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TOWARD A DEFINITION OF NATIONAL MINORITY

JOHN R. VALENTINE*

I. INTRODUCTION

Viktor Orban, Hungary's former prime minister, recently said that protecting national minorities is a "European value"¹ and one that Hungary will work to have enshrined in the constitution of the European Union.² But what is a "national minority"? Is a purely ethnic, religious, or linguistic minority a national minority? If not, how can we tell the difference between these minorities and a national minority?

There appears to be no easy answers to these questions. The Council of Europe Framework Convention for the Protection of National Minorities (the "Framework Convention, or the "Convention"), which came into effect in 1998,³ "contains no definition of national minorities, *none having received the consent of all Council of Europe member states.*"⁴ Because there is no agreed upon definition of national minority, we are left to wonder: What is this "European value" that is to be protected and what minorities may receive protection under the Framework Convention? This paper will discuss the possible meaning of the term "national minority, with special emphasis given to the Framework Convention for the Protection of National Minorities.

I will argue that a national minority is distinct from an ethnic, religious, or linguistic minority,⁵ and I will suggest some possible characteristics that can be looked at to discern what is a national minority. This paper will begin in Part II

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1. Ahto Lobjakas, *Hungary: Ex-Prime Minister Says EU Enlargement Will Solve the Hungarian Minority Issue*, Radio Free Europe/Radio Liberty, at <http://www.rferl.org/nca/features/2003/10/17102003164603.asp> (Oct. 17, 2003).

2. *Id.*

3. Framework Convention for the Protection of National Minorities, *opened for signature* Feb. 1, 1995, C.E.T.S. No. 157 (entered into force Feb. 1, 1998), *available at* <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Feb. 24, 2004) [hereinafter Framework Convention].

4. Francesco Capotorti, *The First European Legislation on the Protection of National Minorities*, in *THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY* 147 (Council of Europe Publ'g 1996) (emphasis added).

5. At least one scholar suggests similar distinction: "The [Framework Convention for the Protection of National Minorities] protects only 'national' not religious minorities. Thomas Giegerich, *Freedom of Religion as Source of Claims for Equality and Problems for Equality*, 34 *ISR. L. REV.* 211, 227 n.66 (2000).

6. The definition of "national minority" may have a significant impact in the freedom of religion area, particularly for those religions which actively proselytize converts. Proselytizing religions are

by generally discussing the differing approaches to minority rights. Part III will focus on efforts to protect minority rights between World War I and World War II. Part IV will focus on developments between World War II and the end of the Cold War, and Part V will focus on the period immediately following the Cold War. Part VI will be devoted to a discussion of efforts to protect national minorities following the Cold War. Finally Part VII will offer a brief conclusion.

II. GENERAL APPROACHES TO PROTECTING MINORITY RIGHTS

Protection of minorities' rights can follow one of two general approaches: an individual rights or a group rights approach.⁷ The individual rights approach requires that a person who has been discriminated against petition the government (usually the courts) for redress. By granting that individual relief, the court (at least theoretically) sends a message to all would-be discriminators that such discrimination will not be tolerated. As a result, discrimination in society *as a whole*, as well as discrimination against the specific minority group the petitioner represents, should decrease based upon the government's efforts to protect the rights of that one individual.⁸

The group rights approach, on the other hand, "guarantees the rights of groups, by name, [and] specifically reserves for groups a certain proportion of posts in government, in civil services, in the universities, [and] in business."⁹ The group rights approach operates by way of a quota or some other preference for stated minorities, guaranteeing those minorities representation in the major centers of power within a country (in the government, universities, etc.) Individuals from each minority group who hold these positions of power will, it is rationally assumed, act to protect the rights of the minority they represent. The idea behind the U.S. affirmative action movement is arguably based upon a group approach to minority rights.¹⁰

An individual rights approach is responsive by nature. Courts may only respond to an individual's complaint of a violation of his/her minority rights after the violation has occurred. An individual rights approach will punish discrimination after-the-fact, but it does not contemplate positive action to prevent such discrimination from happening again. A group rights approach, on the other

likely to draw converts from all racial, cultural, and linguistic groups within a country. While the adherents of a proselytizing religion are likely (at least initially) to be minority within given country, they are also likely to have only one characteristic in common, namely religion.

7 For a good discussion of both the individual rights and group rights approaches to minority rights, see Nathan Glazer, *Individual Rights against Group Rights*, in *THE RIGHTS OF MINORITY CULTURES* 123, 123-24 (Will Kymlicka, ed., 1995).

8. In questioning the validity of the individual rights approach, Glazer asks, "Does not every other individual who is a member of the group also require satisfaction and compensation?" *Id.* at 124.

9. *Id.* at 126.

10. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 580-81 (acknowledging and challenging the argument that affirmative action is based on group rights approach to minority rights and is therefore violation of the equal protection clause).

hand, is prospective by nature. By guaranteeing each minority a certain number of positions within government, education, etc., the group rights approach acts prospectively to guarantee minority representation in these vital institutions of society even before specific acts of discrimination are alleged.

Nathan Glazer argues that “the *form* of a nation’s response to diversity—individual rights or group rights—should have no bearing on whether we consider that nation responsive to human rights and to civil rights.”¹¹ Furthermore, he notes that neither approach is more consistent with democracy, as is evidenced by the fact that the some democracies (for example, the United States, the United Kingdom, France, and Australia) tend to prefer the individual rights approach while other democracies (Canada, Belgium, Malaysia, and India) prefer the group rights approach.¹²

Which approach to minority rights a country chooses will, however, have a profound effect upon the future of that country. If the country sees itself (or hopes to see itself) as a single, unified society, a group rights approach would defeat that goal by further ingraining group identities rather than helping to dissolve them. A group rights approach

make[s] a statement to all [of a country’s] individuals and groups that people derive rights not only from a general citizenship but *from another kind of citizenship within a group*. And just as laws and regulations are required to determine who is a citizen of the state and may exercise the rights of a citizen, so would laws and regulations be required to determine who is a citizen of subsidiary group, and who may exercise the rights of such a citizenship.¹³

However, if a country sees itself as a “confederation of groups”¹⁴ rather than as a single, unified society, a group rights approach would be appropriate. Thus, the individual rights approach is the proverbial “melting pot. In terms of human rights, each person has the same rights as every other person, regardless of individual characteristics such as race, creed, nationality, language, or religion. The group rights approach sees society as something more akin to beef stew, with each group (like the carrot, the potato, and the beef) maintaining its integrity while still being mixed in the same pot. The individual rights approach seeks to be “color-blind, while the group rights approach openly acknowledges the full rainbow of human diversity and seeks to have each “color” respect the other.

While Glazer acknowledges that both approaches to minority rights can legitimately provide protection for minorities, he also seems to acknowledge that the group rights approach has certain drawbacks of its own:

If we choose the group-rights approach we say that the differences between some groups are so great that they cannot achieve satisfaction on the basis of individual rights. We say, too, that—whether we want to or not—we will permanently

11. Glazer, *supra* note 7, at 133.

12. *Id.*

13. *Id.* at 134 (emphasis added).

14. *Id.*

section the society into ethnic groups by law. Even if advocates of group rights claim this is a temporary solution to problems of inequality, as they do in India and in the United States, it is inconceivable to me that benefits given in law on the basis of group membership will not strengthen groups, will not make necessary *the policing of their boundaries*, and will not become permanent in a democratic society, where benefits once given cannot be withdrawn.¹⁵

Because the Framework Convention adopts elements of a group rights approach, it is just this policing of boundaries that makes the definition of national minority so important to understanding the protections provided by the Framework Convention.

The human rights movement for most of the latter half of the twentieth century approached minority rights through individual rights avenues. This approach may be necessary given the international nature of most human rights instruments: A group rights approach to minority rights requires a micro-managed system for determining how many persons from each minority should be allocated positions within government, education, etc. Such decisions are probably better left to individual countries to make, and a pure group rights approach would therefore be a less suitable mechanism for an international treaty on the protection of minority rights.

III. BETWEEN WORLD WAR I AND WORLD WAR II

The term "national minority" appears to be a peculiarly European term, as it does not appear in the Universal Declaration of Human Rights (the "UDHR"),¹⁶ the International Covenant on Civil and Political Rights (the "ICCPR"),¹⁷ the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"),¹⁸ the American Convention on Human Rights,¹⁹ or the African Charter on Human and Peoples' Rights.²⁰ Besides the Council of Europe Framework Convention for the Protection of National Minorities, it appears that the term "national minority" is only used with the same meaning²¹ in the European

15. *Id.* at 137 (emphasis added).

16. See *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 2 (1948), available at <http://www.un.org/Overview/rights.html> (last visited Feb. 24, 2004) [hereinafter UDHR].

17. See *International Covenant on Civil and Political Rights*, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at <http://www.hrweb.org/legal/cpr.html> (last visited Feb. 24, 2004) [hereinafter ICCPR].

18. See *International Covenant on Economic, Social and Cultural Rights*, opened for signature Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), available at http://www.unhcr.ch/html/menu3/b/a_cescr.htm (last visited Feb. 24, 2004) [hereinafter ICESCR].

19. See *American Convention on Human Rights*, 1144 U.N.T.S. 123 (entered into force July 18, 1978), available at <http://www1.umn.edu/humanrts/oasinst/zaoas3con.htm> (last visited Feb. 24, 2004).

20. See *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last visited Feb. 24, 2004).

21. The term does appear in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, but it appears to carry a different meaning than that

Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR")²² and in the Draft Treaty establishing a Constitution for Europe, which notes that "[a]ny discrimination based on any ground such as ethnic or social origin [or] membership in a national minority shall be prohibited."²³ Thus, a basic understanding of the history of minority rights, particularly in the context of European history, is important to understanding the Framework Convention and the term "national minority"

A. Nationalism

The prevailing theory at the end of World War I was nationalism; that is, "the notion that the boundaries of the nation and the state should coincide."²⁴ A nationality (or nation) is "a people having a common origin, tradition, and language and capable of forming or actually constituting a nation-state."²⁵ The goal at the end of World War I was to give each nation a state and thereby make each state nearly homogenous in terms of the characteristics of its inhabitants.

However, the Paris Conference was soon faced with "the practical impossibility of a coherent territorial division of Europe given the difficulties connected with the multiplicity of nationalities,"²⁶ and the result was that "some 20-30 million people found themselves continuing in, or newly cast in, the role of national minorities."²⁷ For example, the Allies "placed German-speaking minorities under the rule of weak central and east European states."²⁸ The Jewish minorities in these newly created states were also a concern.²⁹ In the early stages of the drafting of the Covenant of the League of Nations, the existence of these minorities in the newly-defined countries of Europe was recognized as a threat to international peace.³⁰

During the drafting of the Covenant of the League of Nations, some of the

contemplated by the Framework Convention. See discussion *infra* Part V

22. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, opened for signature Nov. 4, 1950, C.E.T.S. No. 005 (entered into force Sept. 3, 1953), available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited Feb. 24, 2004) [hereinafter ECHR].

23. Draft Treaty establishing Constitution for Europe, art. II-21(1), CONV 850/03, at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (July 18, 2003).

24. David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV 597, 599 (1997).

25. Merriam-Webster Dictionary, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=nationality> (last visited Feb. 24, 2004).

26. *Study of Control and Monitoring Systems in International Conventions: Proposals for a Control or Monitoring System Under a Framework Convention on the Protection of Minorities*, para. 22, Ad Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 7 (Apr. 12, 1994) (photocopy on file with author) [hereinafter CAHMIN (94) 7].

27. Wippman, *supra* note 24, at 599. Wippman also notes that "the vagaries of history, geography, and politics made it impossible to give every nation a state of its own. *Id.*"

28. Hugh Miall, *Introduction to MINORITY RIGHTS IN EUROPE 2* (Hugh Miall, ed., 1994).

29. See MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 104 (1997).

30. *Id.* at 86.

participants suggested that protecting freedom of religion was also important to protecting international security³¹ They recognized that religious persecution could lead to open conflict and even war.³² A clause providing for the protection of religious freedom was considered³³ but ultimately rejected.³⁴

B. The Minorities Treaties

Also absent from the Covenant of the League of Nations was a provision for the protection of minority rights. Instead, protection for minority rights was provided through a series of Minorities Treaties signed by the newly-created and the newly-expanded nations of Europe.³⁵ The Allied and Associated Powers negotiated minorities' treaties with Poland, Czechoslovakia, the Serb-Croat-Slovene state, Romania, and Greece.³⁶ All of these treaties were based on the treaty with Poland, but each varied somewhat according to the specific needs of the newly-created (or newly-expanded) country and the specific concerns of the Allied powers for that country.³⁷

Although the Polish treaty is termed a *minorities* treaty the main concern of the treaty was the protection of Polish Jews:³⁸

Above all else, [the Polish minorities' treaty] was designed to protect the Jewish population in the new State of Poland and it was the Jewish lobby that made the treaty a reality. *Its applicability to other minority groups was little more than a side effect.* Although concern was expressed for other minorities and their needs made known, they had little impact upon the discussions and some amendments distinctly disadvantageous to other minorities were accepted in order to placate Polish unease at the extent of the protection being offered to the Jews.³⁹

The Jewish minority was of particular concern given the centuries of anti-Semitism that had persisted in Europe. The fact that the Jewish minority had in common a single culture, religion, and language was not without significance. It was precisely because of the combination of the Jews' unique culture, religion, and language that they were separated from and feared by the communities in which they lived.

31. *See id.* at 90.

32. *See id.*

33. *See generally id.* at 93-103 (explaining that the drafters' attempts to include a provision concerning religious freedom were hindered by disagreements about the scope of protection that the Covenant should afford).

34. *Id.* at 104.

35. *See id.*

36. *Id.* at 125. Other states joining the League were requested to comply with the Minorities treaties as well. *Id.* at 139. Latvia, Lithuania, and Estonia joined and made declarations for the protection of minorities within their borders. *Id.* at 142. One final minorities declaration was made by Iraq in May 1932. *Id.*

37. *See id.* at 125.

38. *Id.* at 105.

39. *Id.* (emphasis added).

Despite the relatively large population of Jews within the country, Germany was not forced to sign a Minorities Treaty because Germany “was still a Great Power and the refusal of the Allies to accept similar obligations [for the protection of minorities] would be put into bold relief by imposing a general regime of minorities obligations upon her.”⁴⁰ The Minorities Treaties system was thus a less-than-uniform attempt at protecting minorities.

The absence of a provision within the Covenant of the League of Nations for the protection of religious freedom⁴¹ was probably due to the belief that freedom of religion would be a part of the protection of the rights of minorities through the Minorities Treaties. Thus, the Minorities Treaties stayed far clear of recognizing freedom of religion as a fundamental right. Religious freedom was, in essence, guaranteed to minorities as an aspect of their minority status, but no provision was made for religious freedom for those in the majority. Persons not covered by the Minorities Treaties could protect their freedom of religion only through the political process (that is, through the legislative and executive branches) rather than through the judiciary.

The Minorities Treaties technically followed an individual rights approach to minority rights.⁴² However, because the rights protected could only be asserted by minorities, the Minorities Treaties “had the practical effect of advancing the interests of minorities *as collectivities*. Thus, as a practical matter, the League of Nations’ protection regime superimposed some elements of *collective rights* on a *formally individual rights approach* to moderating majority-minority tensions.”⁴³

Although the Minorities Treaties were concluded with the Allied and Associated Powers, the League of Nations was responsible for treaty enforcement.⁴⁴ This move was significant as it was the first time that the protection of minorities had been given to an international organization.⁴⁵ However, League of Nations oversight of the Minorities Treaties was unpopular with many of the States bound by them. Delegates from Romania, Poland, Czechoslovakia, and the Serb-Croat-Slovene state argued that allowing the League of Nations to oversee the implementation of the treaties would undermine their sovereignty by giving minorities the right to look beyond national governments to the international community for the protection of their rights.⁴⁶ While these arguments did not prevail,⁴⁷ the opposition of these states to international supervision of minority rights shows dislike of the system from the outset.

40. *Id.* at 129.

41. *Id.* at 104.

42. Wippman, *supra* note 24, at 600.

43. EVANS, *supra* note 29, at 104 (emphasis added).

44. *Id.* at 129.

45. CAHMIN (94) 7, *supra* note 26, at para. 23.

46. See EVANS, *supra* note 29, at 127.

47. See *id.*

C. League Assembly Resolution of September 1921

Despite the Allied Powers' reluctance to take upon themselves the obligations of the Minorities Treaties, a resolution was passed during the Second Session of the League Assembly in September 1921 which stated:

[T]hose states which are not bound by any legal obligation with respect to minorities treaties will nevertheless observe, in their treatment of their own racial, religious and linguistic minorities, at least as high a standard of justice and toleration as is required by any of the treaties and by the regular action of the Council.⁴⁸

It is interesting here to note the difference between the Minorities Treaties and this League Assembly resolution. The Minorities Treaties were crafted with the protection of one minority in mind, namely the Jewish minority and, as noted above, the applicability of the Minorities Treaties to other minorities was attenuated at best.⁴⁹ The League Assembly resolution was meant to apply only to those states in the League of Nations which were not already bound by a minorities' treaty, which suggests that the resolution was meant to impose upon these countries the same obligations that the parties to the Minorities Treaties had undertaken. Unlike the Minorities Treaties, however, this resolution requires states to treat with justice and toleration three distinct kinds of minorities—racial minorities, religious minorities, and linguistic minorities.⁵⁰ It is unclear whether this difference was intended or even noted by the members of the League of Nations. However, since the resolution appears to have been intended to impose the same obligations on the members of the League of Nations as imposed by the Minorities Treaties, it could be argued that even the Minorities Treaties themselves were meant to protect purely racial, religious, or linguistic minorities. However, the actual practice of the Minorities Treaties shows little support for this interpretation.

D. The Demise of the Minorities Treaties System

The September 1921 Resolution of the League Assembly did not satisfy the Minorities Treaties countries' demands for a uniform system of minorities' protection. During the fifteenth Session of the League in 1934, Poland went as far as to propose a resolution that a general minorities' convention should be concluded.⁵¹ Such a convention would have provided uniform protection for the rights of minorities among all members of the League of Nations and not just the states of Europe. Although the suggestion received some degree of support, Poland ultimately withdrew the resolution.⁵² "The lack of a general and uniform

48. *Id.* at 142.

49. *See id.* at 105.

50. EVANS, *supra* note 29, at 142.

51. *Id.* at 143.

52. *Id.*

system of obligations regarding minorities provided a convenient weapon for those States who wished to avoid their own treaty obligations and Poland ultimately withdrew from the supervisory mechanisms of the League on this basis, undermining the entire system."⁵³ The lack of *uniformity* within the Minorities Treaties system ultimately proved to be the system's downfall. Although the system failed, it was important as the first international effort to protect minority rights.

IV WORLD WAR II TO THE END OF THE COLD WAR

World War II proved that the concerns over minority rights expressed at the end of World War I were well founded. Germany invaded its neighbors to the east under the pretext of protecting the rights of German minorities living there,⁵⁴ and the Holocaust accompanying the war was the most violent expression of anti-Semitism in world history. The human rights movement, particularly the Universal Declaration of Human Rights ("UDHR"), was a direct response to these tragedies. The UDHR adopted a purely individual rights approach, within which a discussion of the rights of minorities *as minorities* would have had little meaning. By adopting a universal and uniform approach to human and minority rights, the UDHR (discussed in depth in the next section) addressed the biggest defect in the Minorities Treaties system, namely lack of uniformity and universality.

The end of World War II also led to the beginning of the Cold War:

The Cold War subsequently froze the political map, incidentally bequeathing to the [European] continent the most stable borders it has enjoyed since the French Revolution. Simply put, self-determination was not a real issue between 1945 and 1989. States were sovereign, or if they were not, there was nothing that could be done about it.⁵⁵

Thus, *states* rather than *nations* were sovereign, regardless of the mix of peoples occupying the state. The Cold War pushed the idea of minority rights to a position of secondary importance as the superpowers vied for political and ideological supremacy.

A. *The Universal Declaration of Human Rights*

Because the Universal Declaration of Human Rights adopted an individual rights approach to minority rights, no mention is made of minority rights in either the UN Charter⁵⁶ or the Universal Declaration of Human Rights.⁵⁷ The most

53. *Id.* at 143-44.

54. James Mayall, *Sovereignty and Self-Determination in the New Europe*, in *MINORITY RIGHTS IN EUROPE* 7, 9 (Hugh Miall ed., 1994).

55. *Id.*

56. Charter of the United Nations, available at <http://www.unhchr.ch/pdf/UNcharter.pdf> (last visited Mar. 2, 2004).

57. UDHR, *supra* note 16, at art. 2. See also Patrick Thornberry, *International and European Standards on Minority Rights*, in *MINORITY RIGHTS IN EUROPE* 14 (Hugh Miall ed., 1994).

important right enumerated in the UDHR for the protection of minorities is the principle of non-discrimination. Article 2 of the UDHR declares: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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."⁵⁸ The principle of non-discrimination protects the rights of minorities because a country that cannot discriminate cannot give greater rights to the majority than it gives to a minority. As the noted minorities scholar Patrick Thornberry has argued, the UN Charter and the UDHR do not mention minority rights because "the principle of universal human rights on the basis of non-discrimination on racial, ethnic, religious and other grounds was deemed to be sufficient protection for minority groups."⁵⁹ However, Thornberry also argues that "the principle of non-discrimination is only a first step in the protection of minorities, but is not sufficient in itself to deal with the question."⁶⁰

B. The International Covenant on Civil and Political Rights

The ICCPR, by contrast, provides more protection than the mere nondiscrimination principle of the UDHR. Article 27 of the ICCPR specifically provides for the protection of the rights of minorities as minorities:⁶¹

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁶²

Article 27 clearly distinguishes between three kinds of minorities: A minority may be an ethnic (or cultural)⁶³ minority, a religious minority, or a linguistic minority, and "persons belonging to *such minorities*"⁶⁴ are given certain rights. The use here of the plural term "minorities" makes it clear that Article 27 contemplates three distinct kinds of minorities and that a minority need not have culture, religion, and language in common in order to receive protection. Article 27 further emphasizes the distinctness of each of these kinds of minorities by guaranteeing each minority the right to enjoy that quality which makes the minority distinct. Thus, a cultural minority has the right to enjoy its culture, a religious minority has the right to

58. UDHR, *supra* note 16, at art. 2.

59. Thornberry, *supra* note 57, at 14. Of course, if a country does not guarantee the rights and freedoms listed in the UDHR to the majority, the principle of non-discrimination will not protect the rights of minorities. The UDHR accounts for this weakness by stating first that the rights and freedoms of the UDHR apply to everyone in every country, be they part of the majority or minority. UDHR, *supra* note 16, at art. 2.

60. Thornberry, *supra* note 57, at 20.

61. ICCPR, *supra* note 17, at art. 27

62. *Id.*

63. Article 27 refers to an ethnic minority in the introductory phrase and then provides in the predicate of the sentence that the members of such a minority shall have the right "to enjoy their own culture." *Id.* Article 27 thus seems to equate ethnic minority with cultural minority.

64. *Id.* (emphasis added).

practice its religion, and a linguistic minority has the right to use its own language.⁶⁵

1. Article 2 of the UDHR vs. Article 27 of the ICCPR

Article 27 of the ICCPR differs significantly from Article 2 of the UDHR in the kind of protection provided for (or the rights guaranteed to) minorities. Article 2 of the UDHR does not specifically mention the term “minority, nor does it provide any substantive rights but merely provides every person the right to assert every other right listed in the Declaration.⁶⁶ Article 27 of the ICCPR, on the other hand, affirmatively provides minorities with the substantive right to enjoy their culture, religion, or language.⁶⁷

These two sections also differ with regards to who can assert protection under them. Article 2 of the UDHR prevents discrimination against any individual, regardless of whether that person is part of the majority or a minority. Article 27 of the ICCPR, on the other hand, protects *only* those belonging to one of the three stated minorities.⁶⁸ Furthermore, Article 27 of the ICCPR only applies “[i]n those States in which ethnic, religious or linguistic minorities exist,”⁶⁹ suggesting that these rights “may not be universal since the groups may not ‘exist’ in all states.”⁷⁰ Thus, Article 2 of the UDHR appears to provide broader but less specific protection than Article 27 of the ICCPR. The fact that minority rights lack universality may help to explain why they were omitted from the Universal Declaration of Human Rights.

Despite the reference in Article 27 to a person’s right to enjoy his or her culture, religion, or language “in community with the other members of their group,”⁷¹ the rights guaranteed under Article 27 must be asserted individually. Thornberry notes that “[t]he text refers to the rights of persons and not of groups, thus limiting the community or collective dimension of the rights.”⁷² Thus, like Article 2 of the UDHR, Article 27 of the ICCPR contemplates an individual-rights approach to minority rights.

2. Article 18 vs. Article 27 of the ICCPR

Article 18 of the ICCPR (providing for freedom of religion and belief) and Article 27 of the ICCPR have a significant amount of overlap with respect to religious minorities. Article 18 provides:

Everyone shall have the right to freedom of thought, conscience and religion.

65. *Id.*

66. UDHR, *supra* note 16, at art. 2.

67. ICCPR, *supra* note 17, at art. 27.

68. *Id.*

69. *Id.*

70. Thornberry, *supra* note 57, at 15.

71. ICCPR, *supra* note 17, at art. 27.

72. Thornberry, *supra* note 57, at 15.

This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁷³

While Article 18 does not specifically mention religious minorities, General Comment 22 to Article 18 suggests that the Article contemplates protection of religious minorities:

Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.⁷⁴

Under Article 18, as under Article 27 members of religious minorities must assert their rights individually. Article 18 guarantees the right to freedom of thought, conscience and religion to *everyone*, not to every *group*.⁷⁵ However, both Article 18 and Article 27 provide the right to practice one's religion in community with others.⁷⁶

Because both Article 18 and Article 27 apply to religious minorities, what is the difference between the two? Article 27 but not Article 18, is subject to derogation "[i]n time of public emergency which threatens the life of the nation."⁷⁷ This fact reveals "[t]he fundamental character of [freedom of thought, conscience and religion guaranteed under Article 18]"⁷⁸ and suggests that the rights of religious minorities guaranteed under Article 27 may not be fundamental. However, the right of a religious minority to *profess and practice* its religion under Article 27 is guaranteed without limitation,⁷⁹ while the right to *manifest* one's religion or belief (but not the right to believe or to adopt a religion or belief)⁸⁰ under Article 18 is subject 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."⁸¹

These facts are significant, but they do not fully answer the question as to what protections each Article provides and to whom they are provided. General

73. ICCPR, *supra* note 17, at art. 18(1).

74. General Comment No. 22, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 48th Sess., para. 2, (1993), *available at* [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/\\$FILE/G0141468.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/$FILE/G0141468.pdf) (last visited Feb. 24, 2004) (emphasis added) [hereinafter General Comment No. 22].

75. ICCPR, *supra* note 17, at art. 18(1).

76. *Id.* at arts. 18(1), 27.

77. *Id.* at art. 4(1)-(2)

78. General Comment No. 22, *supra* note 74, at para. 1.

79. *See* ICCPR, *supra* note 17, at art. 27.

80. General Comment No. 22, *supra* note 74, at para. 3.

81. ICCPR, *supra* note 17, at art. 18(3).

Comment 23 affirms that the right guaranteed under Article 27 “is 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.”⁸² So how is an Article 18 religious minority different from an Article 27 religious minority?⁸³

Article 18 applies solely (but universally) to *individuals*, who may or may not be part of a religious minority. Article 27 on the other hand, applies to individuals “who belong to a *group* and who share in common culture, a religion and/or a language.”⁸⁴ “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.”⁸⁵ Article 27 thus incorporates a group rights element for the protection of minority rights much like the Minorities Treaties. Furthermore, the existence of an Article 27 minority group “does not depend upon a decision by that State party but requires [establishment] by *objective criteria*.”⁸⁶ Although not specifically indicated, these objective criteria presumably are the minority’s unique ethnic, religious or linguistic characteristics.⁸⁷

Inherent in Article 27 therefore, is the existence of a group.⁸⁸ Group affiliation for purposes of Article 27 is more than just mutual association, however, for even the members of an Article 18 religious minority may manifest their religious belief in community with others.⁸⁹ Article 18, on the other hand, may be asserted by a person constituting a religion of one.⁹⁰

82. General Comment No. 23, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 50th Sess., para. 1 (1994), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/\\$FILE/G0141468.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/26bd1328bee3bd13c1256a8b0038e0a2/$FILE/G0141468.pdf) (last visited Feb. 24, 2004) (emphasis added) [hereinafter General Comment No. 23].

83. I will refer to a religious minority who qualifies for Article 27 protection as an Article 27 minority; religious minority who does not qualify for Article 27 protection will be referred to as an Article 18 minority.

84. General Comment No. 23, *supra* note 82, at para. 5.1 (emphasis added).

85. *Id.* at para. 6.2 (emphasis added).

86. *Id.* at para. 5.2 (emphasis added).

87. *See id.*, ICCPR, *supra* note 17, at art. 27.

88. General Comment No. 23 provides that an Article 27 minority must include members “who share in common culture, religion *and/or* language. General Comment No. 23, *supra* note 82, at para. 5.1 (emphasis added). The use of the “and/or” here in General Comment 23 is significant, for it suggests that a purely cultural, religious, or linguistic minority may constitute an Article 27 minority, but it is certainly possible that such an Article 27 minority will have more than one characteristic in common.

89. ICCPR, *supra* note 17, at art. 18(1).

90. The explanation given in this paragraph hinges in large part on General Comments No. 22 and No. 23 to Articles 18 and 27 of the ICCPR, respectively. General Comment No. 22 was written in 1993, and General Comment No. 23 was written in 1994. General Comment No. 22, *supra* note 74; General Comment No. 23, *supra* note 82. Other international instruments adopted around this same time (the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the Framework Convention for the Protection of National Minorities (opened for signature 1995)) use a similar hybrid individual rights-group rights approach to minority rights. While the interpretation given in General Comments No. 22 and No. 23 is consistent with the text of Articles 18 and 27, this interpretation is not necessarily inherent in these Articles. Thus, it is possible (although not certain) that General Comments Nos. 22 and 23 were influenced by the work on

Article 27 minorities are to receive “positive measures of protection”⁹¹ against acts by the State and by others within the State that would infringe on their rights, and “[p]ositive 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.”⁹² This Comment reveals that Article 27 is concerned not so much with protecting religious freedom as with protecting the *group identity* of cultural, linguistic, and religious minorities. While such positive measures must respect the principles of non-discrimination and equal protection found in Articles 2.1 and 26, respectively,⁹³ special treatment of an Article 27 minority “aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under [A]rticle 27”⁹⁴ is deemed permissible if based on reasonable and objective criteria.⁹⁵

Article 27 differs from the Minorities Treaties approach by providing a uniform system for the protection of minority rights. Furthermore, the ICCPR is intended to be a declaration of fundamental rights,⁹⁶ so an argument could be made that the rights guaranteed under Article 27 are fundamental (despite the fact that they are severable), unlike the rights guaranteed under the Minorities Treaties.

C. The Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) protects minority rights through the mechanism of non-discrimination: “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.”⁹⁷ The ECHR thus adopts a purely individual rights approach to minority rights, as did the UDHR.

The ECHR is significant, as it is the first international treaty to use the term “national minority.” Religion is mentioned in the ECHR as a separate ground of prohibited discrimination, possibly indicating that a national minority and a religious minority should be treated as separate and distinct concepts.

these other international instruments and may be the result of an intellectual trend in the protection of minority rights that prevailed throughout the 1990s.

91. General Comment No. 23, *supra* note 82, at para. 6.1.

92. *Id.* at para. 6.2 (emphasis added).

93. *Id.*

94. *Id.*

95. *Id.*

96. The preamble to the ICCPR states that “[the] recognition of the *inherent dignity* and of the equal and *inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world. ICCPR, *supra* note 17, at pmb1. (emphasis added). Consequently, it appears that the ICCPR, like the UDHR, is meant to enumerate fundamental, universal rights.

97. ECHR, *supra* note 22, at art. 14.

V MINORITY RIGHTS FOLLOWING THE COLD WAR: THE UN DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

The end of the Cold War brought renewed interest in minority rights. James Mayall notes that “with the end of the Cold War and the collapse of communism the protection of minority rights has risen to the top of the political agenda for the first time since 1945.”⁹⁸

The earliest legal instrument in this flurry of activity regarding minority rights is the 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“UN Declaration”).⁹⁹ While this Declaration refers to the term “national minority, the term as used here seems to be equated with ethnic minority only¹⁰⁰ and is likely not equivalent to the term national minority as used in the Framework Convention.

The UN Declaration is significant because, like the Minorities Treaties and Article 27 of the ICCPR, it blends individual rights and group rights ideas in protecting minority rights. The rights enumerated in the Declaration must be asserted by individuals, not by groups,¹⁰¹ but the Declaration requires States to “protect the existence and *identity*” of national or ethnic, cultural, religious and linguistic minorities. Again, as with Article 27 of the ICCPR, it is the minority’s identity that is to be particularly protected.

The UN Declaration goes a step further than Article 27 however, by requiring that States both protect and encourage conditions *promoting* the identity of these minorities.¹⁰² Promotion of a minority’s identity would likely require positive measures by States to foster the development of such minorities. This special treatment “shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.”¹⁰³ Furthermore, States must allow members of these minorities the opportunity to contact other members of their minority either within the State or across international borders.¹⁰⁴

98. Mayall, *supra* note 54, at 7

99. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 135, U.N. GAOR, 47th Sess., 92nd plen. mtg. (1992), available at <http://www.un.org/documents/ga/res/47/a47r135.htm> (last visited Feb. 24, 2004) [hereinafter UN Declaration].

100. The title of the Declaration refers to “National or Ethnic” minorities, thus appearing to equate the two terms. *Id.*

101. “Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language *Id.* at art. 2(1) (emphasis added).

102. *Id.* at art. 1(1).

103. *Id.* at art. 8(3). Whether this special treatment is truly fair and non-discriminatory will be for the reader to decide.

104. *Id.* at art. 2(5).

VI. PROTECTION OF NATIONAL MINORITIES FOLLOWING THE COLD WAR

A. Early Attempts to Protect National Minorities

Although the end of the Cold War brought an increased interest in the rights of minorities generally, as will be shown, special concern was also given to so-called "national minorities." The term "national minority," however, appears to have grown out of the period immediately following World War II. As early as 1949, the Parliamentary Assembly of the Council of Europe recognized the importance of protecting the rights of national minorities.¹⁰⁵ In 1961, the Parliamentary Assembly recommended the inclusion of an article in a second additional protocol to the ECHR to guarantee the rights of national minorities.¹⁰⁶ A Committee of Experts was organized to consider the adoption of such a protocol, but "[i]n 1973 it concluded that, from a legal point of view, there was no special need to make the rights of minorities the subject of a further protocol to the ECHR."¹⁰⁷ European leaders then put aside the idea of special legal protection for national minorities for well over a decade.

B. Political Developments Leading Up to the Adoption of the Framework Convention for the Protection of National Minorities

1. Copenhagen Document of 29 June 1990

A series of political events in the early 1990s had a significant impact upon the development of the Framework Convention. In June 1990, the Conference for Security and Co-operation in Europe adopted an agreement for the advancement of human rights and fundamental freedoms,¹⁰⁸ which laid the groundwork for what would become significant developments in the protection of national minorities. This agreement, called the Copenhagen Document, provides that "[p]ersons belonging to *national minorities* have the right freely to express, preserve and develop their ethnic, cultural, linguistic *or* religious identity and develop their culture in all its aspects."¹⁰⁹ The Copenhagen Document thus clearly anticipates that a national minority need not have ethnic, cultural, linguistic, *and* religious characteristics in common.

The Copenhagen Document provides that a person belonging to a national

105. Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 1, available at <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Explanatory%20report/explreport.htm> (emphasis added) (last visited Feb. 22, 2004) [hereinafter Explanatory Report].

106. *Id.*

107. *Id.* at para. 2.

108. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, available at <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm> (last visited Feb. 22, 2004) [hereinafter Copenhagen Document].

109. *Id.* at para. 32 (emphasis added).

minority may choose whether to be treated as such,¹¹⁰ a new concept later adopted formally in the Framework Convention.¹¹¹ Also significant is the fact that the Copenhagen Document provides national minorities the right “to establish and maintain unimpeded contacts among themselves within their country *as well as contacts across frontiers* with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs.”¹¹² This concept later found its way into the UN Declaration¹¹³ and the Framework Convention.¹¹⁴

2. Recommendation 1134 of the Parliamentary Assembly (1990)

The Parliamentary Assembly of the Council of Europe also began to consider the need for greater protection of minorities within Europe. In Recommendation 1134 (1990),¹¹⁵ the Parliamentary Assembly noted that with the fall of the communist governments in Central and Eastern Europe, “grave minority problems [have] come to light [which] have been ignored and neglected for many years by authoritarian rule.”¹¹⁶ The Parliamentary Assembly noted the need to implement the Copenhagen Document of 29 June 1990¹¹⁷ and recommended, as it had in 1961, that either the Committee of Ministers draw up a European Convention on Human Rights protocol on minorities’ rights, or that a special Council of Europe convention be enacted to protect minorities’ rights.¹¹⁸ This recommendation is probably the earliest suggestion of the need for a Council of Europe convention for the protection of minorities.

In making this recommendation, the Parliamentary Assembly had in mind the protection of minorities generally. The Recommendation notes that “[t]here are *many* kinds of minorities in Europe. They have certain characteristics which may be ethnic, linguistic, religious or other which distinguish them from the majority in a given area or country,”¹¹⁹ and the document recommends the protection “[of] the rights of [all] *minorities*,”¹²⁰ not just national minorities.

National minorities did, however, receive special recognition. Recommendation 1134 defines national minorities as “separate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of that state and have certain religious, linguistic, cultural or other

110. *Id.*

111. Framework Convention, *supra* note 3, at art. 3(1).

112. Copenhagen Document, *supra* note 108, at para. 32.4 (emphasis added).

113. UN Declaration, *supra* note 99, at art. 2(5).

114. Framework Convention, *supra* note 3, at art. 17(1).

115. *On the Rights of Minorities*, Eur. Parl. Ass., 42nd Sess., pt. 2, para. 6, Recommendation 1134 (1990), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta90%2FEREC1134.htm> (last visited Feb. 22, 2004) [hereinafter Recommendation 1134].

116. *Id.*

117. *Id.* at para. 14.

118. *Id.* at para. 17.

119. *Id.* at para. 1 (emphasis added).

120. *Id.* at para. 17 (emphasis added).

characteristics which distinguish them from the majority of the population,"¹²¹ and recommends a number of special protections for national minorities.¹²²

Recommendation 1134's definition of national minority does not put any special emphasis on the number or kind of characteristics that the members of a national minority have in common. Instead, a national minority may have either "religious, linguistic, cultural *or* other characteristics"¹²³ in common and distinct from the majority.

The key characteristics of a national minority under this definition are that the group is "separate or distinct"¹²⁴ (the "separateness element") and that it is "well defined and established"¹²⁵ (the "temporal element"). By focusing on "well defined and established" minorities, Recommendation 1134's proposed definition of national minority focuses on groups with an historical presence in Europe. Thus, "new" minorities (including new religions or religious groups) would likely not fall under this definition. Of course, "new" and "established" are relative terms, and the Recommendation gives no indication as to how long a group needs to have been in a particular country in order to fall under this definition.

In May 1992, the Committee of Ministers instructed the Steering Committee for Human Rights to consider "the possibility of formulating specific legal standards relating to the protection of *national minorities*."¹²⁶ Thus, despite the Parliamentary Assembly's concern for the rights of minorities in general, these early instructions from the Committee of Ministers focused specifically on the issue of national minorities.

3. Recommendation 1201 of the Parliamentary Assembly (1993)

In 1993, the Parliamentary Assembly issued another recommendation, Recommendation 1201, on national minorities.¹²⁷ While the Parliamentary Assembly had previously suggested in Recommendation 1134 the adoption of either an additional protocol to the ECHR or a special convention on national minorities, Recommendation 1201 expressed the Assembly's preference for the passage of an additional protocol¹²⁸ to the ECHR because it would allow minorities to "benefit from the remedies offered by the convention, particularly the right to submit applications to the European Commission and Court of Human Rights."¹²⁹

121. *Id.* at para. 11.

122. *See id.* at para. 11(i)-(v).

123. *Id.* at para. 11 (emphasis added).

124. *Id.*

125. *Id.*

126. Explanatory Report, *supra* note 105, at para. 4.

127. *Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights*, Eur. Parl. Ass., 44th Sess., pt. 4, Recommendation 1201 (1993), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta93%2FEREC1201.htm> (last visited Feb. 22, 2004) [hereinafter Recommendation 1201].

128. *Id.* at para. 8.

129. *Id.* at para. 7.

Recommendation 1201 proposes the text for such an additional protocol, which includes a different definition of national minority:

[T]he 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.¹³⁰

While differing on some fine points, the definitions in Recommendations 1134 and the proposed Additional Protocol of Recommendation 1201 have much in common; Recommendation 1134 talks about national minorities as being nationals of the state,¹³¹ while the Additional Protocol of Recommendation 1201 talks about national minorities being residents and citizens of the state.¹³² Recommendation 1134 speaks of national minorities as being “well defined and established,”¹³³ while the Additional Protocol talks about them “maintaining longstanding, firm and lasting ties with [a] state.”¹³⁴ Thus, both include a temporal element. Furthermore, Recommendation 1134 speaks of national minorities as having “religious, linguistic, cultural or other characteristics”¹³⁵ in common, while the proposed Additional Protocol states that a national minority is a group that has “distinctive ethnic, cultural, religious or linguistic characteristics.”¹³⁶ Notably, in both definitions the connector “or” is used in the list of characteristics that might define a national minority, thus leaving open the possibility that a national minority may be a group that has only one or a few of the mentioned

130. *Id.* at Text of the Proposal for an Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning Persons Belonging to National Minorities, § I, art. 1 (the “Additional Protocol”).

131. Recommendation 1134, *supra* note 115, at para. 11.

132. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(a).

133. Recommendation 1134, *supra* note 115, at para. 11.

134. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(b). Admittedly, the historical requirement as proposed in the Additional Protocol seems clearly to set a higher standard than the definition in Recommendation 1134 by requiring not just an established relationship with the state but “longstanding, firm, and lasting ties.” *Id.* (emphasis added). However, in both cases, relatively “new” minorities would be excluded from the definition.

135. Recommendation 1134, *supra* note 115, at para. 11.

136. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(c).

characteristics in common. Noticeably absent from Recommendation 1201, however, is the separateness element contained in Recommendation 1134.¹³⁷

The definition in the Additional Protocol proposed by Recommendation 1201 does add a few nuances to the definition of national minority contained in Recommendation 1134. Under the definition in the proposed Additional Protocol, a national minority must be "sufficiently representative"¹³⁸ among the general population of the country. That is, under this definition, national minorities, while still minorities, are not small, isolated groups but minorities of considerable size. Furthermore, while a national minority under this definition may have only one or a few distinctive characteristics in common, the group would have to be particularly motivated by a desire "to preserve together that which constitutes their *common identity*."¹³⁹ This fact is further underscored in Section 2, Article 2 of the proposed Protocol which states that "[m]embership of a national minority shall be a matter of free personal choice."¹⁴⁰ Thus, under this definition, a national minority is not only a group with characteristics distinct from the majority, but it is also one that is particularly motivated to maintain those distinguishing characteristics.¹⁴¹

Recommendation 1201 noted that the issue of the protection of national minorities was "extremely urgent and one of the most important activities currently under way at the Council of Europe."¹⁴² Therefore, the Parliamentary Assembly recommended the adoption of a protocol at the then upcoming summit of heads of state and government to be held in Vienna on October 8 and 9 of 1993.¹⁴³

4. The Final Declaration of the Heads of State and Government of the member States of the Council of Europe, Vienna, 9 October 1993

The Vienna summit did not, however, go so far as to adopt an additional protocol to the ECHR. Instead, the participants adopted a document entitled "The Final Declaration of the Heads of State and Government of the member States of the Council of Europe, Vienna, 9 October 1993" (the "Vienna Declaration"). Meeting less than two years after the dissolution of the Soviet Union, the

137. See text *supra* accompanying note 124. Recommendation 1134 defines national minorities in terms of "separate and distinct groups, which suggests that national minority may live as separate "community within a community. Recommendation 1134, *supra* note 115, at para. 11. In contrast, the Additional Protocol of Recommendation 1201 mentions only that national minorities have distinctive characteristics. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1. The Additional Protocol thus omits the suggestion that national minorities may live as separate communities.

138. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(d).

139. *Id.* § I, art. 1(e) (emphasis added).

140. *Id.* § II, art. 2(1).

141. This aspect of the definition contained in the proposed Additional Protocol is similar to Article 3(1) of the Framework Convention for the Protection of National Minorities, which states that "[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such. Framework Convention, *supra* note 3, at art. 3(1).

142. Recommendation 1201, *supra* note 127, at para. 9.

143. *Id.*

participants at the summit acknowledged that “the end of the [Cold War] division of Europe offers an historic opportunity to consolidate *peace and stability* on the continent.”¹⁴⁴ The participants expressed a desire to have the countries recently freed from communist oppression join the Council of Europe, provided they bring their political institutions and legal systems in line with European standards.¹⁴⁵ Among the factors specifically mentioned in this regard was the protection of national minorities.¹⁴⁶

The Vienna Declaration was primarily concerned with maintaining security and stability in Europe.¹⁴⁷ The participants expressed a hope that “Europe can become a vast area of *democratic security*.”¹⁴⁸ They lamented the fighting in Yugoslavia and issued a call to leaders to put an end to such conflicts.¹⁴⁹ The participants also expressed their desire to make the Council of Europe “capable of contributing to *democratic security*” and of cooperating with “other organizations involved in the construction of a *democratic and secure Europe*.”¹⁵⁰ They expressed resolve to make full use of the organs of the Council of Europe “to promote the strengthening of *democratic security in Europe*”¹⁵¹ as well as a hope that the political dialogue within the Council of Europe would “make a valuable contribution to the *stability* of [the] continent.”¹⁵² Finally, the Vienna Declaration expressed the participants’ intent to cooperate with non-European States in order “to promote *peace and democracy*.”¹⁵³ Democratic security, if it means nothing else in this context, is security and stability in a post-communist (and now democratic) Central and Eastern Europe. The protection of minority rights was given particular notice in light of the history of minority rights in Europe and the conflicts that have arisen over the question of minorities in the past.

Appendix II to the Vienna Summit was dedicated to national minorities.¹⁵⁴ It noted that national minorities have been created by “the upheavals of history” in Europe and that these minorities “should be protected and respected so that they can contribute to stability and peace.”¹⁵⁵ The “upheavals of history”¹⁵⁶ referred to here are, undoubtedly, the two world wars that swept across Europe during the twentieth century. New minorities were created when territory occupied by

144. Vienna Summit Final Declaration, Oct. 9, 1993, available at http://www.coe.int/T/E/human_rights/Ecri/5-Archives/2-Other_texts/2-Vienna_Summit/Declaration/Declaration_Vienna_Summit.asp (last visited Feb. 22, 2004) (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.* (emphasis added).

152. *Id.*

153. *Id.* (emphasis added).

154. See Vienna Declaration, Appendix II, Oct. 9, 1993, available at <http://cm.coe.int/ta/decl/1993/Vienna%20Summit%20Declaration.htm> (last visited Feb. 22, 2004).

155. *Id.*

156. *Id.*

members of one nationality was placed within the borders of a country dominated by a different nationality thus making the first nationality a minority within the newly-restructured country. Good examples are the German¹⁵⁷ and Hungarian¹⁵⁸ minorities of Eastern Europe created following World War I. These facts suggest that whenever there is such a kin-state/kin-minority relationship (e.g., Germany and the German minorities or Hungary and the Hungarian minorities living outside of Germany and Hungary, respectively), the kin-minority will be a national minority. This definition is certainly consistent with the Framework Convention for the Protection of National Minorities, but it does not appear to encompass the entire definition of national minority for purposes of the Convention.¹⁵⁹

C. The Text of the Framework Convention for the Protection of National Minorities

On November 4, 1993, less than a month after the Vienna Declaration, the Committee of Ministers established the Ad Hoc Committee for the Protection of National Minorities ("Ad Hoc Committee" or "CAHMIN").¹⁶⁰ This committee was the body responsible for drafting the Framework Convention for the Protection of National Minorities.¹⁶¹ Its terms of reference instructed the committee to draft both a framework convention for the protection of national minorities *and* a protocol to the European Convention on Human Rights in the cultural field.¹⁶² During the first meeting of the Ad Hoc Committee, it was decided (probably in response to the instruction given in the Final Declaration of the Vienna Summit to draft a framework convention "with minimum delay")¹⁶³ that a clear preference should be given to the completion of a framework Convention while hindering as little as possible the completion of a draft protocol to the European Convention on Human Rights.¹⁶⁴ The result of the efforts of the Ad Hoc Committee is the

157. See *supra* discussion accompanying notes 26-30.

158. Lobjakas, *supra* note 1. This article includes the following explanation from Viktor Orban of the creation of the Hungarian minorities:

There is Hungarian issue. The Hungarian issue is that after the World War I, two-thirds of Hungarian territory and millions of its people belonged to other, newly born neighboring countries. Now the territories are not an issue, but the people are still there, the people living there still feel themselves [to be] Hungarian, speak [the] Hungarian language, and have a Hungarian culture. So from a Hungarian point of view, the European Union is a possibility to unify the Hungarian nation, in a cultural sense, without the modification of state borders.

Id. (quoting Viktor Orban). Orban thus seems to suggest that the problems of national minorities may be somewhat alleviated through the structures of the European Union.

159. See discussion *infra* Part VI.C.3.

160. *Terms of Reference of the CAHMIN on the drawing up of framework convention and protocol complementing the European Convention on Human Rights (ECHR) as adopted by the Committee of Ministers on 4 Nov. 1993*, para. 1, Ad Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 1 (Dec. 10, 1993) (photocopy on file with author) [hereinafter CAHMIN (94) 1].

161. Explanatory Report, *supra* note 105, at para. 6.

162. *Id.* at para. 5.

163. Vienna Declaration, Appendix II, *supra* note 154. See also Explanatory Report, *supra* note 105, at para. 5.

164. *Meeting Report, 1st Mtg., 25 Jan.-28 Jan. 1994, Palais de l'Europe, Strasbourg*, para. 4, Ad

Framework Convention for the Protection of National Minorities.¹⁶⁵

During the first meeting of the Ad Hoc Committee, the participants discussed whether or not they should define the term “national minority.”¹⁶⁶ They decided to begin drafting the Framework Convention “without embarking on a prior discussion of the definition question.”¹⁶⁷ As previously noted, the Convention ultimately included no definition of the term. Therefore, this article will look to the text of the Framework Convention as well as to the history of minority rights to try to discover the meaning of the term “national minority.”

1. Article 1 and Article 3(2)

The protections provided by the Framework Convention include a mixture of individual and group rights principles of minority rights. Article 1 of the Convention refers to “the rights and freedoms of *persons* belonging to [national] minorities.”¹⁶⁸ Article 3(2) states, “*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.”¹⁶⁹ While each person is entitled under Article 3(2) to enjoy the rights guaranteed under this Convention collectively (that is, with others), this article does not guarantee collective (or group) rights: “[Article 3(2)] recognises the possibility of joint exercise of [the rights and freedoms guaranteed under the Convention], which is distinct from the notion of collective rights.”¹⁷⁰

However, the Convention applies only to members of specific groups

Hoc Comm. for the Prot. of Nat'l Minorities, CAHMIN (94) 5 (Feb. 1, 1994) (photocopy on file with author) [hereinafter CAHMIN (94) 5].

165. While the committee was successful in completing its drafting of the Framework Convention for the Protection of National Minorities, a draft protocol to the ECHR in the cultural field was never finished, presumably due to a lack of time. See *Meeting Report, 7th Mtg., 10-14 Oct. 1994, Palais de l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 19, CAHMIN (94) 32 (Oct. 14, 1994) (photocopy on file with author). However, the Committee of Ministers in its January 1999 reply to the Parliamentary Assembly's Recommendations 1134 and 1201 stated that “an additional protocol as recommended by the Parliamentary Assembly has proved not to be feasible for several reasons, inter alia because it contains certain elements (*the definition of a national minority* . . .) which do not muster the general support of all member States. *Recommendations of the Assembly, Replies from the Committee of Ministers*, Eur. Parl. Ass., Doc. 8306, (1999), available at http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorking_Docs%2FDOC99%2FEDOC8306.htm (last visited Feb. 22, 2004) (emphasis added). Whether differences of opinion regarding the definition of national minority or lack of time (or both) caused the Ad Hoc Committee not to complete draft protocol seems unclear. What is clear, however, is that no definition of national minority arose out of the drafting process.

166. CAHMIN 94(5), *supra* note 164, at para. 5.

167. *Id.*

168. Framework Convention, *supra* note 3, at art. 1 (emphasis added).

169. *Id.* at art. 3(2) (emphasis added).

170. Explanatory Report, *supra* note 105, at para. 37. The Explanatory Report also expresses confidence that an individual rights approach will achieve adequate protection of national minorities as whole: “The Parties recognise that protection of national minority can be achieved through protection of the rights of individuals belonging to such a minority. *Id.* at para. 31.

(national minorities), thus incorporating a group rights element into the exercise of the rights under the Framework Convention. While providing protection for individuals, the Framework Convention requires the additional step of determining which groups are national minorities eligible to assert the rights of the Framework Convention. This hybrid individual rights/group rights approach is similar to the Minorities Treaties system,¹⁷¹ Article 27 of the ICCPR,¹⁷² and the UN Declaration.¹⁷³

2. Article 3(1)

As in the UN Declaration, the Framework Convention allows each member of a national minority the opportunity to choose whether he or she will be treated as such: "Every person belonging to a national minority shall have the *right freely to choose to be treated or not to be treated as such* and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice."¹⁷⁴

While the Framework Convention provides individuals with a choice of whether they will be treated as a national minority, it does not permit just any individual or group the unfettered right to choose status as a national minority. Rather, Article 3 allows a person *who is already part of a national minority* the choice as to whether he or she will be treated as such:¹⁷⁵ "[Article 3(1)] does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to *objective criteria* relevant to the *person's identity*."¹⁷⁶ On the flip side, state parties to the Framework Convention "do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the [F]ramework [C]onvention."¹⁷⁷ Thus, neither the minorities themselves nor the states of which they are a part have the right to decide whether a minority is a national minority because the answer to this question must be based upon objective criteria. Article 3(1) does not, however, list these objective criteria. The Explanatory Report to Article 3(1) makes it clear, however, that the objective criteria are linked to a person's *self-identity*.¹⁷⁸

171. See discussion *supra* Part III.B.

172. See discussion *supra* Part IV.B.2.

173. See discussion *supra* Part V

174. Framework Convention, *supra* note 3, art. 3(1) (emphasis added).

175. See *id.*

176. Explanatory Report, *supra* note 105, at para. 35 (emphasis added). Compare this reference to "objective criteria" as listed in General Comment 23, *supra* note 86, at para. 5.2.

177. *Rights of National Minorities*, Eur. Parl. Ass., 2003 Sess., 4th pt., para. 6, Recommendation 1623 (2003), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2Fdocuments%2FadoptedText%2Fta03%2FEREC1623.htm> (last visited Feb. 22, 2004) [hereinafter Recommendation 1623].

178. Explanatory Report, *supra* note 105, at para. 35.

3. Article 5(1)

Article 5(1) is probably meant to provide the objective criteria used in determining what constitutes a national minority. It states: "The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."¹⁷⁹ Article 5(1) thus outlines the characteristics *essential* to a national minority's *identity*: religion, language, traditions *and* cultural heritage.¹⁸⁰ Since the elements in this familiar list are now connected by an "and," it appears that, at least under the Framework Convention, a national minority must have all of these elements in common. The Explanatory Report further explains that "[Article 5(1)] does not imply that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities."¹⁸¹ Thus, a purely cultural, religious or linguistic minority would *not necessarily* qualify as a national minority under the Framework Convention, although the possibility is not completely ruled out.

That the door may still be open for a purely cultural, religious, or linguistic minority to qualify as a national minority is suggested by the fact that the Ad Hoc Committee rejected a proposal to extend the protections of the Framework Convention "to persons belonging to ethnic, religious and linguistic minorities, because the Committee felt that this would prejudge the issue of the definition of a national minority"¹⁸² In other words, to extend the protections of the Framework Convention for the Protection of National Minorities to ethnic, religious, and linguistic minorities could either equate these minorities with the term "national minority" or could define these minorities as categorically distinct from national minorities. The Ad Hoc Committee was careful *not* to make either distinction, thus leaving open the possibility that a purely ethnic, religious or linguistic minority could qualify as a national minority. However, the fact that Article 5(1) lists elements *essential* to a national minority's identity would seem to carry great weight in defining what minorities are national minorities.

On its face, Article 5(1) appears to incorporate neither the separateness element contained in Recommendation 1134 nor the temporal element mentioned in Recommendations 1134 and 1201. The concept of separateness, however, may come into the Framework Convention through the back door. A minority defined

179. Framework Convention, *supra* note 3, at art. 5(1). Since the Framework Convention uses the capitalized term "Parties" when referring to the Parties to the Framework Convention, this article will do the same.

180. *Id.* At least one expert who participated in the drafting expressed desire "to replace the words 'the essential elements' by 'other essential elements.'" *Meeting Report, 2nd Mtg., 14-18 Mar. 1994, Palais, De l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 11, CAHMIN (94) 9 (Mar. 23, 1994) (photocopy on file with author). This reading would have added culture as a fifth essential element of the identity of national minorities, but it was not adopted.

181. Explanatory Report, *supra* note 105, at para. 43.

182. *Meeting Report, 5th Mtg. 27 June - 1 July 1994, Palais de l'Europe, Strasbourg*, Ad Hoc Comm. for the Prot. of Nat'l Minorities, para. 32, CAHMIN (94) 19 (July 7, 1994) [hereinafter CAHMIN (94) 19] (photocopy on file with author).

by a unique religion, language, tradition and cultural heritage will likely be "separate and distinct"¹⁸³ from the majority. However, Article 5(1) does *not* appear to "back door" the temporal element. While Article 5(1) does refer to a national minority's "traditions and cultural heritage,"¹⁸⁴ there is no suggestion that the minority must have existed on the territory for a significant period of time and thus be "established"¹⁸⁵ or have "longstanding, firm and lasting ties."¹⁸⁶ Consequently, for purposes of the Framework Convention, new minorities could fall under the rubric of national minority as long as they meet the other identity classification requirements of Article 5(1).

Article 5(1) arguably provides a positive right to national minorities: "The Parties [to the Convention] undertake to *promote* the conditions"¹⁸⁷ specified in Article 5(1). Promotion suggests affirmative action, including the use of Parties' resources for the benefit of their national minorities. The preamble to the Convention requires Parties to do more than just respect national minorities; they must also create conditions to allow them to flourish.¹⁸⁸ Article 12(1) requires Parties to the Convention to "foster knowledge of the culture, history, language and religion of their national minorities."¹⁸⁹ Thus, unlike Article 2 of the UDHR and Article 27 of the ICCPR,¹⁹⁰ the Framework Convention provides national minorities an avenue to assert their rights in a positive fashion.

However, the fact that the Convention is only a "framework convention" is not without legal significance. As Francesco Capotorti points out, "The term 'framework convention' indicates that the principles in the convention are not directly applicable in internal law. States must implement them either through bilateral or multilateral agreements with other states or through legislation or appropriate national policies."¹⁹¹ The Framework Convention also reflects this idea in its preamble, which states that the Parties are "determined to implement the principles set out in [the] framework Convention through national legislation and appropriate governmental policies."¹⁹² Thus, while the Convention legally binds all the signing Parties, it may only be implemented through the actions of individual governments.

4. Article 17(1)

The Framework Convention also provides national minorities the right "to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an

183. Recommendation 1134, *supra* note 115, at para. 11.

184. Framework Convention, *supra* note 3, at para. 5(1).

185. Recommendation 1134, *supra* note 115, at para. 11.

186. Recommendation 1201, *supra* note 127, at Additional Protocol, § I, art. 1(b).

187. Framework Convention, *supra* note 3, at art. 5(1) (emphasis added).

188. *Id.* at pmb1.

189. *Id.* at art. 12(1).

190. See discussion *supra* Parts IV.A and B.

191. Capotorti, *supra* note 4.

192. Framework Convention, *supra* note 3, at pmb1.

ethnic, cultural, linguistic or religious identity, or a common cultural heritage.”¹⁹³ A similar idea was adopted in the UN Declaration.¹⁹⁴ Undoubtedly, this provision particularly considers those kin-state/kin-minority relationships created where a group of individuals of one nationality (the “kin-minority”) is separated from its nation state (the “kin-state”) by the realignment of international borders and becomes a minority of another country.

A kin-minority of a corresponding kin-state would be the quintessential example of a national minority, an idea consistent with the Vienna Declaration.¹⁹⁵ The members of the kin-minority would share *all* of the essential elements of identity listed in Article 5(1) and would be particularly likely to want to maintain contacts with others of their nationality in the kin-state. Indeed, because the term “national minority” is unique to Europe and because it appears to have arisen out of the time period immediately following the two world wars and the subsequent realignment of international borders in Europe, the term probably was originally meant to apply to such kin-state/kin-minority situations. These facts help explain why Orban called the protection of national minorities a “European value.”¹⁹⁶

This analysis suggests that the definition of “national minority” is related to the concept of “nationality, and perhaps the best definition of “national minority” would be a minority that, if given the opportunity, could become a nation state. At the very least, it seems clear that for purposes of the Framework Convention, whenever there is a kin-state/kin-minority relationship, the kin-minority will be a national minority of its home country.¹⁹⁷ While such a kin-state/kin-minority relationship is probably sufficient to make the kin-minority a national minority, there is no indication that such a relationship is necessary for a group to constitute a national minority. For example, while they do not have a corresponding kin-state, the Roma are probably a national minority.¹⁹⁸ Thus, under the Framework Convention, the true defining characteristic of a national minority is the sharing of a number of attributes between the members of a group (i.e., religion, language, culture and traditions) and not necessarily the relationships the minority maintains with other groups or countries.

The dangers posed to international security by the existence of such kin-state/kin-minority relationships appear to be real and ongoing. As mentioned previously Germany used the excuse of protecting German-speaking minorities in the countries of Eastern Europe as a pretext for starting World War II.¹⁹⁹ More recently, the Hungarian minorities living outside Hungary have been an issue. Hungary recently passed a Status Law giving special privileges to the Hungarian

193. *Id.* at art. 17(1).

194. See UN Declaration, *supra* note 99, at art. 2(5).

195. See discussion *supra* Part VI.B.4.

196. Lobjakas, *supra* note 1.

197. See discussion *supra* Part VI.B.4.

198. See Recommendation 1623, *supra* note 177, at para. 6 (encouraging “states parties to pay particular attention to the possibility for the most vulnerable Roma minorities to fully benefit from the protection envisaged in the Framework Convention [for the Protection of National Minorities]”).

199. See *supra* text accompanying note 54.

minorities living in Croatia, Serbia and Montenegro, Romania, Slovenia, Slovakia and Ukraine.²⁰⁰ The law created serious concerns in both Romania and Slovakia,²⁰¹ which undoubtedly were worried about the possibility of Hungary meddling in their domestic affairs. The Parliamentary Assembly of the Council of Europe responded to the Hungarian law by stating that it generally “welcomes assistance give[n] by kin-states to their kin-minorities”²⁰² but also cautioned that such assistance must be acceptable to the states of which the kin-minorities are citizens.²⁰³ The Parliamentary Assembly further noted “that responsibility for minority protection lies primarily with the home states.”²⁰⁴ Nevertheless, this incident shows that the issue of national minorities remains a real international concern.

VII. CONCLUSION

Although this review of the Framework Convention does not provide a final definition of the term “national minority,” we can draw some firm conclusions about what is a national minority, at least for purposes of the Convention. The members of a national minority share essential characteristics (religion, language, traditions and cultural heritage) that define the self-identity of the individuals that make up the minority. The members of a national minority most likely have all of these essential characteristics in common, and they may live separate and apart from the majorities among whom they live. Thus, the meaning of the term national minority under the Framework Convention seems to incorporate, through the back door, the concept of separateness suggested in Parliamentary Assembly Recommendation 1134. However, because the Framework Convention contains no temporal element in describing a national minority, newly created minorities could potentially qualify if they meet the other elements described in the Convention.

A kin-state/kin-minority relationship is sufficient but not necessary to make a minority a national minority. Furthermore, a national minority is one that is likely to have a particular interest in maintaining contacts with others across international borders, often because of the existence of a kin-state, the members of whose majority population are of the same nationality as the national minority. These facts, together with the fact that national minorities probably have a number of characteristics in common, suggest that the concept of a national minority is related to the concept of nationality and that a national minority could best be defined as a minority that, if given the opportunity, could become a nation state.

200. See *Preferential Treatment of National Minorities by the Kin-State: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries (“Magyars”) of 19 June 2001*, Eur. Parl. Ass., 2003 Sess., 3rd pt., paras. 3-4, Res. 1335 (2003), available at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta03%2FERES1335.htm> (last visited Feb. 22, 2004) [hereinafter Resolution 1335]. See also Lobjakas, *supra* note 1.

201. See Lobjakas, *supra* note 1.

202. Resolution 1335, *supra* note 200, at para. 1.

203. *Id.*

204. *Id.* at para. 2.

The recent Hungarian law shows that continued concern over national minorities is well-founded. Hopefully, the particular attention the Framework Convention provides to national minorities and the additional rights it guarantees to them will help to diffuse future tensions over the question of national minorities.

