶¹³ Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 12.

⁶¹⁴ Conversation with ECRI staff members, Strasbourg, 6 April 2006.

⁶¹⁵ *Ibid.*

⁶¹⁶ I am grateful to Geoff Gilbert for suggesting this point to me.

⁶¹⁷ Lord Chief Justice Woolf, *Equal Treatment Benchbook* (May 2004); for commentary, see: ‘In the News’, *Index on Censorship* 3/2004, p. 6. Kymlicka?

continue to suffer - from racism and racist discrimination. This is illustrated by the GPRs focusing specifically on the Roma/Gypsies, Muslims and anti-Semitism. These policy recommendations are very important as they address the root causes of racism and not merely its concrete manifestations. As such, they look at situational and systemic discrimination and explore ways of countering and eliminating the same.

The three GPRs were not cast in the same mould: differences in prioritisation and language are easily detectable. Of itself, this is not a problem. Indeed, it is perfectly understandable that different groups could be best served by different emphases and approaches. However, one can also witness here a recurrence of the previously mentioned tendencies to resort to language that is inconsistent with that of codified international law and the failure to adequately capture the underlying concepts of international law. In particular, insufficient consideration has been given to relevant interlinkage with other rights guaranteed by international law,⁶¹⁸ meaning that a hugely important and hugely relevant source of legal and philosophical inspiration has not been fully tapped into.

Another instance of digression from the terms of conventional international law again involves minorities. In GPR No. 5, which focuses on Muslims, ECRI makes certain recommendations to “the governments of member States, where Muslim communities *are settled and live in a minority situation* in their countries” (emphasis added). Again, “in a minority situation”, is a turn of phrase that is unfamiliar to leading international texts dealing with minority rights. However, the words, “are settled”, are much more problematic. Such a verbal construction would appear to limit the beneficiaries of the recommended measures to non-nomadic Muslim groups, a limitation which is arbitrary, morally indefensible and – it must be hoped – unintended by its drafters.

(iii) The third *forte* of the thematic approach to combating racism is that it has provided ECRI with a very useful means to address policy, institutional and methodological/procedural questions. In terms of policy, GPR Nos. 1 and 7 are the most important. GPR No. 1, entitled “Combating racism, xenophobia, antisemitism and intolerance”,⁶¹⁹ stands out among other GPRs for its ability to see the proverbial bigger picture. It recognises that international law is the backdrop to the struggle against racism and that the obligations imposed on States by international law must remain salient. GPR No. 7 – on national legislation to combat racism and racial discrimination⁶²⁰ - is somewhat weaker in that regard, but its shortcomings are offset to some extent by its accompanying Explanatory Memorandum. This is the only GPR to have such an appendix, and the explanatory detail it provides on the recommendations concerning constitutional, civil and administrative, and criminal law, is to be welcomed.⁶²¹

⁶¹⁸ GPR No. 3 does not explicitly refer to any specific provisions of the ECHR; GPR No. 5 mentions Articles 9 and 14, ECHR, but not, for example, Article 10; GPR No. 9 mentions Article 14, ECHR, Protocol No. 12 to the ECHR, and Article 10, ECHR (but this reference is not so much an affirmation of the right to freedom of expression as a reiteration of the fact that certain types of expression do not enjoy Article 10 protection).

⁶¹⁹ ECRI general policy recommendation no. 1: Combating racism, xenophobia, antisemitism and intolerance, adopted on 4 October 1996.

⁶²⁰ ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002.

⁶²¹ For further commentary, see: Giancarlo Cardinale, “The Preparation of ECRI General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, op. cit., pp. 81-92.

As regards institutional questions, GPR No. 2 calls for the establishment of specialised bodies to combat racism at the national level and makes recommendations concerning the functions, responsibilities and working methods of such bodies. Finally, as regards methodological/procedural questions, GPR No. 4 is based on the premise that attitudinal information and experiential information are very important complements to statistical information. It therefore focuses on the need to gather and process information about how (potential) victims experience and perceive racism.

When assessing ECRI's thematic work at the macro level, two main points should be made. The first is gleaned from, or more accurately, is a summation of, the foregoing critique: the GPRs do not always reflect the letter and spirit of international law provisions. Nor do they always manage to achieve the desirable, and indeed necessary, linkage with other fundamental rights. The second point is that the thematic approach pursued by ECRI very importantly allows it to be responsive to changing agendas of racism and racial discrimination. By setting its own thematic agenda, ECRI has also managed to be pro-active in its decisions to pursue certain topics. This is conducive to fostering dynamic working methods.

(iv) By way of conclusion to this analysis of ECRI's thematic work, two other recent documents should also be briefly discussed: its Declaration on the use of racist, antisemitic and xenophobic elements in political discourse⁶²² and its Annual Report for 2004.

The Declaration begins by stating that tolerance and pluralism are cornerstones of democracy and that diversity "considerably enriches" democratic societies. Any affirmation of the right to freedom of expression is once again conspicuous by its absence. Given the thematic focus, this omission is regrettable: the counterbalancing and promotional qualities of free expression could usefully have been emphasised in the context of removing racist expression from political discussion.⁶²³

When stressing that "political parties can play an essential role in combating racism, by shaping and guiding public opinion in a positive fashion", the Declaration appears to have missed a useful opportunity to pick up on, and thereby consolidate, precedents in ECRI's earlier thematic work. For instance, it could have explicitly referred to "the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions" in contexts where terrorism fans racist flames.⁶²⁴

Like the examples documented, *supra*, ECRI's annual report for 2004 also fails to foreground the right to freedom of expression. At a relevant juncture, it states:

Internet continues to be used for the dissemination of racist, xenophobic and anti-Semitic material. ECRI deplores the current extent of differences between States in dealing with this phenomenon. It

⁶²² Adopted on 17 March 2005.

⁶²³ See, in particular, Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (discussed further, *infra*).

⁶²⁴ For a consideration of the responsibilities of parliamentarians in combating hate speech, see: Summary and Recommendations presented by the Rapporteur of the Seminar, Mr. Emile Guiricoulou, Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, Organized jointly by the Inter-Parliamentary Union and ARTICLE 19, Geneva, 25-27 May 2005.

hopes that the Convention on Cybercrime and its Additional Protocol will rapidly enter into force and that international co-operation will improve, enabling a more effective fight against racism and xenophobia on the Internet.

This statement appears to overlook the fact that the Cybercrime Convention entered into force on 1 July 2004, having secured the requisite five ratifications by States.⁶²⁵ Aside from this inaccuracy, it also fails to recognise the full extent of the many (and often countervailing) factors at play. While it is, unfortunately, correct that the Internet is being used for racist acts and expression, no indication is given in the same section of the ECRI report that many intergovernmental, governmental, self- and co-regulatory, civil society as well as industry-driven, initiatives are in place which strive to minimise such practices. This is a surprising omission, given that ECRI's *raison d'être* is to *combat* racism. Viewed from such a perspective, one might reasonably have expected initiatives countering online racism to have been detailed, or at least acknowledged. If the nefarious potential of the Internet is to be stressed, so too should its corrective potential.

Furthermore, to “deplore” “the current extent of differences between States in dealing with this phenomenon”, is an unhelpfully sweeping statement that gives the impression of a text that has been drafted without due rigour. This is strong language, after all, and it should be used only when required by the exigencies of the situation and in any case for well-defined, circumscribed targets. It hardly seems appropriate to deplore “differences between States” in how they deal with a particular problem. Surely, it would be much more sensible (and politically more astute) to deplore the fact that the response of certain States to the dissemination of racist material online is not in sync with international human rights law or best international practice? One must caution against over-use or loose use of (morally) condemnatory terms, lest such practices would lead to the inflation and devaluation of the words themselves.

The above criticisms are intended to be constructive. Particularly when dealing with legal issues, ECRI's public statements have, on occasion, been lacking in conceptual depth, balance and consistency, as well as linguistic precision. Such tendencies clearly run the risk of undermining ECRI's credibility. It would be most unfortunate if the Commission's credibility were indeed to be eroded, given all of the important work that it has carried out to date in this very difficult and demanding field. It is submitted here that a more considered and more expansive conceptualisation of ECRI's work would do much to offset any scepticism about the adequacy of its treatment of legal issues. Increased attention to legal contextualisation would be very useful in this regard too. It would also help to refute suggestions that ECRI operates in a kind of echo chamber because of the limited range and self-reinforcing nature of the sources of inspiration referred to in much of its work.

6.6.3 Assessment of integrated approaches to combating “hate speech”

Racism will never be driven away by a resolute alliance of prohibitive measures and (threats of) criminal sanctions. Long, hard experience has taught that the only way of effectively combating racism is to address its root causes as well as its various manifestations. What is required is a comprehensive approach, comprising educational, cultural, social, legal,

⁶²⁵ Pursuant to Article 36(3) of the Convention, it would only enter into force after it had been ratified by five States, including three Member States of the Council of Europe (as the Convention is open for signature by non-Member States as well – Article 36(1)).

political, economic and other initiatives. The validity and viability of such a multi-faceted approach to countering racism apply equally at international, national and sub-national levels.

Different limbs of the Council of Europe tackle the problem of racism in different ways. Although the relevant strategies are not formally coordinated by any central figure or body, their collective impact in recent years has been commendable, especially in terms of awareness-raising among States authorities and the mainstreaming of the anti-racist agenda in the Council's own activities. Needless to say, this enhanced attention and support for anti-racist goals at the intergovernmental level consequently reverberates in civil society at the national level too. All of this is to the credit of the Council of Europe, and particularly to ECRI, its specialised anti-racist body.

However, the centripetal tendencies in the Council of Europe's anti-racism policies and practices do not always yield positive results. What is gained in flexibility of approach is too often lost in coherence and consistency of result. The main message of the latter half of this chapter is that the Council of Europe's anti-racism activities would be rendered more effective if they were to be better focused and coordinated. Whatever its shortcomings, the ECHR offers a definite conceptual and legal framework within which the democratic imperative of combating racism can be pursued. It is therefore very important to retain the ECHR as a central reference point; for it to continue to be the touchstone for the Council's anti-racist strategies. The body of case-law built up by the Strasbourg court over the years situates the elimination of racism at the heart of the Convention's aspirations, but without allowing it to unquestioningly override other fundamental rights.

The point made in the tail-end of the preceding sentence is crucial. However laudable the zealous pursuit of anti-racist objectives may be, it should not take place in a closed ideological vault. It should remain open to, and be part of, the swirling interplay of other fundamental human rights guaranteed by international law. It follows from the analysis in the second half of this chapter that a number of the Council of Europe's anti-racist initiatives (especially policy statements) would gain in political credibility if their conceptual and legal underpinnings were to be firmed up. This could be achieved, *inter alia*, by meeting head-on the potential tension generated by interaction with other human rights, rather than shying away from it, and by recognising such potential as creative rather than destructive.

This is perhaps best illustrated by exploring the relationship between the right to freedom of expression and the right not to be subjected to racism or racist discrimination. This relationship is often – erroneously – presumed to be conflictual, because of “excessive focus on the negative, rather than the positive, impact of freedom of expression on racial equality”.⁶²⁶ Freedom of expression is not only a constitutive right, but an instrumental one. As such, it can serve specific ends, like facilitating the expression of those who oppose racism.⁶²⁷ The media, in particular, can play a powerful corrective and promotional role against racism.⁶²⁸

⁶²⁶ ARTICLE 19 – Global Campaign for Free Expression, Memorandum on Freedom of Expression and Racism for The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, London, 2001, p. 4.

⁶²⁷ It can even be argued that given the inherent limitations on the exercise of the right to freedom of expression, and the resultant legal restrictions on racist expression, anti-racists are in a position to enjoy the benefits of the right more consummately than their racist counterparts.

⁶²⁸ See further: Recommendation (97) 21 on the media and the promotion of a culture of tolerance, *op. cit.*; Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the

It is also often assumed that when the right to freedom of expression and the right not to be subjected to racism or racist discrimination are applied to the same factual situation, one of the “competing” sets of objectives will triumph over the other. However, such an assumption over-simplifies matters. The relationship between the right to freedom of expression and the right to be free from racism is not necessarily confrontational and interaction between the two rights/objectives rarely involves one simply triumphing over the other. According to the European Court of Human Rights, protecting freedom of expression on the one hand, and fighting racism and intolerance on the other, are reconcilable goals.⁶²⁹ Moreover, both are imperatives for democratic society, which prompts the conclusion that “it would be unacceptable to give, in a general fashion, precedence to either one at the expense of the other”.⁶³⁰ Instead of a blanket or general rule preferring one set of objectives to the other, what is required is “highly contextualized analysis”⁶³¹ on a case-by-case basis. This would facilitate the search for equitable accommodations of divergent interests and – ultimately - for “those circumstances and conditions in which one right should be preferred over the other”, as well as “coherent justifications for which right is preferred in particular circumstances”.⁶³²

In conclusion, other branches of the Council of Europe, especially ECRI, would do well to seek to emulate the Court’s tendency to contextualise the fight against racism in the catalogue of rights vouchsafed not only by the ECHR, but also by other relevant instruments of international law, such as ICERD.⁶³³ Proper legal contextualisation would provide a solid basis for optimising the enormous potential of diversified anti-racism strategies.

Whereas s. 6.6 considered the Council of Europe’s anti-racism strategies, in particular those pursued under the FCNM, as an example of an integrated approach to combating hate speech and promoting tolerance, the question of the existence or feasibility of a similarly coherent model at the global level, was not specifically addressed. A case could perhaps be made for the suitability of ICERD as a basis for such a model. The main drawback of such an approach would be that both ICERD and CERD place much heavier emphasis on prohibitive and punitive measures than on promotional ones, so much so that some academic commentators have deplored the neglect suffered by Article 7, ICERD,⁶³⁴ which reads:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001.

⁶²⁹ See the discussion of the *Jersild* case, *supra*.

⁶³⁰ Explanatory Memorandum to Recommendation No. R (97) 20 on “Hate Speech”, *op. cit.*, para. 23.

⁶³¹ Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, pp. 17-51, at 46.

⁶³² Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, *op. cit.*, pp. 1-8, at 1.

⁶³³ First step in that direction: Expert seminar, November 2006 – forthcoming publication.

⁶³⁴ See, for example: Stephanie Fariior, “The Neglected Pillar: The “Teaching Tolerance” Provision of the International Convention on the Elimination of All Forms of Racial Discrimination”, 5 *ILSA J. Int’l & Comp. L.* 291 (1999), pp. 291-299.

Irrespective of the feasibility of replicating the “model” of the FCNM for combating hate speech and promoting tolerance at the global level, it is important to note that the essence of the approach that characterises the FCNM “model” is regularly advocated at the global level. Examples include recent CERD General Recommendations (see further, *supra*), the Programme of Action adopted at the Durban World Conference against Racism in 2001 (again, see further, *supra*) and a number of the annual joint declarations issued by the various IGOs’ specialised mandates on the right to freedom of expression.⁶³⁵ Of particular relevance here are the specialised mandates’ Joint Statement on Racism and the Media of 2001 and their (untitled) Joint Declaration of 2006. The following excerpt is from the former:

Promoting Tolerance

Media organisations, media enterprises and media workers – particularly public service broadcasters – have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

The following excerpt is from their 2006 Joint Declaration:

Freedom of Expression and Cultural/Religious Tensions

- The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.
- Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient ‘hate speech’ legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.
- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or

⁶³⁵ Annual Joint Declarations by the Special Rapporteurs on freedom of expression/media have been adopted since 1999. The integral texts of the Declarations are available at: www.article19.org.

other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.

The mandates of public service broadcasters should explicitly require them to treat matters of controversy in a sensitive and balanced fashion, and to carry programming which is aimed at promoting tolerance and understanding of difference.

Conclusions

There has been much debate in recent years about the actual and desirable limits to freedom of expression. The former can be objectively determined whereas the latter tend to be subjective and sometimes speculative. There is a pressing need for law- and policy-makers to have a very clear understanding of the precise limitations on the right to freedom of expression that are permissible under international law, as well as the precise nature and extent of the State obligations which they engender. Any permissible limitations on the right to freedom of expression must be interpreted restrictively. Through meticulous analysis, this Chapter provides the necessary clarification in respect of limits concerning incitement, hatred, offence, etc.

Much of the confusion about relevant limitations originates in the primary texts, but is perpetuated from within by bodies charged with interpretation or monitoring of relevant treaties. As far as the ICCPR is concerned, the main interpretive standards are very outdated: the General Comments on Articles 19 and 20 were adopted in 1983. HRC Communications on relevant issues are not voluminous and only offer limited clarification of the frictional aspects of the relationship between the right to freedom of expression and the right to non-discrimination/equality. The confusion surrounding exact State obligations under (Article 4 of) ICERD is generally the result of poor drafting exacerbated by over-zealous and under-contextualised application of standards. More particularly, as this Chapter has shown, CERD has misquoted the Convention it is supposed to oversee in at least two of its General Recommendations. Although this glaring error does not appear to have been spotted by other commentators, it represents an embarrassing setback for the aim of enhancing clarity and awareness of the precise content of relevant State obligations under ICERD. As regards the Council of Europe's standards, this Chapter cautions against over-reliance on the term, "hate speech". It is demonstrated that the term is not organic to the ECHR and that it was first used by the Court in 1999, without any explanation of why it was being introduced into its jurisprudential lexicon or where its theoretical origins lay. In the absence of any attempt by the Court to define the term (which, owing to its origins in critical race theory in the US, has a much broader meaning than is generally appreciated), it should be used with circumspection. While the importance of countering "hate speech" cannot be gainsaid, once the term is used in a legal sense, there is a greater need for conceptual and terminological precision to attach to the notion than in respect of non-legal measures.

The central question, at all times, concerns the most effective measures for countering "hate speech" without emasculating the right to freedom of expression in the process. For instance, negative stereotyping and biased portrayals of minorities do not meet internationally-recognised grounds for restricting the right to freedom of expression, but nevertheless, they are certainly capable of having harmful consequences, not just for persons targeted by them, but society in general. This apparent dilemma does not, however, leave States powerless to deal with such practices. Not only is it possible for States to resort to a range of non-legal remedies and pro-active policies to counter such practices, they are under a duty to do so. The

precise nature of those duties must be informed at all times by the public operative value of comprehensive pluralistic tolerance.

It is important to resist political pressures which would water down or limit existing guarantees of freedom of expression *and* protection from racist/“hate” speech. It is imperative that a genuinely, fully integrated approach to human rights be pursued. Because hate speech adversely affects many other rights and occasions a range of different types of harms, a root-and-branch approach is required to counter its effects. Abusive speech can unproblematically be restricted by legal measures, but for other types of speech not meeting the threshold required by internationally-recognised restrictions, a coherent and systematic approach to contextualising factors is necessary. The imperative of combating “hate speech” creates a range of different obligations for States authorities, which are discharged through different types of action. The advocated root-and-branch approach should comprise an appropriately equilibrated set of legal and non-legal measures.

The Council of Europe’s anti-racism strategies, in particular those pursued under the FCNM and by ECRI, provide an example of an integrated approach to combating “hate speech” and promoting pluralistic tolerance, which has successfully led to the development of an important body of best practices for States authorities and third parties such as the media. The feasibility of replicating a similarly coherent model at the global level is more difficult, owing to the divergence of treaties involved, each with its own particular objectives, standards and emphases. No single existing treaty at UN-level would be an obvious choice as a basis for such a model. As regards ICERD, for example, both the text of the Convention and CERD place much heavier emphasis on prohibitive and punitive measures than on promotional ones, thereby resulting in a failure to fully reflect the necessary interplay between relevant human rights and the stabilising role of pluralistic tolerance.

Irrespective of the feasibility of replicating the “model” of the FCNM for combating hate speech and promoting tolerance at the global level, it is important to note that the essence of the approach that characterises the FCNM “model” is regularly advocated at the global level. Examples include *recent* CERD General Recommendations, the Programme of Action adopted at the Durban World Conference against Racism in 2001 and a number of the annual joint declarations issued by the various IGOs’ specialised mandates on the right to freedom of expression.

Chapter 7 – Regulation and facilitation of expression for minorities: media-related pluralism and cultural diversity

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 - 7.4.4 World Summit on the Information Society

Introduction

This chapter picks up on the theme of pluralistic tolerance, addressed earlier in Chapter 2. It presents two specific applications of the generic principle: media-related pluralism and cultural diversity. Meaningful analysis requires a certain amount of unpackaging of the concept of media-related pluralism. The unpackaging that takes place here distinguishes between structural and substantive aspects of media-related pluralism. The attempt at conceptual clarification is followed by an assessment of relevant legal standards at the international level. The attention then shifts to cultural diversity, which is examined here on the basis of: (i) its relevance to substantive aspects of media-related pluralism/diversity of media content, and (ii) the ability of the media to advance the goal of cultural diversity.

7.1 Pluralistic tolerance and media-related pluralism

The general principle of pluralistic tolerance outlined in Chapter 2 has many offshoots which give rise to specific, idiosyncratic applications of the principle. These specific applications remain connected to the general principle, however, and in the case of freedom of expression, the nodal connection is particularly strong. This is because pluralistic tolerance is only possible when a dialogical relationship exists between various societal groups. The existence

of such a relationship depends in turn on the existence of an adequate number of appropriate fora in which inter-group dialogue can take place. As Peter Dahlgren has pointed out, “pluralistic society should contain many different forms of public discourse, with many registers and inflections”.¹

Groups require expressive opportunities for political and cultural reasons and their existence can prove determinative of whether the right to freedom of expression is real or merely illusory in particular circumstances. These expressive opportunities facilitate participation in political affairs and public life; the articulation and advancement of cultural values and identities and thereby lifestyle validation and cultural transmission. But pluralistic tolerance is not uni-, but multi-directional. A number of corollaries follow from these premises: first of all, that expressive opportunities must be nurtured for all (democracy-beholden) groups.

Secondly, the importance of the right to receive information, especially about other groups, is reinforced. Inter-group or intercultural dialogue and understanding require the presence of communicative intent and the realisation of that intent. Such reasoning underscores “the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”.² This quotation has admittedly been lifted out of its original context here, but justifiably so, because its pairing of “diverse and antagonistic sources” is very instructive for present purposes. In the interest of promoting pluralistic tolerance, it is not enough to merely insist on the availability of a diversity of sources of information – as is the wont of most pertinent international standard-setting documents; the further requirement that at least some of those sources be discordant with one another is also crucial. This argument holds equal validity in the contexts of inter-cultural relations and of public deliberation on matters of general interest. Prejudice, ignorance and Mill’s “dead dogma” are the dangers to be averted here.

Denis McQuail has enumerated the “Main public benefits of diversity” as follows:

- Opening the way for social and cultural change, especially where it takes the form of giving access to new, powerless or marginal voices
- Providing a check on the misuse of freedom (for instance, where the free market leads to concentration of ownership)
- Enabling minorities to maintain their separate existence in a larger society
- Limiting social conflicts by increasing the chances of understanding between potentially opposed groups and interests
- Adding generally to the richness and variety of cultural and social life³

McQuail’s insightful list prompts a number of general remarks. First, taken together, these identified benefits constitute a persuasive argument supporting the view that diversity is a public good. Second, it is clear that minorities stand to benefit significantly from the existence of media-related diversity. Third, the list convincingly demonstrates the umbilical nature of the link between media-related pluralism and access to the media.

In more specific terms, though, the benefit of “Limiting social conflicts by increasing the chances of understanding between potentially opposed groups and interests” is of greatest

¹ Peter Dahlgren, “Enhancing the Civic Ideal in Television Journalism”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 89-100, at p. 92.

² Black, J. (delivering the opinion of the Court), *Associated Press v. United States*, 326 US 1, at 20.

³ Denis McQuail, *McQuail’s Mass Communication Theory* (5th Edition) (Great Britain, Sage Publications Ltd., 2005), p. 197.

immediate interest. This point rests on the intuitive logic that greater dialogical interaction between societal groups is likely to breed greater familiarity between them. In developing a parallel line of thought, Joseph Raz has argued that the expression and portrayal in public of different lifestyles serve the dual functions of validation and familiarisation. He refers to contemporary society's high dependence "on public communication to establish a common understanding of the ways of life, range of experiences, attitudes, and thinking which are common and acceptable in their society."⁴

7.2 Media-related pluralism: structural and substantive considerations

In any consideration of pluralism in the realm of freedom of expression, questions concerning the purpose, design and impact of media pluralism are likely to predominate. These questions arise logically and legitimately from the particularly influential role played by the media in modern democratic society (for a more detailed discussion of relevant matters, see Chapter 2, *supra*). As Thomas Gibbons has put it: "pluralism requires that programming should be distributed so that no particular point of view gains a disproportionate advantage from use of a medium which is pervasive and relatively limited in the variety of channels that it can provide".⁵ This view is couched in terms of distributive or procedural fairness, depending on where the emphasis is laid. The fundamental public-interest rationale being applied here is that no vested interest – whether State, politically-partisan, or sectional third-party (especially corporate) – should be allowed to dictate or distort the range of available information. It is necessary to foreclose the possibility that political and cultural narratives be unduly controlled by factional or even majoritarian interests. The range of available information is, after all, the raw material which human cognitive and emotional faculties process into opinions.

Structural pluralism and substantive or content pluralism are intimately linked. However, as David Ward has stressed in a recent report on content diversity for the Council of Europe, "Although the protection of structural pluralism remains a key policy objective in the media sector its impact on content pluralism in a comparative context has been a neglected field of research".⁶ Here – as in Ward's report – the linkage between both types of pluralism is viewed as essential.

7.2.1 Conceptual confusion

In one of his most famous treatises, the legal theorist Wesley Newcomb Hohfeld remarked that "in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression".⁷ Pluralism in respect of the media could certainly be considered to be such a "chameleon-hued" word. As noted in Chapter 4:

⁴ Joseph Raz, "Free Expression and Personal Identification", 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 312.

⁵ Thomas Gibbons, *Regulating the Media* (Second Edition) (London, Sweet & Maxwell, 1998), p. 98.

⁶ David Ward, Final report on the study on "the assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets", Group of Specialists on Media Diversity (MC-S-MD), Media Division, Directorate General of Human Rights, Council of Europe, 27 February 2006, Doc. No. MC-S-MD (2006) 001, p. 5.

⁷ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (Ed. Walter Wheeler Cook) (USA, Yale University Press, 1919), p. 35. This book comprises Hohfeld's two seminal articles, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning [I]", (1913) 23 *Yale Law Journal*, 16, and "Fundamental Legal Conceptions as Applied in Judicial Reasoning [II]", (1917) 26 *Yale Law Journal*, 710, and other materials.

the use of the term is bedevilled by a lack of definitional precision and consistency across international instruments and academic literature (and notoriously even within international instruments and in the works of individual authors). These inconsistencies and the despairing confusion which they have generated have been well-documented, not least in the context of freedom of expression and information.⁸ Some definitional decortication is therefore in order if we are to disabuse ourselves of prevalent misunderstandings arising from inconsistent applications of this term.

The (perceived) interchangeability of the terms “pluralism” and “diversity” often lies at the source of the aforementioned inconsistencies of usage. Some authors and bodies have clear preferences for one term or the other, whereas some use both terms seemingly indiscriminately.⁹ The absence of any widely-recognised definition of either term in international legal instruments merely exacerbates the conceptual messiness. Some commentators have attempted to painstakingly establish clear distinctions between the two, but their efforts are ultimately unconvincing. In light of the conceptual circularity involved, the approach to definitions and terminology pursued here is purely pragmatic. It does not claim to set out an authoritative, hard-and-fast distinction between “pluralism” and “diversity”, but merely to provide a reasoned frame for further analysis. Thus, as already set out in Chapter 2.¹⁰

Pluralism “is generally taken to refer to issues of media ownership; of choices available to the public between providers of services. Diversity, for its part, is most often taken to refer to the range of programmes and services available to the public. The legal and semantic overlap between pluralism and diversity is unclear, and the terms are frequently used interchangeably, not only by the Court itself, but also by expert commentators.”¹¹

This tentative distinction between pluralism and diversity will now be pruned in order to allow for further analytical growth. Earlier, general references to pluralism relating to the media have tended to be couched as “media-related pluralism”. This term has been chosen advisedly: the usefulness of the qualifier, “media-related”, is that it encapsulates both media pluralism and media diversity. Its usefulness is truly borne out when discussing texts that use both terms interchangeably.

A number of commentators have pointed out the unhelpful but continuing tendency to elide the terms, “media ownership” and “media pluralism”.¹² Dietrich Westphal has correctly suggested that ownership does not convey the same meaning or conceptual complexity as pluralism, but that the terms’ continued elision is due, at least in part, to the predominance of European Union policy developments in this area, which emphasise competition issues and single market objectives.¹³

7.2.2 Structural considerations

⁸ Dietrich Westphal, “Media Pluralism and European Regulation” [2002] EBLR 459-487.

⁹ See, by way of dreadful example: Media diversity in Europe – report prepared by the AP-MD (Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions), Doc. No. H/APMD (2003) 1, December 2002. This report is discussed further, *infra*.

¹⁰ Chapter 2, *supra*, p. 26.

¹¹ See, for example, the writings of Tom Gibbons and Eric Barendt.

¹² David Ward (CoE, 2006), *op. cit.*, p. 5.

¹³ Dietrich Westphal, “Media Pluralism and European Regulation”, *op. cit.*, p. 487.

The thrust of the observations and arguments of the preceding paragraph are rather general in their inclination. They strongly suggest that media pluralism is merely instrumental (to the goal of informational pluralism), but upon closer examination this initial suggestion is broken down and the lines of argumentation finessed. Gibbons, again, has usefully distinguished between three distinct levels of media-related pluralism: content, source and outlet.¹⁴ Of these three levels, content is the most substantive in character and therefore the ultimate end-goal. It is concerned with variety in political and cultural media output, both as regards information and opinion. Source and outlet, by contrast, are instrumental. They are useful means by which the ultimate end-goal may be achieved. However, they are not entirely dispositive as they cannot, of themselves, guarantee the achievement of the ultimate end-goal.

Other analyses also attempt to disaggregate the different levels of “media pluralism”, such as the following example from the Council of Europe’s Committee of Ministers, which states that the notion “should be understood as diversity of media supply, reflected, for example, in the existence of a *plurality of independent and autonomous media* (generally called structural pluralism) as well as a *diversity of media types and contents (views and opinions) made available to the public*”.¹⁵ Again, pride of place is given to media “supply” (or output or content, depending on the preferred terminology). The need to stress the interrelationship between substantive and structural considerations when determining pluralism is also replicated. However, the distinction between the “plurality of independent and autonomous media” and “diversity of media types” is not drawn as a bright shining line. To what extent do these formulations correspond to Gibbons’ neater categories of “source” and “outlet”, respectively? It is also puzzling that instead of bracketing two instrumental aspects of pluralism together and recognising the separateness of the substantive aspect, as rationalised in the previous paragraph, the Committee of Ministers opted instead to consider a “diversity of media types” as more substantive than structural and therefore shack it up with “media contents”.

In light of these puzzles, it is submitted here that the disaggregation carved out by Gibbons is cleaner. One possible shortcoming of his disaggregation, however, is that it is likely to become increasingly difficult to sustain in light of continued trends towards technological convergence and vertical integration (of programme production and distribution). These developments tend to blur distinctions between substantive and structural aspects of the media that have been more obvious in the traditional broadcasting sphere.

7.2.2(i) Source/Ownership

Although it was written over 50 years ago, the seminal publication of the Commission on Freedom of the Press, *A Free and Responsible Press*, contains much wisdom that has managed to retain its relevance in modern times. The Commission warned, in micro terms, that “the first danger to free expression will always be the danger at the source, the timidity of

¹⁴ Thomas Gibbons, “Concentrations of Ownership and Control in a Converging Media Industry”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157. This distinction is replicated in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

¹⁵ (emphasis per original) Explanatory Memorandum to Recommendation No. R (99)1 of the Committee of Ministers to member states on measures to promote media pluralism, adopted on 19 January 1999, para. 3.

the issuer, or his purchasability”.¹⁶ The danger, of course, is considerably amplified when considered in macro terms. Thus, the Commission posited that “[T]hrough concentration of ownership the flow of news and opinion is shaped at the sources; its variety is limited”,¹⁷ and that this “[C]oncentration of power substitutes one controlling policy for many independent policies, lessens the number of major competitors, and renders less operative the claims of potential issuers who have no press.”¹⁸

The entrenchment of the mass media oligopoly dominated by the corporations referred to by Ben Bagdikian – descriptively rather than admiratively – as “the Big Five”¹⁹ is frequently used as an example of how the concentration of media ownership can determine the fundamental course of news and cultural production. Edward S. Herman and Noam Chomsky consider the mass media of the US to be “effective and powerful ideological institutions that carry out a system-supportive propaganda function”.²⁰ Indeed, their propaganda model:

sees the media as serving a “societal purpose,” but not that of enabling the public to assert meaningful control over the political process by providing them with the information needed for the intelligent discharge of political responsibilities. On the contrary, a propaganda model suggests that the “societal purpose” of the media is to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state. The media serve this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises.²¹

At least three caveats should be entered here. First, Herman and Chomsky are not known for the timidity of their political opinions. Second, their analysis and criticisms focus on the US media, and third, their analysis is now somewhat dated, having been based on trends up to the late 1980s. Nevertheless, these caveats should not detract unduly from the underlying validity and force of the criticisms made. The meticulous study undertaken by the authors does raise very serious questions about the lack of independence and impartiality of the mass media, which is also significantly compromised by the cosiness of relationships between leading figures in the political and journalistic establishments.²² Moreover, and this is an enduring point that certainly has not been eroded by the passage of time: the mass media dispose of immense power to create and shape news and cultural content. In the quotation above, Herman and Chomsky very usefully disaggregate a number of the different stages in the production chain, each of which presents new opportunities for shaping the informational product before it is finally offered to the public.

The ability of the media to influence the collection, production and presentation of information allows them to exert considerable influence over the formation of public opinion. When media ownership becomes concentrated in the hands of a small elite, the ability to steer public debate and ultimately public opinion becomes similarly concentrated. The danger that arises in such a scenario is evident from the observation that “smoothest road to control of

¹⁶ The Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, Chicago, 1945?), pp. 113-114.

¹⁷ *Ibid.*, p. 124.

¹⁸ *Ibid.*, p. 130.

¹⁹ Ben H. Bagdikian, *The New Media Monopoly* (Boston, Beacon Press, 2004). The five conglomerates in question are: Time Warner, the Walt Disney Company, Rupert Murdoch’s News Corporation, Viacom and Bertelsmann – pp. 3 *et seq.*

²⁰ Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994), p. 306.

²¹ *Ibid.*, p. 298.

²² Anthony Lewis...

political conduct is by control of opinion”.²³ Granted, ability to influence should not automatically be equated with “control”, but the potential danger for the former to grow into the latter is patent.

The US does not have a monopoly on extreme concentrations of media ownership. The most infamous home-grown European example of media ownership concentration is Italy, which has drawn intense scrutiny and stern criticism from a number of international organisations, including the Council of Europe (Parliamentary Assembly,²⁴ Venice Commission²⁵), European Union (Parliament²⁶) and the OSCE Representative on Freedom of the Media.²⁷

The precise concern, as stated in the PACE Resolution on the so-called “Italian anomaly”, is that “concentration of political, commercial and media power” in the hands of the then Italian Prime Minister, Silvio Berlusconi, is jeopardising media pluralism, as guaranteed by Article 10 of the European Convention on Human Rights. This state of affairs has resulted from the collective failure of successive Italian governments to effectively grapple with persistent conflicts between political and media (ownership) interests - by legislative or other means. The nature of the concentration of power is as follows: the Italian television market has in effect become a duopoly as Mediaset, a company owned by the Prime Minister, along with RAI, the public service broadcaster, “command together about 90% of the television audience and over three quarters of resources in the sector”; a situation which gives rise to anti-trust concerns.²⁸ The much-publicised conflict of interests involving the Prime Minister is democratically problematic,²⁹ especially in light of documented political interference with the operations of the RAI. Furthermore, the situation was likely to be exacerbated by the adoption of the Gasparri and Frattini Laws (see further, *infra*).

The entire case for plurality of sources and ownership rests on the premise that there is an assumptive – or perhaps even probabilistic – relationship between source/ownership and

²³ John Dewey, *The Public and its Problems* (Chicago, The Swallow Press, Inc., 1954), p. 182.

²⁴ Monopolisation of the electronic media and possible abuse of power in Italy, Resolution 1387 (2004) (Provisional Edition), Parliamentary Assembly of the Council of Europe, 24 June 2004 and Monopolisation of the electronic media and possible abuse of power in Italy, Report of the Committee on Culture, Science and Education (Rapporteur: Mr. Paschal Mooney), Parliamentary Assembly of the Council of Europe, 3 June 2004, Doc. 10195 (see also the Opinion of the Committee on Legal Affairs and Human Rights, (Rapporteur: Mr. Abdülkadir Ates), 22 June 2004, Doc. 10228). See further: Tarlach McGonagle, “Parliamentary Assembly: New Resolution Critical of Media Concentration in Italy”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-7: 3.

²⁵ Opinion on the compatibility of the Laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media (Opinion No. 309/2004), European Commission for Democracy through Law (Venice Commission), 13 June 2005, Doc. No. CDL-AD (2005) 017. See further: Tarlach McGonagle, “Venice Commission: Opinion on Freedom of Expression and Media Pluralism in Italy”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2005-8: 5.

²⁶ Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final). See further: Tarlach McGonagle, “European Parliament: Adoption of Report on Media Independence and Pluralism”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-6: 6.

²⁷ “Visit to Italy – The Gasparri Law: Observations and Recommendations”, OSCE Representative on Freedom of the Media, 7 June 2005.

²⁸ Further details of how this duopoly is compounded are provided in para. 5 of the Resolution and in the extensive, identically-titled report on which the Resolution is based: both, *op. cit.*

²⁹ As stated in the OSCE RFOM’s report: “Italy has an ongoing record of control over public-service television by political parties and governments. As the Prime Minister is also the country’s main media entrepreneur, co-owning *Mediaset*, the ‘traditional’ fears of governmental control of *RAI* are aggravated by worries of a general governmental control of the nation’s most important information source, television” –*op. cit.*, p. 14.

content. As noted, for instance, by the Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe on measures to promote media pluralism, “the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels *generally enhances* pluralism and democracy”.³⁰ The foregoing discussion of US and Italian examples weighs very heavily in support of that crucial premise, but that does not mean that its veracity can be taken for granted (hence the italicisation of “generally enhances” in the foregoing citation). According to Toby Mendel:

A highly concentrated media market may offer enormous choice in terms of number of broadcast channels and even of topics and styles. However, it is also susceptible of political and/or owner interference with the result that the coverage of certain important political issues may be suppressed or limited, undermining the quality of information made available to the public.³¹

On a similar tack, many scholars have cautioned against equating plurality of source/ownership or indeed outlets with diversity of media content. The former is primarily quantitative, whereas the latter, which is best gauged by media performance, is primarily qualitative. As Jan van Cuilenburg has put it: “highly competitive media markets may still result in excessive sameness of media contents, whereas one should at least theoretically not exclude the possibility of media oligopolies or even monopolies to produce a highly diverse supply of media content”.³² Indeed, such caution is not just theoretical: some recent empirical data suggests that there is not always a “a strong link between concentration of markets and the diversity of content” and that even “[M]arkets that are strongly concentrated can demonstrate similar levels of content diversity as markets that are less concentrated”.³³

Relevant assumptions about linkage between ownership and content also apply, *mutatis mutandis*, to minority ownership and minority content. In the US, for example, it has been a longstanding view of the Federal Communications Commission (FCC) that “ownership is a prime determinant of the range of programming available”.³⁴ Consistent with that view, it has further concluded that there is an “empirical nexus between minority ownership and greater diversity”.³⁵ The well-known *Metro Broadcasting* case provides detailed judicial treatment of that empirical nexus and merits some consideration here.³⁶ Importantly, the FCC and Congress conceded that the empirical assumption in question could not be clinically proven, but they did insist on the careful and protracted enquiry, study and reflection that preceded the

³⁰ (emphasis added). Recital 4, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on measures to promote media pluralism, adopted on 19 January 1999 at the 656th meeting of the Ministers’ Deputies.

³¹ Toby Mendel, “Restrictions on Political Expression”, in Susanne Nikoltchev, Ed., *Political Debate and the Role of the Media: The Fragility of Free Speech, IRIS Special* (Strasbourg, European Audiovisual Observatory, 2004), pp. 41-50, at 44.

³² Jan van Cuilenburg, “Diversity Revisited: Towards a Critical Rational Model of Media Diversity”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 38-49, at 41.

³³ David Ward, CoE 2006, *op. cit.*, p. 2.

³⁴ *Metro Broadcasting, Inc., v. Federal Communications Commission, et al.*, 497 US 547, at 549.

³⁵ *Ibid.*

³⁶ The Supreme Court’s judgment in *Metro Broadcasting* was later overturned by its subsequent judgment in *Adarand Constructors, Inc. v. Peña*, 515 US 200, on the grounds that the wrong standard of scrutiny had been applied by the Court in the former case. In short, the Court in *Metro Broadcasting* had held that congressionally mandated “benign” racial classifications only had to satisfy “intermediate scrutiny”. As such, it departed from earlier judicial precedents to which the Court returned in *Adarand*, viz. that strict scrutiny of governmental racial classifications is essential due to the difficulty of determining whether such a classification is in fact “benign”. This, however, should not detract from the interest/relevance of the FCC’s rationales for its minority ownership provisions, as quoted.

conclusion that such linkage did in fact exist. The following passage from the Supreme Court’s judgment reveals the thinking behind the FCC’s minority ownership provisions:

Neither Congress nor the FCC assumes that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete “minority viewpoint” on the airwaves. Nor do they pretend that all programming that appeals to minorities can be labeled “minority” or that programming that might be so described does not appeal to nonminorities. Rather, they maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. This judgment is corroborated by a host of empirical evidence suggesting that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. [...] ³⁷

7.2.2(ii) Outlet

The existence of a range of media outlets is similarly an important, but of itself, insufficient safeguard for the preservation of media-related pluralism. More specifically, it plays an assumptively instrumental role in ensuring diversity of media output. Having said that, the primary freedom of expression interest in maintaining a plurality of media outlets in society is that such plurality implies at least the potential for more extensive access to expressive opportunities. In a roundabout way, extensive access for diverse groups in society should enhance the availability of diverse media output.

The argument from pluralism is not the strongest argument that could be furnished for the importance of maintaining a wide range of media outlets in society. A more persuasive argument is that a variety of outlets should, on the balance of probabilities or law of averages, lead to the possibility of individuals and groups having more effective expressive opportunities. As is evident from the discussion of media functionality (s. 4.3.1, *supra*), different types of media outlet are more suitable than others for the dissemination of particular types of media content. Thus, the more plurality in available media outlets, the greater the likelihood that there will be suitable channels for various kinds of media content to be transmitted. Moreover, the plurality of outlets should also extend to geographical reach, linguistic competences, technological capacities, etc. To illustrate the point: the contribution of a wide selection of national newspapers to overall diversity in media output may be limited, if the newspaper titles are not distributed throughout the country. Similarly, if all broadcasting stations transmit content exclusively in the State language, that will also be to the detriment of overall diversity in media output. An abundance of diverse content on digital television may be irrelevant to minorities due to the prohibitive cost of acquiring the technology needed to view that content. These practical examples all demonstrate the need for a variety of qualitatively different media outlets to be fostered if media-related pluralism is to be guaranteed at all geographical levels and for all sections of society.

A further, consumer-oriented, argument is that a pluralistic offer of media outlets enables individuals to choose the means by which they receive their information and ideas in accordance with their own consumption preferences and habits. This argument could also be described as autonomy-based, or even as a variant sub-element of the democratic-participation theory (eg. to the extent that one is more receptive to information and ideas

³⁷ *Ibid.*, p. 549; 579-582.

communicated in a way or format with which one is familiar, thereby increasing the ease of intelligibility and ultimate effectiveness of the communication). The argument gains in significance in the context of increasingly converged and multifunctional media. In this technological context, access to a wide range of media platforms is an essential (but not necessarily sufficient) requirement for access to truly diverse content and services. It is therefore important that different types of content-providers, especially (different types of) broadcasters have equitable access, to and are able to operate on, different distribution platforms.³⁸ In this connection, it has been urged that the digital dividend (i.e., the “radio spectrum freed as a result of the switchover from analogue to digital broadcasting”³⁹) be used for the advancement of diversity in broadcasting.⁴⁰

Opinions are divided on how external pluralism (i.e., pluralism across the entire media sector),⁴¹ can best be achieved. Some scholars hold out that the objective is best-served by (State-induced) encouragement of “a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action”.⁴² The latter model is that of internal pluralism, which is usually reserved for public service broadcasters. This proposition is, however, sometimes regarded as inadequate, as “the mere increase in the number of channels which will be brought about by digital television is not sufficient in itself to guarantee media pluralism”.⁴³ Other additional criteria, such as the determination of relevant markets and shares of relevant markets, remain important for assessing whether sufficient pluralism can be achieved.

7.2.3 Substantive considerations

The interrelationship and interdependence between structure and substance in respect of media-related pluralism has already been underscored. Structural factors are often perceived primarily in instrumentalist terms, in view of their impact on substantive matters. The focus of this subsection will be on media content/output/production and it will accordingly draw on the instrumentalist perception of structural considerations. It will therefore lean in the direction of constructivist or post-critical theories concerning the generation and acquisition of knowledge. Thus, in contradistinction to objectivist theories, it will be assumed that information (and, *a fortiori*, ideas) presented by the media is always refracted through a miscellany of vested interests. Moreover, information-gathering processes also affect the manner in which information is finally presented to the public. In epistemological terms, then, information is invariably relativised by a range of contextualities and contingencies. Sue Curry Jansen has developed this point, stating *inter alia* that “the new sociology or anthropology of knowledge assumes that knowledge, truth, and facts are social constructions,

³⁸ This point is made, *inter alia*, in the Joint Declaration on Diversity in Broadcasting, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE RFOM, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 12 December 2007.

³⁹ Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest, 20 February 2008.

⁴⁰ *Ibid.*; Joint Declaration on Diversity in Broadcasting, *op. cit.*

⁴¹ See further, Eric Barendt, *Broadcasting Law*, *op. cit.*, pp. 96-97.

⁴² Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970), p. 671.

⁴³ European Commission for Democracy through Law (Venice Commission), Opinion on the compatibility of the Laws “Gasparri” and “Frattini” of Italy in the field of freedom of expression and pluralism of the media, June 2005, Opinion No. 309/2004, para. 264; see also, PACE: discussion of Italian Gasparri Law, *op. cit.*

artifacts of communication, community, and culture”.⁴⁴ How information is then processed into knowledge depends on other, subjective epistemological criteria, such as “perceptual and interactional strategies”,⁴⁵ again, as Curry Jansen has claimed, “we *always* approach knowledge through the portals of our interests”.⁴⁶

The ability to access a wide range of media content is crucial for persons belonging to minorities for a number of reasons. The existence of diverse media content has a direct bearing on their informational and expressive rights, as well as their cultural and linguistic rights. Consequently, it affects their ability to participate effectively in public life. The particular relevance for minorities of theories relating to these substantive matters is explored throughout Chapter 4, *infra*.

7.2.4 Gauging media-related pluralism

When it comes to gauging media-related pluralism, important distinctions have to be drawn between State obligations and media responsibilities. Here, perceived conceptual differences between pluralism and diversity acquire a practical significance which can often be glossed over in other analytical frameworks. On the one hand, State obligations tend towards pluralism of source and outlet, and owing to the complex juridical nature of the State obligations in this respect, a separate analytical framework will be proposed. On the other hand, media responsibilities essentially concern diversity of content and are thus evaluated on the basis of performative criteria. Each will now be considered in turn.

7.2.4(i) State obligations

The importance of States’ positive obligations to safeguard pluralism and access has already been adumbrated in s. 5.1.3, *supra*. In order to attempt to properly ascertain the nature and extent of State obligations to uphold media-related pluralism, the relationship between the right to freedom of expression and media-related pluralism must first be explored. Various conceptions of that relationship have been advanced.

According to one conception, pluralism is a prerequisite for true freedom of expression. For instance, in a recent Motion for a European Parliament Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (discussed, *supra*), one of the starting points was the postulation that “a free and pluralist media is an essential requirement for the full respect of the right of freedom of expression and information [...]”.⁴⁷ In other words, it sets out media-related pluralism as logically prior to freedom of expression and as an enabling condition for the exercise of that right.

An opposing conception of the relationship between freedom of expression and media-related pluralism casts the former as being instrumental to the achievement of the latter. In other words, the right to freedom of expression is viewed, not as a constitutive right, but as a

⁴⁴ Sue Curry Jansen, *Censorship: The Knot That Binds Power and Knowledge* (New York, Oxford University Press, 1991), p. 182.

⁴⁵ *Ibid.*, p. 182.

⁴⁶ (Emphasis per original) *ibid.*, p. 183.

⁴⁷ *Op. cit.*, p. 7.

functionalist one. One of its main purposes is therefore to advance the objective of media-related pluralism.

A third conception, favoured by Barendt, wisely avoids being drawn on the above “chicken-and-egg” debate.⁴⁸ It stresses that freedom of expression both “reflects and reinforces pluralism”⁴⁹ and its “values of diversity and variety”.⁵⁰ Barendt has neatly described media-related pluralism as “the objective of ensuring the access of citizens to a wide variety of opinion and sources of information”.⁵¹

As discussed in greater detail, *infra*, the European Court of Human Rights has held that the States is the “ultimate guarantor” of pluralism, especially “in relation to audio-visual media, whose programmes are often broadcast very widely”.⁵² This places the State under a positive obligation to uphold pluralism, in particular in the broadcasting sector. Again, as shown below, the Court has not explicated what this positive State obligation entails. In order to try to fill this theoretical lacuna in the Court’s jurisprudence, consideration will now be given to the meaning and implications of that obligation.

A pertinent point of departure to this discussion is provided by Onora O’Neill, who has convincingly argued that the “communicative obligations of any democratic society” entail both perfect and imperfect obligations.⁵³ She cites non-coercion and non-deception as examples of “perfect communicative obligations”. Media-related pluralism and access to expressive opportunities, on the other hand, would more aptly be considered to be imperfect communicative obligations. The essence of such obligations is that they “are not owed to specified others so have no correlative rights, yet must be met if public communication in a democracy is to be possible”.⁵⁴

This is certainly an interesting articulation of media-related pluralism, but *prima facie*, it sits somewhat uneasily with Hohfeld’s schematization of jural relations as opposites and correlatives.⁵⁵ One of the essential elements of the Hohfeldian scheme is that “a duty is the invariable correlative of that legal relation which is most properly called a right or claim”.⁵⁶ This begs the question whether the existence of a right to media-related pluralism can legitimately be asserted (at least on a Hohfeldian model of rights). Perhaps one way to give an affirmative answer to the question, without rejecting O’Neill’s consideration of “imperfect communicative obligations”, would be to invoke the notion of collective rights, already discussed in Chapter 1, *supra*.

⁴⁸ However, he does consider media freedom (as a particular subset of freedom of expression) to be an instrumental freedom, “rather than a primary or fundamental human right”. He continues: “Press claims to special privileges and immunities should only be recognized insofar as they promote the values of freedom of speech, in particular the public interest in pluralism in its sources of information.”: Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 422. See also in this connection, *ibid.*, p. 430.

⁴⁹ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 34.

⁵⁰ *Ibid.*, p. 35.

⁵¹ *Ibid.*, p. 430.

⁵² *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 28 October 1993, para. 38.

⁵³ Onora O’Neill, “Practices of toleration”, in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 155-185, at p. 170.

⁵⁴ *Ibid.*, p. 171. See also, *ibid.*, p. 173.

⁵⁵ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, *op. cit.*, pp. 36 *et seq.*

⁵⁶ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, *op. cit.*, p. 39.

According to Joseph Raz, three conditions must be satisfied before the existence of a collective right can be recognised:

First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty.⁵⁷

To summarise the foregoing, then: the European Court of Human Rights has repeatedly held that the State is the ultimate guarantor of pluralism, particularly in the audiovisual sector. However, neither the theoretical underpinnings of this finding, nor its likely implications, have been spelt out by the Court. As such, a State obligation to guarantee media-related pluralism has been identified, without expressly stating that that obligation flows from a specific right to media-related pluralism. Assuming, *pace* Hohfeld, that the existence of an obligation is predicated on the existence of a correlative right, the nature of that right must be inferred. Given that media-related pluralism can uncontroversially be regarded as a public good, it appears largely unproblematic to consider the right in question, if it does indeed exist, to be collective in nature. This postulation is further supported by the view that the State obligation to guarantee media-related pluralism can at best be considered an imperfect communicative obligation as it lacks a specific object.

The next question to be addressed concerns how to measure the discharge of State obligations to guarantee media-related pluralism in less theoretical and more concrete terms.

It is useful to recall at this stage that the right to freedom of expression is doubly amalgamative: first, it amalgamates the right to freedom of opinion, expression and information,⁵⁸ and second, it amalgamates the rights and interests of speakers, listeners and the public in general.⁵⁹ A restriction on any of these constituent conceptual elements of the right to freedom of expression can ordinarily be considered to be a restriction on the right proper. However self-evident this point may seem, it is imperative that it be reiterated here because doctrinal patterns tend to emphasise an apparent primacy of the right to impart information, or, in other words, the *expressive* rights of *speakers*. However, no relevant provision of international law seeks to establish any kind of hierarchy between the amalgamated rights involved. Indeed, in the *travaux préparatoires* of the ICCPR, it is explicitly recorded that “no definite understanding appeared to have been established” in respect of the question “whether freedom to seek and freedom to receive information should be subject to the same restrictions as freedom to impart information, and whether they should be subject to any restrictions at all”.⁶⁰

In order for a State to effectively guarantee media-related pluralism and (thereby enhance freedom of expression), it is most likely that protective *and* promotional measures will be required. Toby Mendel advances several examples of the latter: rules requiring “broadcasters to carry minimum quotas of local content”; broadcast licensing “to ensure orderly use of frequencies in the public interest”; “Rules designed to prevent undue concentration of media

⁵⁷ Joseph Raz, *The Morality of Freedom*, *op. cit.*, p. 208.

⁵⁸ Chapter 2, p. 2.

⁵⁹ Chapter 4, p. .

⁶⁰ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 393.

ownership”, and “rules limiting private political advertising during election periods”.⁶¹ However, he rejects the appellation, “positive measures”, as “both inappropriate and inadequate”.⁶² He reasons that: “such a classification fails to capture the rationale for these measures”, which “are not designed to promote more expression, however that may be defined, but rather to enhance the quality of the expression that is available”. On initial consideration, this observation may seem a little too hasty. The ultimate, longer-term objective of such measures is usually to promote the free flow of certain kinds of expression. There is, as Mendel points out, concern for the quality of the expression that is available, but also for the quality and quantity of types of expression that are not (sufficiently) available. Even if the measures listed above have the immediate aim and impact of restricting certain types of expression, that aim is instrumental (and secondary) to the achievement of their more fundamental aim, *viz.* the promotion of certain types of expression on the grounds that they will enhance the quality of public discussion. These quibbles aside, the subsequent development of Mendel’s reasoning is highly instructive:

It is submitted that the measures noted above, rather than being positive in nature, are better understood as promoting the right to receive, rather than to impart, information and ideas. It may be noted that, in many cases, these measures actually limit the right to impart information and ideas. As such, they pit the speaker against the listener, a private rights model of freedom of expression against one which seeks to preserve public expressive space, a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive.

In most cases, restrictions on freedom of expression are specifically designed to promote other social interests, such as privacy, public order or the administration of justice. The measures noted above, in contrast, are designed to promote freedom of expression, albeit one aspect, perhaps one conception, of this right and frequently at the expense of another. This does not mean that such measures may not, if they do also restrict another aspect, or perhaps another conception of, freedom of expression, be deemed to be in breach of this right.⁶³

Mendel then continues by pondering how courts should assess the legitimacy of these measures and determine whether they are consistent with or in conflict with freedom of expression, thereby following through on the likely practical implications of his theoretical distinctions. He argues that the three-part test traditionally applied under national law (prescribed by law; serving a legitimate purpose; necessity in a democratic society – see further, Chapter 2) usually turns on the necessity criterion, which entails a “presumption in favour of protecting the right to freedom of expression”.⁶⁴ Such a presumption is not appropriate, however, “when the legitimate interest being served is actually a human right and particularly when that right is freedom of expression”, he contends.⁶⁵ “In other words, it is not appropriate to apply an analysis that automatically accords one conception of freedom of expression priority over another”.⁶⁶ A more satisfying approach, both philosophically and practically, he argues, would be for courts “to start by assessing whether, taking all of the circumstances into account, the impugned measures do, on balance, restrict freedom of expression”.⁶⁷ The idea that the overall “enrichment of public debate”⁶⁸ should be the

⁶¹ Toby Mendel, “Restrictions on Political Expression”, in Susanne Nikoltchev, Ed., *Political Debate and the Role of the Media: The Fragility of Free Speech, IRIS Special* (Strasbourg, European Audiovisual Observatory, 2004), pp. 41-50, at 43.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 44.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Owen M. Fiss, “Free Speech and Social Structure”, 71 *Iowa Law Review* 1405 (1986), at 1416.

“touchstone”⁶⁹ for judicial analysis has also met with approval in other contexts (eg. the permissibility of State regulation of expression under the First Amendment of the US Constitution⁷⁰ and the resolution of conflicts within a media organisation⁷¹). Intuitively, such an approach would seem to pave the way for a consequentialist assessment of the impugned measures, their impact on the different sets of values underlying different stake-holder interests in freedom of expression and the comparative restrictiveness of alternative measures.⁷²

Needless to say, the foregoing discussion does not plead for an outright *volte-face* from the predominance of speaker-oriented balancing exercises by the judiciary. It is, for example, equally difficult to accept Justice White’s famous dictum in the *Red Lion* case, “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount”.⁷³ White’s assertion is simply too sweeping, too cut-and-dry. What *is* recommended is a judicial approach that is more sensitive to the various and often competing interests of speakers, listeners/viewers and the wider public, than is currently the case. As already noted, the key evaluative criterion should be the overall impact of an impugned measure on (the quality of) public debate.

To conclude, then, concerns for media-related pluralism (and specifically for diversity in media content) and the quality of public debate are primarily concerns that relate to the right to receive information. This holds true under various justificatory theories of freedom of expression, especially the truth-finding theory and the democratic-participation theory. In trends towards homogeneity and conventionalism, the first casualties are always minority and unorthodox perspectives. Despite an apparent hesitancy on the part of courts to weigh different constitutive elements, or competing conceptions, of freedom of expression, it is likely that in the future, they will increasingly be confronted with the challenge of doing so.⁷⁴ The reluctance of courts to engage with and judicially enforce media-related pluralism, especially as regards diversity of content, is perhaps understandable. Rachael Craufurd Smith has suggested that “There are so many different ways of achieving pluralism, and so many different gradations of achievement, that the strong subjective element in programme policy is likely, and not without good reason, to deter judicial evaluation in all but the clearest cases of failure”.⁷⁵ Her remarks are indeed borne out in practice, as will become apparent from the discussion of the jurisprudence of the European Court of Human Rights in s. 7.3.2, *infra*.

For the moment, though, a further reason why pluralism does not easily lend itself to justiciability needs to be examined. It is widely accepted that the State is under a duty to ensure that the media “provide a wide variety of programmes and present all relevant strands of political and social opinion”⁷⁶ – without encroaching unduly on their autonomy, of course.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Barendt has argued that: “Hard cases concerning the resolution of free speech conflicts within a media organization can most satisfactorily be resolved by the court determining which result enhances the values of freedom of expression, in particular, the public interest in the dissemination of information of political or social significance and the values of pluralism – the diversity of sources of information and the range of opinion available to the public” - Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 444.

⁷² T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 151-168, at 166-167.

⁷³ *Red Lion Broadcasting Co., Inc., v. Federal Communications Commission*, 395 US 367 (1969), at 390.

⁷⁴ Toby Mendel, “Restrictions on Political Expression”, *op. cit.*, at 44-45.

⁷⁵ Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), pp. 169-170.

⁷⁶ Eric Barendt, *Broadcasting Law*, *op. cit.*, p. 105.

The State usually seeks to discharge this duty by means of legislative impositions on broadcasters requiring them to provide a balanced range of programming and to uphold certain qualitative standards such as impartiality, objectivity, etc. Such obligations usually bind public service broadcasters in a more stringent way than their private-sector counterparts. Although such impositions have the *de facto* effect of trammelling the editorial autonomy of broadcasters, the measures are designed to ultimately enrich the quality of broadcasting output (see further, *supra*), to the benefit of the (viewing or listening) public. Whatever the reach of this principle, or how far its motivation will travel in practice, it does not in any sense confer a right on viewers or listeners “to determine what is contained in the broadcasting schedules”.⁷⁷ Nor can it be construed as founding a right for individuals to receive particular types of content. At a theoretical level, it does not stretch beyond the basis for a claim for diversity of political and cultural content; more specific entailments can only be established at the regulatory level (and not as part of the general, abstract right). These points reinforce the observation made earlier that pluralism is an essentially imprescriptible obligation.

7.2.4(ii) Media responsibilities

Media sociology offers a choice of methodological approaches to measuring the diversity of media content. First, though, it is useful to identify the main features of such content diversity. McQuail has prioritised the following:

- a wide range of choice for audiences, on all conceivable dimensions of interest and preference;
- many and different opportunities for access by voices and sources in society;
- a true or sufficient reflection in media of the varied reality of experience in society.⁷⁸

Second, given the difficulty of measuring these features in the abstract, suitable external standards have to be selected, against which specific media output can be measured. As McQuail has observed, “Lack of diversity can be established only by identifying sources, references, events, types of content, and so on, which are missing or under-represented”.⁷⁹ The diversity of media content should therefore be seen as relative and not absolute. Furthermore, it is clear from McQuail’s prioritisation of characteristic features of content diversity that he does not regard the notion as self-contained or hermetic. Instead, its relationship of qualified dependence on “many and different opportunities for access [...]” for a broadly representative cross-section of society is emphasised. Audiences are implicitly differentiated and the element of choice regarding interests and preferences is also foregrounded.

According to Jan van Cuilenburg, the diversity of media content has traditionally been measured under two main normative frameworks (or variants or combinations thereof). These frameworks, prioritising “reflection” (of diversity in society) and “openness” (striving for *perfect* equality of access for all persons and ideas in society). Both have their drawbacks: the former tends to favour conventionalism and homogeneity; the latter can lead to disproportionate distribution of expressive opportunities and informational offers (to the advantage of unrepresentative factions). Van Cuilenburg takes the view that in the future, a framework combining contextual and procedural aspects, will prevail when it comes to measuring the diversity of media content. As to the contextual aspects: a suitable “enabling

⁷⁷ *Ibid.*, p. 42.

⁷⁸ Denis McQuail, *McQuail’s Mass Communication Theory* (5th Edition), *op. cit.*, p. 355.

⁷⁹ *Ibid.*

environment”⁸⁰ must first exist to secure media freedom. As to the procedural: governmental regulation is countenanced in order to ensure and enhance certain process values relating to freedom of expression. Such a model would therefore attribute greater weighting to “openness” (in Van Cuilenburg’s sense of the term) than to “reflection” or representativeness (in media output). While he is certainly correct to insist on the interdependence of contextual and procedural considerations, his arguments peter out in a series of non-sequiturs.

For instance, he writes: “From the perspective of democratic truth-finding and political and cultural innovation it is particularly the confrontation of ideas that is important, aside from whether social support is large or small. Mainstream should have no more opportunity to manifest itself than the unorthodox minority”.⁸¹ These postulations are problematic. First, societal support for ideas *does* matter – much more than Van Cuilenburg seems prepared to acknowledge. Non-propositional elements of ideas are important because they are often very good indicators of the intensity with which ideas are endorsed or rejected and they also contribute to the prioritisation of ideas in public debate. Aside from “democratic truth-finding” (an unusual formulation) and “political and cultural innovation”, the ability to gauge levels of support for particular ideas (as reflected, *inter alia*, by the exposure they are given in the media) is of crucial importance for participation in democratic politics and society. It is not enough to be aware of the existence of an idea: it must also be possible to test its theoretical mettle in the arena of public opinion.

Second, the demand that mainstream and minority elements of society should have perfectly equal opportunities to express themselves also seems poorly thought-out, at least insofar as it could lead to a corruption of some of the most basic precepts of democracy. It has been argued in previous chapters that society should continually guard against tyranny of the majority, but that minority diktat is also a menace to democratic society. Both are perversions of what democracy is most fundamentally about: majority rule that provides adequate accommodation for the effective participation of non-majority factions. Under such a model of democracy, results cannot and must not be pre-ordained. Rather, the emphasis must be on procedural values and the facilitation of opportunities to achieve results. Moreover, to pre-determine that all ideas should be given equal airing in public (regardless of their representativeness) could lead to contrived focuses for debate and also damage the agenda-setting autonomy of majority and minority sections of society alike. Both of these arguments are of particular relevance for the media.

7.3 Media-related pluralism: overview of international legal standards

Given the conceptual salience of pluralistic tolerance and media-related pluralism to various theories of freedom of expression, outlined above, it is perhaps puzzling that relevant notions (however styled) have not found more direct expression in positive international law. Most international texts refer only to the right to freedom of information and ideas in whatever form. Arguably, such references do encompass the notion of pluralism, but the absence of explicit references means that such arguments are not fully conclusive. Indeed, the drafting

⁸⁰ See generally: Monroe Price & Peter Krug, *The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance*, Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, US Agency for International Development (Occasional Papers Series, January 2002).

⁸¹ Jan van Cuilenburg, “Diversity Revisited: Towards a Critical Rational Model of Media Diversity”, in Kees Brants, Joke Hermes & Liesbet van Zoonen, Eds., *The Media in Question: Popular Cultures and Public Interests* (Sage Publications Ltd., London, 1998), pp. 38-49, at p. 48.

histories of many leading international human rights treaties reveal that pluralism has tended to play a surprisingly low-key role.

Another plausible explanation for the apparent muffling of pluralism in international law-making is that it can be readily subsumed into other, broader, more traditional rationales for the protection of freedom of expression. On such a theoretical level, Frederick Schauer aligns his (independent) “argument from diversity” very closely with the more time-honoured “argument from truth”.⁸² Similarly, Eric Barendt, who consistently emphasises the special importance of pluralism in terms of freedom of expression, also adverts to the congruent features of pluralism and free expression theories based on the discovery of truth and democratic participation.⁸³ The converse to the main argument of this paragraph is that the dangers posed by the absence of media-related pluralism could also be countered by a variety of specific (consequentialist) measures that would impose certain limitations on the media (in particular).

Pluralism, as a value, can be said (at best) to be implicitly recognised by Article 19, ICCPR. The drafting history of that article shows an acute awareness on the part of the drafters that freedom of expression is simultaneously a “precious heritage” and a “dangerous instrument”.⁸⁴ Although the drafters conceded that the free flow of information could be obstructed by licensing,⁸⁵ governmental interference⁸⁶ and other factors,⁸⁷ the focus of their proposed limitations to the exercise of the right to freedom of expression was primarily negative. They do not appear to have given any serious consideration to more positive and pre-emptive measures such as the safeguarding of media-related pluralism. Thus, the point that small, poor countries, with underdeveloped media systems would be at a competitive disadvantage transnationally, although raised,⁸⁸ failed to generate sufficient concern for media-related pluralism to be prioritised in a meaningful textual or other manner.

Even in the thematically more specific and detailed UN Draft Convention on Freedom of Information, notions of pluralism were neither prevalent nor prominent. The first early and significant draft contained no express reference whatever to either pluralism or diversity.⁸⁹ Nor did it stress any congruent notions into which pluralism or diversity could plausibly be subsumed. By 1959, however, tentative efforts had been made to bring pluralism in from the conceptual cold. The Preamble to the draft Convention included some references that touched on pluralism:

Considering that the free interchange of accurate, objective and comprehensive information and of opinions, both in the national and in the international spheres, is essential to the cause of democracy and peace and for the achievement of political, social, cultural and economic progress,
Considering that freedom of information implies respect for the right of everyone to form an opinion through the fullest possible knowledge of the facts,
[...]
Recognizing that in order to achieve these aims the media of information should be free from pressure or dictation, but that these media, by virtue of their power for influencing public opinion,

⁸² Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, pp. 66-67.

⁸³ Eric Barendt, *Freedom of Speech* (2nd Edition), *op. cit.*, p. 25.

⁸⁴ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 386.

⁸⁵ *Ibid.*, p. 383.

⁸⁶ *Ibid.*, p. 385.

⁸⁷ *Ibid.*, p. 396/7.

⁸⁸ *Ibid.*, p. 393.

⁸⁹ UN Ybk 47/8, p. 593.

bear to the peoples of the world a great responsibility, and have [214] the duty to respect the truth and to promote understanding among nations,

Much more importantly, though, one aspect of media-related pluralism was significantly upgraded in the substantive part of the draft Convention. Article 1(a) read as follows: “Each Contracting State undertakes to respect and protect the right of every person to have at his disposal diverse sources of information”.⁹⁰ The introduction of this provision was made at the behest of France, which is perhaps unsurprising, given the importance attached to the value of pluralism in the French Constitution.⁹¹

The Convention on the Rights of the Child (CRC) represents a high water-mark of sorts in terms of the explicit recognition of media-related pluralism in UN treaties. Article 17, CRC, emphatically underscores the conceptual centrality of pluralism (or at least the plurality of sources) in respect of freedom of expression:

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

The remainder of Article 17, comprising five subsections, addresses how those objectives should be realised, i.e., by encouraging: (a) “the mass media to disseminate information and material of social and cultural benefit to the child [...]”; (b) “international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources”; (c) “the production and dissemination of children’s books”; (d) “the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”; (e) “the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being [...]”. Thus, it can be concluded that Article 17 is concerned with pluralism as regards content/output (“information and material of social and cultural benefit” – s-s. (a); language – s-s. (d)); sources (s-s. (b)); genres within the mass media (eg. the emphasis on books in s-s. (c)). These concerns correspond to Gibbons’ triumvirate categories of content, source and outlet, discussed *supra*.

7.3.1 Council of Europe

Deep concerns for the maintenance of pluralism in the media sector inform debates on whether States should pro-actively support the media in financial and logistical terms. The European Court of Human Rights has offered some interpretative guidance concerning States’ obligations specifically to promote pluralism in terms of freedom of expression. This guidance – such as it is – is gleaned primarily from a cluster of cases involving disputes arising out of the allocation of broadcasting licences.

⁹⁰ Article 1 (as a whole and as amended) was adopted by the Third Committee on 7 December 1959, by 41 votes to 4, with 21 abstentions.

⁹¹ Article 11, Declaration des droits de l’homme et du citoyen, 1789, case-law and Barendt and Craufurd-Smith, *Broadcasting Law and Fundamental Rights*, *op. cit.*, pp. 162 *et seq.*

In *Groppera Radio AG & others v. Switzerland*, the Court subjected the third sentence of Article 10(1)⁹² – and relevant discussions recorded in the *travaux préparatoires* of the ECHR⁹³ – to careful scrutiny. On the basis of this scrutiny, the Court concluded that “States are permitted to control by a licensing system the way in which broadcasting is operated in their territories, particularly in its technical aspects”, subject to the requirements of Article 10(2).⁹⁴ The Court later expanded the scope of that finding in the *Informationsverein Lentia & Others v. Austria* case, when it made the seminal pronouncement:

Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.

This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.⁹⁵

This reasoning paved the way for the next crucial pronouncement made by the Court in the *Lentia* case, i.e., that in a democratic society, freedom of expression allows the press to impart information and ideas which the public is moreover entitled to receive and:

Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.⁹⁶

This is the clearest statement in the jurisprudence of the European Court of Human Rights concerning the obligation on States to uphold pluralism in the context of freedom of expression. Although the principle seems rather unequivocal, fault has been found with the choice of wording used by the Court on account of its terseness. Rachael Craufurd Smith, for instance, notes that “the Court in *Lentia* did not hold that the state, as ‘guarantor’ of the communication of information and ideas to the public, was also under a legal obligation to ensure its provision”.⁹⁷ This criticism is, however, misplaced and captious. First, it is misplaced because the Court designates the State as the ultimate guarantor of the principle of pluralism – not of “the communication of information and ideas to the public”. To dwell on the distinction between both formulations is not to split hairs. Without further qualification, the responsibility of a State to guarantee “the communication of information and ideas to the public” is simply too vague to be meaningful. Granted, pluralism is also a rather vague notion, but not in the same order. Second, her criticism is captious because in legal terms, to be the guarantor of something plainly creates a legal obligation to uphold it and ensure its existence.

⁹² “This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

⁹³ Paras. 60-61. In the latter paragraph of the judgment, Article 19, ICCPR, and the drafting process from which it emerged were similarly scrutinised. This demarche was criticised by

⁹⁴ Para. 61. See also, *Autronic AG v. Switzerland*, Judgment of the European Court of Human Rights of 24 April 1990, para. 52 of which affirmed that the final sentence of Article 10(1) is subject to Article 10(2), as well as *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 28 October 1993, ditto, in para. 29.

⁹⁵ Para. 32.

⁹⁶ Para. 38; *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001, para. 73.

⁹⁷ Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), p. 182.

A more valid criticism could, however, be extracted from the essence of Craufurd Smith's concerns. Neither in *Lentia*, nor on any subsequent occasion, did the Court endeavour to develop criteria or indicators for measuring the extent to which States effectively discharge their responsibility to safeguard pluralism. While the Court's failure to develop such criteria is regrettable from the point of view of predicting future doctrinal development, it is perhaps unsurprising for two main reasons. First, as the Court has repeatedly held, it is not its task "to indicate which means a State should utilise in order to perform its obligations under the Convention".⁹⁸ Indeed, this inherent restriction on judicial powers is by no means unique to the European Court of Human Rights. The tenet has general validity and applicability. As posited by J.M. Balkin:

Where affirmative liberties are at stake, the most that courts can do is define a range of alternatives for the political branches to pick from, or direct the political branches to propose their own alternatives and then accept them if they appear reasonably calculated to succeed. In other words, the effective protection of affirmative liberties requires considerably more judicial restraint than the protection of negative liberties.⁹⁹

It should also be borne in mind that the margin of appreciation doctrine exerts a further restraining influence on the Court in respect of the level of activism it may legitimately pursue. In consequence, the Court has always been very reluctant to usurp in any way the fact-finding or evaluative functions of the national courts – sometimes, it must be said, with unfortunate conservatism.¹⁰⁰

A second possible explanation as to why the Court's jurisprudence on media-related pluralism is somewhat lacking in explanatory power can be found by scrutinising and relativising the broader doctrinal picture. As has been argued in a different context, it is only over the stretch of time and experience, with the repetition of patterns and the accumulation of case-law that suitable evaluative criteria are developed by the judiciary.¹⁰¹ In keeping with this logic, the development of a clearer understanding of the nature of positive State obligations in this regard will be gradual.

Nevertheless, some fragmentary elements of this understanding have already been put in place. In the *Lentia* case itself, the Court accepted that the "monopoly system operated in Austria is capable of contributing to the quality and balance of programmes, through the supervisory powers over the media thereby conferred on the authorities".¹⁰² However, it cautioned that of all the means of ensuring respect for pluralism:

a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.¹⁰³

⁹⁸ *VgT Verein gegen Tierfabriken v. Switzerland*, *op. cit.*, para. 78.

⁹⁹ J.M. Balkin, "Some Realism about Pluralism: Legal Realist Approaches to the First Amendment", 1990 Duke L.J. 375, at 413.

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¹⁰¹ Tarlach McGonagle, "Workshop Report: The Changing Hues of Political Expression in the Media", in Susanne Nikoltchev, Ed., *IRIS Special: Political Debate and the Role of the Media – The Fragility of Free Speech* (Strasbourg, European Audiovisual Observatory, 2004), pp. 1-30, at p. 29.

¹⁰² Para. 33.

¹⁰³ Para. 39.

Technological progress, the development of transfrontier broadcasting and comparative practices in other States have all contributed to divesting the so-called “scarcity argument” for maintaining State broadcasting monopolies of its earlier persuasiveness. In consequence, notwithstanding the potential for internal pluralism within State monopoly structures, such structures are presumptively deemed to be contrary to the safeguarding of pluralism. This line of reasoning has consistently been applied by the Court in relevant cases since *Lentia*, such as *Radio ABC v. Austria*¹⁰⁴ and *Tele 1 Privatfernsehgesellschaft Mbh v. Austria*.¹⁰⁵

In *Demuth v. Switzerland*,¹⁰⁶ the Court reiterated that the pursuit of pluralism in broadcasting is a legitimate public policy goal for States, subject to the proportionality of the measure used for that purpose.¹⁰⁷ The Court balanced “the legitimate need for the quality and balance of programs in general” and the applicant’s right to impart information and ideas. It referred to the potential of audiovisual media for wide diffusion and concluded that “In view of their strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programs on offer.” On the facts of the instant case, this reasoning was unsatisfactory. First of all, the impact of the partisan television output would have been limited by the proposed duration of the broadcast – “two hours, to be repeated during 24 hours and to be renewed once a week” (although it was planned to extend its duration “later”). Secondly, notwithstanding the Court’s reluctance to interfere with the respondent State’s margin of appreciation in broadcasting matters, it could usefully have dwelt further on the likelihood that CAR TV’s broadcasts would jeopardise the overall pluralism of the Swiss broadcasting sector.

Generally-speaking, the Court’s deliberations on safeguarding pluralism in the media have been informed by the need to make efficient use of scarce frequencies.¹⁰⁸ However, with the proliferation of new technological possibilities for broadcasting, the persuasiveness of the scarcity argument has been in steady decline. Despite an obvious tendency for the synchronous deployment of arguments from scarcity and for pluralism, rumours of the demise of the latter have been greatly exaggerated.¹⁰⁹ Rather, technological advances have given rise to new types of concerns for pluralism in the media, eg. prominence on EPGs, digital switch-over strategies and reservation of multiplex capacity for particular public-interest purposes.¹¹⁰

Despite the relative paucity of case-law dealing specifically with pluralism and freedom of expression, its importance cannot be gainsaid. The symbiotic relationship between the two is examined in a number of texts adopted, *inter alia*, by the Committee of Ministers of the Council of Europe (see further, *infra*). First and foremost among those texts is the Declaration on the freedom of expression and information (1982), which provides that States “should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions”.¹¹¹ To this end, the Declaration sets for States the objective of achieving “the existence of a wide variety of

¹⁰⁴ Judgment of the European Court of Human Rights of 20 October 1997.

¹⁰⁵ Judgment of the European Court of Human Rights of 21 September 2000.

¹⁰⁶ Judgment of the European Court of Human Rights (Second Section) of 5 November 2002.

¹⁰⁷ Paras. 43 and 44.

¹⁰⁸ See, for example, *Hins & Hugenholtz v. the Netherlands*, Application No. 25987/94, Decision of inadmissibility of the European Commission of Human Rights of 7 March 1996.

¹⁰⁹ Paraphrasal of Mark Twain...

¹¹⁰ See further, Chapter 4.5, *supra*, and Joint Declaration on Diversity in Broadcasting, December 2007.

¹¹¹ Committee of Ministers’ Declaration on the Freedom of Expression and Information, 29 April 1982, para. 6.

independent and autonomous media, permitting the reflection of diversity of ideas and opinions”.¹¹²

The importance attached to this objective in the 1982 Declaration achieved an elevated status when a new provision, “Media pluralism”, was incorporated into the ECTT by its Amending Protocol in 1997.¹¹³ It reads:

Article 10bis – Media pluralism

The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism.

However, this provision – despite the symbolic importance of its inclusion – disappoints in many respects. It is little more than a perfunctory genuflection towards media pluralism. It does not impose any specific obligations on States and it is devoid of explanatory value. Furthermore, the terse corresponding entry in the Explanatory Report to the ECTT is also sorely wanting in terms of its ability to elucidate the notion or the full significance of its inclusion in the Convention.¹¹⁴

Article 10bis, ECTT, also seems to be viewed with a certain amount of dissatisfaction within the Council of Europe, including in the Standing Committee on Transfrontier Television and the CDMC. Against the background of the proposed modernisation of the EU’s “Television without Frontiers” Directive, the Standing Committee and CDMC considered that the best option for any re-assessment of the ECTT’s future development would be “modernising the ECTT in close alignment with the new TWF Directive, and possibly adding some new issues”.¹¹⁵ Subsequently, the Secretariat submitted a number of proposals for new human rights-related issues to be introduced into the ECTT – including media pluralism – to the Standing Committee for its consideration. The proposals were not accepted, *inter alia*, because some members of the Standing Committee were of the view that media pluralism would be better regulated at the national (as opposed to the international) level.

Notwithstanding the foregoing, it would appear that *if* the inclusion of particular new issues or focuses in the ECTT would indeed distinguish its scope from that of the new Directive, a possible adjustment of the ECTT might be examined more concretely. One question in respect of media pluralism, currently before the Standing Committee, is whether, “In view of its very general characters, should Article 10bis be amplified so as to distinguish clearly between the question of diversity of content and that of media concentration, each concerned by the very general concept of media pluralism”.¹¹⁶ Such a clarifying amendment would surely be welcome. However, on the basis of the theoretical discussion in s. 5.3, *supra*, it is clear that a proposed amendment to explain the interlinkage between important discrete components of the notion of media pluralism could and should go much further than simply distinguishing between diversity of content and concentration of media ownership.

¹¹² *Ibid.*, Section II, *d*.

¹¹³ ETS No. 171, entry into force: 1 March 2002.

¹¹⁴ Explanatory Report to the European Convention on Transfrontier Television, as amended by the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002, para. 204.

¹¹⁵ Karol Jakubowicz, “Implementation and Monitoring: Upholding Human Rights and Cultural Values”, in Susanne Nikoltchev, Ed., *Implementing the Regulation of Transfrontier Audiovisual Media Services* (Strasbourg, European Audiovisual Observatory, forthcoming – 2006) (p. 5 of draft paper).

¹¹⁶ *Ibid.*, p. 8 of draft paper.

A more serious attempt by the Council of Europe to engage with the details and difficulties – conceptual and practical – involved in (media) pluralism, came in the form of a Recommendation addressed by the Committee of Ministers to Member States: Recommendation No. R (99) 1 on measures to promote media pluralism. That text has, however, since been superseded by the very detailed and expansive approach taken by Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content¹¹⁷ and Declaration on protecting the role of the media in democracy in the context of media concentration.¹¹⁸ Rec(2007)2 recognises the importance of distinguishing between structural pluralism and diversity of content and addresses both in a way that reflects the specificities of new technologies. It also shows keen awareness of the importance of relevant capacity-building measures to ensure the effective use of media technologies and singles out the particular needs of minorities and other groups in this connection.

Public debate and the duty of the media to inform

One of the central premises of Recommendation (2004) 16 on the right of reply in the new media environment is that the corrective potential of such a right helps to further “the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information”.¹¹⁹ This thinking underscores the important role of the media in providing information to the public – a critical step in the opinion-formation process of members of the public. Similar ideals and visions are promoted, specifically as regards political affairs, in the Declaration on freedom of political debate in the media (2004). In the even more specific context of media coverage of electoral campaigns, “regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media”.¹²⁰ Issues of balance and impartiality are very much to the fore in media coverage of elections, and again, policies and practices aiming to ensure balanced coverage can safeguard diverse opinions.

The objective of ensuring that the media keep the public adequately informed on matters of general interest has also been stated to apply in cyberspace. For example, the Preamble to the Declaration on freedom of communication on the Internet (2003), refers to the need to guarantee “the right of users to access pluralistic content from a variety of domestic and foreign sources”.

It should be noted as well that a veritable *leitmotif* of the Committee of Ministers’ texts is the belief that public service broadcasting has a very special role to play in the advancement of cultural and linguistic diversity. This role is dealt with in greatest detail in Recommendation (96) 10 on the guarantee of the independence of public service broadcasting; Recommendation (99) 1 on measures to promote media pluralism, and Recommendation (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting. However, it is also emphasised in numerous other Recommendations and Declarations by the Committee of Ministers and in numerous texts adopted by the Parliamentary Assembly of the Council of Europe.

¹¹⁷ Adopted by the Committee of Ministers on 31 January 2007.

¹¹⁸ Adopted by the Committee of Ministers on 31 January 2007.

¹¹⁹ Preamble to the Recommendation.

¹²⁰ Recommendation (99) 15 on measures concerning media coverage of election campaigns, Section II.1.

7.3.2 European Union

The symbiosis between freedom of expression and media pluralism has also been enshrined as a central concept in Article 11 (Freedom of expression and information) of the Nice Charter, which reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

The direct and succinct formulation leaves no doubt that the drafters plainly sought to attach importance to media pluralism. This is attested to by the Explanatory Note, which explains that Article 11(2) “spells out the consequences of paragraph 1 regarding freedom of the media”.¹²¹ However, there are good grounds for fearing that the importance of the explicit reference to media pluralism is more symbolic than real. Pending the outcome of the stalled European Constitution, the Nice Charter remains a document that is merely politically- (and not legally-) binding on EU Member States. Moreover, even that symbolic importance is questionable, because, first of all, “respected” is a significantly weaker formulation than, for example, “guaranteed” or “secured” (even if it is preceded by “shall”). As such, it involves a considerably lighter commitment for States. Second, the Explanatory Note does not spell out the essence or scope of media pluralism, which suggests a non-committal attitude to – or wariness of – its actual or potential implications. Such attitudes could plausibly be explained by the political contentiousness of the issue of media pluralism within the EU institutions (see further, *infra*).

Article 11 of the Nice Charter has a dual objective. First, it seeks to provide a modernised articulation of Article 10 ECHR, which would implicitly crystallise and incorporate the body of case-law developed by the European Court of Human Rights over the years.¹²² It is also intended to reflect – or at least not depart from – the central principles of the relevant case-law of the Court of Justice of the European Communities (ECJ). The Explanatory Note confirms that Article 11(2) is indeed based on relevant ECJ case-law regarding television – especially the case *Stichting Gouda*, discussed *infra*, as well as the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty and the Television without Frontiers Directive – especially its Recital No. 17.¹²³

Recital No. 17 reads as follows:

Whereas this Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition;

¹²¹ Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, CHARTE 4473/00, p. 14.

¹²² See further: Paul Mahoney, “The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention”, 23 *Human Rights Law Journal* 300-303 (2002).

¹²³ Note from the Praesidium, *op. cit.*, p. 14.

It seems odd, however, that the (Explanatory) Note from the Praesidium should refer to Recital No. 17 in this connection, but not to Recital No. 16, which appears to be of even greater relevance:

Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole;

The issue of media pluralism arises in several ECJ cases, but again, the judicial interpretation offered generally fails to provide much additional elucidation of the precise scope of the principle.

One of the ECJ's earliest cases dealing with media-related pluralism was *Bond van Adverteerders & others v. The Netherlands*.¹²⁴ The background to the case involved the statutory advertising monopoly that existed in the Netherlands at the operative time. Under that monopoly, only one organisation - the STER - was allowed to broadcast advertisements.¹²⁵ The STER's task was to organise the transmission of advertising prepared by third parties, to which it sold airtime.¹²⁶ The STER was bound by statute to transfer its receipts to the State, which used them to subsidise national broadcasters and the press.¹²⁷ Pursuant to relevant statutory provisions, there was a prohibition on the distribution by cable of programmes transmitted by broadcasters established in other Member States that contained advertising intended specifically for the Netherlands. The Dutch authorities explained that the use of revenues generated by the STER for the purpose of funding national broadcasters and the press was to enable them to preserve their non-commercial character. They maintained, additionally, that "a pluralistic broadcasting system is conceivable only if the *Omroeporganisaties* [i.e., broadcasters] are non-commercial in character".¹²⁸

The Court found that the distribution by cable of programmes transmitted by broadcasters established in other Member States did constitute a transfrontier service under Articles 59 and 60 of the Treaty.¹²⁹ It also found the Dutch statutory prohibition on the same to be discriminatory as national broadcasters were not subject to the same restriction on their right to freedom to provide services.¹³⁰ It pointed out that the only permissible derogation in a case such as this would be one grounded in a justification of public policy.¹³¹ However, it insisted that "economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the member state in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty".¹³² The Dutch authorities, for their part, argued that "in the final analysis, the prohibitions of advertising and subtitling have a non-economic objective, namely that of maintaining the non-commercial and, thereby, pluralistic nature of the Netherlands broadcasting system".¹³³

¹²⁴ Case 352/85, Judgment of the Court of Justice of the European Communities of 26 April 1988, ECR 1988, p. 2085. It should be noted that this judgment predated the adoption of the 'Television without Frontiers' Directive.

¹²⁵ *Ibid.*, para. 3.

¹²⁶ *Ibid.*, para. 25.

¹²⁷ *Ibid.*, paras. 3 & 35.

¹²⁸ *Ibid.*, para. 35. At the relevant time, the Dutch broadcasting system was characterised by its "pillarised" structure, under which each pillar was expected to contribute to the overall pluralism of the system.

¹²⁹ *Ibid.*, paras. 12-17.

¹³⁰ *Ibid.*, paras. 26-27; 29-30.

¹³¹ *Ibid.*, paras. 32-33.

¹³² *Ibid.*, para. 34.

¹³³ *Ibid.*, para. 35.

Ultimately, the Court found the impugned measures to be disproportionate and contrary to relevant Treaty provisions. In reaching its decision, it adverted to the fact that the Dutch authorities themselves had conceded that less restrictive, non-discriminatory measures could have been adopted in order to achieve the intended objectives.¹³⁴

A very interesting question, raised formally by the Dutch national court in the *Bond van Adverteerders* case but left unanswered by the Court, read as follows:

Can the generally accepted principles of Community law (in particular the principle of proportionality) and the fundamental rights enshrined in Community law (in particular the freedom of expression and freedom to receive information) impose directly applicable obligations on the Member States in the light of which national rules such as those concerned here must be assessed, regardless of whether or not any written provisions of Community law are applicable thereto?¹³⁵

The Court interpreted this question as referring to the principle of proportionality and the scope of Article 10, ECHR.¹³⁶ However, it ultimately regarded the question as redundant, stating that the answers it had given to the earlier questions would enable the national court to “resolve the dispute before it in light of those answers alone”.¹³⁷ To this day, neither the ECJ nor the European Court of Human Rights has squared up fully to this question and answered it in a detailed and definitive way.

In *Stichting Gouda v. CVDM*,¹³⁸ the ECJ accepted that a cultural policy aimed at safeguarding freedom of expression for diverse societal groups “may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.”¹³⁹ It also pointed out, however, that there is no necessary connection between such national cultural policies and conditions relating to the structures of foreign broadcasters; nor did it see any need for national cultural policies to concern itself with the latter.¹⁴⁰ The same cultural policy was also examined in *Commission v. The Netherlands*.¹⁴¹ In that case, the ECJ pointed out the connection between pluralism and the guarantee of freedom of expression enshrined in Article 10, ECHR,¹⁴² but also found that the goal of pluralism in the audio-visual sector did not require a prohibition on national broadcasters from using production services of broadcasters in other jurisdictions.¹⁴³

The Court upheld these findings concerning the preservation of pluralism in the media in *Commission v. Belgium*,¹⁴⁴ a case in which Belgium was found to be in breach of its

¹³⁴ *Ibid.*, para. 37. See also para. 36.

¹³⁵ *Ibid.*, para. 10.

¹³⁶ *Ibid.*, para. 40.

¹³⁷ *Ibid.*, para. 41.

¹³⁸ Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de media* [1991], Judgment of the Court of Justice of the European Communities of 25 July 1991, ECR I-4007.

¹³⁹ *Ibid.*, para. 23. See also paras. 22, 24.

¹⁴⁰ *Ibid.*, para. 24.

¹⁴¹ Case C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands* [1991], Judgment of the Court of Justice of the European Communities of 25 July 1991, ECR I-4069.

¹⁴² *Ibid.*, para. 30. See also *Stichting Gouda, op. cit.*, para. 23; Case C-260/89, *Ellinki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991], Judgment of the Court of Justice of the European Communities of 18 June 1991, ECR I-2925, para. 45; *TV10 SA v. Commissariaat voor de media* [1994], Judgment of the Court of Justice of the European Communities (Fifth Chamber) of 5 October 1994, ECR I-4795, para. 25.

¹⁴³ *Commission v. the Netherlands, op. cit.*, para. 31.

¹⁴⁴ Case C-11/95, *Commission v. Belgium* [1996], Judgment of the Court of Justice of the European Communities of 10 September 1996, ECR I-4115, para. 54.

obligations under Article 2, TWF, on account of a system of prior authorisation for the retransmission by cable of television broadcasts emanating from other Member States. On the facts of the case at hand, the Court held that the Belgian authorities had failed to satisfactorily demonstrate the necessity and proportionality of the contested system of prior authorisation for the protection of “pluralism in the audiovisual field or in the media generally”.¹⁴⁵ The Court also rejected the Belgian Government’s submission that the impugned system was intended to serve certain cultural objectives and was therefore justified “inasmuch as Directive 89/552, and in particular Articles 4 and 5, must be construed in the light of Article 128 of the Treaty [...]”.¹⁴⁶ The Court recalled that the cultural objectives of the TWF Directive are encapsulated in Recitals 17 and 18 of its Preamble and also in its Articles 4 and 5, before stating that Article 128 of the Treaty “does not in any way authorize the receiving State, by way of derogation from the system established by Directive 89/552, to make programmes emanating from another Member State subject to further controls”.¹⁴⁷

In an abstrusely worded sentence in *Vereniging Veronica Omroep v. CVDM*,¹⁴⁸ the ECJ authorises Member States to use legislative means to prohibit broadcasting organisations under its jurisdiction from investing in foreign broadcasting organisations or from providing other forms of assistance to the latter “where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation”.¹⁴⁹

The factual background to the *Familiapress* case¹⁵⁰ involved the distribution in Austria of a German publication offering prizes for crossword competitions; this practice fell foul of a statutory prohibition in Austria on publishers of periodicals inviting consumers to take part in draws. The Austrian Government submitted that the aim of the relevant national legislation

¹⁴⁵ *Ibid.*, para. 55.

¹⁴⁶ *Ibid.*, paras. 46, 47. The reference here is to (former) Article 128 of the Treaty establishing the European Community. That Article has since been repositioned in the consolidated version of the Treaty. The (new) Article 151 reads as follows:

“1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
— improvement of the knowledge and dissemination of the culture and history of the European peoples;
— conservation and safeguarding of cultural heritage of European significance;
— non-commercial cultural exchanges;
— artistic and literary creation, including in the audiovisual sector.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:
— acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;
— acting unanimously on a proposal from the Commission, shall adopt recommendations.”

¹⁴⁷ *Ibid.*, para. 50.

¹⁴⁸ Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993], Judgment of 3 February 1993, ECR I-487.

¹⁴⁹ *Ibid.*, para. 15.

¹⁵⁰ Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997], Judgment of 26 June 1997, ECR I-3689.

was to preserve press diversity, and that such a justification could be considered an overriding requirement for the purposes of Article 30. The ECJ, following its earlier judgments in *Commission v. Netherlands* and *Veronica v. CVDM*, re-affirmed that the “[M]aintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods” as “[S]uch diversity helps to safeguard freedom of expression [...]”.¹⁵¹ It reiterated that such overriding requirements must be interpreted “in the light of the general principles of law and in particular of fundamental rights”,¹⁵² including freedom of expression.¹⁵³ The Court found that “[A] prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression”.¹⁵⁴ However, basing its remarks on the *Lentia* judgment of the European Court of Human Rights (s. 5.5.2, *supra*), the ECJ stated that derogations from freedom of expression for the purpose of maintaining press diversity are permissible, as long as they are prescribed by law and necessary in a democratic society.¹⁵⁵

The essential question to be considered by the Court, therefore, was “whether a national prohibition such as that in issue [...] is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression”.¹⁵⁶ It continued:

To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.

The Court thereby opted to frame its enquiry in terms of the impact of unfair competition; considerations relating directly to freedom of expression simply did not figure. Even the suggestions that “blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize” were considered uniquely as measures that would be “less restrictive of free movement of goods” than the contested outright prohibition. The fact that such measures would also be less restrictive on freedom of expression is not even adverted to. The competition-centric reasoning employed by the Court is therefore regrettably lop-sided.¹⁵⁷ Thus, it concluded that Article 30 of the Treaty would not preclude legislation such as that which was the focus of the *Familiapress* case, as long as it is “proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means”, and that the above-mentioned assumptions hold true. It added that “the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned

¹⁵¹ *Ibid.*, para. 18.

¹⁵² *Ibid.*, para. 24.

¹⁵³ *Ibid.*, para. 25.

¹⁵⁴ *Ibid.*, para. 26.

¹⁵⁵ *Ibid.*, para. 26.

¹⁵⁶ *Ibid.*, para. 27.

¹⁵⁷ It could be mentioned in passing that this down-playing of freedom of expression interests by the ECJ is consistent with its broader doctrinal patterns. The economic objectives of the EU have unsurprisingly played a determinative role in shaping *its* development of freedom of expression interests. The right to freedom of expression has therefore traditionally been relativised in terms of values associated with the goal of achieving free trade in the context of European economic integration. Attempts by the European Court of Human Rights to balance freedom of expression and public policy objectives such as the prevention of unfair competition and false/misleading advertising have also led to unsatisfactory results.

the opportunity to win a prize”, before concluding that the national court should determine whether the relevant conditions “are satisfied on the basis of a study of the national press market concerned”.¹⁵⁸

In *TV10 SA*, the purpose of safeguarding pluralism was spelt out by the ECJ, drawing explicitly on its earlier *ERT* and *Commission v. Netherlands* judgments, as being “to preserve the diversity of opinions, and hence freedom of expression [...]”.¹⁵⁹ In short, TV 10 was a broadcasting company whose activities (especially the transmission of programming by cable) were directed primarily at the Netherlands, but which had – according to the *Commissariaat voor de media* (the Dutch media regulatory authority) and upheld by the *Raad van State* (Dutch Council of State) – established itself in Luxembourg in order to circumvent national legislation applying to domestic [Dutch] broadcasters. One of the objectives of the legislation in question was to safeguard “the pluralist and non-commercial content of programmes”.¹⁶⁰ The ECJ concluded that “the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State”.¹⁶¹

By way of conclusion, we can distil from the brief foregoing overview that the ECJ has recognised the value of pluralism and its potential role in guaranteeing expressive opportunities for discrete societal groups and thereby helping to ensure that diverse opinions remain in circulation. Yet, there is something unsatisfactory about this distillation: its explanatory power as regards the importance of media pluralism for democracy is weak. The ECJ has shown little interest in elaborating a comprehensive theoretical basis for its standpoints on these matters. The largely inconclusive nature of its doctrine to date could be taken as supporting Thomas Gibbons’ suggestion that “media pluralism was not promoted for the purpose of supporting a more democratic role for the media, as might be supposed from its content”, but that “[I]nstead, the idea was adopted as a transitional concept that conveniently assisted a shift from public service dominance to a market approach”.¹⁶²

*Other regulatory measures*¹⁶³

Although “the protection of media pluralism is primarily a task for the Member States”,¹⁶⁴ a number of relevant references and provisions do exist at the EU-level. A major instrument in

¹⁵⁸ *Familiapress*, *op. cit.*, para. 34.

¹⁵⁹ Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* [1994], Judgment of the Court of Justice of the European Communities (Fifth Chamber) of 5 October 1994, ECR I-4795, para. 25.

¹⁶⁰ *Ibid.*, para. 21.

¹⁶¹ *Ibid.*, para. 26.

¹⁶² Thomas Gibbons, “Pluralism, guidance and the new media”, in Christopher T. Marsden, Ed., *Regulating the Global Information Society* (London & New York, Routledge, 2000), pp. 304-315, at 307.

¹⁶³ Treoirilinte teilifise agus teicneolaíochta nua agus abairt no dho chun na hailt a nascadh le cheile.

¹⁶⁴ Commission of the European Communities, Green Paper on Services of General Interest, COM(2003) 270 final, 21 May 2003, para. 74; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions The Future of a European Regulatory Audiovisual Policy, COM(2003) 784 final, 15 December 2003, p. 8. See also: European Commission Staff Working Document, Media pluralism in the Member States of the European Union, SEC(2007) 32, 16 January 2007.

the EU's regulatory approach to media pluralism is the Merger Regulation.¹⁶⁵ Under Article 21(4) of the Merger Regulation, Member States are allowed to “take appropriate measures to protect legitimate interests” (i.e., public security, plurality of the media and prudential rules”, thereby putting them beyond the ordinary purview of the Regulation. Any “appropriate measures” thus adopted must be “compatible with the general principles and other provisions of Community law”.

Furthermore, Article 8.1 of the EU's Framework Directive,¹⁶⁶ states that “National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism”. Similarly, its Radio Spectrum Decision¹⁶⁷ establishes procedures in order to, *inter alia*:

facilitate policy making with regard to the strategic planning and harmonisation of the use of radio spectrum in the Community taking into consideration *inter alia* economic, safety, health, public interest, freedom of expression, cultural, scientific, social and technical aspects of Community policies as well as the various interests of radio spectrum user communities with the aim of optimising the use of radio spectrum and of avoiding harmful interference;¹⁶⁸

It should also be mentioned that throughout the 1990s, various initiatives to develop formal regulatory instruments (i.e., directives) to deal specifically with media pluralism were taken, but ultimately shelved, due *inter alia* to their political contentiousness and failures to reach necessary inter-institutional agreement within the EU. Although those various initiatives did not culminate in the adoption of a relevant directive, they were politically very significant for the development of policy approaches to issues relating to media pluralism. However, given that relevant details and debates are only of tangential interest to minority rights, they will only be signalled here, but not explored any further.¹⁶⁹

As already mentioned, plans to develop regulation in this field have merely been shelved – not binned – and they tend to intermittently re-appear on political agendas. One of the most recent reappearances was in 2004 when the European Parliament adopted - at first reading – a report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights).¹⁷⁰ The mainstay of the report is a motion for an identically-titled European Parliament Resolution, which *inter alia* calls on the European Commission to present a proposal for a directive to safeguard media pluralism in Europe.

¹⁶⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1 (29 January 2004).

¹⁶⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33, 24 April 2002.

¹⁶⁷ Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), OJ L 108/1, 24 April 2002.

¹⁶⁸ Article 2(a), *ibid.*; see also, in the same connection, Recitals 3 and 8 of the Decision.

¹⁶⁹ It should be noted a wealth of relevant academic literature exists, including: Barendt, Craufurd Smith, Goldberg, Prosser & Verhulst, Ward, Westphal...

¹⁷⁰ Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final). See further: Tarlach McGonagle, “European Parliament: Adoption of Report on Media Independence and Pluralism”, *IRIS – Legal Observations of the European Audiovisual Observatory* 2004-6: 6.

The motion stresses that media independence and pluralism are crucial for guaranteeing the right to freedom of expression and information. Relevant issues are subjected to a detailed examination, particularly from the angles of audiovisual policy; public service broadcasting and the commercial media. Due emphasis is laid on the individual and collective impact of arguments from democracy; technological advances and constitutional and competition law considerations.

Attention is drawn to specific problems pertaining in a number of EU Member States: France; Germany; Ireland; the Netherlands; Poland; Spain; Sweden and the United Kingdom. The greatest scrutiny, however, is reserved for Italy, due to persistent concerns over high levels of concentration of ownership in the audiovisual market there, coupled with the prominence of political involvement in the same.

The proposed recommendations were distilled from concerns identified and explored in the body of the motion. For instance, it is stated that EU competence in policy and regulatory matters affecting the media, especially new technological features relating to digital television, should be used for furthering media pluralism and combating “horizontal and vertical media concentration in traditional as well as in new media markets”.

Among the motion’s calls for specific lines of action on the part of the European Commission are:

- (i) the submission of a communication on the state of media pluralism in the EU as soon as possible (the envisaged scope of such a communication is broad, including a *compte rendu* of current measures and practice at the national and EU levels alike; explorations of possible and recommended courses of action, and the relevant mechanics of such action and any consultation procedures that would be involved);
- (ii) the submission of “a proposal for a directive to safeguard media pluralism in Europe in order to complete the regulatory framework [...]”.

Another key recommendation is that “legislation should be adopted at European level to prohibit political figures or candidates from having major economic interests in the media [...] legal instruments should be introduced to prevent any conflict of interest [...]”, and that the Commission should “submit proposals to ensure that members of government are not able to use their media interests for political purposes”. The Commission is also called upon to devise an action plan on measures to promote pluralism in all EU sectors of activity. Twenty points are suggested for inclusion in such an action plan. The substantive recommendations conclude with an invitation to the Italian Parliament to address the aforementioned concentration of media ownership and related problems in Italy.¹⁷¹

¹⁷¹ More specifically, it invited the Italian Parliament to:

- (i) speed up reforms of the national audiovisual sector in keeping with “the recommendations of the Italian constitutional court and the President of the Republic, taking due account of the incompatibility with Community law, as identified by these authorities in the Gasparri Bill”;
- (ii) resolve “the problem of a conflict of interest of the President of the Italian Council of Ministers who also directly controls the principal provider of private and, indirectly, public television, the main advertising franchise holder and many other activities connected with the audiovisual and media sector”, and
- (iii) adopt “measures to ensure the independence of the public service broadcaster”.

7.3.4 Framework Convention for the Protection of National Minorities: evaluation

Article 9(4), FCNM, requires States “to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism”. The use of the conjunction “and” makes it clear that the requirement to facilitate access for minorities to the media is distinct from, and in no sense conditional on, the other stated objectives of promoting tolerance and permitting cultural pluralism. Nevertheless, the fact that they have been positioned alongside each other, in the same paragraph, is suggestive of a perceived underlying connection between them. It is submitted here, reasonably (the *travaux préparatoires* of the FCNM do not offer any helpful guidance on this point), that these three objectives have been bracketed together on account of the inherent connection between the more general principle of pluralistic tolerance and its specific media-related pluralism, as developed at the very outset of this chapter.

Be that as it may, media-related pluralism has a similar “poor-relation” status under the FCNM to the status it has under many other international human rights treaties (see further, *supra*). It is not mentioned *per se* in Article 9, or anywhere else in the text of the FCNM, either as an objective or even *in passim*. On the whole, Article 9 is preoccupied with the expressive rights (and conditions for the exercise of those rights) of minorities – to the partial neglect of recipient-oriented rights and liberties. The defining, driving logic of the FCNM is that the position of national minorities in society is best protected through the enshrinement and enforcement of a catalogue of negative and positive rights. According to that logic, it may appear that there is nothing untoward about prioritising the advancement of rights that specifically benefit minorities over broader (and perhaps vaguer) societal concerns for media pluralism. However, this line of argument overlooks the essential role played by media pluralism in the furtherance of “a spirit of tolerance and intercultural dialogue” and “mutual respect and understanding and co-operation” at societal level (it will be recalled that these objectives are among those set out in Article 6(1), FCNM) (see further, *supra*, Chapter 5.1). In light of these considerations, it must be concluded that the negligible attention paid to media-related pluralism in the text of the FCNM and in its monitoring process is a regrettable shortcoming of the overall approach. A more rounded assessment of minorities’ freedom of expression rights and interests, i.e., sending *and receiving* information and ideas (and also as third parties affected by the same) – such as the theoretical analysis conducted in s. 7.3, *supra* – would likely have yielded a different, more balanced sense of priorities.¹⁷²

The right of persons belonging to national minorities to receive information and ideas has, however, been the focus of attention in two distinct contexts. The first concerns transfrontier broadcasting and the second, geographical/technical obstacles impeding the reception of broadcasting signals. Consideration of the latter will be delayed until Chapter 8 as the Advisory Committee has tended to class such issues as coming under the rubric of “access”. As will be argued in Chapter 8, this tests the elasticity of access as a concept, and is only really meaningful if a distinction is made between “passive” and “active” access.

7.3.5 European Charter for Regional or Minority Languages: evaluation

The key observation made in the previous section in respect of Article 9, FCNM, *viz.* that the AC’s monitoring work has an indirect but indisputable impact on diversity/pluralism in the

¹⁷² Tagairt dhíreach nó dhó eile ag teastáil anseo.

media, also holds true in respect of Article 11, ECRML. However, the impact is also direct as Article 11(3) reads:

The Parties undertake to ensure that the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media.

Although not all States Parties to the ECRML have committed themselves to this undertaking, a significant number have done so¹⁷³ and the Committee of Experts' monitoring of this provision has produced some useful interpretive results. This provision seeks to promote participatory inclusive deliberation, even if it does fall short of guaranteeing actual representation. The clause, "or taken into account" could dilute the impact of the provision as a whole if it were to be interpreted without sufficient rigour. In practice, the Committee of Experts has paid attention to the *effectiveness* of the mechanisms used to ensure that the interests of speakers of regional or minority languages are heard within relevant bodies:

While the implementation of this article does not require that each individual Part III language should have its own representative on the bodies in question, it does require that adequate systems or processes exist to ensure that the interests of speakers of each Part III language are in fact represented or taken into account.¹⁷⁴

It is clear that this goal could be realised by structural or procedural means, but preferably through the "active participation" of speakers of regional or minority languages.¹⁷⁵ It is also clear that the onus is on States Parties which have committed themselves to Article 11(3) to demonstrate the effectiveness of the manner in which the interests of speakers of designated languages are represented or taken into account. For example, the UK committed itself to apply Article 11(3) to the Welsh language, but the Committee of Experts noted in its First Report on the UK that it had not been made aware of any intention to include a representative of regional or minority languages on the board of OFCOM, nor had it been informed of any alternative means by which the objectives of Article 11(3) would be realised.¹⁷⁶ This suggests flexibility as to the means, but firmness as to the goals.

The reference to "bodies [...] with responsibility for guaranteeing the freedom and pluralism of the media" is instinctively suggestive of regulatory authorities in the media sector. On at least one occasion, however, the Committee of Experts takes a more expansive understanding of the provision, i.e., when it appeared to apply the provision to the administrative structures of a PSB. In its Second Report on Finland, the Committee stated that it had not received any information "as to how the interests of the Sami are taken into account in the administration of the Finnish Broadcasting Company or in other bodies as may be established with the responsibility to ensure the freedom and pluralism of the media".¹⁷⁷ The wording used is not, of itself, conclusive as to whether it was indeed the intention of the Committee to extend the application of Article 11(3) in this manner. Moreover, on another occasion when it commented on representation in decision-making structures and bodies responsible for guaranteeing freedom

¹⁷³ Armenia, Croatia, Finland, Hungary, Montenegro, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine, United Kingdom.

¹⁷⁴ Second Report on Croatia, para. 180.

¹⁷⁵ First Report on Croatia, Boxed Comment after para. 100.

¹⁷⁶ First Report on the UK, para. 171. It is noteworthy that in its Second Report on the UK, the Committee of Experts reported that OFCOM had established an office in Wales "with a Welsh representative on the Content Board" and that it had also created an advisory committee for Wales: Second Report on the UK, para. 249.

¹⁷⁷ Second Report on Finland, para. 152.

and pluralism of the media in the same paragraph, it distinguish between them.¹⁷⁸ In any case, even if this extension of Article 11(3) proves to be a once-off occurrence, it must nevertheless be considered presumptively invalid to take this approach because to have responsibility for guaranteeing freedom and pluralism of the media, a body would have to be vested with powers of oversight and sanction. By virtue of its mandate, a PSB may be (and more often than not is) required *to contribute to or promote pluralism in the media*. As held by the European Court of Human Rights in the *Lentia* case, the ultimate responsibility for guaranteeing pluralism in the media rests with States or its (regulatory) organs. Moreover, unless a PSB is in a complete monopoly position, it could at best only guarantee pluralism in respect of its own services, in other words in the PSB sector and not “of” the media generally. The distinction between internal and external pluralism is relevant here.¹⁷⁹

7.4 Cultural diversity

Having considered various aspects of media-related pluralism, the topic of cultural diversity will be treated at this juncture, as it is another specific application of more general principles of pluralism and diversity. Cultural diversity is a major component of overall diversity of media content, but in keeping with the discussion in the foregoing sections, some structural modalities can prove very influential in determining the level of cultural diversity that is assured at the content-level (the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, discussed in s. 7.4.2, *infra*, contains a number of provisions that reflect this realisation). As the media are important vectors of culture, their ability to contribute to the promotion of cultural diversity, especially in terms of media output, should not be underestimated.

7.4.1 UNESCO Universal Declaration on Cultural Diversity¹⁸⁰

As well as attempting to give shape to the notion of cultural diversity, the Preamble to the Declaration seeks to explicate the societal importance of the notion. It notes, for instance, that “culture is at the heart of contemporary debates about identity, social cohesion, and the development of a knowledge-based economy”. It affirms that “respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding, are among the best guarantees of international peace and security”. It also considers that “the process of globalization, facilitated by the rapid development of new information and communication technologies, though representing a challenge for cultural diversity, creates the conditions for renewed dialogue among cultures and civilizations”. These preambular emphases already point towards the relevance of the substantive provisions of the Declaration to the cultural rights, needs and interests of persons belonging to minorities. On a general level, they can be said to collectively address overarching and often overbearing public policy questions, the successful resolution of which necessarily requires the effective participation of persons belonging to minorities. Importantly, the quoted preambular statements also recognise the complex ability of modern media to influence the formal and informal processes involved.

¹⁷⁸ First Report on Switzerland, para. 149.

¹⁷⁹ Second Report on Switzerland, paras. 131-132; Wheatley and Young.

¹⁸⁰ Adopted unanimously by the UNESCO General Conference at its 31st session on 2 November 2001. For a detailed overview of UNESCO’s other standard-setting and activities in the realm of culture, see generally: Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (forthcoming 2008, text on file with author).

As an instrument devoted entirely to cultural diversity, the UNESCO Universal Declaration provides plenty of scope for in-depth exploration of its various component elements. Article 1 of the Declaration recognises that culture is not static and that its development is influenced by temporal and spatial considerations. It describes cultural diversity as “a source of exchange, innovation and creativity” and thus “the common heritage of humanity” which “should be recognized and affirmed for the benefit of present and future generations”. This description, consistent with prevailing international standards, argues against any fly-in-amber style of preserving cultures, including minority cultures. In other words, cultures are organic and diverse and should be celebrated as such. The intergenerational transmission of cultural heritage in viable formats is of particular importance for ailing or endangered cultures.

Article 2, entitled “From cultural diversity to cultural pluralism”, fails to elucidate the conceptual distinction between its two main focuses, but its underlying message is of particular relevance:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

Article 3 mentions the contribution of cultural diversity to the development of economic and wholistic human capacities, all of which are of relevance for the purposes of personal self-fulfilment/realisation. Article 4 is easily recognisable as an abuse of rights clause: it states that cultural diversity may not be invoked to infringe upon or limit the scope of human rights, as guaranteed by international law. It emphasises that cultural diversity, human dignity and human rights and fundamental freedoms, “in particular the rights of persons belonging to minorities and those of indigenous peoples”, are all bound together.

In the logic of the universality, indivisibility and interdependence of human rights, Article 5, entitled “Cultural rights as an enabling environment for cultural diversity”, states that the full realisation of cultural rights is a prerequisite of cultural diversity. After referring to Article 27, UDHR, and Articles 13 and 15, ICESCR, it states that, “subject to respect for human rights and fundamental freedoms [applicable to whole article or only final ss?]”, all persons have the right to:

- “express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue”;
- [enjoy] “quality education and training that fully respect their cultural identity”;
- “participate in the cultural life of their choice and conduct their own cultural practices”.

Article 6 articulates the importance of access to cultural diversity. It underscores the instrumental role of the media (traditional and new) in this regard: “Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.”

Subsequent Articles draw attention to the potential of cultural heritage for stimulating creativity and furthering intercultural dialogue (Article 7); “the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods” (Article 8); the importance of cultural policies for the creation of “conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level” and the prerogative of States to define and develop their own cultural policies (with due regard for their international obligations) (Article 9). Articles 10 and 11 focus respectively on “Strengthening capacities for creation and dissemination worldwide” and “Building partnerships between the public sector, the private sector and civil society”. Finally, Article 12 outlines the role of UNESCO in respect of the Declaration and its responsibilities arising therefrom.

7.4.2 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹⁸¹

A new high water-mark was arguably reached on 20 October 2005, when the General Conference of UNESCO adopted a Convention on the Protection and Promotion of the Diversity of Cultural Expressions by 148 votes to two, with four abstentions.¹⁸² The Convention represents a new terminological departure and an adjusted conceptual positioning. The shift in terminology – from cultural diversity (as in the eponymous UNESCO Declaration) to the diversity of cultural expressions – is not merely semantic. It was a deliberate ploy by States, adopted at the very outset of the drafting process, to seek to narrow the focus of the proposed Convention.¹⁸³ The shift has been noted with a measure of trepidation by some commentators, who feel that it breaks continuity with a term that had been achieving a certain anchorage in relevant standard-setting and discussions on the international plane.¹⁸⁴ The conceptual repositioning involves greater attention for means than for ends and for the conviction that cultural diversity is instrumental in securing a range of cultural freedoms and exchange, including the free flow of cultural activities, goods and services.¹⁸⁵

The Convention seeks to protect and promote the diversity of cultural expressions and to create an appropriate climate in which cultures can thrive. Other key goals are to strengthen

¹⁸¹ The author is grateful to Yvonne Donders for her helpful suggestions for reading materials about the Convention.

¹⁸² Israel and the USA voted against the Convention and Australia, Honduras, Liberia and Nicaragua abstained. For a more comprehensive overview of the Convention’s scope and provisions, see: Tarlach McGonagle, “UNESCO: New Convention on Diversity of Cultural Expressions”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2005-10: 2; Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *ZaöRV* 66 (2006), 819-862. For details of the background to the adoption of the Convention and a critical analysis of its provisions, see: Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *R.G.D.I.P.* 2007-1, 43-87; Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions” (forthcoming, 2008) (pre-publication version of chapter on file with author).

¹⁸³ Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 15 of text as submitted for publication.

¹⁸⁴ See, for example, Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 831.

¹⁸⁵ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 53.

awareness of and respect for such diversity at all levels and to encourage intercultural interaction and dialogue. The Convention also aims to stress the linkage “between culture and development for all countries, particularly for developing countries” and to “give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning”. Of particular importance is its reaffirmation of “the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”. This objective clearly seeks to ensure that States retain control over their own cultural policies in the face of interventionist proclivities exhibited by various IGOs (not least concerning trade agreements). It is revisited in Article 5 of the Convention, where its reaffirmation has been referred to as the “normative heart” of the Convention.¹⁸⁶ As an objective, State sovereignty in cultural matters is an important precondition for the ability to adopt the programmatic measures envisaged under Articles 7 and 8 of the Convention to promote and protect cultural expressions (see further, *infra*). The Convention also aims to strengthen international cooperation and solidarity, especially by “enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions”.

It is useful at this juncture, after having explained the emphasis on State sovereignty and before examining the stated “Guiding Principles” of the Convention, to recall Yvonne Donders’ cautionary observation that the Convention is not and was never intended to be a human rights instrument, *proprement dit*.¹⁸⁷ It focuses on States’ prerogatives (in particular to “introduce culturally motivated measures”¹⁸⁸) as opposed to individual human rights, although the latter are listed among the Convention’s “Guiding Principles”.

Article 2 sets out those “Guiding Principles”: respect for human rights and fundamental freedoms; [State] sovereignty; equal dignity and respect for all cultures; international solidarity and cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access, and openness and balance. It should be noted in passing that the principle of equal dignity and respect for all cultures, as outlined, includes a specific reference to the cultures of persons belonging to minorities and indigenous peoples. It is also noteworthy that the principle of equitable access to a “rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination” is considered an important factor for “enhancing cultural diversity and encouraging mutual understanding”. Here, as in an increasing number of international treaties, the interlinkage between freedom of expression (i.e., to receive and impart ideas and information), cultural diversity and understanding/tolerance, is set out in explicit fashion.

The definitional framework for the Convention is provided in Article 4, which states that cultural diversity “refers to the manifold ways in which the cultures of groups and societies find expression” – both within and among groups and societies. It further points to the possibility that such expression can take place through a variety of activities, means and technologies. This recognition is important in respect of media regulation and is considered in more detail in Chapter 4. “Cultural expressions” are described as “those expressions that

¹⁸⁶ “Le coeur normative de la convention”: Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 71.

¹⁸⁷ Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 16 of pre-publication text of chapter.

¹⁸⁸ Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, 1 *International Journal of Communication* (2007), pp. 24-55.

result from the creativity of individuals, groups and societies, and that have cultural content”. The significance of the focus on cultural activities, goods and services has already been adverted to, *supra*. They are taken to be “activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have”. By highlighting that activities, goods and services can have inherent cultural features, notwithstanding the co-existence of commercial features, this definitional provision provides support for the claim that a main purpose of the Convention is political delineation. Hélène Ruiz Fabri, for instance, has argued that the Convention constitutes a basis for mounting a challenge to an exclusively commercial approach to relevant issues.¹⁸⁹

Article 5 reiterates the sovereign rights of States in respect of cultural matters and Article 6 proceeds to explore a range of measures that States Parties may adopt with a view to protecting and promoting the diversity of cultural expressions. A list of illustrative examples of appropriate measures is preferred to a general definition of the same. The indicative list of measures includes: regulation; public financing; provision of opportunities for the “creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services”; ensuring effective access for “domestic independent cultural industries and activities in the informal sector” to “the means of production, dissemination and distribution of cultural activities, goods and services”; encouragement of [efforts of] non-profit organisations, public and private institutions, artists and other cultural professionals; establishment and support of public institutions, “as appropriate”. Last, but certainly not least, “measures aimed at enhancing diversity of the media, including through public service broadcasting”, are also contemplated.

The promotion and protection of cultural expressions are each given separate consideration in the context of States Parties’ relevant rights and obligations (Articles 7 and 8, respectively). No explanation is offered for the curious inversion of “promotion” and “protection”: protection is logically prior to promotion and such an ordering is reflected in the title of the Convention itself, as well as elsewhere in international human rights law (see, for example, the discussion of the duty of States to respect, protect and fulfil human rights, where the promotion of rights falls under the duty to fulfil – Chapter 5.2.3). Whereas earlier drafts of the Convention had proposed the imposition of substantive obligations on States Parties for the realisation of the aims of the Convention, they were progressively watered down and were not retained in the adopted text. This is perhaps explainable by a concern to make the Convention palatable to a larger number of States, including those with weak economies which would be apprehensive about the financial implications of (additional and specific) positive obligations.

Under Article 7 (‘Measures to promote cultural expressions’), States Parties “shall endeavour to create in their territory an environment which encourages individuals and social groups” to carry out a number of activities. Reliance on weak wording like “endeavour” and vague aims like the creation of an environment which encourages certain action, does not augur well for the effective attainment of the aims in question. The shortcomings of this kind of language have already been exposed in some detail in respect of the FCNM, where such formulations are recurrent. In the first place, individuals and social groups should be encouraged:

¹⁸⁹ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 55.

to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

This reference to creation, production, dissemination, distribution and access to cultural expressions, like other similarly itemised references elsewhere in the Convention, is important as it implicates a range of actors at different stages of the generation and transmission of cultural expressions.¹⁹⁰ The explicit call for attention for the situational specificities of persons belonging to minorities is also welcome. Both of these references are meaningful considerations when it comes to the actual realisation of the right to freedom of expression for persons belonging to minorities.

Secondly, individuals and groups should be encouraged “to have access to diverse cultural expressions from within their territory as well as from other countries of the world”. The importance of the transnational dimension has traditionally suffered from relative neglect in discussions about “cultural diversity” (to revert to more familiar parlance). However, the requirement that States endeavour to create an environment which encourages its subjects to have access to diverse cultural expressions is lofty and does not give rise to any justiciable or even quantifiable legal obligation. Alternative wording could have required States to endeavour to facilitate effective access to diverse cultural expressions of domestic and foreign origin. Such wording does not give rise to easily assessable legal obligations either, but it would signal a more serious sense of moral commitment than the present wording. Finally, the wording employed in Article 7(2)¹⁹¹ saps the provision of all vigour and helps to compound the criticism that the Convention’s objectives are poorly served by its “substantive” provisions.¹⁹² It requires States to “endeavour to recognize” the important contribution and roles of artists, communities and organisations involved in cultural creativity to the fostering of the diversity of cultural expressions.

Article 8 is entitled ‘Measures to protect cultural expressions’. More specifically, it concerns the ability of a State Party “to determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding”. Even in such situations of real peril for cultural expressions (overlooking the awkwardness of the reference to a risk of extinction of cultural expressions (which are by nature inanimate), instead of cultures (which are organic)), a State Party is not obliged to take action, but “may” do so. The failure to prescribe concrete action by States in such scenarios and only to allow it provides further evidence of the Convention’s overall weakness.¹⁹³ Article 17 provides for ‘International cooperation in situations of serious threat to cultural expressions’, i.e., situations determined in accordance with Article 8.

A number of procedural priorities are identified as being important for the pursuit of the Convention’s goals: information-sharing and transparency; education and public awareness; participation of civil society, and promotion of international cooperation (Articles 9-12,

¹⁹⁰ See also: H el ene Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversit e des expressions culturelles”, *op. cit.*, at 73.

¹⁹¹ Article 7(2) reads: “Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.”

¹⁹² For a different version of this criticism, see: Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 861.

¹⁹³ See also, H el ene Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversit e des expressions culturelles”, *op. cit.*, at 72.

respectively). Article 9(a) requires States Parties to “provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level”. Rachael Craufurd Smith has lambasted this provision for its inherent weaknesses: no obligation on States Parties to report on their countries’ state of cultural diversity in general terms; no obligation to report on measures or factors adversely affecting cultural diversity in their countries; no provision for sanctions for failure to file reports; no provision for effective monitoring and follow-up by an independent body.¹⁹⁴ As such, the promise of more robust proposals on the table during the drafting process failed to materialise.¹⁹⁵

Article 12(d) explicitly recognises the potential of new technologies to contribute to the attainment of these aims and accordingly calls for the promotion of their use. The Convention also underscores the importance of States Parties’ commitment to the integration of culture in their development policies at all levels with a view to maintaining and enhancing the diversity of cultural expressions (Article 13), as well as to “cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector” (Article 14).

Article 18 of the Convention provides for the establishment of an “International Fund for Cultural Diversity” which is to be financed by, *inter alia*, voluntary contributions by States Parties, “funds appropriated for this purpose by the General Conference of UNESCO”, contributions from miscellaneous sources and “any interest due on resources of the Fund”. A voluntary basis for financing the Fund can hardly be regarded as a secure basis, so until practice proves otherwise, the existence of the Fund can only be viewed as precarious.¹⁹⁶ The administration of the Fund is one of the tasks to be carried out by an Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, which is to be set up pursuant to Article 23 of the Convention.

Article 20 is entitled “Relationship to other treaties: mutual supportiveness, complementarity and non-subordination”; as such, it addresses a key preoccupation of States from the very beginning of the drafting process.¹⁹⁷ The compromise wording which prevailed strives to promote complementarity between the Convention and other international treaties; thereby avoiding controversial confrontations or hierarchisations.¹⁹⁸

The provisions for the settlement of disputes (Article 25 and the Annex entitled ‘Conciliation Procedure’) are also deficient for their failure to mandate parties involved in the proposed conciliation procedure to accept the findings of the purpose-created Conciliation Commission. The Commission is only empowered to make proposals for the resolution of disputes and the Parties involved are not obliged to accept the same proposals, merely to consider them in good faith. Again, in the absence of provision for possible sanctions for ignoring or rejecting

¹⁹⁴ Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 38.

¹⁹⁵ *Ibid.*

¹⁹⁶ See further on this point, Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 38 and p. 53.

¹⁹⁷ See further: Yvonne Donders, “The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, p. 11 and p. 14 of pre-publication text of chapter.

¹⁹⁸ See further, *ibid.*, at pp. 14-15.

the proposal of the Commission, the dispute-resolution apparatus is rendered potentially toothless.¹⁹⁹

In accordance with Article 29, having been ratified by the requisite 30 States, the Convention entered into force on 18 March 2007. The accession of the European Community to the Convention on 18 December 2006 proved a crucial catalyst for its entry into force. However, the importance of the Convention had already been recognised by other IGOs, in particular the Council of Europe. The Committee of Ministers of the Council of Europe adopted a Recommendation calling on Member States to ratify, accept, approve or accede to the UNESCO Convention at the earliest opportunity. The Recommendation was prompted by the recognition of “the commonality between the objectives and guiding principles” set out in the Convention and “a number of Council of Europe instruments concerning culture as well as the media”.²⁰⁰ The Recommendation also declared that “in the context of its work, the Council of Europe will have due regard to the provisions of the UNESCO Convention and will contribute to their implementation”.

It is, as of yet, too early to evaluate the real (initial) impact of the Convention. Much will depend, as Ruiz Fabri correctly points out, on the establishment and effectiveness of the Convention’s organs;²⁰¹ State practice relating to the Convention, and the engagement of civil society.²⁰² She is also right, however, to insist that political and symbolic importance of the adoption and entry-into-force of the Convention should not be understated. The Convention constitutes a significant statement of principle that State sovereignty should apply to cultural matters and thereby a counterweight to forcefully commercial approaches to cultural activities, goods and services.²⁰³ As detailed in the foregoing analysis, certain discrete emphases in the text of the Convention (eg. the link between diversity of cultural expressions and intercultural dialogue and understanding (Article 2); the need to pay due attention to the specific circumstances of persons belonging to minorities (Article 7(1)(a)); threats to cultural expressions (Article 8) and the potential of new technologies to enhance the diversity of cultural expressions) hold considerable promise. Repeated references to the different stages and processes involved in the production, transmission and reception of cultural expressions are also valuable insofar as they prompt a disaggregated approach to the realisation of the right to freedom of expression. This also facilitates the task of addressing bottle-necks in the different stages of cultural activity. However, in practical terms, the programmatic character of envisaged State obligations and the general absence of operationalising criteria that would facilitate their realisation are major hurdles to be cleared.²⁰⁴ The enduring impact of the Convention is likely to be best measured in terms of symbolism and awareness-raising; its consistent resort to non-committal language, although somewhat offset by intermittently more

¹⁹⁹ For further critique, see: Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?”, *op. cit.*, p. 39.

²⁰⁰ Recommendation Rec(2006)3 of the Committee of Ministers to member states on the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, adopted on 1 February 2006.

²⁰¹ Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 84.

²⁰² *Ibid*, at 85.

²⁰³ *Ibid*, at 55 and 83.

²⁰⁴ Rostam J. Neuwirth, “‘United in Divergency?’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”, *op. cit.*, at 860; Hélène Ruiz Fabri, “Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles”, *op. cit.*, at 72. Note to self: [not readily justiciable; cross-fertilisation]

specific, programmatic provisions, means that it is unlikely to lead to meaningful legal achievements.²⁰⁵

7.4.3 European-level measures concerning cultural diversity

Attention will now turn to a selection of regulatory provisions at the European level which are implicitly, associatively or explicitly styled as promoting cultural diversity. It will take the provisions promoting European audiovisual works as its starting point.

As a result of the pronounced efforts undertaken by the European Union and the Council of Europe to synchronise their respective standard-setting measures pertaining to the audiovisual sector,²⁰⁶ much of the content of the two IGOs' flagship instruments dealing with transfrontier broadcasting is strikingly similar.²⁰⁷ Thus, the EU's Television without Frontiers Directive (TWF)²⁰⁸ and the Council of Europe's European Convention on Transfrontier Television (ECTT)²⁰⁹ both contain provisions for the promotion of European audiovisual works. Given the broad congruence between Articles 4 and 5, Television without Frontiers Directive, and Article 10, ECTT, only the former will be dealt with here.

7.4.3(i) "Television without Frontiers" Directive

Under Articles 4 and 5 of the Television without Frontiers Directive, television broadcasters in Europe are subject to a quota system for European, and independent European, works. The system is based on a rather convoluted definition of European works set out in Article 6, Television without Frontiers Directive. Relevant excerpts from Articles 4 and 5 are as follows:

Article 4

1. Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 5

²⁰⁵ C.f. Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?", *op. cit.*, p. 53.

²⁰⁶ Explanatory Report to the European Convention on Transfrontier Television, paras. 39, 40. See further: Daniel Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television without Frontiers Directives from 1989 & 1997* (Nomos Verlagsgesellschaft, Baden-Baden, 2002), esp. Chaps. 4, 5 & 6.

²⁰⁷ See further: Tarlach McGonagle, "Workshop Report", in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules* (Strasbourg, European Audiovisual Observatory, 2006), pp. 47-59, at 47-49; Pierre Goerens, "Interplay Between Relevant European Legal Instruments – ECTT and TVwF Directive: Competition or Complementarity?", in *ibid.*, pp. 1-11.

²⁰⁸ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23, 17 October 1989, and amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202/60, 30 July 1997.

²⁰⁹ Council of Europe (1989), *European Convention on Transfrontier Television (1989)*, ETS No. 132, as amended by its *Amending Protocol* (1998), ETS No. 171, which entered into force on 1 March 2002.

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

The cited Articles tend to be regarded as the main provisions in the Television without Frontiers Directive which, by design or in effect, serve the goal of promoting cultural diversity in broadcasting.²¹⁰ As no other Article in the Directive deals with cultural diversity *per se*, it is perhaps predictable that the Articles promoting European, and independent European, works might, by default, be considered to be the most relevant. However, upon closer scrutiny, the perceived relevance of Articles 4 and 5 turns out to be somewhat specious as the (intended and actual) contribution of these Articles to the goal of promoting cultural diversity in broadcasting is actually quite limited.

Articles 4 and 5 have been roundly criticised by many commentators for being little more than EU cultural protectionism unconvincingly dressed up as promoting creativity and cultural diversity.²¹¹ In reality, they pursue dual economic and cultural objectives, but those objectives are not evenly weighted. The actual wording of relevant preambular Recitals and of the Articles themselves, as well as the *Realpolitik* of their drafting history, all suggest that Articles 4 and 5 were really conceived of as protective economic measures, designed to support the European audiovisual industry in the face of US dominance of global audiovisual markets. Conversely, the cultural credentials of Articles 4 and 5 appear questionable. They constitute particularly blunt instruments as regards their purported cultural objectives for a number of reasons: they lack any qualitative criteria; they lack any stipulations about time-scheduling and they lack any requirement to reinvest percentages of *profits* in new, independent European production. Such shortcomings increase the likelihood of mere *pro forma* compliance with Articles 4 and 5 by cost-conscious broadcasters who might prefer to meet their obligations by transmitting cheap, low-quality programming at off-peak hours. The reporting system concerning Articles 4 and 5 is primarily statistical, which makes it very difficult to gauge the qualitative impact of the provisions. Furthermore, in the absence of what have been termed “public, precise and transparent indicators”, it can be a problematic exercise to determine the exact extent to which States actually discharge their relevant obligations.²¹²

In light of the foregoing comments about the architectural design of Articles 4 and 5 being primarily quantitative, those Articles could appear to be predicated on a deterministic

²¹⁰ Note, for example, their thematic coupling during the latest formal process of revision of the Television without Frontiers Directive: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005.

²¹¹ See further: Tarlach McGonagle, “The Quota Quandary: An Assessment of Articles 4-6 of the Television without Frontiers Directive”, in David Ward, Ed., *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate Publishing Limited, forthcoming, 2008); Irini Katsirea, “Why the European broadcasting quota should be abolished”, 28 *European Law Review* (No. 2, 2003), pp. 190-209; Jackie Harrison & Lorna Woods, “Television Quotas: Protecting European Culture?”, 12 *Entertainment Law Review* (No. 1, 2001), pp. 5-14.

²¹² *Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the “TV without Frontiers” Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (2004/2236(INI))*, European Parliament Committee on Culture and Education, Rapporteur: H. Weber, Doc. No. A6-0202/2005, 21 June 2005, para. 7.

understanding of television broadcasting. A proper evaluation of the effectiveness of the provisions would necessitate due consideration of attitudinal complexities in viewing processes/reception analysis. It would also need to be informed by awareness of changing patterns of media usage (eg. the emergence of new participatory paradigms in broadcasting; increasing audience preferences for user-generated content, etc.).

The myth that Articles 4 and 5 constitute important vectors for cultural diversity can also be exposed by referring to the Articles' Eurocentric focus. If they were properly concerned about the promotion of cultural diversity, they would have to embrace the belief that cultural diversity is valuable in and of itself and thus a source of societal enrichment. Based on the assumption that audiovisual content is capable of expressing cultural identities, traditions and aspirations, the prescription of measures protecting/promoting *European* audiovisual content, as opposed to *extra-* or *non-European* audiovisual content, would be difficult to reconcile with such a profession of faith in the inherent value of cultures. On such a reading, the Articles could be perceived as implying a disconcerting hierarchisation of cultures and a *de facto* relegation of non-European cultures to a status of inferiority. However, given that the motivation for the protective/promotional measures for European audiovisual works is primarily economic – and not to promote cultural diversity as such, this criticism can hardly be sustained. To hold otherwise would be to fault Articles 4 and 5 for failing to fulfil goals imputed to them, but which they do not actually hold. The foregoing conceptual contradictions highlight the dangers involved in considering Articles 4 and 5 to be default measures for the promotion of cultural diversity.

7.4.3(ii) Audiovisual Media Services Directive

In December 2007, the protracted process of modernising the Television without Frontiers Directive drew to a close with the publication in the *Official Journal of the European Communities* of the so-called Audiovisual Media Services (AVMS) Directive.²¹³

The development of EU policy in audiovisual matters generally, and the negotiation, drafting and first formal revision of the Television without Frontiers Directive, in particular, have been described as struggles between different, or rather, opposing, philosophies of broadcasting. Interventionist (*dirigiste*) and liberal perspectives clashed repeatedly, and often acrimoniously, during the deliberative process. Articles 4 and 5 were a common site for those clashes. States espousing an interventionist approach to broadcasting, eg. France, insisted on the inclusion of the provisions and lobbied strongly for high prescriptions of European audiovisual content. Other States, such as Germany and the United Kingdom, which pursued more liberal philosophies as regards broadcasting, opposed the provisions and favoured limiting their scope. Against this background of contention and political positioning, it is surprising that the previous debates were not re-ignited to any significant extent during the latest formal revision of the Directive and that Articles 4 and 5 have remained essentially unchanged in the new text.

One of the most important novel features to be introduced into the AVMS Directive is the distinction between linear and non-linear audiovisual media services, described in the

²¹³ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27 of 18 December 2007.

Directive as “television broadcasting” and “on-demand audiovisual media service[s]”, respectively. The former are defined as services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule” (Article 1(e)). In other words, these are so-called “push” technologies (because content is “pushed” to viewers), such as traditional television broadcasting or other forms of scheduled broadcasting via the Internet or mobile phones. Non-linear audiovisual services, on the other hand, are defined as services “provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider” (Article 1(g)). These are also known as “pull” technologies (because viewers “pull” content from networks) or on-demand services. The AVMS Directive will introduce a form of tiered regulation, with different tiers of obligations and responsibilities applying to media service providers, depending on whether they provide linear or non-linear audiovisual media services. A basic, minimum level of content regulation will apply to non-linear audiovisual media services, whereas additional regulation will apply to linear audiovisual media services. The distinction between the two is likely to be of capital importance in respect of the future realisation of the objective of promoting the distribution and production of European audiovisual content (see further, *infra*).

The preamble to the AVMS Directive is sprinkled with references to the goal of promoting cultural diversity in the European audiovisual sector: most saliently, Recitals 1, 4, 5, 8 and 48. Of these, the first four are, by and large, differently-crafted re-affirmations of the importance of cultural (and linguistic) diversity. Recital 48, for its part, engages directly and extensively with the goal of promoting cultural diversity specifically in respect of on-demand audiovisual media services. It reads:

On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out under this Directive, Member States should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services and in the actual consumption of European works offered by such services.

The observations and objectives outlined in Recital 48 are shored up in more concrete terms in the substantive part of the Directive. Article 3i is the operative provision and it reads:

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.
2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

Article 3i's all-important first paragraph clearly steers a middle course between the two most opposing positions that could have been taken, i.e., to extend the application of Articles 4-5, Television without Frontiers Directive, fully to on-demand audiovisual media services, or not at all.²¹⁴ It is relevant to note in this connection that the Court of Justice of the European Communities (ECJ) had already held in the *Mediakabel* case that Articles 4 and 5 of the Television without Frontiers Directive *do* apply to near-video-on-demand services.²¹⁵ The new obligation in Article 3i can more accurately be described as promotional rather than prescriptive. Member States are obliged to “ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote [...] the production of and access to European works”, but only “where practicable and by appropriate means”. Such a qualification could easily render the obligation ineffective. It would be all too easy for States seeking to shirk this obligation to argue that the pursuit of the objective of promoting the production of and access to European works is not practicable in a complex and ever-changing technological environment.

Having said that, the qualification “where practicable and by appropriate means” does not sap the obligation of all its vitality. The fact that Article 3i(1) sets out illustrative examples of what any “appropriate measures” could conceivably entail is helpful insofar as it offers some guidance as to how the obligation could be discharged in practice. It is also relevant that Article 3i(2) creates new reporting obligations for Member States concerning the promotion, by on-demand services provided by audiovisual media service providers, of the production of and access to European works. These reporting obligations are additional to those already established pursuant to Articles 4 and 5 of the Television without Frontiers Directive. Another relevant consideration is that Article 3i(3) envisages a double-barrelled evaluation exercise on the part of the European Commission (i.e., on the basis of information provided by Member States, on the one hand, and an independent study on the other). It is to be expected that in the fullness of time, the reporting and evaluation processes will facilitate the development of indicators and bench-marking criteria, as well as the identification of best practices, all of which will contribute to the realisation of the potential of Article 3i.

Whatever the precise depth of potential that Article 3i does hold for contributing to the goal of promoting the production of and access to European works, its usefulness for the advancement of cultural diversity generally suffers from the same inherent conceptual constraints as Articles 4 and 5, Television without Frontiers Directive, as discussed, *supra*. It fails to articulate the goal of promoting cultural diversity in an inclusive way that would give due recognition to the importance of non-European audiovisual works (which, in practice, are often expressive of non-European cultures). It thereby fails to encourage, or even acknowledge the value of, audiovisual works emanating from non-European countries or their expression of the vitality and importance of cultural identities and imaginations which transcend, or are simply located beyond, Europe's political borders.

Other suspects and other prospects

²¹⁴ For a short overview of the different positions considered during the review of the Television without Frontiers Directive with a view to its modernisation, see: European Commission, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, Issues Paper for the Liverpool Conference, July 2005, pp. 2-3; European Commission Expert Group, *Cultural Diversity and the Promotion of European and Independent Audiovisual Production*, May 2005, p. 5.

²¹⁵ Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, Judgment of the Court of Justice of the European Communities (Third Chamber) of 2 June 2005, ECR I-4891. The essence of the Court's reasoning can be found in para. 51 of the judgment.

In light of the shortcomings of Articles 4 and 5 of the Television without Frontiers Directive in terms of their exclusionary Eurocentricity and their ineptitude for dealing with novel technological complexities, it is necessary to explore the suitability of other mechanisms for advancing cultural diversity in the broadcasting sector. Particular attention will be paid to the relevant potential of public service broadcasting (PSB) and must-carry provisions.

7.4.3(iii) Public service broadcasting

By virtue of its philosophy and mandate, public service broadcasting (or public service media, as they are increasingly being called in deference to the diversification of technological forms across which they (may) operate) is simultaneously an ideal agent to, and an ideal forum in which to, promote cultural diversity. There is no single, fixed, legally-authoritative definition of public service broadcasting at the European level. The aims and defining characteristics of PSB are articulated in a variety of comparable formulations. For example, in one of its recent Recommendations to Member States, the Council of Europe's Committee of Ministers (CM) described the "specific role of public service broadcasting" as being:

to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism; and with regard to its goal of offering a wide choice of programmes and services to all sectors of the public; promoting social cohesion, cultural diversity and pluralist communication accessible to everyone.²¹⁶

Whereas the promotion of cultural diversity is often identified as a general objective of PSB, it can also feature in a more detailed fashion among the more specific objectives of PSB. For example, the CM's Recommendation on the remit of public service media in the information society also emphasises that:

In their programming and content, public service media should reflect the increasingly multi-ethnic and multicultural societies in which they operate, protecting the cultural heritage of different minorities and communities, providing possibilities for cultural expression and exchange, and promoting closer integration, without obliterating cultural diversity at the national level.²¹⁷

It should be noted that the Recommendation understands cultural diversity in an open, inclusive way – there is no question of the notion being restricted to European cultural diversity, as in the aforementioned regulatory measures prescribing the transmission of European audiovisual works. This is clear from para. 24 of the Recommendation, which states: "Public service media should promote respect for cultural diversity, while simultaneously introducing the audience to the cultures of other peoples around the world".

PSB is currently in a state of transition, but as Karol Jakubowicz has noted, "there was hardly a time in the eight decades of PSB's existence when it was not 'in transition'".²¹⁸ He describes the challenges constantly faced by PSB as being "at once conceptual and contextual": different understandings of the role of PSB and the fact that "changing contexts of PSB operation have always affected the shape, nature and objectives of that media institution and positioned it in society and on the media scene in a variety of ways".²¹⁹ The current state of

²¹⁶ Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007, Preamble.

²¹⁷ *Ibid.*, para. 23.

²¹⁸ Karol Jakubowicz, "Public Service Broadcasting: A Pawn on an Ideological Chessboard", in Els De Bens, Ed., *Media Between Culture and Commerce* (Bristol, UK & Chicago, USA, Intellect, 2007), pp. 115-141, at 116.

²¹⁹ *Ibid.*

transition has been triggered by technological, market-related and socio-cultural trends.²²⁰ How PSB engages with these new trends will largely determine its future. Broadcasting technologies are becoming inexorably digitised and converged. If PSB is to retain its previous (or even current) level of influence in this new technological environment, it is imperative that it develops into an effective player across diverse media types and formats. Relevant initiatives are being actively encouraged at the European level, notably in the standard-setting work of the CM that came to fruition in 2007.

Calls for increased general PSB exploitation of new technological opportunities are also increasingly being linked to the specific goal of promoting cultural diversity. For example, again in its Recommendation on the remit of public service media in the information society, adopted at the beginning of 2007, the CM stated:

Public service media should play a particular role in the promotion of cultural diversity and identity, including through new communication services and platforms. To this end, public service media should continue to invest in new, original content production, made in formats suitable for the new communication services. They should support the creation and production of domestic audiovisual works reflecting as well local and regional characteristics.²²¹

The CM's Recommendation on measures to promote the public service value of the Internet, adopted towards the end of 2007,²²² picks up on this theme. Its central objective is to prompt States authorities, where appropriate in cooperation with all interested parties, to take all necessary measures to promote the public service value of the Internet, *inter alia* by "upholding human rights, democracy and the rule of law [...] and promoting social cohesion, respect for cultural diversity and trust" in respect of the Internet and other ICTs. States authorities are expected to draw on the guidelines appended to the Recommendation in their efforts to realise its central objective. The guidelines have five main focuses: human rights and democracy; access; openness; diversity, and security. The guidelines' focus on diversity strives for equitable and universal involvement in the development of Internet and ICT content. As such, it encourages, *inter alia*:

- the development of a cultural dimension to digital content production, including by public service media;
- strategies and policies geared towards the preservation of digital heritage;
- participation in "the creation, modification and remixing of interactive content";
- measures for the production and distribution of user- and community-generated content;
- capacity-building for local and indigenous content on the Internet;
- multilingualism on the Internet.

The selection of measures listed above is indicative of an important level of awareness of the wide spectrum of novel issues that need to be addressed. Of course, a number of earlier Recommendations and Declarations adopted by the CM also continue to inform strategies for promoting cultural diversity in broadcasting. The most relevant of those standard-setting texts (including those mentioned above) are summarised here in tabular form:

²²⁰ See, *ibid.*, at 120.

²²¹ CM Recommendation Rec(2007)3 on the remit of public service media in the information society, *op. cit.*, para. 19.

²²² Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, 7 November 2007.

| Text | Topic |
|---------------------|---|
| Rec (2007) 16 | Promotion of public service value of the Internet |
| Rec (2007) 3 | Remit of public service media in the information society |
| Rec (2007) 2 | Media pluralism and diversity of media content |
| Declaration (2007) | Protecting role of media in democracy & in context of media concentration |
| Rec. No. R (2003) 9 | Promotion of democratic and social contribution of digital broadcasting |
| Declaration (2000) | Cultural diversity |
| Rec. No. R (99) 1 | Measures to promote media pluralism |
| Rec. No. R (97) 21 | Media and promotion of a culture of tolerance |
| Rec. No. R (97) 20 | “Hate Speech” |
| Rec. No. R (96) 10 | Guarantee of independence of public service broadcasting |
| Declaration (1982) | Freedom of expression and information |

7.4.3(iv) Must-carry regulation

Must-carry provisions will be considered at this juncture, instead of under access rights in Chapter 8 because “the must-carry principle is about the universal and equal accessibility of public interest programming” and “not about the individual consumer’s access to a certain platform”.²²³

So-called “must-carry” obligations,²²⁴ i.e., (regulatory) provisions mandating access to electronic communications networks for certain parties, subject to certain conditions, have considerable potential for ensuring access for minority groups to structural means of audiovisual transmission. However, the exploitation of that potential – to the extent that it is actually realised in practice – tends to occur at the national and sub-national levels.²²⁵ The most important supra-national regulatory provisions governing must-carry are based on notions of “general interest objectives”, which are left for determination by States authorities. The extent to which cultural diversity is inferred into such general interest objectives therefore depends on how well-disposed States authorities are towards the goal of promoting cultural diversity. More specifically, the extent to which minorities would feature in, or be catered for in, States’ policies on cultural diversity is similarly wedded to the goodwill of States authorities.

²²³ Natali Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (The Netherlands, Kluwer Law International, 2005), p. 112.

²²⁴ For an overview of current issues affecting “must-carry” obligations, see, generally, Susanne Nikoltchev, Ed., *IRIS Special: To Have or not to Have Must-carry Rules* (Strasbourg, European Audiovisual Observatory, 2005), and in particular, Sabina Gorini & Nico van Eijk, “Workshop on Must-Carry Obligations: Summary of the Discussion”, in *ibid.*, pp. 1-5. See also: Mike Feintuck & Mike Varney, *Media Regulation, Public Interest and the Law* (Second Edition) (Edinburgh, Edinburgh University Press, 2006), pp. 227-229; Natali Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting*, *op. cit.*, pp. 111-114, 202; Mike Varney, “Must-carry Obligations in the New European Regulatory Framework for Communications: A True Guardian of Pluralism and Diversity?”, 14 *Utilities Law Review* (2004/2005), p. 68.

²²⁵ For an overview of “must-carry” regulations in EU Member States, see: OVUM/Squire Sanders, *An inventory of EU ‘must-carry’ regulations: a report to the European Commission, Information Society Directorate* (February 2001).

Public service broadcasters are typical – but by no means the only – beneficiaries of must-carry regimes. Must-carry provisions can also apply to other types of broadcaster or content, including (as will be seen *infra*), commercial broadcasters which have public service obligations.

Must-carry obligations can prove of enormous importance to public service broadcasting, especially by helping to ensure its universal availability. The importance of must-carry provisions for ensuring the continued availability of PSB is heightening considerably in an increasingly digitised broadcasting environment. This realisation has prompted the Council of Europe’s Committee of Ministers to urge that must-carry regulations continue to be “applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes” via diverse digital platforms.²²⁶ The CM’s concern would appear to have escalated since then. In its Recommendation on media pluralism and diversity of media content, adopted at the beginning of 2007, it stated:

Member states should envisage, where necessary, adopting must carry rules for other distribution means and delivery platforms than cable networks. Moreover, in the light of the digitisation process – especially the increased capacity of networks and proliferation of different networks, member states should periodically review their must carry rules in order to ensure that they continue to meet well-defined general interest objectives. Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. [...]²²⁷

At the EU level, the main regulatory provisions governing must-carry obligations are to be found in the EU’s Universal Services Directive.²²⁸ The key provisions are set out in Article 31, which is devoted exclusively to the topic. Article 31(1)²²⁹ reads:

Member States may impose reasonable ‘must carry’ obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.

The types of networks envisaged by this provision include cable, satellite and terrestrial broadcasting networks, but could also include other networks “to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts”.²³⁰ It has been pointed out that this qualification concerning usage of a

²²⁶ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting, 28 May 2003, Appendix, para. 21.

²²⁷ Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007, para. 3.3.

²²⁸ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Services Directive). For commentary, see: Nico van Eijk, “New European Rules for the Communications Sector”, *IRIS plus – Supplement to IRIS – Legal Observations of the European Audiovisual Observatory*, 2003-2, at 5-6.

²²⁹ Article 31(2) recognises the ability of States to determine appropriate remuneration (if any) in respect of measures taken in accordance with Article 31, provided that all network providers are treated in a non-discriminatory manner and that procedures governing remuneration (where it is provided for) are proportionate and transparent.

²³⁰ *Ibid.*, Recital 44. Also of relevance in this connection is Recital 45, which states: “Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the

network by “a significant number of end-users” sits uneasily under the overarching theme of the Directive – *universal* access.²³¹ If the Directive is to remain true to its own internal logic, its concern should be to ensure access for all users to “a (minimum) must carry package because of the relevance of the programmes within the package”.²³² Without further elaboration or refinement, this qualification concerning “a significant number of end-users” fails to acknowledge geographical specificity. This is potentially problematic as whether the existence of a “significant number” of end-users is calculated at the national, regional or local level will have very different implications for locally-concentrated minority groups.

Significantly, Article 31 does not require Member States to impose must-carry obligations on network providers – it merely allows them to do so. As the Directive recognises that the practice of imposing must-carry obligations already exists in various Member States,²³³ the importance of Article 31 resides in the fact that it sets out the parameters which should govern any measures undertaken by Member States in respect of must-carry regimes. Recital 43 further clarifies the regulatory thinking behind Article 31 and the parameters it establishes: “Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review.”

As it is left to States to formulate their own “public policy” and define their own “general interest objectives”, the Directive does not enumerate – even for illustrative purposes – what kinds of general interest objectives could be involved.²³⁴ In the absence of further specifications, one commentator has submitted that such general interest objectives would presumptively include pluralism and cultural diversity, but - following ECJ case-law - not objectives of an economic nature.²³⁵ Thus, as already mentioned, Article 31 creates ample scope for the development of must-carry obligations pertaining to minorities.

The potential of must-carry provisions for PSB and for the promotion of cultural diversity was adverted to, albeit somewhat indirectly, in the leading ECJ case to date dealing with must-carry obligations, *United Pan-Europe Communications Belgium SA v. Belgium*.²³⁶ Article 31 could not be considered in the case as the Universal Service Directive was not in force at the time of the adoption of the regulatory provisions under scrutiny in the case.²³⁷ At issue in the case were national measures obliging cable operators to broadcast programmes transmitted by certain private broadcasters. The Belgian Conseil d’Etat referred four main questions to the ECJ for a preliminary ruling under Article 234 EC. Put broadly, those questions were

common regulatory framework for electronic communications networks and services”. It further holds that “Providers of such services should not be subject to universal service obligations in respect of these activities” and that the Directive “is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services”.

²³¹ Nico van Eijk & Natali Helberger, forthcoming, p. 73 of draft manuscript on file with author.

²³² *Ibid.*

²³³ *Ibid.*, Recital 43.

²³⁴ The only example specifically mentioned is “the transmission of services specifically designed to enable appropriate access by disabled users”: *ibid.*, Recital 43.

²³⁵ Thomas Roukens, “What Are We Carrying Across the EU these Days?: Comments on the Interpretation and Practical Implementation of Article 31 of the Universal Services Directive”, in Susanne Nikoltchev, Ed., *IRIS Special: To Have or not to Have Must-carry Rules*, *op. cit.*, pp. 7-19, at pp. 11-12.

²³⁶ Case C-250/06, Judgment of the Court of Justice of the European Communities (Third Chamber) of 13 December 2007.

²³⁷ *Ibid.*, paras. 25 and 26.

designed to elicit interpretive clarification of, *inter alia*, Article 49 EC – freedom to provide services, and whether the national legislation at issue would constitute a prohibited interference with that freedom.

Aside from its consideration of various aspects of European law, eg. the general legitimacy of policies geared towards the maintenance of pluralism due to its connection to the right to freedom of expression, the ECJ also made a number of pronouncements concerning the goal of upholding pluralism in the specific factual circumstances of the case. Those pronouncements are significant, first because of their contribution to existing doctrine dealing with pluralism in the audiovisual sector, and second, because of their obvious bearing on the ability of discrete groups in society to access pluralistic audiovisual content and by extension audiovisual content which corresponds to their cultural and linguistic needs and preferences. For instance, the Court accepted that the national legislation at issue in the case “pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region”.²³⁸ The Court proceeds to state that such legislation “guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture”.²³⁹ Although not explicitly referred to as “the promotion of cultural diversity in the broadcasting sector”, that is actually what was at issue in the case at hand. The Court’s key conclusions in its judgment read as follows:

[...] Article 49 EC is to be interpreted as meaning that it does not preclude legislation, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

- pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and
- is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.

It is for the national court to determine whether those conditions are satisfied.²⁴⁰

The Court was also instructive on the point that a transparent procedure, based on objective non-discriminatory criteria known in advance, is a necessary safeguard against the arbitrary exercise by Member States of the discretion vested in them.²⁴¹ It specifies, for example, that:

[...] each broadcaster must be able to determine in advance the nature and scope of the precise conditions to be satisfied and, where relevant, the public service obligations it is required to observe if it is to apply for that status. In that regard, the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient.²⁴²

²³⁸ *Ibid.*, para. 42.

²³⁹ *Ibid.*, para. 43.

²⁴⁰ *Ibid.*, para. 51. See also, para. 52.

²⁴¹ *Ibid.*, para. 46.

²⁴² *Ibid.*

The standards of scrutiny envisaged here are very rigorous and specific and do much to foreclose the possibility of arbitrariness. The same rigour and specificity is evident again when the Court scrupulously tailors the basis of the must-carry status to the objective of securing pluralism by allowing certain access-oriented public service obligations. It states that:

[...] such status should not automatically be awarded to all television channels transmitted by a private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective.²⁴³

Finally, it should also be signalled that owing to the focus of “must-carry” obligations on access to networks and technical facilities, some commentators have advocated, perhaps controversially, the development of (complementary) “must-offer” regimes, which would aim to enhance access to specific content.²⁴⁴ Such proposals style “must-carry” and “must-offer” obligations as constitutive elements of a concept of “universal service obligations with regard to content”.²⁴⁵ Additional measures supporting access to specific content – again, presumably determined on the basis of defined general interest objectives – could also have considerable potential for minorities. Much would depend on the extent to which minority perspectives, needs and interests would inform the determination of general interest objectives.

7.4.4 World Summit on the Information Society (WSIS)

In its ordering of the topics it addresses, the Declaration of Principles adopted at the Geneva Phase of WSIS brackets cultural diversity and identity with linguistic diversity and local content.²⁴⁶ Its approach to the promotion of cultural diversity is content-oriented and technologically-informed. Like the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, WSIS explicitly links the wider goal of promoting cultural diversity to the discrete goals of promoting the production of, and accessibility to, different types of content in diverse languages and formats.²⁴⁷ These goals are, in turn, linked to the goal of promoting wide and inclusive participation in the Information Society.²⁴⁸ It also emphasises the instrumental role that technology can play in preserving cultural heritage, which it recognises as “a crucial component of identity and self-understanding of individuals that links a community to its past”.²⁴⁹ At the Tunis Phase of WSIS, signatory States

²⁴³ *Ibid.*, para. 47.

²⁴⁴ Peggy Valcke (in cooperation with David Stevens and Eva Lievens), “The Future of Must-Carry: From Must-Carry to a Concept of Universal Service in the Info-Communications Sector”, in *ibid.*, pp. 31-40, esp. at pp. 32, 34, 35 & 39.

²⁴⁵ *Ibid.*, at p. 39.

²⁴⁶ WSIS (Geneva Declaration of Principles) “Building the Information Society: a global challenge in the new Millennium”, *op. cit.*, Section 8, paras. 52-54.

²⁴⁷ *Ibid.*, para. 53, which reads: “The creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society, paying particular attention to the diversity of supply of creative work and due recognition of the rights of authors and artists. It is essential to promote the production of and accessibility to all content – educational, scientific, cultural or recreational – in diverse languages and formats. The development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas.”

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*, para. 54.

committed themselves to “promote the inclusion of all peoples in the Information Society through the development and use of local and/or indigenous languages in ICTs” and to generally continue to “protect and promote cultural diversity, as well as cultural identities, within the Information Society”.²⁵⁰ Although the specific interests of persons belonging to minorities are not mentioned in connection with the general goal of promoting cultural diversity, “particular attention” will be paid to the “special needs of marginalized and vulnerable groups of society, including [...] minorities [...]” in building the Information Society.²⁵¹

Conclusions

The bridging of Chapter 6 with Chapters 7 and 8 is crucial for the structure and substance of this thesis. By recognising that the promotion of pluralistic tolerance is logically complementary to the prohibition of abusive speech, a link is established between what are routinely termed “negative” and “positive” State obligations. Although the distinction between negative and positive State obligations is retained here for organisational purposes, the analysis in Chapter 5 suggests higher levels of differentiation are possible under references to a continuum of State obligations to respect, protect and fulfil the right to freedom of expression of persons belonging to minorities. In any case, two general and related obligations on States which are of considerable importance for the realisation of the right to freedom of expression of persons belonging to minorities are the obligations to uphold media- and information-related pluralism and access to the media and other expressive fora. Both of these obligations branch out into more specific obligations, again which can be situated at various points along the continuum of States obligations to respect, protect and fulfil human rights.

The importance of media- and information-related pluralism can be explained in two main ways: its ability to facilitate or strengthen pluralistic tolerance in democratic society (by ensuring that diverse information about different groups in society is transmitted through different outlets); its ability to strengthen a broad range of democratic values and goals (by ensuring that diverse information of all kinds is transmitted through different outlets). The reference to “media- and information-related pluralism” captures the importance of both structures (i.e., conduits and discursive fora) and content (ideas, opinions and information).

This Chapter endorses the description of the State obligation to guarantee pluralism in the media sector as an imperfect communicative obligation as the obligation is not due to specific individuals and it is not correlative to a particular right in the Hohfeldian sense. Nevertheless, it is a vital aspect of the right to freedom of expression and of democratic communication. Thus styled, media- and information-related pluralism is difficult to define, quantify or operationalise.

This Chapter therefore disaggregates the concept and explains its importance at various levels, in particular source/ownership, outlet and content. These levels span structures, processes and output; each of which offers opportunities for participation and discrimination/exclusion. The distinction between different levels allows for the meaningful application of considerations of media functionality in respect of the communicative needs and interests of persons belonging

²⁵⁰ WSIS Tunis Commitment, *op. cit.*, para. 32.

²⁵¹ WSIS (Geneva Declaration of Principles) “Building the Information Society: a global challenge in the new Millennium”, *op. cit.*, para. 13, and reiterated in the Tunis Commitment, *op. cit.*, para. 20.

to minorities. International human rights treaties and other legally-binding texts regulating broadcasting at the global and European levels inadequately reflect this conceptual disaggregation and its practical advantages. A number of standard-setting initiatives that are not legally-binding on States do, however, recognise the theoretical and strategic benefits of such a differentiated approach to the safeguarding and promotion of media- and information-related pluralism (eg. CoE CM Recommendations and WSIS). If relevant treaty monitoring processes were to be increasingly characterised by disaggregated approaches along the lines outlined above, it would greatly enhance progress towards the realisation of an objective that all-too-often remains out of reach due to the perceived vagueness of its essential features and its status as an imperfect obligation.

The obligation on States to uphold cultural diversity could also be described as an imperfect obligation that is closely connected with the right to freedom of expression, including for persons belonging to minorities. Cultural diversity entails the existence and expression of multiple cultural identities. Cultural diversity is enabled by a societal climate of pluralistic tolerance and by the transmission of cultural expressions via diverse media and in diverse fora. The international treaty that embraces the foregoing considerations most extensively is the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The adoption of the Convention was a symbolic milestone, but it is eviscerated by ineffectual language that gives rise to very weak legal obligations. Its usefulness lies rather in its disaggregation of strategies and issues alike. It helps to embed intercultural dialogue or understanding and it recognises the important contribution of minority cultures to the attainment of the more general goal of cultural diversity.

At the European level, the main regulatory instruments governing broadcasting do not make any earnest attempt to promote cultural diversity. Provisions for the protection and promotion of European and independent European works are often regarded as default measures to promote cultural diversity but several design-faults (too Eurocentric, exclusionary, commercial and quantitative) prevent them from being properly considered as addressing cultural diversity, let alone promoting it. Nevertheless, the goal of promoting cultural diversity via the media is advanced through various other (mainly non-binding) instruments (esp. Recommendations by the CoE's CM) and regulatory measures at the national level (esp. concerning PSB, which is particularly suitable for the promotion of cultural diversity by virtue of its ethos and mandate, and must-carry provisions). The advancement of cultural diversity by media is also assured in no small measure by media- and information-related pluralism.

Chapter 8 – Regulation and facilitation of expression for minorities: access rights

- 8.1 Rights-based theories of access
 - 8.1.1 Freedom of expression and access rights
 - 8.1.2 Interplay between rights
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Introduction

As intimated in Chapter 5 and at various junctures in Chapter 7, media-related pluralism and access can be described as an essential double-helix of (positive) State obligations to uphold the right to freedom of expression. A clear complementarity exists between both: whereas audience interests tend to prioritise having “access to ‘enough’ expression [...] and that the expression to which they have access should not be distorted”, participant interests are more likely to be concerned with “having “enough” opportunities for expression and the value of having these opportunities not be unfairly distributed”.¹ While these sets of complementary interests are not “exactly coincident”² with one another, there are occasions on which their relationship can become one of intersection. Certain modalities of access to expressive opportunities can have direct implications for media-related pluralism, for instance (eg. “must-carry” provisions,³ etc.).

It is not necessary for present purposes to fully explore all of the possible relational permutations and combinations involving media-related pluralism and access. The essential observation to be made is that there exists considerable conceptual proximity between the notions, but that the incidence and extent of overlap between them can only meaningfully be established when they are applied in concrete situations. The focus in this chapter will be on access, which is located at the confluence of the rights to freedom of expression, participation, non-discrimination and equality.

8.1 Rights-based theories of access

This section will seek to position (putative) rights of access to expressive opportunities, and in particular the media, in the broader context of positive international law provisions

¹ T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 151-168 at 163/4. See also: T.M. Scanlon, “Content regulation reconsidered”, in Judith Lichtenberg, [...].

² *Ibid.*

³ See generally, Susanne Nikoltchev, Ed., *IRIS Special – To Have or not to Have Must-carry Rules* (Strasbourg, European Audiovisual Observatory, 2005). See also the discussion in Chapter 7.4.3, *supra*.

guaranteeing the right to freedom of expression. In this regard, Article 19(2), ICCPR, is of primary importance. It reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This provision clarifies that in the exercise of their right to freedom of expression, individuals are entitled to choose the medium that they would like to use to convey information and ideas. Although this “freedom” is subject to certain restrictions, most pertinently those set out in Article 19(3), the potential import of Article 19(2) is far-reaching, but as yet somewhat understated and underdeveloped. The wording of Article 13(1), CRC,⁴ is almost identical to that of Article 19(2), ICCPR, but there is no equivalent provision in Article 10, ECHR. The absence of such a provision in Article 10, ECHR, has certainly influenced relevant doctrinal development, as will now be demonstrated.

8.1.1 Freedom of expression and access rights

“[N]otwithstanding the acknowledged importance of freedom of expression”, Article 10, ECHR, does not, in its current state of development, “bestow any freedom of forum for the exercise of that right”.⁵ That being so in a broader context, the same holds true in more specific contexts and the right to freedom of expression therefore does not include an individual or group right of access to *particular* means of expression or to *particular* media. The question has been considered on several occasions in relation to access to the broadcast media, but has consistently been dismissed. As stated by the European Commission of Human Rights in the *Haider v. Austria* case,⁶ Article 10, ECHR: “cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion, save under exceptional circumstances, for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time”. A right of access must therefore be regarded as being highly contingent on specific circumstances.

Before exploring relevant case-law by the European Court of Human Rights, the notion of access needs to be unpacked. It is important to distinguish in the first place, whether access is conceived of as structural, procedural or substantive. In other words, does the sought-after access relate to a forum or medium, decision-making or production processes (within relevant structures), or content/output? Unless the notion is unpacked in this way (and indeed in even greater detail), its analytical usefulness is seriously curtailed.

Relevant statements of principle by the European Court of Human Rights can be summarised as follows:

⁴ It reads: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

⁵ *Appleby and Others v. the United Kingdom*, Judgment of the European Court of Human Rights of 6 May 2003, para. 47.

⁶ Decision of inadmissibility of the European Commission of Human Rights (First Chamber) of 18 October 1995, Application No. 25060/94.

- States are allowed – under the third sentence of Article 10(1) – to regulate broadcasting by a licensing system based on such criteria as the nature and objectives of the proposed station and its potential audience
- States enjoy a certain margin of appreciation in this area, but it is subject to strict supervision due to the importance of the right to freedom of expression
- Broadcasting enterprises have no guarantee of any right to a licence
- The rejection by a State of an application for a broadcasting licence must not be manifestly arbitrary or discriminatory

When assessing whether the rejection of an application for a broadcasting licence amounts to a breach of Article 10, the Court places arguably undue store by the availability of other means for applicants to exercise their right to freedom of expression. The appeal of this approach is, however, merely superficial. At its centre lies the assumption that the refusal to grant a licence for a particular bandwidth or geographical area is not necessarily disproportionate if there is no impediment to the broadcasting enterprise applying for a licence on another bandwidth or another geographical area. The Court relied heavily on this argument in *Brook v. The United Kingdom*,⁷ a case in which the exclusion of short-wave frequencies from the licensing regime was contested. The Court pointed out that the applicant could have applied for, *inter alia*, “national or local radio licences on either AM or FM frequencies, or for satellite radio licences”.⁸ Similarly, in *United Christian Broadcasters Ltd. v. The United Kingdom*,⁹ a case in which the applicant challenged its ineligibility, as a religious organisation, to even apply for a national broadcasting licence, the Court held:

It is, moreover, significant that the limitation on the applicant’s right to freedom of expression through radio broadcasting is far from being absolute, since there is no restriction on religious bodies applying for and being granted licences for local radio broadcasting.¹⁰

This line of reasoning is flawed. Instead of scrutinising the effect of the limitation on the applicant’s right to freedom of expression and enquiring as to whether less restrictive measures might have been more proportionate, the Court focuses on the fact that the restriction is not absolute. The Court is therefore measuring from the wrong end of the spectrum. Limitations on rights should be narrowly drawn and restrictively interpreted. They should be measured against less restrictive limitations, not more restrictive ones.

The approach taken by the Court in *Brook* and *United Christian Broadcasters* runs the risk of overlooking or at least downplaying the qualitative consequences that flow from a choice of frequency or target area. Different media initiatives have different needs and objectives (see Chapter 4, generally) and the availability of alternative broadcasting opportunities may be manifestly unsuited to specific broadcasting ambitions, thereby making the “alternative” more theoretical than real. In the *United Christian Broadcasters* case, the applicant association’s target audience was geographically dispersed, which explains why it would find a national licence vastly more attractive than local broadcasting licences. The specific facts of this case point up a more general problem for minorities whose membership is not concentrated into localised pockets: the availability of alternative frequencies simply may not be a viable

⁷ *Brook v. the United Kingdom*, Application No. 38218/97, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 11 July 2000.

⁸ Para.

⁹ *United Christian Broadcasters Ltd. v. the United Kingdom*, Application No. 44802/98, Decision of inadmissibility of the European Court of Human Rights (Third Section) of 7 November 2000.

¹⁰

option. Purposive and media functionality considerations therefore merit greater judicial attention than they have hitherto received (see further, Chapter 4.3.1).

The Court adopted a variant on the above approach in the *Demuth v. Switzerland* case.¹¹ The applicant was refused a licence for CAR TV, a “segmented television program”, which he intended to set up to cover “all aspects of car mobility and private road traffic, including news on cars, car accessories, traffic and energy policies, traffic security, tourism, automobile sport, relations between railways and road traffic and environmental issues”. The programme offer would have been broadcast by cable in German and French. The applicant was refused a broadcasting licence because CAR TV’s proposed programme offer was found not to meet the stipulated requirements concerning cultural content and diversity. The European Court of Human Rights noted that the Federal Council’s decision to turn down the application for a licence for CAR TV “was not categorical and did not exclude a broadcasting licence for once and for all”.¹² It continued:

On the contrary, the Federal Council disclosed flexibility by stating that a segmented program such as CAR TV AG could obtain a licence if the content of its program further contributed to the “instructions” listed in Section 3 § 1 of the RTA. In this context, the Court takes note of the Government’s assurance before the Court that a licence would indeed be granted to CAR TV AG if it included cultural elements in its program.

The majority of the Court styled the possibility to adapt CAR TV’s programme offer as a factor that mitigated the severity of the interference with the applicant’s freedom of expression. However, the Court was wrong to describe this possibility as an example of “flexibility” on the part of the Federal Council. It would be more accurate to describe it as an example of “flexibility” being imposed on CAR TV. The specialised nature of the proposed television service would be diluted – and perhaps seriously compromised – by alterations to its programme offer. As pointed out in the dissenting opinion of Judge Jorundson, “this could not amount to a valid alternative for the applicant since the purpose of his program, as the name CAR TV AG suggested, was to deal exclusively with matters pertaining to automobiles”.

Again, drawing on the discussion in Chapter 4.3.2/3, it is clear that requirements such as these would go against the ideological grain of several types of minority broadcasting, especially those with intra-community communicative objectives. The argument could also be made that this amounts to (in)direct interference with the principle of editorial autonomy.

It can be concluded that the existing case-law of the European Court of Human Rights offers little grounds for optimism as far as the future development of more robust access rights is concerned. However, the perspective is not necessarily as bleak as the foregoing overview of jurisprudence might initially suggest. Some measure of potential can be detected in the Court’s judgment in the *Appleby* case. In that case, the applicants argued that the shopping centre to which they sought to gain access should be regarded as a “quasi-public” space because it was *de facto* a forum for communication. The Court held that:

[Article 10, ECHR], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the

¹¹ Judgment of the European Court of Human Rights of 5 November 2002, Reports 2002-IX.

¹² Para. 47.

automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). *Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.*¹³

A crucially important factual feature of the *Appleby* case is that access was sought to privately-owned property *for communicative purposes*. This strengthens its analogous relevance to access to media, which often implicates the property and expressive rights of various parties.

Any prognosis for the future development of access rights must take cognizance of a number of relevant factors that can also provide impetus and direction for their growth. First, there is the inevitable interplay with, in particular, the rights to non-discrimination/equality and effective participation in public life. Second, without prejudice to any State obligations to take positive measures in order to ensure non-discrimination/equality in respect of freedom of expression (and including access to means of expression), States are under certain additional obligations by virtue of their commitment to render the right to freedom of expression effective in practice. Third, there is a dynamic quality that inheres in all rights and which implies that our understanding of rights is not static, but evolutive. These three growth-enhancing factors will now be considered in turn.

8.1.2 Interplay between rights

The inter-related and interdependent character of all human rights and the synergies generated by the interplay between freedom of expression and a range of other rights, such as the right to non-discrimination/equality, effective participation in public life, religious, cultural, linguistic and educational rights, has already been carried out in Chapter 3, so it will suffice to briefly re-emphasise a few central principles here. The focus will be on their relevance for access-related issues.

States Parties to the ICCPR are required in certain circumstances to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.¹⁴ Thus, the UN Human Rights Committee has held, “in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions”.¹⁵ Measures constituting such affirmative State action are legitimised by their corrective, specific and temporary nature. Another crucial principle is that the prohibition of discrimination not only covers all rights enshrined in the ICCPR, but also has an autonomous existence, thereby stretching to prohibit “discrimination in law or in fact in any field regulated and protected by public authorities”.¹⁶

When applied to the right to freedom of expression, the upshot of these principles, taken together, is that it is incumbent on States authorities to actively seek to eliminate

¹³ (emphasis added) *Appleby and Others v. the United Kingdom*, *op. cit.*, para. 47.

¹⁴ United Nations Human Rights Committee, General Comment 18, Non-discrimination, 10 November 1989, para. 10.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 12.

discriminatory regulations, structures and practices that prevent members of minority groups from effectively exercising their right to freedom of expression. This reading of general State obligations to combat discrimination and promote equality under the ICCPR gains in force when considered in conjunction with State obligations towards minorities. Under Article 27, ICCPR, “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group”; such measures must be in accordance with Articles 2.1 and 26, ICCPR, and seek to correct “conditions which prevent or impair the enjoyment of the rights guaranteed under article 27”.¹⁷

Insofar as the advancement of cultural, linguistic and religious objectives of minorities is partly dependent on the right to freedom of expression, positive State action is clearly required to eliminate discrimination and disadvantage in the system of freedom of expression. Moreover, the envisaged 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”. Given the huge power of private media interests to shape the system of freedom of expression and influence its workings, this candid statement by the UN Human Rights Committee has potentially far-reaching implications. It essentially recognises that in order to be effective, positive State measures cannot be limited to State bodies, but should also be horizontally applicable. It thereby mandates States to take measures limiting the power of media, but any such measures would implicitly have to be guided by principles of media sovereignty and independence.

The scope of the right to effective participation in public life necessarily includes participation in public debate. To the extent that the media and other fora serve as sites in which public debate is conducted, access rights are crucially important. Linguistic rights are also crucially important in respect of access to the media and other expressive fora: an individual’s linguistic ability or the *lingua franca* of a particular medium or forum can prove largely determinative of whether s/he can exercise his/her right to freedom of expression via that medium or forum in an effective and meaningful manner.¹⁸

Having briefly sketched the relevance of synergic interplay between selected rights for access-related issues, the enquiry will now turn to the question of the extent of relevant State obligations to render different kinds of access effective in practice. Building on the analysis carried out in Chapter 5.2.3, it is submitted that different types of obligations are implicated in different situations, and different levels of intervention may therefore be required to discharge them. Debate about the extent of State obligations in respect of the press (i.e., whether or not the State should be abstentionist or interventionist), was triggered by a proposal submitted in the earlier stages of the drafting process of the ICCPR. The proposal set out:

In order to ensure the right of the free expression of opinion for large sections of the peoples and for their organizations, State assistance and co-operation shall be given in providing the material resources (premises, printing presses, paper, and the like) necessary for the publication of democratic organs of the press.¹⁹

¹⁷ United Nations Human Rights Committee, General Comment 23, The rights of minorities (Article 27), 8 April 1994, para. 6.2.

¹⁸ See further in this connection: *Many Voices One World: Towards a new more just and more efficient world information and communication order* (Great Britain, UNESCO, 1980), p. 51.

¹⁹ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, op. cit., p. 374.

This proposal was put forward by the USSR and it was very much in keeping with its Socialist credo. That it ultimately failed to prevail is of little surprise, given its in-built potential for arbitrary application and abuse by States Parties, not to mention the friction its adoption would have caused with principles of media autonomy. While the issue was uncontroversially removed from the ICCPR agenda, it re-appeared later on the UNESCO agenda in the context of the New World Information and Communication Order (NWICO) debate.²⁰ The NWICO agenda sought to promote a more equitable international communication order and free, multi-directional (as opposed to vertical or linear) information flows at the global level. To those ends, it sought to advance the concept of a “right” to communication, socially responsible journalism and other mechanisms for the circulation of information and ideas; it favoured the democratisation of (international) communications structures and processes (inter alia by making them more participatory in character) and strongly linked communicative rights to the whole development agenda. Its vision was very much shaped by the contemporary geo-political cleavages between North and South and East and West, which were perpetuated in culture, communications and commerce. The pursuit of the NWICO’s objectives proved highly polemical and led to bitter political rifts within UNESCO, with long-term consequences, such as the withdrawal of the US and the UK from the organisation.

Such proposals were also discussed in the drafting of Article 9, FCNM, for example, the so-called FUEN draft for an additional protocol to the ECHR,²¹ which was considered in the drafting of the FCNM. The draft included the provision that persons “belonging to ethnic groups” “shall have the right to equal access to the State’s or to other public mass media, as well as the right to their own means of communication and adequate public subsidies for this purpose”.²² Ultimately, no explicit provision along these lines was retained in the final text of Article 9(3) specifically (or in any other part of Article 9 either). According to the Explanatory Report to the FCNM, “No express reference has been made to the right of persons belonging to a national minority to seek funds for the establishment of media, as this right was considered self-evident.”²³ This explanation is somewhat inadequate, however. There is a considerable gap between guaranteeing that adequate public subsidies are available (or a provision to that effect) and merely allowing minorities to *seek* funds. Asking costs nothing, as the old adage goes, but a firm undertaking by States to ensure that relevant funds are freed up for specific purposes such as the establishment of minority media outlets, has clear and potentially far-reaching financial consequences. It will be recalled that this issue had also proved controversial during the drafting of the Universal Declaration of Human Rights.²⁴

The promotion of access to the media, including through regulatory, licensing and subsidising measures are recurrent priorities in, but are usually confined to, the non-legally binding media-related work of the Council of Europe.²⁵ This can be explained by the fact that the genuine sense of priority that is placed on such objectives, in principle, would meet much resistance in practice if commitments demanding considerable budgetary follow-up were to be legally enshrined. The politically-binding (and even then, often non-prescriptive) character of

²⁰ See: *Many Voices One World: Towards a new more just and more efficient world information and communication order* (Great Britain, UNESCO, 1980).

²¹ FUEN, Fundamental Rights of Persons Belonging to Ethnic Groups in Europe, Draft for an Additional Protocol to the ECHR (Revised FUEN Draft), 1994.

²² Article 10(2) of draft.

²³ Para. 61.

²⁴ As explained, *supra*, René Cassin removed the reference to the ear-marking of public funds for minority educational and other institutions when he reworked John Humphrey’s initial draft text.

²⁵ Enumerate relevant CM Recommendations, etc.

Committee of Ministers' Recommendations and other soft-law instruments allows States to occupy an increasingly crowded comfort zone between conscience and cost.

8.1.3 Dynamism of rights

It is important to note that access rights are constantly developing. This “dynamic aspect” of rights is wholly consistent with the prevalent conception of human rights instruments as being living documents. The ability of rights to create new duties has also been described as “fundamental to any understanding of their nature and function in practical thought”.²⁶ As any list of duties corresponding to a right can never be exhaustive, the full implications of a right cannot be predicted in advance – at least not always and not necessarily with any degree of certainty. As Joseph Raz has pointed out, “The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live”.²⁷ It is therefore conceivable that new (unforeseen) circumstances could very well give rise to a new duty being grounded in the previously recognised right.²⁸

This theory of the dynamic character of rights can be explicated in a variety of ways. T.M. Scanlon, for instance, embeds it in his own analysis of rights, which maintains that a right has three essential components:

- (1) ends – the goals or values relative to which the consequences of unfettered discretion are judged to be unacceptable and the constraints proposed are held to be justified;
- (2) means – the particular constraints that the right in question is taken to involve; and
- (3) linking empirical beliefs about the consequences of unfettered discretion and about how these consequences would be altered by the constraints the right proposes. These include beliefs about the motivation of the relevant actors, about the opportunities to act that are already available to them, and about the collective results of the decisions that are likely to make. Also relevant here are facts about the institutional background that determine whether a given constraint is “in force”.²⁹

Under this theoretical model, Scanlon maintains that rights possess a “creative instability”³⁰ because of the susceptibility of our empirical beliefs to change and the unlikelihood that our understanding of a right’s ends, means and empirical beliefs will, at any given time, make up a coherent whole. He argues that new or altered situations, or changes in our empirical beliefs, can prompt us to reappraise the adequacy of existing constraints, or even the sets of values “in terms of which existing constraints are justified”.³¹ The tension released by this fluctuating, three-way relationship “gives rights a dynamic quality that can lead to an almost constant process of revision”, he concludes.³²

In keeping with the foregoing comments by Raz and Scanlon, far-reaching technological developments could be classed as the kind of societal or factual changes that could give rise to the recognition of new duties flowing from an existing right, *in casu*, the right to freedom of expression. Successive waves of technological developments, especially and most recently,

²⁶ Joseph Raz, *The Morality of Freedom* (New York, Oxford University Press, 1986), p. 171.

²⁷ *Ibid.*

²⁸ *Ibid.*, pp. 171, 185, 186.

²⁹ T.M. Scanlon, p. 152.

³⁰ *Ibid.*, p. 154.

³¹ *Ibid.*, p. 154.

³² *Ibid.*, p. 154.

the advent of the Internet, have profoundly altered informational and communicative realities throughout the world. Those changes could not have been anticipated when leading human rights treaties with generic provisions safeguarding the right to freedom of expression were drafted and adopted. Consequently, prior understandings of the scope of the right to freedom of expression require urgent updating, adaptation and expansion in order to take account of, and accurately reflect, the complexities of the new communicative dispensation. The ICCPR is a case in point: it was opened for signature and ratification in 1966 and the General Comment on Article 19 dates from 1983. Calls for the UN Human Rights Committee to adopt a new General Comment on Article 19, ICCPR, are therefore well-justified and ought to be acted on as a matter of urgency.³³

The above observations were made in relation to the right to freedom of expression generally, but they are particularly true in relation to access to modern communications technologies. As J.M. Balkin has opined:

Where the exercise of a liberty depends upon technology, access to that technology largely determines the substantive liberty of the actor. Sometimes this is because the liberty in question cannot be enjoyed in any form without a general level of technology. More commonly, however, it is because liberties are always in conflict. Access to widely different levels of technology by persons who seek to exercise competing liberties may place some actors at a very significant disadvantage with respect to others, and thus result in an effective denial of their liberty.³⁴

The future development of access rights will also inevitably give rise to a number of corresponding duties³⁵ – usually on the part of States authorities. An example of such an obligation is provided by the 2005 Joint Declaration adopted by the [then] three IGO special rapporteurs on freedom of expression, which states:

The right to freedom of expression imposes an obligation on all States to devote adequate resources to promote universal access to the Internet, including via public access points. The international community should make it a priority within assistance programmes to assist poorer States in fulfilling this obligation.³⁶

The identification of apposite State duties should be guided by realistic considerations of what is necessary to ensure the effective exercise of all component parts of the right to freedom of expression in practice. Increasingly, in this connection, emphasis is being placed on the availability and accessibility of new media technologies for everyone. This is a key strategy employed in efforts to bridge the digital divide and it accordingly involves the promotion of media and technological literacy.³⁷ The WSIS Principles and Commitments reveal a keen awareness of the impact of new technologies on contemporary communicative practices. As such, they seek to promote not access to particular media, but to “information and

³³ Such calls have come from various quarters; see, *inter alia*, Jamie F. Metzl, “Information Technology and Human Rights”, 18 *Human Rights Quarterly* (No. 4, 1996), pp. 705-746, at 743-744; Kevin Boyle & Cherian George, Final Report of the 8th Informal Asia-Europe Meeting (ASEM), Seminar on Human Rights – “Freedom of Expression”, Siem Reap, Cambodia, 26-28 Cambodia, p.7 (Recommendation No. 2).

³⁴ J.M. Balkin, “Some Realism about Pluralism: Legal Realist Approaches to the First Amendment”, 1990 *Duke L.J.* 375, at 406. [see same page for two nice quips about effectiveness of technology for communicative purposes].

³⁵ This is particularly what Joseph Raz had in mind when he referred to the “dynamic aspect of rights”, cited *supra*.

³⁶ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

³⁷ See, for example, the Special Rapporteurs’ Joint Declaration on Diversity in Broadcasting, *op. cit.*

communication infrastructure and technologies” and “information and knowledge”.³⁸ In respect of the former, the WSIS Geneva Principles state that “Universal, ubiquitous, equitable and affordable access to ICT infrastructure and services, constitutes one of the challenges of the Information Society and should be an objective of all stakeholders involved in building it”.³⁹ Its underlying reasoning is that “Connectivity is a central enabling agent in building the Information Society”.⁴⁰ In respect of the latter, the WSIS Geneva Principles state that:

Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.⁴¹

The separate attention paid to the accessibility of structures and substance stems from an awareness of the technology-enhanced diversity of sources and vectors for information and ideas. The WSIS Principles and Commitments also recognise that the communicative effectiveness of relevant technologies relies heavily on ancillary factors, like capacity-building measures, the realisation of which may implicate certain State obligations.⁴² In this connection, emphasis is also placed on the need to develop digital content in local languages.⁴³

The impact of technology can also result in the identification of new State obligations in respect of the synergic interplay between the right to freedom of expression and other rights. The right to effective participation applies across an ever-expanding range of areas of public life. This is a logical consequence of continuous societal progress and attendant adjustments and extensions of democratic practices. With the increasing importance of the Internet and other online means of communication in governance as well as in everyday life, access to the Internet will become determinative for individuals’ ability to participate effectively in public life. It must therefore surely only be a matter of time before international standard-setting bodies begin to push for a meaningful concatenation of expressive, participatory and access rights, especially in the realm of online communications.⁴⁴

Other angles of approach to the intersection of rights of participation and access also boast validity and deserve further exploration. The question has, for instance, been framed in terms of “the right to participate fully as consumers and producers in the stream of media and telecommunications”.⁴⁵ Some commentators have departed from the notion of rights of universal access to take the underlying concept a step further. Nico van Eijk, for instance, has referred in this context to a “contiguous” right to easily access information.⁴⁶ The subtext here is that the right is contiguous *to the right to freedom of expression*. Similarly, Owen Fiss has

³⁸ WSIS Tunis Commitment, para. 9, which summarises the key principles of the Geneva Declaration of Principles (in which paras. 21-23 deal with access to information and communication infrastructure and paras. 24-28 deal with access to information and knowledge).

³⁹ *Ibid.*, para. 21; see also, WSIS Tunis Commitment, para. 18.

⁴⁰ *Ibid.*, para. 21.

⁴¹ *Ibid.*, para. 26.

⁴² WSIS Geneva Principles, section 4, paras. 29-34.

⁴³ WSIS Tunis Commitment, para. 14.

⁴⁴ See also, in this connection: David Honig, “What Kind of Future for Television?”, 32 *Intermedia* (No. 4, November 2004), pp. 10-15, at 15.

⁴⁵ David Honig, “What Kind of Future for Television?”, 32 *Intermedia* (No. 4, November 2004), pp. 10-15, at 14.

⁴⁶ Nico van Eijk, “Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law”, *IRIS plus* – Supplement to *IRIS* – Legal Observations of the European Audiovisual Observatory, 2006-2, pp. 5 and 7.

argued that “A proper regard for democratic values requires *easy access to all ideas*, for without such exposure the public is not likely to know its options or the costs of the present arrangements under which it lives”.⁴⁷

The validity of such a right of easy access to information and ideas has not gone unchallenged. So far, relevant issues have only been given rather scant consideration by the European Court of Human Rights. In *Appleby*, for instance, the applicants submitted that notwithstanding the existence of other expressive outlets, they had been denied “the easiest and most effective method of reaching people”.⁴⁸ The Court dealt with this argument by focusing on the particular facts of the case at hand instead of seeking to elaborate any findings of more general applicability. Thus, the Court found that the applicants could not claim that they had been “effectively prevented from communicating their views to their fellow citizens”⁴⁹ as a result of the refusal by the property-owners to admit them onto their property. The Court would not be drawn on the question of whether the applicants’ right to freedom of expression could otherwise be exercised in a meaningful manner.⁵⁰ It is still premature to speculate whether *Appleby* will become a controlling precedent for this question, but the Court’s reliance on the central criterion of the effectiveness of the enjoyment of the right to freedom of expression seems both prudent and consistent with its settled case-law.⁵¹ The ease with which information and ideas can be accessed is therefore perhaps best understood as a measure of the effectiveness with which the right to seek and receive information and ideas is exercised in practice.

8.1.4 Prognosis for future development of access rights

The various contributions by the above-named factors to the ongoing and likely future development of access rights are highly synergic. Indeed, all of those factors converge in the following observation by T.M. Scanlon:

One aim of freedom of expression is to provide opportunities for the kind of public discussion that is an essential precondition for fair democratic politics. If the political system is to be fair, however, a significantly widespread equality of opportunity to engage in this discussion is required. [...] But in a society like ours, one cannot achieve a significant degree of equality of access to effective means of expression simply through the strategies that freedom of [159] expression has traditionally involved (i.e. simply by constraining the power to regulate expression).⁵²

Scanlon follows up on this observation by suggesting that the imperative of achieving a significant degree of equality of access to effective means of expression triggers positive State obligations to find new strategies for the same. Viewed from another angle, we witness a dove-tailing of the right to equality and the right to effective participation in public life. They join each other at the right to freedom of expression and glide further by virtue of their inherent dynamism.

⁴⁷ (emphasis added) Owen M. Fiss, “Silence on the Street Corner”, XXVI *Suffolk University Law Review* (No. 1, Spring 1992), pp. 1-20, at p. 19.

⁴⁸ *Appleby and Others v. the United Kingdom*, *op. cit.*, para. 48.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See further, the earlier discussion on *Airey*, etc., and the need for rights to be effective, real, meaningful in practice.

⁵² T.M. Scanlon, “Content regulation reconsidered”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, *op. cit.*, pp. 151-168, at pp. 158-159.

A crucial notion in Scanlon's observation is that of access to "effective means of expression" (emphasis added). It is commonly – and correctly – believed that the right to freedom of expression does not include the right (or any other kind of entitlement, for that matter) for one's expression to achieve its desired perlocutionary effects or to lead to the achievement of particular results/consequences. Conversely, it cannot be accepted that freedom of expression is a purely self-regarding activity either. Otherwise, it would simply have no claim to special constitutional protection. In recent times, there has been much lively academic and political debate in the context of WSIS about whether or not the right to freedom of expression could usefully be restyled as a right to freedom of communication. One of the arguments that featured in that debate suggests that such a step would be logical in light of the (implicit) communicative dimension already present in prevailing conceptions of freedom of expression and protected accordingly. A full discussion of the desirability of granting legal recognition to the right to freedom of communication is beyond the scope of this thesis. Nevertheless, it is important to acknowledge the existence of that communicative dimension within the right to freedom of expression. The right to freedom of expression stretches to cover the free, multidirectional flow of information and ideas. The other-regarding aspect of expressive activity is therefore not in doubt.

On the basis of these observations, it is legitimate to hold that a speaker must be able to communicate his/her message to others. It is not enough – on any theory of freedom of expression, or under positive international law - for him/her to be able to utter his/her message in private and only in private. It is the variously designated public, interactional, communicative nature of the expressive act that is the essence of the right. This is not to presume or even infer that speakers enjoy any kind of entitlement to compel a reluctant audience.⁵³ Properly understood, it is the right to realise the communicative potential of expression (which is not the same as predetermining the outcome of expression). What matters, therefore is that expression would have a fair or reasonable chance of being effectively communicated. It is submitted here that that is how Scanlon's reference to "effective means of expression" should be construed.

Closely related to the notion of "effectiveness" of means of expression is the notion of equivalence of means of expression. As shown in the discussion on media functionality (s. 4.3.1, *supra*), all media do not share the same objectives or *modus operandi* and their different outlooks and approaches can have significant bearing on the assessment of their actual effectiveness. Equality of expressive opportunity is only possible if the premise of comparable, or roughly equivalent, viability between media is upheld. As posited by Owen Fiss:

to rely exclusively, or even primarily, on parading or picketing [...] would leave to the less powerful elements in society only the least effective modes of political persuasion. Compare one day's work of distributing pamphlets at a local shopping center with a half hour on TV. Effective speech in the modern age is not cheap.⁵⁴

Such considerations can be determinative when the access of a would-be speaker to a particular medium is denied and the only alternative fora available are qualitatively different

⁵³ Although on some versions of the theory of freedom of expression, such unsolicited exposure could be included. See further, T.M. Scanlon, "Content regulation reconsidered", in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, *op. cit.*, pp. 151-168, at p. 154.

⁵⁴ Owen M. Fiss, "Why the state?", in Judith Lichtenberg, Ed., *Democracy and the mass media* (USA, Cambridge University Press, 1990), pp. 136-154, at 150-151.

in character to the would-be speaker's first choice of medium. This proposition is obviously highly contingent on relevant circumstantial factors. The basic point, though, is that the effectiveness and equivalence of particular media can legitimately be taken into consideration when seeking to ascertain whether the right to freedom of expression has been infringed.

Given the quasi-public character of certain institutions, outlets or locations – a broad public interest in access can militate against narrow private interests, such as proprietary rights.⁵⁵ It may well prove necessary for the State to secure access for third parties to such places in order to ensure that the right to freedom of expression is not merely theoretical or illusory. That is the essence of the public forum doctrine, which could arguably be extended to means of expression such as the media (eg. insofar as they play a public forum role). If opportunities to participate in public debate are stymied, there is little chance that the debate itself will be uninhibited, robust and wide-open.

Notwithstanding the fact that access rights are of a qualified nature, a violation of the right to impart information and ideas could arise if the denial of access were to be found to be arbitrary or discriminatory. This is further evidence of the cross-cutting nature of the right to non-discrimination and equality.

8.2 General “taxonomy” of access rights

The notion of access to the media is as crucial as it is amorphous. Any meaningful assessment of its importance for minorities must proceed from a clear delineation of its many applied meanings. In other words, what is required is – to borrow Monroe Price's catchy phrase – “a taxonomy of access”.⁵⁶

A preliminary distinction between possible types of access is self-explanatory and can be dealt with in a perfunctory manner. It is the distinction between the concepts implied by the somewhat uncouth terms, passive and active access.⁵⁷ The former term refers to end-users' ability to receive information/media output; it is consonant with the idea of universal service (to use conventional technical jargon). It is very important in terms of the right to receive information and ideas without restriction that physical, technological, linguistic, or indeed socio-economic factors should not impede the exercise of this right. Active access to the media suggests involvement in the creation of media output (especially by participation in managerial, editorial and production processes and representation in relevant structures) and this will be the main focus in our taxonomy of access proper.

Yet even the reference to “active access to the media” is deceptively self-contained: in reality, what is involved is varying degrees of access to different types of media. If the media are conceived of as complex processes with necessarily inter-related institutional, individual and group dynamics, it becomes important to identify and distinguish between the different degrees of access. First and foremost, the notion of active access implies, according to Karol Jakubowicz, “the ability of minorities to be actively involved in the work of the mainstream

⁵⁵ Balkin, Barron, Fiss, Sunstein, *Pruneyard, Steele & Morris v. UK, Appleby v. UK*.

⁵⁶ Monroe E. Price, *Television The Public Sphere and National Identity* (New York, Clarendon Press, 1995), p. 194. See also: Monroe E. Price, “An Access Taxonomy”, in Andras Sajo, Ed., *Rights of Access to the Media* (The Netherlands, Kluwer Law International, 1996), pp. 1-28.

⁵⁷ See further: Karol Jakubowicz, “Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of persons belonging to national minorities and the media (1998-2003)”, in *Filling the Frame, op. cit.*, pp. 113-138, at p. 133.

media in a variety of capacities, or to own and operate their own minority media”.⁵⁸ It should also involve their “access to decision-making and the work of bodies involved in legislation, regulation and oversight of the media”.⁵⁹ These different layers of access will be discussed in more concrete terms in s. 8.3, *infra*, but for the moment, it suffices to link them back to earlier discussions about the promotion of pluralistic tolerance and intercultural dialogue in various institutional structures in the media sector (Chapter 6), as well as the potential of co-regulatory measures for enhancing the participatory rights of persons belonging to minorities in the media sector (see Chapter 4.5, *supra*).

A plethora of different types of access can be recognised, both voluntary and mandated. Some are designed to enhance freedom of expression and its underlying value of pluralism; others seek to empower groups and individuals politically and culturally. Others still are designed to stimulate independence and creativity of output or uphold qualitative standards in output. Different types of access and factors affecting minorities’ access to the media will be discussed in s. 8.3, *infra*. Beforehand, a classic form of access – the right of reply⁶⁰ – will be described in terms of the protection it is accorded under international law and its usefulness for minorities discussed.

8.2.1 Right of reply as a form of access

The putative right of reply is not provided for *expressis verbis* in the relevant articles of leading UN conventions or in the ECHR. The absence of a provision is by no means accidental. The desirability of such a provision was debated on several occasions during the drafting of the ICCPR.

A text submitted by the UN Conference on Freedom of Information contemplated the institution of such a right, which it formulated as follows: “A State may establish on reasonable terms a right to reply or a similar corrective remedy.”⁶¹ The usefulness of the right to reply was stressed – along with that of “subsequent criminal liability” - as a preferable means of correcting misinformation to prior censorship.⁶² In the heel of the hunt, a provision enshrining the right of reply was omitted not for reasons of principle, but due to technical considerations. There was general consensus among the drafters that such a provision would be more at home in “special conventions in the field of freedom of information” than in the more generalist ICCPR.⁶³

For its part, the title of the UN Convention on the International Right of Correction⁶⁴ is at first glance slightly misleading. It could be taken to suggest a right of correction that is internationally available. The international dimension is present, but it is really concerned with a right of correction that is inter-national, or, more accurately, inter-State. This convention has long been regarded as ineffectual and irrelevant.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, at pp. 133-134.

⁶⁰ See generally, Marie McGonagle, “A Right to Reply” in ..., pp. 271-292.

⁶¹ Drafting Committee, 2nd Session (1948), cited in Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 374.

⁶² Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, *op. cit.*, p. 399.

⁶³ *Ibid.*, p. 400.

⁶⁴ 435 UNTS 191, entry into force: 1962.

A right of reply is not expressly provided for in Article 10, ECHR, and relevant case-law from the adjudicatory organs in Strasbourg has accordingly been meagre. Nevertheless, the European Court of Human Rights has held that “as an important element of freedom of expression”, the right of reply does fall within the scope of Article 10.⁶⁵ The Court puts this down to “the need to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate”.⁶⁶ Thus conceived, the dual purpose of recognising a right of reply under Article 10 can be described as to protect the rights of others (in accordance with Article 10(2)) and to act as a safeguard for the much-prized pluralism of information and opinions.⁶⁷

In the case, *Ediciones Tiempo S.A. v. Spain*, the Commission refuted the suggestion that the judicially-enforced insertion of the aggrieved individual’s reply was a disproportionate interference with the publication’s right to freedom of expression. The Commission pointed out that the publishing house was not obliged to modify the content of the impugned article and moreover, it was allowed to republish its version of the facts alongside the aggrieved individual’s reply.

In the case, *Melnychuk v. Ukraine*, the Court engages more thoroughly with key aspects of the nature, scope and importance of the right to reply. The case involved a newspaper’s refusal to publish the applicant’s reply to a critical review of a book written by the applicant. The newspaper maintained that it had refused to publish the reply on the basis that it contained “obscene and abusive remarks” about the reviewer; that its reasoning had been communicated to the applicant and that he had declined the invitation to edit his reply accordingly.⁶⁸ The Court declared the application inadmissible and recalled once more that the right to freedom of expression does not confer on individuals or organisations “an unfettered right [...] to have access to the media in order to put forward opinions”.⁶⁹ It then noted that “as a general principle, newspapers and other privately-owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals”.⁷⁰ It acknowledged that, against this background, “exceptional circumstances” may nevertheless arise “in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case”.⁷¹ Situations such as these may create a positive obligation “for the State to ensure an individual’s freedom of expression in such media”.⁷² The Court concluded by reiterating that a general, base-line obligation of the State is to ensure, in any event, that “a denial of access to the media is not an arbitrary and disproportionate interference with an individual’s freedom of expression, and that any such denial can be challenged before the competent domestic authorities”.⁷³

Article 8 of the European Convention on Transfrontier Television also provides for a right of reply in the following terms:

⁶⁵ *Melnychuk v. Ukraine*, Decision of inadmissibility of the European Court of Human Rights (Second Section) of 5 July 2005, para. 1 (p. 6 of decision).

⁶⁶ *Ibid.*, para. 1 (pp. 6-7 of decision).

⁶⁷ See also in this respect: *Ediciones Tempo S.A. v. Spain*, Decision of inadmissibility of the European Commission of Human Rights of 18 June 1987, Application No. 13010/87.

⁶⁸ *Melnychuk v. Ukraine*, *op. cit.*, p. 2 of decision.

⁶⁹ *Ibid.*, para. 1, p. 7 of decision.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

1. Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction, within the meaning of Article 5. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.

2. For this purpose, the name of the programme service or of the broadcaster responsible for this programme service shall be identified in the programme service itself, at regular intervals by appropriate means.

This provision can be relied upon by any “natural or legal person in order to correct inaccurate facts or information, in cases where such facts or information concern him/her or constitute an attack on his/her legitimate rights (especially in regards to his/her dignity, honour or reputation)”.⁷⁴ As such, it can certainly be invoked by individual members of all minority groups, irrespective of the nature of those groups, as long as they are democratic. This is corroborated by the Explanatory Note to the ECTT (para. 170).

One of two documents cited as having influenced the text of Article 8,⁷⁵ the Committee of Ministers’ Resolution (74) 26 on the right of reply – position of the individual in relation to the press, also dealt with the issue, but it was recently thoroughly revised in order to take account of major technological developments in the media sector (eg. the existence and widespread use of electronic archives⁷⁶). As a result, it has effectively been replaced by Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment.⁷⁷ The Preamble to the Recommendation links the right of reply to, *inter alia*, the public’s interest in receiving “information from different sources, thereby guaranteeing that they receive complete information”. While this statement panders to the goal of pluralism, the right to reply, as configured in the Recommendation, is only of limited value in attaining that goal.

It is concerned with correcting specific, individual inaccuracies and is not designed to be a platform for countering broader patterns of stereotyping or negative reporting. According to the Recommendation, a reply must be limited to a correction of the facts challenged.⁷⁸ Moreover, it only applies to “factual inaccuracies and not opinions”,⁷⁹ thereby adhering to the conceptual distinction consistently underlined by the European Court of Human Rights, *viz.* that the latter are not susceptible of proof. Again, the limited focus of the right *ratione materiae* points up its unsuitability for use as a foil for negative reporting. The basic point being made here is that the right of reply can be a valuable tool at the micro level, for dealing with specific instances of inaccurate reporting of facts, but it clearly cannot be taken as a central prong in a more ambitious, pro-active strategy of correction at the macro level.

As already mentioned, there have been pronounced efforts to synchronise the standard-setting measures of the Council of Europe and the European Union in the audiovisual sector.⁸⁰ It is

⁷⁴ Explanatory Report to the European Convention on Transfrontier Television, as amended, para. 168.

⁷⁵ Para. 167, Explanatory Note to the ECTT.

⁷⁶ Para. 7 of Recommendation Rec (2004) 16 and corresponding text in Explanatory Note.

⁷⁷ Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers’ Deputies.

⁷⁸ Principle 5 – Exceptions.

⁷⁹ Explanatory Memorandum to the draft Recommendation on the right of reply in the new media environment, CM(2004)206 addendum, 17 November 2004, para. 12.

⁸⁰ Explanatory Report to the ECTT, paras. 39, 40. See further: Daniel Krebber, *Europeanisation of Regulatory Television Policy: The Decision-making Process of the Television without Frontiers Directives from 1989 &*

therefore unsurprising that the EU's Television without Frontiers Directive should contain provisions guaranteeing a right to reply in almost identical terms to the ECTT. Article 23 of the TWF Directive reads as follows:

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. *Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.*
2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil law proceedings or would transgress standards of public decency.
5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

The italicised text was introduced by the amendment to the original TWF Directive in 1997 and it seeks to vouchsafe the fairness and proportionality of modalities implementing the right of reply. As with its ECTT equivalent, the overriding concern is for the correction of inaccuracies that would adversely affect the legitimate (especially reputational) interests of natural or legal persons. The kind of access it offers is therefore subject to the same limitations of reaction and responsiveness. It was proposed in the most recent European Commission report on the protection of minors and the right of reply that the latter should be extended to cover all media.⁸¹

The American Convention on Human Rights (1969) uniquely sets out the right of reply as an autonomous human right and should therefore be mentioned in passing. It is not conceived of as a limitation on the right to freedom of expression or conditionalised in any other reductionist manner. The operative article reads:

Article 14 Right of reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

1997 (Nomos Verlagsgesellschaft, Baden-Baden, 2002), esp. Chaps. 4, 5 & 6; E.J. Dommering *et al.*, *European Media Law Handbook* (forthcoming 2008).

⁸¹ Full citation.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

One of the arguments of predilection of opponents of the right to reply is that by mandating such replies, pluralism is actually diminished as the reply takes up limited space (or airtime), thereby reducing further the available opportunities for the expression of yet other views.

To the extent that the right of reply is corrective in nature, it is an important but insufficient form of access for persons belonging to minority groups. It is a reactive mechanism which affords a valuable opportunity to set facts straight, counter prejudicial attacks and challenge specific instances of stereotyping. But its potential for advancing identity and culture is inherently (and severely) limited. It does not set its own terms; it responds to terms set by others. There is no provision for pre-emptive thrusts. It merely allows for ripostes within imposed strictures of substance and form. Defensive, parrying, it cannot be a basis for sustaining more positive images of minorities precisely because it is reactionary.

8.2.2 Public access channels⁸²

Public access channels on cable or satellite networks are channels that have been reserved for non-commercial purposes. Typically, such purposes would include various kinds of public interest broadcasting - in the realms of education, community matters, civic affairs, etc. Whereas must-carry obligations tend to concentrate on particular channels, obligations on cable or satellite operators to free up a portion of available capacity for public interest broadcasting can be open to a wider range of potential participants. The concept of public access channels is well-established in Germany, where they are known as *Öffene Kanäle* (trans. "Open Channels").⁸³ This name captures the essential openness of the channels; indeed, the channels are in principle open to all parties who do not or cannot operate their own broadcasting station. They are designed to be accessible and inexpensive and in practice they are often State-subsidised. As such, public access channels offer considerable potential for ensuring minority access to programme transmission facilities. In practice, airtime is often offered on a first-come, first-served basis.

In respect of minority use of public access channels, a noteworthy development is the emergence, particularly in urban contexts, of so-called "rainbow" stations. The name derives from the diversity of (ethnic) minorities using them. "Rainbow" stations have been defined by one commentator as "those stations (usually community radio) with a wide diversity in program content, divided into generally small segments of airtime".⁸⁴ An obvious attraction of rainbow stations (and public access channels generally) is the large measure of editorial autonomy enjoyed by minority groups availing of the opportunity presented. In light of the autonomously segmented broadcasting model involved, there is not necessarily much contact between representatives of the different groups. However, even if it does depend largely on

⁸² This section has benefited from helpful exchanges with Toby Mendel.

⁸³ See further: Natali Helberger, "Germany", in Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-Language Related Broadcasting and Legislation in the OSCE*, *op. cit.*, pp. 217-229, at 219; John Keane, *The Media and Democracy* (UK, Polity Press, 1991), p. 159; Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 59.

⁸⁴ Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 66 (fn. 36).

the particular personalities involved on all sides, the potential for interaction and cooperation between the various groups does exist.

Conversely, one of the typical drawbacks of so-called “rainbow” community stations is the limited amount of airtime available to each minority group. Temporal restrictions impose editorial prioritisation, which more often than not result in preference being given to (local) news, chat shows, items on culture, religion, language (depending on the predominant interests of the group) and music.⁸⁵ Given the (predictable) prioritisation of what is perceived as staple content, there is little scope for more creative programming or diversity of genres and formats. Another conceivable drawback of such stations is the likelihood that the communicative process will not reach beyond members of the group itself. The wider public will not, for instance, gain exposure to the broadcasts by virtue of their transmission on a mainstream channel, thereby limiting the potential for inter-cultural communication.

Another version of public access stations worth mentioning is the *närradio* (“nearby radio”), developed in Denmark, Norway and Sweden.⁸⁶ Under these schemes (which appear to work well in practice), any group or association may apply to use low-power transmitters (located throughout the countries in question) to broadcast their own programmes.⁸⁷ A couple of practical problems associated with the system ought to be mentioned. First, the limited reach of the signals emitted by the transmitters means that the service is only suitable for groups whose members live within a narrow radius of the transmitter, eg. in urban areas. Second, “the program schedule for any given transmitter may be full in the more popular broadcast hours, so newcomers might have to settle for the early morning hours”.⁸⁸

As noted in the Guidelines on the use of Minority Languages in the Broadcast Media:

States should consider providing “open channels” – i.e. program transmission facilities, which use the same frequency, shared by a number of linguistic groups within the service area – where there are technical limitations on the number of frequencies available and/or groups that do not have sufficient resources to sustain their own services.⁸⁹

8.3 Access rights for minorities under FCNM and ECRML

8.3.1 Factors affecting minorities’ access to the media: FCNM

A number of factors tend to influence minorities’ access to the media, particularly in their own languages,⁹⁰ including:⁹¹

⁸⁵ See: Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 167.

⁸⁶ See further: Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere*, *op. cit.*, at 58 and 60.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, p. 58.

⁸⁹ Section IV. Promotion of Minority Languages – A. Frequencies.

⁹⁰ For a more detailed analysis, see: Tarlach McGonagle, Bethany Davis Noll & Monroe Price, Eds., *Minority-language related broadcasting and legislation in the OSCE*, Study commissioned by the OSCE High Commissioner on National Minorities (Programme in Comparative Media Law and Policy (PCMLP), University of Oxford & the Institute for Information Law (IViR), University of Amsterdam, 2003), especially the section entitled ‘Overview’, pp. 1-31. The Overview points out which factors are of relevance in which countries. This study is available online at: <http://www.ivir.nl/index-english.html>.

⁹¹ Some of the factors listed here apply exclusively or almost exclusively to the broadcast media – they are denoted by asterisks. The discussion of the enumerated factors is consciously weighted in favour of the broadcast

- Linguistic topography
- Official recognition of minorities/languages
- Market sustainability
- Licensing of broadcasters (*)
- Regulation of broadcasting output (*)
- Transfrontier dimension
- Temporal and qualitative criteria (*)
- Facilitative measures

In practice, these factors tend to ebb and flow into one another through tentatively-drawn definitional demarcations, and thereby defy neat categorisation. Nevertheless, it is useful to examine the influence they can wield over access to the various stages of the printing/broadcasting process. As will now be discussed in greater detail, the Advisory Committee on the FCNM has been alert to the importance of these factors in its Opinions.⁹² These factors have implications for how the right to freedom of expression is exercised in practice because they connect in different ways with the fundamental characteristics or situational specificities of persons belonging to minorities, both of which are, as explained in Chapter 1, of direct relevance for their ability to exercise their right to freedom of expression in an effective manner.

8.3.1(i) Linguistic topography

The linguistic topography of a State is as it is. It has inevitably been shaped by myriad historical, geographical, demographic, political, economic, sociological, cultural, religious and other influences. So, it is easiest simply to concede that “it is what it is” and deal with the reality at hand. More often than not, States are multilingual rather than monolingual, but this term, “multilingualism”, is - of course - capable of having endless shades of meaning. It is how a State chooses to deal with its linguistic make-up that is crucial.

8.3.1(ii) Official recognition of minorities/languages

The recognition of some minorities/languages, but not of others, either by constitutional or legislative means, or even as a general principle of public policy, can have very practical and concrete consequences, for instance, for the distribution of the allocative resources of the State. To what extent should issues such as the numerical strength,⁹³ the geographical concentration, the internal organisational structures or the lobbying initiatives of minorities or linguistic minorities influence the distribution of a State’s available financial resources? Express recognition does not necessarily have to be more effective than tacit, assumed or *de facto* recognition. Nor does recognition (of any kind) offer any guarantee of preferable or even adequate measures to further the use of minority languages in broadcasting. Conversely,

- as opposed to print - media as the former tend to have to operate in an environment that is comparatively more complicated in terms of regulatory permutations and combinations and technological considerations.

⁹² For stylistic reasons, and especially to ease the task of the reader, a selection of examples of the Advisory Committee’s consideration of these factors intersperse the more general analysis of the same.

⁹³ This is one key aspect of a broader question which has been referred to as “Problems of Numbers”: see John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell & Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Hague, M. Nijhoff Publishers, 1999), pp. 223-273, at p.260.

though, non-recognition does not – of itself - preclude the adoption of effective measures in this regard. The Advisory Committee has homed in on the need for equality in the distribution of available resources, as exemplified by the following pronouncement:

“The Advisory Committee is concerned, however, at the uneven distribution of resources, concerning both television and radio programmes, among the various minorities. It considers the present situation problematic, since one of the main minorities, the Roma community, seems to have far less airtime than the others, particularly for programmes in its own language. Some programmes for Roma also appear to have been dropped. It is therefore important that the authorities look into this matter, and try to revise the balance - but without cutting airtime for other minorities.”⁹⁴

8.3.1(iii) Market sustainability

This topic requires little elaboration. Nowadays, the media have to operate in an increasingly competitive and commercialised environment. This is especially true of the broadcasting sector. In consequence, the need to boost audience shares is growing steadily as a driver of broadcasting policy. Public service broadcasters (PSBs) are also willy-nilly caught up in this vortex, despite the specificity of their mandate. The stark reality is that minority-interest programmes (and especially minority-interest programmes in “less prevalent (national or regional) languages”⁹⁵) almost never command large audience shares. This can have adverse effects on advertising revenues, which in turn can lead to a general reluctance to broadcast minority-language programmes, particularly at peak viewing/listening times. In such an inhospitable climate, a persuasive case can be made for contemplating prescriptive regulation; financial stimulation; administrative relaxation (see further, ‘Facilitative measures’, *infra*), all with a view to adequately catering for the needs and interests of persons belonging to national minorities. As noted by the Advisory Committee:

“[...] In so far as the national minorities encounter difficulties in financing their publications, the Advisory Committee urges the authorities to increase the relevant State support and to pay particular attention to the numerically smaller minorities, who do not have sufficient resources to sustain their publications.”⁹⁶

8.3.1(iv) Licensing of broadcasters

Licensing is a regulatory tool and sometimes a licensing/regulatory authority can be expressly ascribed the task of upholding freedom of expression, diversity, pluralism, the public interest and other key values in broadcasting. The principles of licensing may have to reflect these preoccupations, or even to stimulate programming for minorities. Such goals can be pursued by adopting and implementing distinct licensing policies for different types of broadcasting.

Responsiveness to the needs and interests of the target community is a standard feature of the licensing regime in many States. An ability to add to existing diversity in the broadcasting sphere can be a criterion affecting the licensing process. The likely benefits for the development of cultures of ethnic and other minorities can also be considered.

⁹⁴ Advisory Committee Opinion on Romania, adopted on 6 April 2001, para. 46.

⁹⁵ Bruno de Witte, “Surviving in Babel? Language Rights and European Integration”, in Yoram Dinstein & Mala Tabory, Eds., *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff, 1992), pp. 277-300, at p. 299.

⁹⁶ Advisory Committee Opinion on Lithuania, 21 February 2003, para. 52.

Insofar as it is employed as a licensing criterion, preference for the use of a particular language can be an advance specification for a public tender. Otherwise, linguistic commitments can be agreed upon and formalised in an individualised manner, and later become binding, for example, by their incorporation into a broadcaster's *cahier des charges*.

It should also be noted that the promotion of the official/State language is often encountered as one of the stated goals of the licensing process. Again, the Advisory Committee has shown keen awareness of the interplay between such a goal and other relevant issues:

“[...] While recognising that the Russian Federation can legitimately demand broadcasting licensing of broadcasting enterprises and that the need to promote the state language can be one of the factors to be taken into account in that context, the said article appears to be overly restrictive as it implies an overall exclusion of the use of the languages of national minorities in federal radio and TV broadcasting. The Advisory Committee considers that such an *a priori* exclusion is not compatible with Article 9 of the Framework Convention, bearing in mind, *inter alia*, the size of the population concerned and the fact that a large number of persons belonging to national minorities are dispersed and reside within several subjects of the federation.”⁹⁷

A quick addendum to this consideration of licensing would do well to focus on the *prima facie* neutrality of the licensing system. Groups using less prevalent/dominant languages typically lack the financial and technological resources which would allow them to meet the – seemingly neutral and egalitarian – licensing specifications. Always of relevance, this gap between theoretical equality and effective equality is more acute in some States than in others.

8.3.1(v) Regulation of broadcasting output

8.3.1(v)(a) Broadcasting in general

Promotion of official/State language(s)

A recurrent feature of language regulation in broadcasting is the goal of promoting the official/State language. The legitimacy of such a goal (often to promote national identity, social cohesion, etc.) is unlikely to be challenged (*inter alia* because it is widely considered to fall under the margin of appreciation doctrine), as long as it is tempered, proportionate and non-discriminatory in its design or effects. However, sometimes the goal of promoting a particular language is pursued with such zeal that the relevant provisions insist upon the mandatory use of the official/State language, or its high-mandatory use. Such zealous approaches are a cause of grave concern.

In most of the States where provision is made for the mandatory use/promotion of the official/State language, limited exceptions are countenanced by relevant legislation, thus significantly mitigating the effect such provisions would otherwise have. Commonly, such exceptions include: programmes intended for minorities; educational or foreign-language programmes; musical programmes; live broadcasts from abroad, and translation requirements.⁹⁸

⁹⁷ Advisory Committee Opinion on the Russian Federation, 13 September 2002, para. 76.

⁹⁸ See further, the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE*, *op. cit.*, pp. 14-17.

It is obviously a constant concern that translation requirements (i) do not entail excessive financial, administrative or practical burdens for broadcasters operating in minority languages, and (ii) can be implemented in a flexible manner (i.e., choice of technique). This concern has not escaped the attention of the Advisory Committee either:

“[...] The Advisory Committee agrees that it is often advisable, and fully in the spirit of the Framework Convention, to accompany minority language broadcasting with sub-titles in the state language. However, the Advisory Committee considers that, as far as private broadcasting is concerned, this goal should be principally pursued through incentive-based, voluntary methods, and that the imposition of a rigid translation requirement mars the implementation of Article 9 of the Framework Convention by causing undue difficulties for persons belonging to a national minority in their efforts to create their own media [...]”⁹⁹

While translation requirements are often perceived in a negative light, they need not necessarily be a limiting factor. For example, subtitling practices, coupled with the use of modern technology, can facilitate the simultaneous reception of programmes in several languages.

General prescriptions requiring that a “reasonable”, “significant” or “main part” or “considerable proportion” of programmes be in a given language are commonplace. More specific (i.e., percentaged) provisions or quotas are also frequently encountered and these can vary greatly from country to country.¹⁰⁰ Of course, the key concern here is to determine – in light of all relevant circumstances – the cut-off point at which a prescription favouring the use of one language begins to become a restriction on the use of others. This is quite an instrumentalist approach to the question of language-choice. As has been cogently argued by one commentator: “Restricting the use of certain languages simply cuts off potential audiences or makes it more difficult to reach them, and that harms one of the core interests underlying freedom of expression on any plausible account.”¹⁰¹ The Advisory Committee is again clearly attuned to such concerns:

“[...] The Advisory Committee considers that, bearing in mind its implications for persons belonging to national minorities and the fact that excessive quotas may impair the implementation of the rights contained in Article 9 of Framework Convention, this practice needs to be implemented with caution. Furthermore, it would need to be rooted in a more precise legislative basis than what is contained in the above-quoted provision [...]”¹⁰²

Promotion of minority languages

In a number of States, provisions for the use of minority languages in broadcasting are styled as the obverse of provisions for official/State languages. Where specific obligations concerning minority languages do not exist, another frequently-exploited way of pursuing the same goal is the existence of provisions for the promotion of minority cultures or (general) interests. Although some States lack statutory provisions for the use of minority languages in broadcasting which are applicable across the board, it can be deceptive not to examine other contextual considerations thoroughly. Legislative provisions may only apply to certain

⁹⁹ Advisory Committee Opinion on Estonia, adopted on 14 September 2001, para. 38.

¹⁰⁰ For a more detailed analysis, the reader is referred once again to the ‘Overview’ in *Minority-language related broadcasting and legislation in the OSCE, op. cit.*: see, in particular, pp. 13-14.

¹⁰¹ Leslie Green, “Freedom of Expression and Choice of Language”, in W.J. Waluchow, Ed., *Free Expression: Essays in Law and Philosophy* (Oxford, Clarendon Press, 1994), pp. 135-152, at p. 144.

¹⁰² Advisory Committee Opinion on Ukraine, 1 March 2002, para. 46.

designated broadcasters (PSBs, for instance) or at certain (geographical) levels. Furthermore, legislative provisions may serve to affirm opportunities rather than stipulate prescriptions in concrete terms. Having said all that, legislation in a number of States does require broadcasters in general to provide for minority-language broadcasting (or at least for the languages of certain minorities (as defined by law)).

8.3.1(v)(b) Public service broadcasting

The playwright Arthur Miller once remarked that a good newspaper is a nation talking to itself. By analogy, so too is a good PSB, which is arguably a more obvious vehicle for the advancement of socio-cultural and linguistic objectives than other types of broadcasters. This argument grows from traditional perceptions and expectations of PSBs, including that they would: deliver quality of services and output; boast general geographical availability; provide a wide range and variety of programmes and show concern for national *and* minority identities and cultures. The last-listed expectation is crucial. It demonstrates very clearly that PSBs have to tread a very fine line by trying to satisfy majority and minority sections of the population simultaneously. This is also true of the linguistic demands and preferences of any population. The challenge is therefore to provide general programming in mutually comprehensible languages so that inter-community communication can be safeguarded, while also catering for the extant linguistic specificities in society to the greatest extent possible.

As with the regulation of broadcasting in general, the language obligations on PSBs are also twofold: the official/State language and other languages. The focus here will be on the latter. General PSB obligations to ensure programming in various languages exist in some States, while elsewhere, the practice has been developed to a limited degree without it actually being required by law. Specific prescriptions exist in a number of States too: as determined by boards of directors; in temporal terms; in quantitative terms; dedicated channels; well-established practices of non-State languages being used. Also of relevance here are general requirements that PSBs must devote specified amounts or percentages of their broadcast time to minority groups, without any linguistic stipulations being applicable. While this approach does not preclude some of the available time being used for programming in minority languages, it has the advantage of showing greater deference to the editorial autonomy of those making use of the slots.

8.3.1(vi) Transfrontier dimension

For reasons of geographical proximity; cultural affinity; ethnic dispersity; the hard facts of recent history or economic realities (if not to say vulnerabilities), or any combination of the above, bilateral agreements and cooperative initiatives can play a hugely significant role in securing access to the media, especially in relevant languages. Examples of bilateral agreements which are general in character and contain sections on broadcasting are legion. Aside from such general treaties, States also adopt bilateral treaties specifically on broadcasting. In a number of countries, according to available means, technology is being harnessed in order to enhance transfrontier broadcasting targeting minorities.

All of this is built on the premise that the ability to receive broadcasting from abroad should not obviate the need or responsibility for States to keep their own houses in order as regards the fostering of domestic (minority-language) broadcasting. Concern must also attach to any

attempts by States to impose restrictions on the reception of broadcasts from other States (either from specific States or generally). In the words of the Advisory Committee:

“[...] The Advisory Committee [...] considers that availability of such programmes from neighbouring states does not obviate the necessity for ensuring programming on domestic issues concerning national minorities and programming in minority languages.”¹⁰³

8.3.1(vii) Temporal and qualitative criteria

What is crucial here is ensuring a satisfactory response to the “needs and interests” of the target audience. Some States have made legislative provision for programming (i) catering for the needs and interests of persons belonging to national minorities, and (ii) in the languages of persons belonging to national minorities, to be broadcast at certain times. Less specific provisions have been adopted elsewhere, but share the same aim: for example, where a “fair balance” has to be struck between minority groups/languages, including in the allocation of broadcasting slots.

8.3.1(viii) Facilitative measures

A consideration of measures that promote access to, and the use of minority languages in, broadcasting is a problem-solving exercise; an invitation to think outside the box. Put briefly, it is the search for best practices, forward-looking and often experimental initiatives.

The representation of minorities in general and linguistic minorities in particular, on relevant authorities and decision-making bodies greatly enhances the development of policies and norms which cater for their needs and interests. Active, or better still, pro-active consultation with such groups by the relevant authorities and decision-making bodies is another way of pursuing the same goal. As such, these practices can be perceived as outgrowths of more general democratic principles. Perhaps the best relevant paradigm is that elaborated by Karol Jakubowicz: “representative participatory communicative democracy”.¹⁰⁴ This involves the application of principles of participatory democracy to broadcasting (structures). The basic idea is that while not every individual member of a group can actually broadcast, the organisational structures of the broadcasting entity should strive to facilitate maximum participation by all members in influencing policies and fixing goals.

There are only very sporadic examples of broadcasting authorities incorporating concern for minority language interests into their structures (eg. by means of the appointment of a minority language officer or committee); more common are provisions guaranteeing general representation for persons belonging to national minorities in their composition. Ensuring the

¹⁰³ Advisory Committee Opinion on Albania, 12 September 2002, para. 50. See also: “[...] the Advisory Committee underlines that the availability of foreign broadcasting in Estonia in a language of a national minority does not eradicate the need for, and importance of, domestically produced broadcasting in that language.” - Advisory Committee Opinion on Estonia, *op. cit.*, para. 37.

¹⁰⁴ Karol Jakubowicz, “Access to the Media and Democratic Communication: Theory and Practice in Central and Eastern Europe”, in András Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 139-163, at p. 145.

meaningful involvement of persons belonging to national minorities in the various stages of the legislative process¹⁰⁵ is also a priority concern:

“[...] the Advisory Committee encourages the authorities to take account of the needs of persons belonging to national minorities when preparing and adopting this legislation. In its view, the Government should consult with national minority representatives in order to ensure that any support it provides will be sufficient to meet the needs and to strike an appropriate balance among the various national minorities in terms of media access and presence [...]”¹⁰⁶

In some States, language advisory councils have been established within PSB structures. In others, PSB audience councils, programming councils and advisory committees perform more general advisory roles, often as regards regional or local programming or programme schedules. It is interesting to compare the variety of approaches adopted by such advisory organs in different countries and to consider the extent to which they actively liaise with relevant audiences, including national minorities. The Advisory Committee has also considered relevant issues:

“[...] It notes that the absence of such programmes is explained by the fact that no request to that effect was ever made, but points out that a formal request to that effect is not a legal precondition for considering the implementation of such a facility [...]”¹⁰⁷

Notions of social and special-interest broadcasting can, when properly calibrated and applied, play an instrumental role in the promotion of minority languages in broadcasting. This concept is recognised in a number of countries and it leads to particular regimes applying to types of broadcasting dedicated to fulfilling specific societal missions or meeting stated niche interests (including those of linguistic minorities).

Another variant on this theme concerns special treatment for particular genres of broadcasters in terms of access to infrastructure and technology that would ordinarily be beyond their financial reach. It is fairly typical for such practices to involve the sharing of channels and frequencies between broadcasters in order to defray start-up and operational costs. They can also involve the hosting of minority-interest broadcast output by established broadcasters. A rich mine of potential could be tapped into here:

“[...] The Advisory Committee also notes that digital, cable and satellite broadcasting will bring with it new and further possibilities for meeting demands. Encouragement should be given to opening up broadcasting further to national minorities, using for example opportunities offered by the implementation of new technologies.”¹⁰⁸

The aforementioned study, *Minority-language related broadcasting and legislation in the OSCE*, also documents the vast array of other measures that could broadly be categorised as facilitative of (i) improving access to broadcasting for persons belonging to national minorities, and (ii) the use of minority languages in broadcasting. These include flexible and favourable financing schemes and fiscal regimes and the placing of firm emphasis on capacity-building; a notion of wide embrace which could include ensuring greater support for the education and training – in their own languages – of (i) students of journalism and (ii)

¹⁰⁵ A number of definitions for co-regulation exist. Loosely put, it is a practice which involves both traditional law-makers and interested parties/representatives of civil society in the regulatory process. See further, *Co-Regulation of the Media in Europe, IRIS Special* (Strasbourg, the European Audiovisual Observatory, 2003).

¹⁰⁶ Advisory Committee Opinion on Armenia, 16 May 2002, para. 54.

¹⁰⁷ Advisory Committee Opinion on Denmark, adopted on 22 September 2000, para. 30.

¹⁰⁸ Advisory Committee Opinion on the United Kingdom, adopted on 30 November 2001, para. 69.

media professionals. The promotion of programme production and distribution can also make an important contribution to the creation of a healthier climate in which the goal of (qualitatively and quantitatively) increased broadcasting by and for persons belonging to national minorities, including in minority languages, can be achieved. Needless to say, the above all rings true for publications which share the same objectives as their audiovisual counterparts.

Finally, it should also be noted in passing that language policy documents are becoming increasingly commonplace; plotting future courses of action; devising development strategies; pursuing progress... or not. This observation is of relevance to the extent that States' language policies help to shape the matrix in which broadcasting and publishing in minority languages takes place, even when the theory and practice are out of sync with one another.

Conclusion

One cannot but help feeling that "access to the media" has become something of a stock phrase, the utility of which matches the vagueness that encompasses a number of specific concerns and contexts. Whatever benefits are likely to be gained by frequently relying on a sloganistic phrase of such broad compass, there is a danger that longer-term analytical aims will be compromised. This danger could be averted or reduced if the term were to be systematically linked back to more probing and contextualised analysis by the Advisory Committee.

8.3.2 Factors affecting minorities' access to the media: ECRML

8.3.2(i) Official recognition of languages

The official recognition of languages can be of both practical and symbolic importance and the Committee of Experts has, on a number of occasions, been confronted with uncertainties as to the status of languages/dialects and the nature of their recognition by States authorities. The status of the Kven language in Norway is a case in point. The Committee called for clarification of its status because, as it put it: "The Norwegian authorities seem, on the one hand, to acknowledge the Kven as a national minority, but on the other hand, not to take a stand as to whether the Kven language is a separate language from Finnish".¹⁰⁹ The acknowledgement of Kven as a separate language would, in the Committee's opinion, "probably facilitate the formulation of structured proposals for concrete measures".¹¹⁰

Without wishing to detract from the validity of the probabilistic assumption made by the Committee of Experts in respect of the benefits that would accrue from official recognition of the Kven language, the importance of official recognition for minority groups as groups should not be downplayed. Such recognition can constitute a constitutional or legislative basis for a range of participatory and other rights and entitlements. For example, it can lead to guarantees of representation in national councils for minorities, which must be consulted on all law- and policy-making initiatives that are of relevance to persons belonging to minorities.

¹⁰⁹ First Report on Norway, Finding D.

¹¹⁰ *Ibid.*

Uncertainty about the status of a language can arise from its degree of distinctiveness, both in relation to other languages or in relation to dialects. In this vein, the Committee of Experts notes, but does not adopt a position on, a curious anomaly concerning the application of the Charter in the Netherlands. Whereas the Dutch authorities have recognised the position of Limburgish as a language under the Charter, the Dutch Language Union (*Taalunie*) recognises Limburgish only as a dialect and not as a language, as such. As noted *supra*, different benefits tend to flow from different statuses, but the criteria for distinguishing between languages and dialects are generally political as well as socio-linguistic. As one commentator famously quipped, a language “is a dialect that has an army and navy”.¹¹¹ The Committee of Experts has shown itself to be acutely aware of relevant complexities:

Where there exists a linguistic continuum with persons in adjacent territories speaking variants similar to one another, the distinction between a language and a dialect can be a difficult question. It involves not only the linguistic criterion, but also often political, social, cultural and historical criteria.¹¹²

A final relevant consideration is the extent to which particular languages are moribund. The importance of the distinction between living and dead languages is self-evident, but nevertheless contentious.¹¹³

8.3.2 (ii) Active access to media

In respect of Croatia, the Committee found that a “major drawback to the application of the Charter” in respect of media and culture is the “lack of participation by the users or representatives of the regional or minority languages in the organization, planning and funding of activities in this field”.¹¹⁴ This finding is perspicacious because the distinct references to the organisational, planning and funding levels reflect an awareness of the different kinds of impact that participation can have at each of those levels. The strength of this finding therefore lies in its differentiation.

On other occasions, the Committee has focused on particular forms of participation and access. For instance, in respect of Cyprus, it has welcomed as a “form of *direct* participation” (emphasis added), the presentation of Armenian and Maronite programmes by members of the respective communities and the negotiation of the content of the programmes with CyBC.¹¹⁵

The importance of linguistic representation on PSB boards has also been acknowledged in the context of existing provisions for the same in several countries.¹¹⁶

The foregoing examples reveal that the ECRML does contain considerable potential for promoting the participatory rights of speakers of regional or minority languages in the media sector. However, this potential is subject to the inherent limitations of the Charter itself. As noted by the Committee of Experts in the analogous context of using regional or minority languages in dealings with States authorities:

¹¹¹ Max Weinreich, cited in John Edwards, *Multilingualism* (Routledge, London and New York, 1994), at p. 24.

¹¹² First Report on Sweden, para. 31.

¹¹³ For example, the Committee of Experts noted that the extent to which Skolt Sami is still a living language is unclear: Third Report on Norway, para. 12.

¹¹⁴ First Report on Croatia, Finding E; see also: Second Report on Croatia, Recommendation 3.

¹¹⁵ First Report on Cyprus, para. 77.

¹¹⁶ Slovenia, paras. 144, 219; Croatia (Second Report), para. 180; Finland (Second Report), para. 152.

[...] Although the Charter can help regional or minority language speakers who have difficulty in communicating with authorities, its principal objective is to give regional or minority languages themselves a public dimension through their use in official situations, which confers an increased legitimacy on these languages. [...] ¹¹⁷

8.3.2(iii) Market sustainability

The Committee of Experts has urged States authorities to make greater use of existing financial support schemes and legal regulations that allow for promoting the use of regional or minority languages in the media. It considers that such measures do not constitute “undue interference with editorial freedom” and that they should be relied on more extensively. ¹¹⁸ The Committee has also pointed out that although “Frisian radio and television are put on an equal footing with the Dutch language radio and television in other regions of the Netherlands”, “The extra cost of broadcasting in Frisian is not therefore taken into account in the allocation of subsidies”. ¹¹⁹

8.3.2(iv) Facilitative measures

On a number of occasions, the Committee has recommended training for journalists in regional or minority languages. ¹²⁰

Given that the ECRML is centrally concerned with the preservation of regional or minority languages, many of which are in situations of considerable precarity, it is not surprising that factors influencing linguistic survival are regularly assessed. This is more explicit than under the FCNM. For instance, public perceptions of regional or minority languages and the social prestige which they enjoy are a recurrent concern of the Committee of Experts. Prominent usage in the media, especially television, can “enhance considerably” the “social prestige” of a regional or minority language and thereby be “a crucial factor” for its protection and promotion. ¹²¹ More specifically, the Committee has pointed out that the use of a regional or minority language in the media can contribute to “making it a modern language and [encouraging] young people to learn and speak it”. ¹²² The Committee has also noted other ways for improving the prestige of regional or minority languages, such as their inclusion in the cultural component of national foreign policies. Thus, the Committee was critical of the omission of Frisian language and culture from the “Dutch cultural policy abroad”. ¹²³

Role of the Committee of Ministers

¹¹⁷ First Report on Denmark, Finding J.

¹¹⁸ See, for example, Report of the Committee of Experts on the Charter on the application of the Charter in Germany, 4 December 2002, Finding N.

¹¹⁹ Report of the Committee of Experts on the Charter on the application of the Charter in the Netherlands, 9 February 2001, Finding B. It should be noted, however, that in their Comments on the Report, the Dutch authorities subsequently pointed out that this situation had been addressed by an amendment of the Media Act in September 2000 which makes regional broadcasters as well as national public broadcasting eligible for funding to promote Dutch cultural radio and television broadcasting productions (Appendix II to Report).

¹²⁰ See, for example: Report on Hungary; Report on Switzerland, Finding E; ...

¹²¹ Second Report on Switzerland, para. 118. The Committee of Experts follows up on this point in its Findings in the same report, reiterating that “the presence of a regional or minority language on television is of the utmost importance for its maintenance in modern societies” – Finding G.

¹²² Second Report on the Netherlands, Finding H.

¹²³ Second Report on the Netherlands, Finding I.

The Committee of Ministers plays a similarly important role in the monitoring of the ECRML to the role it plays in the monitoring of the FCNM, detailed *supra*. Its country-specific Recommendations certainly have the potential to give the findings of the Committee of Experts a valuable political imprimatur.¹²⁴ In practice, this potential has not been optimally exploited. As noted in respect of the CM's country-specific Resolutions concerning the application of the FCNM, the texts adopted by the CM are by their nature much more summary and essentialist than the more detailed, discursive reports drafted by the AC or Committee of Experts. Their function is not to provide explanatory detail but to emphasise priorities in a way that purports to be politically meaningful.

Notwithstanding these qualifications, the overall impact of the CM's Recommendations has been disappointing. They are, in general, even less detailed than the CM's Resolutions concerning the FCNM. Five of the 16 Recommendations adopted on the basis of first Periodical State Reports¹²⁵ and three of the 10 Recommendations adopted on the basis of second Periodical State Reports,¹²⁶ lacked any media-specific recommendations. In those Recommendations in which media-specific measures were urged, they were often vague or sloganistic or reworded versions of obligations to which the State Party in question had already committed itself.¹²⁷ As such, they have done little to raise general levels of understanding of the nature of States' obligations regarding the media under the Charter, let alone advance their implementation.

By way of illustration, the recommendations have tended to focus on "measures" (or even "concrete measures"¹²⁸) "to improve the presence of" specific languages on radio and television, without specifying what type of [concrete] measures or what types of broadcasting.¹²⁹ The CM has also, on other occasions, called on States authorities to "take a more active approach towards promoting the presence of the regional or minority languages in the media" and to adopt a "structured approach"¹³⁰ or a "more structured policy"¹³¹ for protecting and promoting the use of specific regional or minority languages in the media. Again, due to their generalistic formulation, such recommendations are of limited practical value. Similarly, the CM has recommended that State authorities "increase" radio and television broadcasting in specific languages, again without clarifying crucial aspects of its recommendation.¹³² Granted, the Committee of Ministers cannot be too directional in its recommendations for fear of overstepping its mandate and leaving itself open to accusations of interventionism. However, the trouble with recommendations such as these is that they are too open-ended to press States towards targeted action to remedy the identified shortcomings in the way they have been discharging relevant obligations under the Charter. Calls for "resolute action", for instance, on the Swiss authorities "to improve the provision for

¹²⁴ CM Recommendations on Hungary (on basis of second and third reports) – ability to receive broadcasts on ordinary radio sets, suitability of frequencies on which programmes are broadcast – very usefully picking up on and reinforcing strong message sent out in Committee of Experts' reports.

¹²⁵ Cyprus, Hungary, Norway, Slovenia and Switzerland.

¹²⁶ The Netherlands, Norway and Slovenia.

¹²⁷ Denmark (on basis of first report), para. 5; Sweden (on basis of first report), para. 3, (on basis of second report), para. 6; United Kingdom (on basis of first report), para. 4.

¹²⁸ Finland (on basis of first report), para. 2. This recommendation was directed at increasing the presence of Sami within the media and called for "concrete measures" for "the creation of newspapers and the broadcasting of regular television programmes".

¹²⁹ Armenia (on basis of first report), para. 3.

¹³⁰ Spain (on basis of first report), para. 4.

¹³¹ Denmark (on basis of first report), para. 1.

¹³² Austria (on basis of first report), para. 6.

Romansh on television and radio in the private sector”,¹³³ are an improvement on the lame phrases adverted to *supra*, but only by virtue of their ability to convey a sense of urgency as to the need for State action.

Having said all that, there have been several examples of the Committee of Ministers rising above platitudes and hollow-sounding rhetoric to make more purposive recommendations. For instance, it recommended that the Croatian authorities:

create institutional mechanisms that encourage direct participation of the users of regional or minority languages in planning, funding and organising cultural activities and in the field of the mass media (on basis of first report – para. 3)

In respect of the Netherlands, the CM has urged the relevant national authorities to “take into account the special needs of broadcasting in Frisian and consider increasing its financial support”.¹³⁴

8.3.3 New technology-driven challenges for the FCNM and ECRML

As societies come to depend increasingly on new technologies for expressive and communicative purposes, the need for the public to have non-discriminatory, effective access to those technologies rises accordingly. Following this logic, it seems reasonable to countenance situations where the inability to access relevant technologies could impair the enjoyment of the right to receive and impart information and ideas. The digital divide is a major concern for many minority groups because such groups are regularly disadvantaged in socio-economic and political terms. Concerns relate to the use of relevant technologies both to receive and to impart information and ideas. When such disadvantages are suffered by persons belonging to national minorities, they can tend to compound their political disenfranchisement, social exclusion and inability to effectively exercise their right to freedom of expression. This explains relevant drives for universal access and the general facilitation of access to communications technologies at IGO and State levels.

A further, important aspect of burgeoning technologies concerns the requisite knowledge and skills to use them. This concern is often explored under the headings of media or Internet literacy.¹³⁵ One definition of media literacy is “the ability to access, understand and create communications in a variety of contexts”.¹³⁶ Again, there is good reason to fear that many members of minority groups will lack familiarity and know-how when it comes to the latest communications technologies. However, this need not always be the case: a recent OFCOM study revealed, *inter alia*, that “Overall in terms of usage and general competence, minority ethnic groups have somewhat higher levels of media literacy compared to the UK as a whole across the digital platforms”.¹³⁷

More substantively, though, technological advances are ushering in some truly transformative changes to the media sector: increased reliance on “pull” (as opposed to “push”) technologies

¹³³ Switzerland (on basis of second report), para. 4.

¹³⁴ – on basis of first report, para. 3.

¹³⁵ See, for example, the Council of Europe’s Internet Literacy Handbook (2004).

¹³⁶ This is the definition elaborated by the UK’s converged regulatory authority, OFCOM, after formal consultation with stakeholders.

¹³⁷ OFCOM, “Media Literacy Audit: Report on media literacy amongst adults from minority ethnic groups”, 3 April 2006, p. 5.

and the concomitant increase in audience choice; proliferation of opportunities to engage in unmediated mass communication; virtual elimination of traditional constraints on communication of temporal and spatial factors, etc. The growth of niche markets, the waning of public reliance on general interest intermediaries and the growing incidence of advance individual selection of news sources are all serving to insulate citizens from broader influences and ideas. These individualising trends in new forms of broadcasting also engender social fragmentation, by eroding the potential for shared experience through broadcasting. As Cass R. Sunstein has argued, “[W]ithout shared experiences, a heterogeneous society will have a much more difficult time in addressing social problems.”¹³⁸

These issues are currently being examined by the Council of Europe’s Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN). The Report which forms the basis of this examination,¹³⁹ as well as its accompanying Comments,¹⁴⁰ provide valuable overviews of the nature of many of the technological advances that are prompting reconfigurations of relevant paradigms in broadcasting regulation and practice. As such, they provide a very useful basis for further analysis of the precise implications of such changes for minorities’ access to the media. Such further analysis would certainly be timely. Although originally uttered a few years ago (already), Beth Simone Noveck’s remark, “Though the future is digital, our thinking about regulation is analogue”,¹⁴¹ retains a large degree of validity today, especially in the applied sphere of minority broadcasting regulation and practice.

Notwithstanding significant new technological opportunities, many of the familiar characteristics of existing media and regulatory and other factors influencing media activities, continue to be *de rigueur*. Moreover, the overarching framework of human rights and fundamental values remains unaltered. However, this should not in any way downplay the importance of technology-driven changes. Such changes merit careful examination in their own right, but also in terms of the adaptive strategies which they often engender in the more traditional media.¹⁴² Thus, the continued relevance of many regulatory and other factors to minorities’ access to the media may themselves undergo qualitative changes and acquire new focuses of application. Participatory concerns, for example, are likely to shift to the elaboration of digital switch-over strategies, and concerns for visibility of media services are likely to shift to electronic programme guides (EPGs).

Conclusions

¹³⁸ Cass R. Sunstein, *Republic.com* (USA, Princeton University Press, 2001), p. 9. See further: Tarlach McGonagle, “Changing Aspects of Broadcasting: New Territory and New Challenges”, *IRIS plus*, Supplement to *IRIS – Legal Observations of the European Audiovisual Observatory*, 2001-10.

¹³⁹ Tom Moring, “Access of national minorities to the media: new challenges”, Report for the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)015;

¹⁴⁰ Tarlach McGonagle, “Comments on the report on ‘Access of minorities to the media: new challenges’”, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)016; Karol Jakubowicz, “Comments on the report on ‘Access of minorities to the media: new challenges’”, Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), Council of Europe, Doc. No. DH-MIN(2006)017.

¹⁴¹ Beth Simone Noveck, “Thinking Analogue About Digital Television? Bringing European Content Regulation Into The Information Age”, in Chris Marsden & Stefaan Verhulst, Eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 37-63 at 38.

¹⁴² See further, Tom Moring,

The ability to exercise the right to freedom of expression effectively is very often contingent on having equitable access to viable expressive opportunities/fora. Nevertheless, the protection of the right to freedom of expression under international law does not, in its current state of development, guarantee any freedom of forum as such. Nor does it ordinarily extend to include an individual or group right of access to a particular means of expression or to particular media. Such a right could only be construed in specific and exceptional circumstances, eg. monopoly situations in the broadcasting sector or systemic, discriminatory obstacles to access.

Although access to the media primarily concerns the right to freedom of expression, its other key concerns include the right to non-discrimination/equality and the right to effective participation in public life. This means that an extremely powerful coalition of rights is brought to bear on the question of access to the media. Moreover, this is an area in which it is imperative that the interpretive approach to relevant rights is dynamic. Provisions in international law promoting access to the media, such as they are, were drafted in an earlier era and have been left in the slipstream of technological and societal developments since. As those texts were intended to be evolutive and bases for the further development of human rights, they must be interpreted so as to reflect the profound changes that communicative practices have undergone in the intervening period. Authoritative interpretive texts should urgently be updated in order to engage with these new communicative realities in a way that anticipates further development and change.

At this juncture, the analysis again insists on the usefulness of the concept of media functionality: in light of the technology-driven changes to communicative practices, it is timely to assess the functionality of traditional and new media/communications technologies, specifically from the perspective of persons belonging to minorities. Again, the unpacking of the media into different types of media is a necessary analytical step: new technological capacities have enabled the explosion – in terms of volume and diversity – of media types and formats. Each offers a different level of functionality to its users.

The notion of access must also be broken down into its possible component parts: it, too, has been rendered more complex and layered due to technological developments. Access can denote access to regulatory mechanisms, institutional structures of the media, editorial and management processes, production facilities, software codes, transmission facilities, airtime, column inches or screen spaces or (in a more passive sense) to content. These distinctions largely mirror the emphasis in Chapter 7 on the distinct importance of gauging media- and information-related pluralism/diversity at the levels of source/ownership, outlet and content. Differentiation between qualitatively different types of access is therefore essential for evaluating their effectiveness in relation to the right of freedom of expression of persons belonging to minorities.

This Chapter's survey of jurisprudence emanating from the European Court of Human Rights, in particular, reveals that the Court appears to under-appreciate the instrumentality of access rights in rendering the right to freedom of expression effective in practice. In specific cases in which access to particular media has been denied, the Court has accepted far too unquestioningly that the mere availability of alternative means of expression meant that there had been no infringement of Article 10, ECHR. The critical questions that the Court should have asked – and should always ask – are whether the alternative means of expression are truly accessible to relevant parties, and whether they constitute viable alternatives. In this latter connection, an assessment of the functionality of the alternative means of expression is

necessary: to what extent do the specific characteristics of the medium correspond to the specific communicative needs of the person seeking to exercise his/her right to freedom of expression? The alternative means of expression do not have to be identical to the means of expression to which access has been denied, but they should offer rough equivalence in terms of purpose, functionality and reach. Owing to the fundamental, compositional and situational characteristics of minority groups, it is harder to match the purposive features, functionality and reach of particular means of expression with groups' specific communicative needs. The above considerations should therefore be integrated more systematically into the monitoring of treaties such as the FCNM and the ECRML.

To date, the monitoring of both treaties has led to improved understandings of the importance of access to the media for persons belonging to minorities. It has done so by linking access to the advancement of cultural objectives, the promotion of pluralistic tolerance and a number of other goals. It has also done so by identifying a number of issues that tend to hinder access to the media in various ways. However, the different ramifications of access to the media – traditional and new – remains under-explored (although the general trend is gradually improving). The monitoring bodies' engagement with differentiated forms of access to various means of expression needs to become more thorough and more systematic than is presently the case. One of the commendable achievements of the monitoring of the FCNM and ECRML to date has been the elucidation of the content of the right to freedom of expression for persons belonging to minorities/speakers of regional or minority languages. This has also led to the elaboration of a valuable body of best practices. A more detailed and coherent approach to questions of media purpose, functionality and reach would greatly enhance the quality and accuracy of evaluations of whether the right to freedom of expression of persons belonging to minorities is effective in practice.

Summary and conclusions

Addressing the problématique

To recapitulate, the main objectives of this study have been to: (i) identify and group; contextualise and describe, and (iii) critically evaluate prevailing international legal standards concerning the dynamic interface between the right to freedom of expression and the rights of persons belonging to minorities. The critical evaluation was concerned, above all, with the effectiveness of the right to freedom of expression of persons belonging to minorities in practice. The central research question pursued could therefore be formulated as follows: are the conceptualisation and calibration of relevant international legal standards sufficiently nuanced and robust to ensure that persons belonging to minorities are able to exercise their right to freedom of expression in an effective manner?

The third, and most challenging, prong to the central research question – the critical evaluation of standards – is all-important and will be the primary focus of these conclusions. Nevertheless, the importance of the first two components to the central research question should not be underestimated, owing to: (i) the disparate provisions of international standards that deal with relevant issues and the fact that they are binding on States to varying degrees; (ii) the multiplicity of contextualising factors that affect the framing and assessment of relevant international standards and how they are/ought to be interpreted - the interrelated character of all human rights; operative public values which shape the interpretive matrix; the relevance of media functionality and technological possibilities for the exercise of the right to freedom of expression in practice. This study expressly seeks to be theoretically informed and politically aware - an aim that necessarily leads to two further layers of contextualisation. All of these contextualising foci will feature recurrently in these conclusions.

Rights of persons belonging to minorities

Chapter 1 of this thesis begins by grouping and surveying the main rationales for the focus in international law on the protection of minority rights. In the interests of critical evaluation, it is important to consider the extent to which these rationales have informed the drafting and final wording of relevant international texts. The Chapter then examines the legal and political difficulties that explain why, to this day, no hard-and-fast definition of a “minority” has been enshrined in international law. It charts the development of the international protection of minority rights through focuses on the emergence of key texts and institutional developments. Drawing on each of these elements, it assesses the *status quo* and makes a number of recommendations for future progress in respect of the protection of minority rights.

As argued in Chapter 1, the specificity of minority rights is not that they are conceptually distinct from or additional to universal human rights; rather, their realisation implicates different, and often more extensive, State obligations. The specificity of minority rights is worth dwelling on – also here in the conclusions – because it is conceptually fundamental to this thesis.

One of the premises on which the concept of minority rights rests is that an overly individualistic approach to human rights protection can, in various respects, prove inadequate for guaranteeing the effective realisation of the human rights of persons belonging to minorities. The limitations of a system of protection of human rights that is exclusively

focused on individual rights are revealed by an examination of the most commonly invoked rationales for minority rights.

First, the most basic objective of minority rights is to ensure the existence and survival of minority groups *qua* groups (as opposed to their individual members). Second, minority rights are often regarded as an important mechanism for ensuring that the application of non-discrimination and equality provisions to persons belonging to minorities guarantee equality that is not merely formal but effective. This may necessitate specific measures in order to counteract “historical inequities” from which minority groups often suffer.¹ Such trends of injustice, traditional or established patterns of persecution and discrimination, engrained societal prejudice, and other socio-cultural, -economic and -political factors stemming from membership of a minority group can be more or less determinative of how a group is structured and situated *vis-à-vis* other groups in society. In turn, these structural considerations can affect the substance of rights and strategies for their protection. On such a reading, minority rights aim to approximate for persons belonging to minorities the circumstances (or “existential status”²) enjoyed by majority sections of the population. Thirdly and similarly, situational considerations arising from group membership can adversely affect the ability of members of a group to fully realise their individual right to cultural identity. The thickness of individual identity is a crucial notion for these purposes. This notion portrays identity not as simply innate, but as being shaped by a range of external influences, which often flow from group or societal associations.

A fourth principal rationale for minority rights recognises the importance of the group dimension to a range of individual rights. That recognition in no way presumes to affect the inalienability of individual human rights. Rather, it serves to stress the dual nature of minority rights or, in other words, their individual and collective dimensions. The symbiotic relationship between the individual and collective dimensions of minority rights is nicely illustrated by the example of linguistic rights. While the need for a right may be individual (eg. the right to use one’s mother tongue), the exercise of the right can conceivably be collective and therefore dependent on interaction with others (eg. the ability to *effectively* use one’s mother tongue). Cultural, participatory and associative rights also illustrate the inherent duality of minority rights. As a result of that duality, different strategies are required for the realisation of minority rights.

Despite these justifications for the protection of minority rights, the “fate of minorities” has suffered from congenital politicisation and prevarication. The consistent failure of international law-makers to forge a legally-recognised and -binding definition of a “minority” has merely exacerbated these congenital dispositions. The absence of a legally authoritative definition at the international level leaves the door open for subjective interpretations of the term at the national level. The erroneous – but prevalent – assumption that the official recognition of minority groups leads *ipso facto* to an obligation to guarantee a broad *corpus* of additional rights, or even to fuel the (latent) secessionist ambitions of minority groups, also explains the reluctance of many States to pursue the issue in international law-making fora. This fear is encapsulated in Heinrich Klebes’ reference to “the spiral ‘cultural autonomy, administrative autonomy, secession’”.³ As a general objection to minority rights, the

¹ *Bernard Ominayak and the Lubicon Lake Band v. Canada*, United Nations Human Rights Committee Communication No. 167/1984, adopted on 26 March 1990, para. 33.

² This term is central to Rolf Künneemann’s analytical model of human rights – see further, *infra*.

³ Heinrich Klebes, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, 16 *Human Rights Law Journal* (No. 1-3, 1995) pp. 92- , at 96.

presumption of a (direct) causal connection between the recognition of minority groups by States and their ultimate secession from the States that recognise them, is flawed. Minority rights are in no way contingent on the prior recognition of discrete minority groups by State authorities. It has long been held under international law that the existence of a minority is not a matter of law, but of fact.⁴ Nor can it be a matter of political discretion either.

For the purposes of international law, the term, “minority”, is not simply a description of a group that is numerically inferior to the majority population in a given society and whose members share certain characteristics or interests. Rather, it is understood as a group which is numerically inferior and distinguished on the basis of certain shared, specified – i.e., ethnic, cultural, religious or linguistic – characteristics. Furthermore, members of the group must harbour a sense of solidarity directed towards the preservation of their culture, traditions, religion or language. This is the general thrust of approximate definitions of a minority in intergovernmental circles, but slight variations in the formula do tend to come to the fore from time to time. Although a definition has never been formally adopted in a legally-binding multilateral treaty, the so-called “Capotorti definition” remains a central reference point in relevant debates. Under this approach, a combination of objective and subjective criteria is applied for the recognition of minority groups. The relevance of this approximate definition is relatively unchallenged at the European level, although regional and national (European) approaches do place heavier insistence on “national” minorities.

An important upshot of the foregoing is that relevant discussions at the highest level are (implicitly) framed in terms of a relatively narrow range of (supposedly) constitutive characteristics of minorities. In this connection, it is important to resist any implicit suggestion that collective identities are largely static. Characteristics which are constitutive are fundamental but not necessarily fixed and are capable of undergoing natural evolution or concerted development. Emphasis on the salient shared characteristics ascribed to all group members must not overlook the internal differentiation within the group. Rich literature exists in sociology and in political science demonstrating the thickness of identities and how they are shaped by myriad influences, including those relating to group membership. Definitional approaches to minorities should explicitly embrace the richness of that literature and reflect the importance of fluidity in notions of identity (i.e., the ability of individual identity to respond (and adapt) to changing personal and societal circumstances), which is of increasing relevance as networking, globalising trends in contemporary society continue unabated.

A more disconcerting problem with the definitional approach sketched above is the inclusion of a nationality criterion. This definitional element requires the prior presence (of unspecified duration) of a minority in a State in order for it to be recognised as a minority. The position taken in Chapter 1 is that it is inappropriate for the recognition of minority rights to be made contingent on such unspecified temporal considerations. As long as a minority group satisfies the other definitional requirements, its minority status should be recognised accordingly. The length of time a minority has been present in a State could, however, be a relevant consideration when assessing the extent of State obligations towards the realisation of a particular minority group’s specific needs. The question of classification of minorities (for the purpose of ascertaining their needs and the extent of State duties towards them) is a separate and subsequent question to the questions of definition and recognition. “New” minorities

⁴ Advisory Opinion of the Permanent Court of International Justice (PCIJ) in the *Greco-Bulgarian “Communities”* case: Advisory Opinion No. 17, July 31, 1930, *Series B, No. 17*, pp. 4 – 46, at p. 22. See also the corroborating statement at p. 27: “it is incorrect to regard the “community” as a legal fiction existing solely by the operation of the laws of the country.”

should therefore be included under relevant international standards of protection. This is the line that has been taken by the UN Human Rights Committee, but the question has proved divisive in numerous international fora. The highly politicised nature of the question should not detract from the imperative of securing human rights for everyone. The importance of an effective right to freedom of expression is very often most acute for “new” minorities, recent immigrants and non-citizens, who are otherwise politically disenfranchised and are generally excluded from expressive fora and participatory structures and processes in public life. These arguments explain this study’s insistence on the inclusion of “new” minorities under relevant international standards of protection.

Pluralistic tolerance and relational aspects of rights

The co-existence of minorities with other societal groups means that their rights must be recognised and realised in a manner that reflects the realities of pluralistic society. As the terms “pluralism” and “tolerance” tend to be invoked in the preambular provisions of international treaties (as opposed to their operative provisions), the fullness of their respective meanings is under-appreciated. The exploration of the theoretical ramifications of pluralism and tolerance elucidates the content of each. Chapter 2 merges the complex concepts of pluralism and tolerance and develops the concept of “pluralistic tolerance”, which it styles as an operative public value, *pace* Parekh. To style “pluralistic tolerance” as an operative public value is to insist that it is more than a guiding interpretive principle for human rights generally and minority rights in particular. It is to point to the need to operationalise the value of “pluralistic tolerance”; to incorporate it in regulatory, policy and institutional practice so that it is meaningfully applied. This approach logically implies the facilitation of expressive and dialogical fora. A key purpose of “pluralistic tolerance” is to protect the vigour of public debate and uphold the importance for democratic society of contestation and criticism that takes place within the limits of appropriate legal standards.

This thesis takes as its conceptual point of departure the universality, indivisibility, interdependence and inter-relatedness of human rights as affirmed, *inter alia*, in the Vienna Declaration (1993). Such an approach allows for the key focuses of the thesis – minority rights and freedom of expression – to be analysed not only in terms of their own intersectional aspects, but also in the broader context of their respective relationships with other human rights. This is important because it is more conducive to rounded and coherent reflection than an approach based on separate, particularised lines of enquiry. It allows for closer scrutiny of the abrasive and synergic aspects of the relationship between the right to freedom of expression, the rights of persons belonging to minorities and other rights, like those prioritised in Chapter 3: non-discrimination/equality, participation, education, culture, religion and language. The right to freedom of expression clearly intersects with the added value of the minority-specific dimension to each of these rights. The presumptive coherence of all human rights does not preclude the possibility that their actual interplay, in specific circumstances, could involve varying degrees of friction. This explains the importance of pluralistic tolerance as an operative public value and as a guiding interpretive principle. Pluralistic tolerance can be considered “comprehensive” when it is meaningfully applied across the whole spectrum of human rights, and protects the space for frictional interaction between rights without vitiating the rights of their content.

Freedom of expression

The right to freedom of expression rests on different theoretical bases with varying levels of complementarity. Chapter 4 demonstrates that each of the traditionally-invoked rationales for freedom of expression has clear relevance for minorities – both in terms of their individual members and of their viability as collectivities. The rationale of self-fulfilment is particularly important for minorities which are distinguishable from other sections of the population by virtue of their linguistic and/or cultural identity. Their individual and collective self-fulfilment is contingent on their ability to fully exercise their right to freedom of expression in their own language(s) in public and in private and also to articulate and thereby develop and shape their cultural identity. As such, freedom of expression is vital for the protection, consolidation, (inter-generational) transmission, development and promotion of minority languages and cultures. The other main rationales for freedom of expression can be loosely grouped together as advancing (i) the quest for truth/avoidance of error and (ii) participation in democratic society. Again, the ability to receive and impart information and ideas in minority languages can determine the effectiveness of minority participation in public life. Moreover, communicative interaction is imperative in (pluralistic) democratic society, for example, for the preservation and cultivation of inter-group understanding and tolerance. In light of the foregoing, it is necessary to explore the theories and practical modalities of achieving such inter-group harmony in some detail. Pluralistic tolerance in society is undergirded by information- and media-related pluralism.

The ability of persons belonging to minorities to exercise their right to freedom of expression in an effective manner is largely determined by the availability and suitability of expressive fora and media. In this connection, it is necessary to disaggregate the concept of mass media and to conduct specific analyses of particular media philosophies/practices (eg. public service broadcasting, community media, transnational media and commercial media) and their level of functionality for minorities. Different types of media correspond to varying degrees to the various but specific communicative needs and preferences of different minority groups in different situations. Degrees of media functionality are therefore crucial considerations in any assessment of whether the right to freedom of expression of persons belonging to minorities is exercised effectively by them in practice. This observation explains the centrality of media functionality to Chapter 4 in particular, but also to the thesis as a whole.

This analysis takes place against the background of the broader enabling environment for media freedom. In other words, the impact of regulation and regulatory policy on discrete media sectors, with particular emphasis on minorities, is evaluated. The analysis necessarily reckons with the advent of new media technologies (eg. increased convergence of media and increased reliance on user-generated content and the demise of general interest intermediaries) and new regulatory paradigms (eg. co-regulation), both of which have far-reaching implications for practices of communication and participation, including for persons belonging to minorities.

Mapping relevant international standards

The right to freedom of expression, as vouchsafed by international law, comprises a number of key components: the right to hold opinions and to seek, receive and impart information of all kinds regardless of frontiers. The full realisation of the right to freedom of expression necessarily involves different emphases on those individual components. Taken together, those components amount to more than the mere sum of their parts. They cover extremely

dynamic processes which typically involve not only speakers and listeners, but also, very often, third parties who are not directly targeted by particular instances of expression, but for whom that expression may nonetheless have implications. The rights – and interests – of persons seeking, imparting and receiving information and opinions, as well as those who are indirectly affected by the same, do not always coincide. While it is important to distinguish between these sometimes divergent and sometimes even conflicting rights and interests ordinarily, the need to do so increases when parties in question are persons belonging to minorities. The reason is that certain group-specific characteristics or situational realities can heavily influence whether or not the rights in question can be exercised effectively by members of the group and the nature and extent of State obligations to ensure that the rights are fully realisable for members of the group.

The range of State obligations to guarantee the right to freedom of expression for persons belonging to minorities implies both preventive and promotional strategies for the full realisation of the different components of the right. Chapter 5 argues that it is important to eschew a binary analytical framework dividing State obligations into the categories of “positive” and “negative”, as the distinction between both categories is often fuzzy. It is tidier, conceptually, to view State obligations to respect, protect and fulfil human rights as corresponding to points along the continuum of so-called “negative” and “positive” State obligations. By using the tripartite typology of State obligations to respect, protect and fulfil rights, it is possible to apply greater analytical and evaluative nuance than under the negative/positive dichotomy. In practice, the tripartite typology has been used most extensively by the CESCR. By extrapolation from its application of the typology to economic, social and cultural rights, Chapter 5 identifies a number of programmatic measures that could/should readily be adopted by States authorities in order to guarantee the effective exercise of the right to freedom of expression by persons belonging to minorities. The requirement that States adopt such measures flows from their generic duty to secure human rights for everyone and also specific obligations entered into under specialised minority treaties such as the FCNM.

Whereas the modern international human rights regime is primarily individualistic in character, pertinent treaties and their enforcement/monitoring mechanisms also have the wherewithal to engage with the specific implications of membership of particular, discrete groups in society for the exercise of human rights by members of such groups. The engagement in question can be based on treaties or treaty provisions explicitly focusing on minorities, or derived from other treaties or treaty provisions that are more general in their orientation. Explicit treaties or treaty provisions do not necessarily guarantee more effective engagement with minority rights than the engagement provided for by treaties or treaty provisions that are more general in focus. Very often, the “minority-sensitivity” of the interpretation of relevant norms and the nature of the mechanisms for their implementation are determinant.

The great challenge for international adjudicative bodies is to develop doctrine exploring and elucidating minority rights, while one of the challenges for international treaty-monitoring bodies is to identify and map out best relevant standards at the national and sub-national levels with a view to bringing them to prominence and replicating them at the level of international standard-setting. These distinct roles should not be confused; court decisions are essentially declaratory and courts should not ordinarily be in the business of making policy recommendations.

Although standard-setting exercises by competent bodies can usefully fill the interstices of international treaty law and seek to spell out in greater detail the implications of a right for a variety of parties and in a variety of concrete situations, such exercises need to be conducted with greater circumspection than is often the case at present. When standards pertaining to a particular treaty are elaborated by a competent court or a designated monitoring body, those standards must respect their anchorage in precise treaty provisions. Any standard-setting that does not follow the procedures germane to formal treaty drafting and amendment is subject to inherent limitations. When standards are elaborated extraneously to (specific) treaties, they must nevertheless be mindful of the legal standards enshrined in relevant specific treaties, otherwise it is likely that a problematic hiatus will result between actual legal standards and popular (mis-)understandings of the same.

These concerns have already been raised in Chapter 6 in respect of departures from legally-recognised limitations on the right to freedom of expression. ICERD sits somewhat uneasily with other leading international human rights treaties as regards its engagement with the right to freedom of expression. The operative article in ICERD, Article 4, provides for restrictions on the right to freedom of expression that go beyond those set out in any other comparable treaty. Article 4 is a composite and convoluted article and is widely regarded as having been poorly drafted. Nevertheless, the mitigating influence of Article 5, ICERD, could make the situation workable, but only if CERD would relinquish its hitherto overly strict interpretation of State obligations under Article 4. Its “strict liability” approach to expression is unnuanced and in conflict with prevailing international standards on freedom of expression. It refuses *ab initio* to contextualise expression or to assess or quantify its (likely) harmful impact. Furthermore, CERD is also guilty of mis-applying the standards enshrined in ICERD, thereby further compounding uncertainty as to the precise scope of those standards. As revealed in Chapter 6, two of CERD’s key General Recommendations misquote the offences created under Article 4 and thereby misrepresent the nature of the State obligation(s) in question. The consequences of these errors were quick to ripple into other influential fora, as other bodies did not notice the mistake and quoted it in their own texts (eg. the EU Network of Independent Experts on Fundamental Rights). ECRI, too, has not always been rigorous enough in its standard-setting work. It has also misquoted its own standard-setting work and willy-nilly downplayed the importance of freedom of expression.

Restricting expression in order to protect minorities

Under international law, the most fundamental obligation on States in respect of freedom of expression and the protection of minorities is to prohibit expression that incites to genocidal acts, racism or hatred against them. The types of incitement follow a general pattern, but their definitional contours are sketched differently in different treaties. Those contours tend to curve in the same direction, with the exception of ICERD, which encroaches further on the right to freedom of expression than any other international treaty with a comparable number of ratifications. There are several reasons for this, including: the difficulty of reaching political compromise on substantive issues (most notably squaring the prevention of racial discrimination with the rights to freedom of expression and association); the imperfect drafting which sought to express those compromises; the over-zealous interpretation of its provisions and the confusion resulting from the mis-application of relevant standards.

Discussions centring on the outer limits of protected expression are further complicated by the increasing tendency of international courts, adjudicative and monitoring bodies, law- and

policy-makers to take “hate speech” as the conceptual focus of their discourse. The term, as such, is not defined in any legally-binding international instrument, which means that its precise scope is somewhat speculative. At its core, “hate speech” is clearly about expression that is motivated by some kind of racial or kindred animus. However, the determination of its definitional perimeter is not straightforward. As explicated at length in Chapter 6 in the context of the jurisprudence of the European Court of Human Rights, because the term is not organic to the ECHR, it has not undergone the same natural interpretive growth as other terms that do figure in the original text of the Convention. Instead, the term was imported into the case-law of the Court in 1999⁵ and has been invoked – sometimes nervously⁶ – on a regular basis since. In the absence of a definition of the term, the Court is quite right to be nervous about its application. The Court sometimes refers to the Committee of Ministers’ Recommendation (97) 20 on “Hate Speech”, which *describes* the term (albeit for the purposes of the application of the principles set out in the Appendix to the Recommendation) as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.⁷

An authoritative articulation of what exactly is meant by the term “hate speech” will necessarily have to precede its usage in a more confident way by the Court. The sudden, unexplained introduction of the term, without setting out its definitional parameters, is puzzling, given that the case-law of the Court prior to 1999 had already engaged – effectively – with the same kind of issues. That earlier case-law was grounded in more familiar and patiently developed terminology.

As demonstrated in Chapter 6, the need for caution is underscored by the origin of the term in critical race scholarship emanating (predominantly) from the United States. Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim’s perspective are given pride of place. It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism]. This suggests that the term has traditionally had a wider meaning than is commonly recognised; it cannot be assumed that it is straightforwardly synonymous with prevailing international legal standards on the restriction/prohibition of racist and other kinds of hateful expression. Critical race theory therefore draws attention to the variety and complexity of harms suffered by victims of “hate speech”: psychic harm, damage to self-esteem, inhibited self-fulfilment, etc.

Partly in recognition of the complexity of relevant harms, different treaties and bodies have different approaches (conceptual and practical) to the question of legitimate restrictions on freedom of expression.⁸ The challenge is therefore to identify “which criteria allow us to distinguish between harms that justify restrictions and those that do not”.⁹ The notion of “abusive speech”¹⁰ could prove useful in this connection: it allows for a distinction to be made

⁵ It would appear that the term was first used in the cases, *Sürek v. Turkey (No. 1)* and *Sürek & Özdemir v. Turkey*, Judgments of the European Court of Human Rights of 8 July 1999. See: para. 62 and para. 63, respectively.

⁶ See, for example, *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.

⁷ Appendix to Recommendation No. R (97) 20, adopted on 30 October 1997.

⁸ See further, *supra*.

⁹ David Kretzmer, “Freedom of Speech and Racism”, 8 *Cardozo L. Rev.* 445 (1987), at p. 478.

¹⁰ Jean-François Gaudreault-DesBiens, “From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide”, (2000) 46 *McGill L.J.* 121, at p. 133.

between expression that offends human dignity and should be prohibited and expression that “offends, shocks or disturbs” certain sections of the population and should be tolerated in the spirit of broadmindedness that is a prerequisite to democratic society. The importance of the consequences of expression should also be stressed, as well as the need to develop suitable methodological tools for the evaluation of such consequences.

When applying their normative principles to specific factual circumstances, adjudicative bodies should give sufficient weighting to factors such as the intent of the speaker and “contextual variables”.¹¹ The latter could include the nature and impact of the medium used to convey the expression; audience-related considerations; socio-political factors; the nature, necessity and proportionality of the measure(s) employed to restrict the perceived harm involved; the triviality/seriousness of the perceived harm and the probability that it would in fact result from the impugned expression. Depending on the findings of such an assessment, it could become clear that a variety of policy measures and practical strategies could be relied upon to restrict the dissemination of objectionable expression. Whereas legal prohibitions are justified in respect of “abusive speech” (as defined *supra*), alternative, i.e., non-legal, measures can prove particularly effective in curbing the dissemination of expression which would not fall foul of existing restrictions on freedom of expression, but which is nevertheless harmful. Again, these conclusions plead for the concerted application of negative and positive measures in a comprehensive, but differentiated, approach to legally-based limitations on freedom of expression.

A significant emphasis on *positive* State obligations can be detected in international human rights law. The Durban Declaration and Programme of Action and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating hate speech by targeting the hatred and intolerance from which it spawns. Their strategies include the promotion of expressive opportunities, especially via the media, for persons belonging to minorities. The promotion of tolerance and of intercultural understanding and dialogue is similarly prioritised. Measures advocated include specialised training for journalists on intercultural themes, ensuring access to media for minorities or other groups, funding of various initiatives promoting ethical journalism and programme production, etc., as detailed in Chapter 6.

Another topical source of considerable confusion about the delineation of the outer limits of free expression concerns the protection of religious beliefs. Freedom of religion – as guaranteed by international law – does not include the right not to be offended in one’s religious beliefs or sensibilities. Instead, the main components of the operative right are to hold or change one’s religion or belief and to manifest one’s religion or belief, “in worship, teaching, practice and observance”.¹² As such, it would require a high level of abusive expression to prevent or restrict the exercise of any of the constituent parts of the right to freedom of religion. Despite significant political gains achieved by the concerted international campaign against the so-called “defamation of religions”, relevant legal standards do not protect religions *qua* belief systems from “defamation” or virulent criticism. Nor are spiritual leaders beyond the reach of criticism, legally-speaking, although the drafting history of an ultimately unfinished and unadopted UN Treaty on Freedom of Information favoured the inclusion of such protection for religious leaders as a permissible restriction on the right to freedom of expression.

¹¹ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

¹² Article 9(1), ECHR.

A more promising angle of approach to the question therefore lies within the right to freedom of expression itself. The exercise of the right is governed by respect for certain duties and responsibilities and the right can also be limited, where necessary, in order to protect the rights of others. Hence, the European Court of Human Rights has elaborated a line of jurisprudence that seeks to stress that the gratuitous offence of religious beliefs and symbols cannot be justified by appealing to the right to freedom of expression. As Chapter 6 shows, this line of jurisprudence is not always consistent and it falters in places. Nevertheless, its general message is clear, even if greater refinement and consistency is required in the methodology it applies to the balancing of relevant rights and interests.

Whereas a legalistic analysis of these flash-points in the penumbral regions of freedom of expression can prove dispositive of certain controversies, the same can hardly be said of socio-political perspectives. In any given society, different groups may have different understandings and expectations of the real and symbolic functions of the law. The *causes célèbres* of *The Satanic Verses* and the “Mohammed Cartoons” are examples of *inter alia*, different, or rather, opposing perspectives on the limits of freedom of expression. Fora for expression and communication (i.e., exchange of information and opinions) have great potential for fomenting societal cohesion. This explains why increased attention for the role of different types of dialogical fora in the building of inter-ethnic knowledge, understanding and respect needs to be emphasised. Support for, and the development of, such fora are a necessary measure for giving effect to the “operative public value” of comprehensive pluralistic tolerance.

Facilitating expression of minorities

Under international law, the most important obligations on States to facilitate the expressive rights of persons belonging to minorities are the promotion of media- and information-related pluralism and access to expressive fora, especially various media. Both pluralism and access are vitally important for linguistic and cultural identity – their preservation, transmission and development, but also for rights relating to effective participation in public life, religion and education. The different components of the right to freedom of expression are also relevant for the discharge of positive State obligations: pluralism is important mainly for the right to seek and receive information and ideas, whereas access is primarily geared towards the right to impart information.

It is a well-established principle of international human rights law that States are ultimately responsible for upholding pluralism in society generally and in the media sector in particular. Societal pluralism and media pluralism are not identical, but they are related in some important respects. The concept of comprehensive pluralistic tolerance is developed to describe the relationship between more generic notions of pluralistic tolerance and the more applied meaning of media pluralism. Information- and media-related pluralism is best gauged by integratively assessing substantive and structural features of a given mediascape and by having due regard for media functionality. Different media types and formats are differently suited to the fulfilment of individual informational, communicative, cultural and linguistic needs and preferences. These considerations apply, *mutatis mutandis*, to minorities.

The right to freedom of expression can only be fully realised when there is widespread access to a diverse range of expressive opportunities and sources of information and opinions.

Quantitative and qualitative considerations are determinative here. Chapter 7 usefully disaggregates the concept of information- and media-pluralism and explains its importance at various levels, in particular source/ownership, outlet and content. These levels span structures, processes and output, each of which offers different opportunities for the participation of persons belonging to minorities. As argued in Chapter 4 in respect of the usefulness of a disaggregated analytical approach to the media, the disaggregated analysis of information- and media-related pluralism conducted here allows for probing evaluation. As such, the systematic application of this disaggregated analytical approach to the monitoring of relevant provisions of relevant treaties would greatly enhance its contribution to assessments of the effectiveness of operative treaty provisions in practice.

Chapter 7 also advocates a disaggregated approach to cultural diversity, along the lines of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and various other standard-setting texts from the Council of Europe. Cultural diversity entails the existence and expression of multiple cultural identities. Cultural diversity is therefore enabled by a societal climate of pluralistic tolerance and by the transmission of cultural expressions via diverse media and in diverse fora. The disaggregated approach pursued here allows for greater analytical precision as regards the effectiveness of relevant instruments in the fulfilment of their objectives. The weak wording throughout the UNESCO Convention has had debilitating effects on the nature and extent of the legal obligations to which it creates/recognises for States Parties. As such, its main worth lies in the disaggregation of measures that could be used to advance its central goal. This is also the prime value of the CoE's relevant standard-setting texts. Such disaggregation facilitates the identification and compilation of best practices for States which are amenable to the objective of protecting and promoting cultural diversity. Other legally-binding regulations, particularly those governing the European broadcasting sector do precious little to promote cultural diversity. Rhetoric simply does not match regulatory reality. This failure to engage with relevant objectives is disappointing as the media in general, and broadcasting in particular can have a huge impact on the vitality of a culture and its dissemination. This is particularly true of the cultures of persons belonging to minorities.

As well as guaranteeing media pluralism, the other main obligation on States to facilitate the expressive rights of persons belonging to minorities is to ensure access rights. This obligation is an obvious complement to its obligation to safeguard information- and media-related pluralism. The right to freedom of expression would not be effective if discriminatory practices were to prevail in relation to access to the media, or influential media. The right to effective participation in public life is obviously also implicated here. This means that a powerful triumvirate of rights (expression, non-discrimination and participation) are brought to bear on the issue of access to the media. This is without prejudice to the relevance of the possible cultural, linguistic and religious goals that might be pursued after having secured access.

Whereas there is no right to freedom of expression via a particular medium of one's choice, as such, adequate access to expressive opportunities and discursive fora requires the development and enforcement of certain procedural safeguards (at least). This is especially true for persons belonging to minorities; because of situational factors, established patterns of discrimination and persecution, etc., additional measures may often be required to ensure that their access to expressive fora are also real and effective. A "taxonomy of access"¹³ –

¹³ Monroe Price, "An Access Taxonomy", in Andras Sajó, Ed., *Rights of Access to the Media* (The Hague, Kluwer Law International, 1996), pp. 1-28.

enumerating the many different forms that access could take – indicates that measures such as the right of reply and public-access channels, have considerable potential for persons belonging to minorities.

Ownership, licensing and miscellaneous regulatory provisions can affect access in a variety of ways. The proportionality of regulation should always be assessed in light of a wide range of factors, including the existing political, social, religious, cultural and linguistic environment; the number, variety, geographical reach, character, function and languages of available broadcasting services, and the rights, needs, expressed desires and nature of the audience(s) affected.

Human rights are inherently dynamic and it is unsurprising that the advent of new information and communications technologies would have implications for rights and give rise to new applications of existing rights. It can at least be argued that the effective exercise of the right to freedom of expression (especially the right to seek and receive information) in the digital age is increasingly contingent on access to new technologies, the acquisition of relevant technological skills and fluency in media literacy, etc. These factors which increasingly determine the quality or effectiveness of access need to be consistently emphasised in policy- and law-making, and applied by adjudicative and monitoring bodies. They are precisely the kind of measures required to render principles of and provisions for freedom of expression operative and effective; to bridge the gap between theory and practice.

Media functionality, including a focus on the impact of new media technologies on communicative practices and regulatory approaches, is not merely of theoretical interest. The systematic inclusion of such considerations would be of enormous benefit for the analytical and insightful quality of the monitoring of international human rights treaties containing provisions concerning the right to freedom of expression. The organic vitality of those treaties and the rights they safeguard is not always reflected in authoritative interpretations of the same. For instance, the General Comments on Articles 19 and 20, ICCPR, date from 1983. Since then, staggering technological and societal changes have taken place with far-reaching implications for how information and ideas are sought, received and imparted. Technology is very often a crucial determinant of the effectiveness of the right to freedom of expression in concrete situations. It is therefore imperative that relevant legal provisions reflect contemporary realities; this necessarily involves engaging with the (varying levels of) functionality of old and new media technologies.

Final remarks

In recent times, progress has steadily been made in terms of the reduction of conceptual and political resistance to minority rights' protection at IGO-level. An increasing number of standard-setting texts provide a largely consistent framework for the protection of minorities. Not all of those texts are legally-binding on States and those that are designed to be legally binding have not necessarily been signed or ratified by States with poor track-records in minority rights' protection. Another problem is that far-reaching reservations can effectively lead to the emasculation of States' substantive obligations under relevant treaties. Nevertheless, all of the relevant texts contribute in their own way to broadly consistent goals centring on the advancement of minority rights.

Progress can also be measured in terms of the extent to which minority rights have been mainstreamed within international human rights law and within key bodies involved in the protection and promotion of human rights standards. The growing number of agencies devoted to the cause is further evidence of the raised profile enjoyed by minority rights of late. Having largely achieved acceptance in international and regional European standards, the next challenge facing minority rights is their consolidation at the national and sub-national levels. In the spirit of the universality, indivisibility, interdependence and inter-relatedness of human rights, it is necessary to examine in a meticulous manner how all human rights relate in their respective ways to minority rights. This thesis has sought to do so in respect of the right to freedom of expression, a multi-layered, high-valency right. The resulting analysis has demonstrated that the interface between the two is extremely dynamic. The interplay between minority rights and the right to freedom of expression is occasionally frictional, but mostly generative of powerful synergies.

It is simply not possible to meaningfully condense an evaluation of the enormous complexities and extensive dimensions involved in the *problématique* of this thesis into a couple of paragraphs. These conclusions have condensed the analysis and arguments of the thesis. They have explained a number of strengths of the current set of international standards protecting and promoting the right to freedom of expression of persons belonging to minorities. They have also identified and criticised a long list of its shortcomings. Throughout the thesis, including its conclusions, the effectiveness of the right to freedom of expression is consistently contextualised by references to:

- Specific rationales for freedom of expression and minority rights
- Assessment of particular communicative needs of minorities, based on salient group characteristics and situational specificities
- Comprehensive pluralistic tolerance as an operative public value
- Interrelatedness and interdependence of all human rights
- Interplay between freedom of expression, minority rights and other human rights
- Enabling environment and broader societal considerations
- Media functionality (including its technology-driven dimensions)
- Dynamism of human rights
- Qualitative and hierarchical distinctions between applicable legal and other standards, coupled with an understanding of their purpose, potential and limitations

The systematic integration of these considerations, along the detailed lines drawn in this thesis, into interpretive and monitoring exercises of relevant international standards, would greatly enhance their consistency and clarity.

By critically evaluating all of these issues throughout the thesis, the journey undertaken ultimately also became its destination.

Samenvatting in het Nederlands

Doelstelling

Dit proefschrift heeft als belangrijkste doelen het identificeren, in de context plaatsen, beschrijven en kritisch evalueren van de internationale regelgeving betreffende het raakvlak tussen het recht op vrijheid van meningsuiting en de rechten van personen die tot een minderheidsgroep behoren. Het raakvlak tussen deze rechten is nogal dynamisch, maar tot voor kort tamelijk onderbelicht.

Definitie-kwesties

De internationale regelgeving erkent geen concrete bindende definitie van het begrip “minderheid”. Gezien het gebrek aan een wettelijke definitie, wordt de zogenoemde Capotorti-definitie als richtinggevend beschouwd. De Capotorti-definitie legt de klemtoon op een combinatie van subjectieve en objectieve overwegingen. Volgens deze invloedrijke definitie, dienen minderheidsgroepen:

- getalsmatig kleiner te zijn dan de rest van de bevolking
- niet (politiek) dominant te zijn
- bepaalde kenmerkende eigenschappen te hebben, te weten etnische, religieuze of linguïstische eigenschappen
- saamhorigheid te vertonen, gericht op het handhaven van hun cultuur, tradities, geloof of taal

Als minderheidsgroepen andere gemeenschappelijke kenmerkende eigenschappen hebben dan de bovengenoemde, dan mogen ze – in beginsel – zich niet beroepen op minderheidsrechten. Deze rechten vormen een integraal onderdeel van het internationale stelsel ter bescherming van de mensenrechten van individuen, maar minderheidsrechten hebben ook een belangrijke collectieve dimensie.

Theoretische grondslagen

(i) De rechten van personen die tot een minderheid behoren

De belangrijkste theoretische grondslagen voor de rechten van personen die tot een minderheid behoren kunnen als volgt worden samengevat:

- het voortbestaan van minderheidsgroepen *qua* groepen
- non-discriminatie/gelijkheid
- het bevorderen van de culturele identiteit van personen die tot een minderheid behoren
- extra – collectieve – dimensie aan mensenrechten van individuen
- het koesteren van pluralisme en tolerantie in een democratische samenleving en het voorkomen van conflicten

(ii) Het recht op vrijheid van meningsuiting

De belangrijkste theoretische grondslagen voor de vrijheid van meningsuiting kunnen als volgt worden samengevat:

- autonomie/zelfontplooiing
- ontdekking van waarheid/voorkoming van fouten
- deelname in de democratische samenleving
- wantrouwen jegens de regering/“slippery-slope” argument
- tolerantie en maatschappelijke verstandhouding/voorkoming van geschillen
- bevordering van andere mensenrechten
- diverse derivatieve redenen

Dit proefschrift geeft een nadere uitleg van de specifieke relevantie van deze grondslagen voor personen die tot een minderheid behoren en past deze toe. Het gaat ook in op de wijze waarop deze theorieën hun weerslag hebben gekregen en uitgewerkt zijn in de internationale (en vooral Europese) regelgeving, zowel in verdragen als in zogenoemde “soft law” (d.w.z. politieke aanbevelingen en verklaringen die niet juridisch bindend zijn).

Functionaliteit van de media

De media zijn uitermate geschikt voor het verspreiden van informatie, ideeën en denkbeelden. Ze vervullen bovendien heel belangrijke functies in een democratische samenleving, waarbij het gaat om hun status als:

- “The Fourth Estate”
- publieke waakhond
- forum voor discussie
- kanaal voor informatie-verstrekking
- hulpmiddel bij opinie-vorming
- deelname in het publieke debat
- cultuurkroes

De media spelen een cruciale functionele rol in het verwezenlijken van het recht op vrijheid van meningsuiting. In het kader van deze functionele rol die aan de media wordt toegeschreven, maakt men een onderscheid tussen:

- verschillende soorten media: (druk)pers, omroep, “nieuw”/online
- verschillende doelen: publiek, commercieel, “not-for-profit”
- verschillende niveau’s van bereik: nationaal, sub-nationaal, grensoverschrijdend

De functionaliteit van de media vanuit het perspectief van minderheidsgroepen wordt mede bepaald door een combinatie van deze factoren. Afhankelijk van de technische aard, doelstelling en bereik van de media, kunnen ze meer of minder geschikt zijn voor bepaalde minderheidsgroepen.

Toegang tot de media is dus bijzonder belangrijk voor minderheidsgroepen. Hun toegang tot de media moet echter aansluiten bij hun specifieke behoeftes en belangen die (grotendeels) door de kenmerkende eigenschappen van de groep bepaald worden.

Pijlers van het onderzoek

Ondanks het potentieel van de media als communicatiemiddel en om de vrijheid van meningsuiting van personen die behoren tot minderheidsgroepen te bevorderen, kunnen de media ook een negatieve rol spelen ten opzichte van (leden van) bepaalde minderheidsgroepen. Men kan namelijk misbruik maken van de media om beledigende, kwetsende, discriminatoire, racistische en haatzaaiende uitingen en ideeën te verspreiden.

De twee hoofdpijlers van dit proefschrift zijn enerzijds het reguleren en eventueel beperken van de vrijheid van meningsuiting om minderheidsgroepen te beschermen, en anderzijds het waarborgen en stimuleren van (i) pluralisme en diversiteit in de media-sector, en (ii) toegang tot de media voor minderheidsgroepen.

Een kritische analyse van uitwerking van deze thema's in een selectie van Europese en internationale verdragen staat centraal in dit onderzoek:

- Europees Verdrag voor de Rechten van de Mens
- Europees Handvest voor Streektaalen of Talen van Minderheden
- Kaderverdrag inzake de Bescherming van Nationale Minderheden
- Verdrag inzake de Voorkoming en de Bestrafing van Genocide
- Internationaal Verdrag inzake de Uitbanning van Alle Vormen van Rassendiscriminatie
- Internationaal Verdrag inzake Burgerrechten en Politieke Rechten
- Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten
- UNESCO Conventie ter Bescherming en Promotie van de Diversiteit van Culturele Expressies

De analyse wordt onderbouwd door veelvuldig te verwijzen naar wetenschappelijke theorieën, vooral op het gebied van mensenrechten, media-sociologie en politieke filosofie, waardoor het onderzoek een belangrijk interdisciplinair karakter krijgt.

Conclusies

Dit proefschrift pleit voor o.a.:

- het moderniseren van de internationale regelgeving inzake het recht op vrijheid van meningsuiting zodat er meer rekening gehouden wordt met de impact op communicatieprocessen van technologische vooruitgang;
- het duidelijk afbakenen van de grenzen van de vrijheid van meningsuiting ten opzichte van uitingen waarvoor de internationale wetgever geen bescherming erkent (bijv. racistische uitingen en “hate speech”);
- het verduidelijken van wettelijke definities van “minderheidsgroepen” en meer erkenning in dit verband voor “nieuwe” minderheden (d.w.z. migranten, e.d.);
- het expliciteren in relevante internationale teksten van de veelzijdige relaties tussen het recht op vrijheid van meningsuiting, de rechten van personen die tot een minderheidsgroep behoren, en andere verwante fundamentele rechten, waaronder:

gelijkheid/non-discriminatie, vrijheid van godsdienst, vrijheid van vereniging en vergadering, en diverse rechten op het gebied van taal en cultuur.

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