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Minority Rights Constraints on a State's Power to Regulate Citizenship under International Law

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ABSTRACT

In international law, there is no officially accepted definition of a minority. The traditional view on the definition of a minority requires that in order for persons belonging to ethnic, religious or linguistic groups to receive minority status and enjoy relevant minority rights, they must hold the citizenship of their State of residence. This thesis questions the traditional approach to the concepts of minority and minority rights with special reference to the case of the ethnic, linguistic Russians in Estonia and Latvia.

It presents an analysis of the international legal and normative bases for justifying the effective protection of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities with reference to their citizenship status. It is argued that at least three international legal and normative bases may be invoked for the effective protection of the ethnic, linguistic Russians in Estonia and Latvia. Such legal and normative bases can be found in minorities-specific standards with the focus on the protection of cultural identity for minorities, general human rights standards with an emphasis on substantive equality, and the right to internal self-determination. The linkage of these legal and normative bases to the protection of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities with reference to citizenship in their States of residence strongly suggests that Estonian and Latvian citizenship laws are problematic from the perspective of minority protection. It also implies that Estonia and Latvia should protect the minority rights of the ethnic, linguistic Russians in an effective manner at the domestic legal level through the implementation of concrete protective measures to that effect, by taking into account their various needs and problems, including the matter of citizenship for the ethnic, linguistic Russian non-citizens and stateless persons.

The discussion about the legal and normative bases for the protection of the ethnic, linguistic Russians in Estonia and Latvia with reference to their citizenship status also indicates that a State's power to regulate citizenship can be constrained 'to the extent' that it is obliged to protect minority rights in an effective manner at the domestic legal level under international law.

Key words: Minority, minority rights, minority protection, human rights, citizenship, the non-discrimination principle, internal self-determination

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ABBREVIATIONS

AJIL: American Journal of International Law

Am. J. Comp. L: American Journal of Comparative Law

AM. U. L. Rev: American University Law Review

ARIZ. J. INT'L & COMP. L: Arizona Journal of International & Comparative Law

Austrian J. Publ. Intl. Law: Austrian Journal of Public and International Law

Brit. Y.B. Int'l L: British Yearbook of International Law

Can. J.L. & Juris: Canadian Journal of Law & Jurisprudence

Case W. Res. J. Int'l L: Case Western Reserve Journal of International Law

CDL: European Commission for Democracy through Law

Chi. J. Int'l L: Chicago Journal of International Law

Colum. J. Transnat'l L: Columbia Jounral of Transnational Law

Conn. J. Int'l L: Connecticut Journal of International Law

Consol. T.S: Consolidated Treaty Series

Cornell Int'l L.J: Cornell International Law Journal

ETS: European Treaty Series

Fordham Int'l L.J: Fordham International Law Journal

GA. Res: General Assembly Resolutions

GAOR: General Assembly Official Records

Geo. Immigr. L.J: Georgetown Immigration Law Journal

Harv. L. Rev: Harvard Law Review

HRLJ: Human Rights Law Journal

HRQ: Human Rights Quarterly

Hum. Rts. Comn: United Nations Human Rights Commission

ICLQ: International and Comparative Law Quarterly

ILM: International Law Materials

Int'l Hum. Rts. Rep: International Human Rights Reports

Int'l Org: International Organization

Int'l Soc. Sci. J: International Social Science Journal

Iowa L. Rev: Iowa Law Review

Israel YB. H.R: Israel Yearbook of Human Rights

JEMIE: Journal on Ethnopolitics and Minority Issues in Europe

LJIL: Leiden Journal of International Law

LNTS: League of Nations Treaty Series

Mich. J. Int'l L: Michigan Journal of International Law

Mich. L. Rev: Michigan Law Review

N.Y.L. Sch. J. Int'l & Comp. L: New York Law School Journal of International and Comparative Law

N.Y.U. J. Int'l & Pol: New York University Journal of International law & Politics

Notre Dame L. Rev: Notre Dame Law Review

Recueil des Cours: Recueil des Cours de l'Académie de Droit International

Refugee Surv. Q: Refugee Survey Quarterly

RIAA: Reports of International Arbitral Awards

S.C. Res: Security Council Resolutions

SAJHR: South African Journal on Human Rights

SCR: Supreme Court Reports (Canada)

Stan. J Int'l L: Stanford Journal of International Law

Tex. Int'l L. J: Texas International Law Journal

Transnat'l L. & Contemp. Probs: Transnational Law & Contemporary Problems

U.C. Davis J. Int'l L. & Pol'y: U.C. Davis Journal of International Law & Policy

UKHL: House of Lords Decisions

U.T. Fac. L. Rev: University of Toronto Faculty of Law Review

UN. Doc: United Nations Document

UNTS: United Nations Treaty Series

Va. J. Int'l L: Virginia Journal of International law

Vand. L. Rev: Vanderbilt Law Review

Y.B. Int'l L. Comm'n: Yearbook of International Law Commission

Yale J. Int'l. L: Yale Journal of International Law

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NOTE ON THE TEXT

1. The expressions 'protection of minority rights' and 'minority protection' are used alternatively in this thesis. The former focuses on the protection of specific rights of persons belonging to minorities within specific standards of minority rights at the international and regional levels, while the latter concerns the comprehensive coverage of the protection of persons belonging to minorities in a variety of areas. As a matter fact, however, it is difficult to distinguish between the multiple meanings of each term exactly, because present international standards of minority rights remain vaguely worded and thus unclear in terms of the contents and effects of minority rights. Thus, it is possible to state that to protect minority rights is to advance minority protection in the end. Given the difficulty arising from appropriate terminology, the terms 'protection of minority rights' and 'minority protection' will be used alternatively in this thesis, depending on given contexts.

2. One may distinguish between the terms 'nationality' and 'citizenship' in a technical legal sense. While essentially the same concept, these words reflect two different legal dimensions. Both terms identify the legal status of an individual in light of his or her State membership. But the term 'citizenship' is confined mostly to domestic legal forums, while the term 'nationality' is connected to the international legal forum. In this thesis, both terms will be used alternatively, according to given contexts.

3. The terms 'people' and 'peoples' are used alternatively in this thesis, depending on given contexts. This is necessary to avoid terminological confusion in discussing the right to self-determination in international law. In this thesis, the term 'people' refers to the entire body of persons who satisfy the criteria generally accepted for determining the existence of a people in a territorial unit. However, if the holders of the right to self-determination are to be referred to universally beyond a single territorial unit, the expression of 'peoples' will be used instead.

4. Unless otherwise stated, the term 'minorities' refers to all categories of minorities, including persons belonging to national, ethnic, religious or linguistic minorities.

5. Unless otherwise stated, ethnic, linguistic Russian populations in Estonia and Latvia in this thesis refer to 'citizens', 'non-citizens' or 'stateless persons' of Russian origin. Although some members of the ethnic, linguistic Russian populations in these States have received citizenship through the naturalisation process, this thesis focuses on those who have not.

6. In terms of subject-matter, including the description of the status of the ethnic, linguistic Russian in Estonia and Latvia, the work now presented is based on the law and materials in existence as of 31 August, 2005, as this revised thesis has corrected the original thesis which covered that period.

Chapter I

Introduction

> Whatever rights are due to states or nations or other actors in international relations, they are subject to and limited by the rights of the international community. The rights of sovereign states, and of sovereign peoples or nations, derive from the rules of the international community or society and are limited by them.
>
> Hedley Bull[1]

1. Background and Main Questions

After the former Union of Soviet Socialist Republics (USSR) fractured into fifteen States on 21 December 1991, the vast majority of new States, formerly republics of the Soviet Union,[2] adopted laws on citizenship as the expression of their sovereignty.[3] In formalising rules for the initial body of citizens and the acquisition of their

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[1] H. Bull, *Justice in International Relations: The 1983 Hagey Lectures* (Waterloo, Ontario: University of Waterloo, 1984), p. 11.

[2] On 8 December 1991 in Viskuli, the residence of the Belarusian Government in Belovezhskaya forest preserve, the leaders of the Republic of Belarus, the Russian Federation and Ukraine signed the Agreement on establishment of the Commonwealth of Independent States (CIS). On 21 December 1991 in Alma-Ata the heads of eleven sovereign States (except the Baltic States and Georgia) signed the Protocol to the above Agreement, in which they stressed that the Azerbaijan Republic, Republic of Armenia, Republic of Belarus, Republic of Kazakstan, Kyrgyz Republic, Republic of Moldova, Russian Federation, Republic of Tajikistan, Turkmenistan, Republic of Uzbekistan and Ukraine on a basis of equality established the Commonwealth of Independent States. The participants of the meeting unanimously adopted the Alma-Ata Declaration, which confirmed the devotion of the former union republics to cooperation in various fields of external and internal policies, and announced the guarantees for implementation of international commitments of the former Soviet Union. In December 1993 the Commonwealth was joined by Georgia. Alma-Ata Declaration, reprinted in 31 ILM 148 (1992). See also, Accord on the Commonwealth of Independent States (1991), reprinted in C. F. Furtado & A. Chandler (eds.), *Perestroika in the Soviet Republics: Documents on the National Question* (Boulder: Westview Press, 1992), pp. 355-58.

[3] M. Iogna-Prat, "An introduction to the Workshop on International Law and Nationality Laws in the Former USSR", *Austrian J. Publ. Intl. Law,* Vol., 49, 1995, pp. 21-27.

citizenship, the States concerned followed various patterns.[4] Some took a liberalist approach, known as the 'zero option', trying to include in the initial body of citizens 'all persons residing permanently in their territory' at the date of the entry into force of citizenship laws[5] and, in some cases, extending the acquisition of citizenship to persons residing outside but having a link with the State concerned.[6] Others adopted quite a restrictive approach and limited the granting of their citizenship to some categories of persons having a strong 'ethnic link' of attachment to the State.[7]

The Supreme Council of the Republic of Latvia in 1991 proclaimed that only citizens of pre-war Latvia and their descendants would be granted automatic citizenship in the newly independent State of Latvia.[8] With this measure, some half a million ethnic, linguistic Russians in Latvia became 'instant aliens' in the place they considered home. Neighboring Estonia also adopted a restrictive citizenship law in 1992 as it reclaimed independence following fifty-one years of Soviet rule.[9]

These two countries adopted more restrictive citizenship laws compared with another country in the Baltic region, Lithuania, where automatic citizenship was granted to all permanent inhabitants in its territory when it regained independence from the former USSR.[10] There has been an ongoing debate, involving international organisations and human rights groups, about the difficulty of the language examinations given in the naturalisation processes in Estonia and Latvia. Some view the procedure as a means of denying citizenship to ethnic, linguistic Russian

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[4] For a general observation, see European Commission for Democracy through Law, *Consequences of State Succession for Nationality, Report by the Venice Commission* (Strasbourg: Council of Europe Publishing, 1998), pp. 34-39.

[5] Belarus, Moldova, Ukraine and Lithuania granted automatic citizenship to all permanent residents in their respective territories.

[6] For instance, Kyrgystan and Georgia linked their new citizenship to the citizenship of the respective former Soviet republics.

[7] Estonia and Latvia restricted automatic citizenship to persons who either had been Estonian or Latvian citizens prior to the annexation by the USSR or who were linked to their territory of the respective State by their origin.

[8] Republic of Latvia Supreme Council Resolution, "On the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization", in the Republic of Latvia: Human Rights Issues (Riga: 5th Saeima's Standing Commission on Human Rights, 1993/1994), p. 76.

[9] L. W. Barrington, "The Making of Citizenship Policy in the Baltic States", *Geo. Immigr. L.J*, Vol., 13, 1999, pp. 159-199.

[10] As for different background in Lithuania compared to Estonia and Latvia in relation to citizenship policies, See Chapter 2 below, pp. 35-43. The new citizenship laws of the States emerging from the dissolution of Czechoslovakia and Yugoslavia were influenced by the pre-existing citizenship laws of these countries' constituent parts. In the successor States of Czechoslovakia and Yugoslavia, persons possessing the citizenship of the respective federated entity which had become independent and their descendants acquired *ipso facto* the new citizenship. See also, B. Bowring, "New Nations and National Minorities: Ukraine and the Question of Citizenship", P. Cumper and S. Wheatley (eds.), *Minority Rights in the New Europe* (The Hague/London/Boston: Martinus Nijhoff Publishers, 1999), pp. 233-250.

populations residing in the countries, most of whom do not speak the local languages.[11] In response to this criticism, the Estonian and Latvian governments have maintained that they have inherent international legal rights to regulate citizenship within the domains of domestic jurisdiction as independent sovereign States and that they have no international legal obligations to grant the ethnic, linguistic Russian residents who had resided therein before independence automatic citizenship of Estonia and Latvia.[12]

Citizenship[13] is like a guarantee for every human being to enjoy normal lives in various aspects of political, civil, economic and other activities in a State. One can easily recognise that a great deal hinges on which passport one possesses; whether one may enter and leave a country at will, live and work there, own and inherit property, vote and serve in public office. On the other hand, it is true that citizenship is something which one usually thinks of as a 'given', objective aspect of his or her existence, much like gender or ethnic character. This is because the legal character of citizenship has long been recognised as belonging to 'reserved domains of domestic jurisdiction' deriving from an attribute of State sovereignty.

In a similar vein, citizenship has served as an institutional tool for nation States to form and maintain their statehood on the basis of a particular ethnic or national grouping.[14] Almost all modern constitutions have assumed a State, a unit of international society, as 'one nation State', although the ethnically plural structure of their population has not always corresponded to the 'one nation State model' in its true sense.[15] Political membership as legally expressed in citizenship within the

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[11] D.F. Orentlicher, "Citizenship and National Identity", in D. Wippman (ed.), *International Law and Ethnic Conflict* (Ithaca and London: Cornell University Press, 1998), pp. 296-325.

[12] *Ibid.*

[13] One may distinguish between the terms 'nationality' and 'citizenship' in a technical legal sense. While essentially the same concept, these words reflect two different legal dimensions. Both terms identify the legal status of an individual in light of his or her State membership. But the term 'citizenship' is confined mostly to domestic legal forums, while the term 'nationality' is connected to the international legal forum. As Weis states, "conceptually and linguistically, the terms...emphasize two different aspects of the same notion...'Nationality' stresses the international, 'citizenship' the national, municipal aspect." P. Weis, *Nationality and Statelessness in International Law* (London: Stevens & Sons, 1956), pp. 5-6. In this thesis, both the terms of nationality and citizenship will be used interchangeably.

[14] B. Anderson, *Imagined Communities: Reflection on the Origins and Spread of Nationalism* (London: Verso, 1991).

[15] It is to be remembered that the nation-State as an established institution has been historically shaped with the process of formation of modern ethno-nations in the very specific European context from the sixteenth and seventeenth centuries on. It was in this sense that nation-State acquired its ethnic identity and content. The nation-State was understood as a specific means or even the only mechanism that could realise certain national interests of nations as specific ethnic communities. The majority of modern States were established and are still perceived as nation-States of certain nations, even though

framework of a nation State is a human creation, at the same time, and given the importance of political membership for the normal lives of natural persons within a State structure, one might reasonably ask why citizenship of a State is given to some and not to others. The years in Estonia and Latvia since independence in 1991 have witnessed the formation of new minorities of long-term residents that live without some of the basic rights associated with citizenship because of restrictive citizenship laws. In Estonia and Latvia there are a large number of individuals who are not citizens because neither they nor their descendants were citizens of Estonia and Latvia prior to the Soviet occupation. Prior to the disintegration of the Soviet Union, these minorities settled down and lived in States of the Union which they regarded as 'home' in factual terms.[16] The ethnic, linguistic Russians in Estonia and Latvia did to some extent return to their homelands, but there are a considerable amount of those who want to stay within the territory they have been living in and to become citizens of Estonia and Latvia. If the governments of the States which they inhabit try to limit the legal parameters of citizenship by enacting citizenship laws, the problem of protecting the persons who have not been recognised as citizens of the State of which they are inhabitants becomes a critical issue. Because they do not possess citizenship, and indeed often find this status effectively denied, they are blocked from the enjoyment of those rights that flow from the status of citizenship, including participation in the political process. The consequence was that over 30% of the non-ethnic Estonians in Estonia and about 40% of the non-Latvians were excluded from citizenship. They were effectively consigned instead to a sort of legal and political limbo, a perpetual state of partial membership and disenfranchisement.[17]

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the population is not usually ethnically homogenous today. See K.W. Deutsch, *Political Community at the International Level: Problems of Definition and Measurement* (Princeton: Princeton University Press,1953); E. Gellner, *Nations and Nationalism* (Ithaca &London: Cornell University Press, 1983); C.A. Macartney, *National States and National Minorities* (London: Oxford University Press, 1934), E.J. Hobsbawm, *Nations and Nationalism since 1780* (Cambridge: Cambridge University Press, 1992); D. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

[16] For a general understanding, see B. Stern, (ed.), *Dissolution, Continuation and Succession in Eastern Europe* (The Hague: Kluwer Law International, 1998); C.D. Harris, "New European Countries and Their Minorities", *Geographical Review*, Vol., 83, 1993, pp. 301-320.

[17] It needs to be noted that while Russia generally is considered a continuation of the former Soviet Union for most purposes such as the United Nations seat, it did not necessarily assume all of the rights and obligations of the former Soviet Union. Russia did not purport to inherit all the territories and populations of other former Soviet republics. Thus, rather than extending its citizenship to all former Soviet citizens, Russia's Nationality Act of 1991, which entered into force in 1992, generally limited the granting of automatic nationality to former citizens who permanently resided on Russian territory as of the law's adoption date. It did not purport to inherit the territories and populations of other former Soviet republics. The approach of the Russian Nationality Act, which took effect on February 6, 1992, generally coincided with former Soviet law whereby a person's respective citizenship was determined

The question why some long-term resident ethnic, religious or linguistic minorities are included in many socio-economic spheres but remain barred or restricted from political membership is in one sense a political issue, and in another a legal issue.[18] The subordination of long-term ethnic, religious or linguistic residents to status as 'second class residents' prompts one to ask the following questions: on what basis may they be denied political membership and to what extent does a State have discretion to justify such exclusion in the form of citizenship? By raising these questions, two issues become essential in calling for desired solutions from the point of view of international law. The first is the problem of statelessness, and the other is the protection of ethnic, religious or linguistic minority groups residing within a State. This thesis is concerned with the latter and it situates the approach to the issue in the context of the protection of human rights for persons belonging to minority groups under international law.

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according to the republic in which the person permanently resided. See Venice Commission, *Consequences of State Succession for Nationality,* European Commission for Democracy through Law, Consequences of State Succession for Nationality 20, No.11, 1997, pp. 32-33; W. R. Brubaker, "Citizenship Struggles in Soviet Successor States", *International Migration Review*, Vol., xxvi, 1992, pp. 269-291. However, in 1993, an amendment to the Russian Nationality Act was adopted. The main change of the amendment refers to the option for Russian nationality by former USSR citizens. An application for Russian citizenship could be made by former citizens of the USSR who reside in the territory of other States that were within the former USSR, provided they declare their intention to acquire Russian citizenship by 31 December 2000; stateless persons permanently residing in Russia on 6 February 1992, or other republics of the former USSR as of 1 September 1991, who within one year of the 1992 Act declared their intention to acquire Russian Federation citizenship. On 31 December 2000, the possibility for former USSR citizens (who resided on the territory of the former USSR and arrived for permanent residence in the Russian Federation after 6 February 1992) of obtaining Russians citizenship through a simplified procedure, provided for under Article 18 (d) ceased to be available. The Presidential Commission on Citizenship stated that those holding a former USSR passport, who had not acquired the citizenship of any country before this deadline, would, as of 1 January 2001, be considered as stateless persons. As a consequence, they would have to apply for Russian citizenship according to the provision of the law applicable to stateless persons. From 1 January 2001, all citizens of any former USSR country have to apply according to the rules for foreign citizens, as the simplified procedure for acquiring Russian citizenship no longer applies. Thus, the Russian Nationality Law has enlarged considerably the categories of persons who may be entitled to Russian nationality. Nevertheless, many ethnic, linguistic Russians (former Soviet citizens) remain non-citizens or stateless persons in Estonia and Latvia, because their life-long base has been in Estonia and Latvia. At the same time, it should be noted that Estonia and Latvia do not allow dual nationality. Russian Federation Nationality Law, Nov. 28, 1991; Amendment to the Russian Federation Nationality Citizenship Law of 1993; J. Putzer, "Overview of Nationality Laws in the Former USSR", *Austrian J. Publ. Intl. Law*, Vol., 49, 1995, pp. 29-41; Statute on Russian Federation Citizenship Matters, Russian Federation President's Edict No. 386, Apr. 10, 1992, Article 2(1) & (2); Amnesty International, Annual Report 2001: Russian Federation, 2001; Human Rights Watch, World Report 2001: The Russian Federation, 2001; See also Chapter 2 below, pp. 55-58.

[18] There is a voluminous body of literature devoted to this debate. See, M. Waltzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, Inc., 1983); W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); A. Buchanan, *Secession: The morality of political divorce from Fort Sumter to Lithuania* (Boulder: Westview Press, 1991); D.L. Phillips, *Looking Backward: A Critical Appraisal of Communitarian Thought* (Princeton: Princeton University Press, 1993).

The attitudes of the Estonian and Latvian governments toward their ethnic, linguistic Russian residents have been based on the Baltic restorationism or legal continuity theory.[19] They have argued that as the incorporation of the Baltic States into the Soviet Union was illegal, it had no legal consequences for Estonia and Latvia. On this basis, they have consistently maintained that they have no legal obligations to grant automatic citizenship to the Russian residents who had resided in the territories of what are now Estonia and Latvia before independence in 1991. However, should not the automatic citizenship have been granted to the ethnic, linguistic Russian residents in Estonia and Latvia, given that they had established their life base in the territories of what are now Estonia and Latvia for a significant period of time? Do the Estonian and Latvian citizenship laws, under which historic and habitual residence of the ethnic, linguistic Russians is denied, conform to international standards on nationality with particular emphasis on the human rights aspect of citizenship?[20]

The Estonian and Latvian governments have asserted that the Soviet State policy that transferred individuals into territories inhabited by a primarily different ethnic group and subjugated the latter constituted virtually the infringement of the host population's right to self-determination.[21] Some Estonians and Latvians have argued that the presence of the ethnic, linguistic Russians in these republics represents a denial of self-determination for all Estonians and Latvians.[22] The status of the ethnic, linguistic Russians in Estonia and Latvia has been the main cause of conflict between titular Estonian and Latvian nationals and the ethnic, linguistic Russian populations in Estonia and Latvia. Self-determination is based on the idea that all 'peoples' have the right to determine freely their political status and pursue freely their economic, social and cultural development. Self-determination has been recognised as a 'right' under international law.[23] Numerous international instruments have codified the strong desire on the part of the inhabitants who have a shared consciousness to determine as a 'group' their own future.[24] This common identity may be based on a number of shared

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[19] See section "The Baltic Restorationism and International Law", Chapter 2 below, pp. 44-51.
[20] See section "The Right to Nationality under International Law", Chapter 3 below, pp. 69-77.
[21] E. Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination", *N.Y.U.J.Int'l & Pol,* Vol., 27, 1994, pp. 159-84.
[22] UNPO. Report, Unrepresented Nations and Peoples Organization (UNPO), Self-Determination in Relation to Individual Human Rights, Democracy and the Protection of the Environment, UNPO GA/1993/CR/1 (Conference Report 1993), at 3; See also, I. Grazin, "The International Recognition of National Rights: The Baltic States' Case", *Notre Dame Law Review*, Vol., 66, 1991, pp. 1385-1419.
[23] A. Cristescu, "The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments", UN Doc. E/CN.4/Sub. 2/404/Rev (1981).
[24] *Ibid.*

ethnic, religious and civic traits. Where the group's desire is coupled with claims to a specific territory, it often has led to calls for the formation of an independent nation State. As peoples who have managed to free themselves from foreign domination of the former Soviet Union, the titular Estonian and Latvian can safely argue that they have the right to self-determination. By this standard, the Baltic peoples' desire to reassert their sovereignty and strengthen their national culture after years of repressive Soviet rule is legally justified under the right to self-determination. Estonia and Latvia seem to have the right to pass language laws that not only made their native languages the official languages of their respective States, but also imposed language requirements for citizenship and for certain jobs in the field of public affairs, such as the police.[25] As a matter of fact, it is readily observable that many countries have an official language and its requirement in certain circumstances, such as civil service jobs, is a reasonable one.[26] The Baltic States put the question of independence to a referendum as they underwent historical transformation in the 1990s. Relying on the claim to the right to self-determination, the Balts argued that if their populations voted for self-governance, then continued rule from Moscow would be impermissible.[27] If this is the case, how can one explain that despite 30% to 40% of the former Soviet residents in Estonia and Latvia having supported the move to independence in the referendum, Estonia and Latvia disenfranchised most of them through citizenship laws after regaining independence from the Soviet Union?[28] What is the definition of the concept of peoples for the right to self-determination? Should not the ethnic, linguistic Russian residents who had been born or resided in the former republics of Estonia and Latvia in the Soviet Union before the independence of Estonia and Latvia in 1991 be included in the membership of the peoples?

Moreover, the restrictive citizenship laws of Estonia and Latvia raise fundamental questions about the protection of the ethnic, linguistic Russian residents as persons belonging to minorities and holders of minority rights recognised under international law. The question arises whether the protection of minorities is exclusively reserved for citizens whose ethnic affiliation is different from that of the majority, or whether

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[25] S.B. Green, "Language of Lullabies: the Russification and de-Russification of the Baltic States", *Mich. J. Int'l L*, Vol., 19, 1997, pp. 219-275.

[26] H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania, 1990), p. 112.

[27] G. Smith, A. Aasland & R. Mole, "Statehood, Ethnic Relations and Citizenship", in G. Smith (ed.), *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania* (London: Macmillan Press, 1996), pp. 181-205.

foreigners or stateless persons also fall within the scope of this protection. This question is directly related to the definitional question of the concept of a minority in international law and is indeed, a very critical matter for the discussion about effective international minority protection, because the definition of a minority has consequences with respect to the nature and content of minority rights in international law. The Law on Cultural Autonomy for National Minorities of Estonia lists citizenship as a requirement for recognition as a member of a minority as the holder of minority rights.[29] The Law on Unrestricted Development of National or Ethnic Groups in Latvia has no definition of a minority,[30] but the holding of citizenship of the State of residence is not a requirement for receiving minority status at least in formal terms. To this extent, Latvia is ahead of Estonia. This Law speaks for equal human rights for all the residents of Latvia, regardless of their nationality,[31] but later in paragraph 4 the Law emphasises the importance of "preserv[ing] the national identity as well as historical and cultural environment of Latvia's ancient indigenous nationality, the Livs." The Latvian government and institutions shall be responsible "...for the renewal and development of the socio-economic infrastructure of the territory, inhabited by them (the Livs)."[32] This example shows concretely how one article in law contradicts the other. In this case, equality of 'all' later becomes priority of some. Furthermore, given that Latvia has not granted automatic citizenship to the Russian residents who had resided in the territory of what is now Latvia before independence in 1991, and many ethnic, linguistic Russians have been left as non-citizens or stateless persons, the effectiveness of minority rights for the ethnic, linguistic Russian non-citizens and stateless persons in Latvia is, if at all, very questionable. Putting together this state and paragraph 4 of the Law above, one could conclude that the indigenous Latvians seem to take priority in terms of enjoyment of the socio-economic development of the country.

The important point is that, because of the restrictive citizenship requirements for naturalisation, such as fluency in the dominant native languages, persons who have a common ethnic, linguistic identity in Estonia and Latvia and who are not citizens of

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[28] For an overview of the citizenship laws in Estonia and Latvia, see Chapter 2 below, pp. 52-54.
[29] Article 1 of the Law on Cultural Autonomy of National Minorities, RT I, No. 71, 1993.
[30] Law on the unrestricted development and right to cultural autonomy, Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs, No. 21, 1991; Human Rights Debate in Latvia 1995-1997, *Latvian Human Rights Quarterly*, 3/4, 1998.
[31] Paragraph 1 of the Law.
[32] Paragraph 4 of the Law.

Estonia and Latvia, do not receive the benefits of common human rights. Persons within a population sharing the same ethnic characteristics, language, culture, tradition and history may have a different legal status which threatens the preservation of their identity, depending on whether or not they hold the citizenship of their State of residence. This case shows the serious consequences of relying on the status of citizenship for applying various human rights, as well as minority rights.

Herein lies the fundamental problem of the protection of the ethnic, linguistic Russians in Estonia and Latvia from the perspective of the effective protection of minority rights under international law. If the citizenship criterion is required for recognising minority rights under international law, it follows that minority rights are basically citizens' rights. Are minority rights merely citizens' rights? Are the ethnic, linguistic Russians who do not hold the citizenship of Estonia and Latvia the members of minority as the right holders of minority rights for the purpose of present international law? What are the nature and contents of minority rights under present international law? Are the contents of minority rights confined to the cultural aspects in the context of the right to identity for persons belonging to minority groups, or beyond these? What are the international legal and normative bases for justifying the effective protection of the ethnic, linguistic Russians as persons belonging to minorities with reference to their citizenship status under international law? What is the implication of the justification for the effective protection of the ethnic, linguistic Russians under international law with respect to a State's power to regulate citizenship?

2. Importance of the Research

The issues raised within 'minority problems' are at the root of several international conflicts and humanitarian disasters. Conflicts and disputes in the Socialist Federal Republic of Yugoslavia (Former Yugoslavia) and Bosnia-Herzegovina, Rwanda, Northern Ireland and East Timor can all be traced to the existence of ethnic, religious or linguistic groups asserting various rights. The suppression of groups within a State leads to continued political instability and unrest and, in extreme cases, to regional destabilisation. In this sense, minority protection is integral to a civilised standard of

international good governance that legitimises States.[33]

The development of 'specific rights' of persons belonging to ethnic, religious or linguistic minority groups is a feature of 20th century international law. The emergence of the protection of minority groups under the Peace Treaties concluded in 1919[34] preceded the modern concept of human rights. The rights of persons belonging to minorities include rights to cultural identity, religious freedom and others. By their nature, they are less easily identified and less easily implemented than other rights, as States have been worried that full guarantee of minority rights can give rise to secessionist movements of ethnic, religious or linguistic groups within existing boundaries of nation States. Despite the long history of the discussion on the protection of persons belonging to ethnic, religious or linguistic minorities in international relations, international legal standards on the rights of persons belonging to such minorities still remain vague.

Today, co-existing with other more general international legal standards, the problem of the protection of persons belonging to minorities raises unique issues and gives rise to tensions with other topics of international law. The affirmation of the rights of persons belonging to minorities as presently understood can be seen in Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[35] as follows:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[36]

In principle, States' international obligation to protect the rights of persons belonging to minorities is evidenced in Article 27 of the ICCPR, and other relevant international and regional instruments should ensure the existence and development of minorities, their distinct language, culture and organisation within the political system of their State of residence.[37]

There is no doubt that respecting the cultural identity of persons belonging to

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[33] See, generally, B. Harff & T. R. Gurr, 2nd ed., *Ethnic Conflict in World Politics* (Boulder: Westview Press, 2004); T.R. Gurr, *Minorities at Risk* (Washington, D.C: United States Institute of Peace Press, 1993).

[34] For instance, minorities treaty between the Principal Allied and Associated Powers and Poland was concluded in June 28, 1919, 225 Consol. T.S. 412.

[35]The International Covenant on Civil and Political Rights, 1966, 999 UNTS 171.

[36]Article 27 of the ICCPR.

[37]Human Rights Committee (HRC) General Comment No. 23, UN Doc.HRI\GEN\1\REV.1\ at 35 (1994), para. 9; See, generally, Chapter 5 below, pp. 131-134.

minorities has been regarded as the most essential aspect of minority protection. It should be noted, however, that the protection of the cultural identity of ethnic, religious or linguistic minorities is not an isolated phenomenon and should be realised in conjunction with the guarantee of various other civil, political and social rights.[38] A need to take a comprehensive and integrative approach to the issue of the protection of minority rights beyond the narrow defined framework with emphasis on preservation of cultural identity for minority groups has been ignored or consciously avoided in the discussion on the protection of persons belonging to minorities in international law. The requirement of holding citizenship of the State of residence for receiving minority status as the holder of minority rights espoused by the traditional view on the definition of a minority clearly illustrates this inherent controversial aspect of the protection of persons belonging to minorities under international law.[39] Granted that citizenship has been regarded as an indispensable legal element in exercising various civil and political rights for individuals within their State of residence as well as a condition for full membership in a State unit, the restrictive approach to definition of a minority under which only 'citizens' of their State of residence can be eligible as possible members of minorities as the holders of minority rights would be nothing but the denial of the protection of persons belonging to minorities in its true sense. The existence of the ethnic, linguistic Russian stateless persons and non-citizens in Estonia and Latvia illustrates the problem of this narrow approach to the protection of minority rights under international law.

The present research questions this narrow approach to minority protection in international law. The thesis presents an analysis of the international legal and normative bases for justifying the effective protection of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities with reference to the Estonian and Latvian restrictive citizenship laws. In this thesis, it is argued that at least three international legal and normative bases may be invoked for the effective protection of the ethnic, linguistic Russians in Estonia and Latvia. Such legal and normative bases can be found in minorities-specific standards with the focus on the protection of cultural identity for minorities, general human rights standards with an emphasis on substantive equality, and the right to internal self-determination. The linkage of these legal and normative bases to the protection of the ethnic, linguistic Russians in Estonia

[38] See Article 5 of the proposed convention in Chapter 8 below, pp. 260-262.
[39] See section "Traditional Definition of a Minority", Chapter 4 below, pp. 90-92.

and Latvia with reference to citizenship in their States of residence strongly suggests that Estonian and Latvian citizenship laws are problematic from the perspective of minority protection. It also suggests that these countries should protect the minority rights of the ethnic, linguistic Russians in an effective manner at the domestic legal level through the implementation of protective measures to that effect, including the matter of citizenship.

A study on minority protection is not a new doctoral project in international legal scholarship. However, previous studies on the issue have been focused on the description of international standards on minority rights without raising underlying questions about them.[40] In this regard, it should be emphasised that the features of the protection of minority rights discourse is a fertile area of theoretical study in international legal studies, as the topic itself is a wide-ranging one in which the rights of ethnic, religious or linguistic groups intersect and interact with other international rules and principles. Of particular importance are the inherent tensions between the guarantee of the rights of persons belonging to minority groups, such as the right to political participation, and a State's territorial sovereignty and stability of boundaries. Minority rights implicate matters going to the heart of a State's existence and could entail the reordering of internal State structure. For these reasons, the topic is very sensitive and complex. The matter is further complicated by associated doctrines like the right to self-determination, given its indeterminate scope and the imprecise nature of the category of 'peoples'. Indeed, the issue of the international protection of persons belonging to minority groups presents a crossing point between the respect of State sovereignty and the protection of human rights in international law.

This is the reason why the case of the ethnic and linguistic Russians in Estonia and Latvia in the Baltic region has been selected and it is a critically important case for the purpose of elaborating and consolidating the legal and normative bases for the effective protection of persons belonging to minorities under contemporary international law. The discussion about the problem of the protection of the ethnic, linguistic Russians in Estonia and Latvia provides an important test to show the

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[40] Primes examples are as follows. Z. Skurbaty, *As if peoples mattered: Critical appraisal of 'peoples' and 'minorities' from the international human rights perspective and beyond* (The Hague and Boston: Martinus Nijhoff Publishers, 2000); K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague and London: Martinus Nijhoff, 2000); J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International Law, 2000); A.S. Akermrk, *Justifications of Minority Protection in International Law* (London/The Hague/Boston: Kluwer Law International Law,

necessity and validity of an integrative approach to international legal protection of persons belonging to minorities against the backdrop of the end of the Cold War.[41] This is so, because, as noted in the previous section, the issue of the protection of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities with reference to citizenship status under international law is inherently interlinked to general questions of the protection of minority rights and human rights as well as self-determination, all of which may be invoked and used generally as the legal and normative bases for effective minority protection under international law, and all of which have been evolving and will likely further develop such that they may be applied to other instances of minority oppression in principle.[42]

An extensive examination of State practice is beyond the scope of this thesis, although this will be treated briefly depending on given contexts. Rather, a more important point in this thesis is to examine the relevant international legal rules and principles that may be used generally as 'constraints' to 'influence' a State's power in treating ethnic, religious or linguistic residents in the form of enacting citizenship policies by using the example of the ethnic, linguistic Russians in Estonia and Latvia from the viewpoint of international minority protection. This may be justified, given the reality that international standards of minority rights still remain vague and there is no authoritative formulation of who the beneficiaries of minority protection schemes are, although the problem is clearly global in reach.[43]

This research is not the first project to examine the protection of minorities under international law, but it should be regarded as a tentative, although admittedly not

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1997).

[41] The greater need to promote respect for the Conference on Security and Co-operaton in Europe (CSCE) norms in areas where democratic institutions are being consolidated and questions relating to minorities are of special concern was recognised. Section 1, Report of the CSCE Meeting of Experts on National Minorities, Geneva 19 July 1991, 12 HRLJ 332 (1991). This is unsurprising, as minorities' situations in the transitional societies of the Baltic and Balkan States provided the major impetus towards the normative developments and implementation efforts. In 1992, members of the Organisation for Security and Co-operation in Europe (OSCE) decided by consensus to create a specific institution to address minority problems, particularly in the Baltic and Balkan States in the form of the OSCE High Commissioner on National Minorities (HCNM). CSCE Helsinki Document 1992/ The Challenge of Change, 10 July 1992, 13 HRLJ 284 (1992). This office was designed to prevent conflict as an 'early warning' mechanism, further promoting the application of OSCE national minorities' standards to enhance stability, particularly within 'nascent' European democracies. That the HCNM has in practice focused on the protection of the ethnic Russian minorities in Estonia and Latvia illustrates the point.

[42] For a dynamic understanding of international law, see W. Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964); L. Henkin, *International Law: Politics and Values* (The Hague: Martinus Nijhoff Publishers, 1995); R. Higgins, *Problems and Process- International Law and How We Use It* (New York: Oxford University Press, 1994).

[43] See Article 4 of the proposed convention in Chapter 8 below, pp. 258-260.

comprehensive, effort aimed at providing broader and more solid legal and normative bases for the effective international minority protection. This research may be described as falling into the category of international human rights law insofar as it provides a logical description of present legal institutions for rulings on human rights and the effects of the international legal order in connection with the protection of persons belonging to minorities in contemporary global society. Since the laws which have been subjected to analysis are mainly governed by international law, treaties, decisions and soft law, this study may also be described as a study of public international law. It is hoped that this study will contribute to the understanding of the protection of the ethic, linguistic Russians in Latvia and Estonia at the micro level, but also to broaden the academic horizon in the field of international minority protection under general international law at the macro level.

3. Conceptual Problems

3. 1. Minority Rights

In this thesis, 'minority rights' are understood as broadly as possible, meaning that minority rights can be implied and derived not only from the instruments of minority rights that directly refer to them, such as Article 27 of the ICCPR, but also from other instruments of human rights and relevant legal principles and rules. This seems to be proper and inevitable, as legal provisions on the rights of persons belonging to minorities in relevant international and European documents have been worded quite vaguely, and at the same time, the scope of minority rights has been broadened by the development of minority rights jurisprudence, as will be discussed in the subsequent chapters in this thesis.

This is also the reason why use of the contextual approach to the concept of minority rights is necessary in this work. It should be noted that contextual or teleological interpretation was often used to justify the protection of persons belonging to minorities under international law. For instance, in the *Acquisition of Polish Nationality Case*, the Permanent Court of International Justice (PCIJ) held that the refusal of Poland to grant citizenship to members of ethnic German minorities in the country was a violation of the principle of the prohibition of discrimination as

incorporated in the Minorities Treaty with Poland. Otherwise, the Court observed that "the value and sphere of application of the Treaty" would be greatly diminished.[44]

It is thus sufficient to note here that the term 'minority rights' is to denote every interest that will serve the benefits of persons belonging to ethnic, religious or linguistic minorities in their States of residence. In other words, minority rights are defined as just or legal claims and what one has a just claim to for the benefits of persons belonging to minorities.[45]

3.2. Complementary Aspect of Individual Rights and Group Rights[46]

Much of the literature in law, jurisprudence and political science focusing on the issue of individual versus group (or collective) rights seeks in fact to address the question of whether it is the individual or the community to be given priority in terms of rights recognition and protection. Thus, it may be possible to classify writers roughly as individualists or communitarians. Unlike individualists, communitarians emphasise the social dimension of the individual and describe his or her rights and duties on the basis of their relations to other individuals and groups.

Legally speaking, group rights are ascribed to a group of people and can only be invoked by the group and its authorised agents. Some commentators reject the notion of group rights because, in their view, it would pose a threat to the territorial integrity of States or to individual rights, whereas others accept it on purely empirical grounds. They contend that national and international law have recognised rights of groups such as peoples and minorities. In fact, both these positions appear flawed in whole or in part.[47] For instance, the right to self-determination is a widely acknowledged group right. However, the right to self-determination as a 'group right' does not necessarily imply its automatic priority over individual rights. In this latter respect, individual human rights can be seen as limiting the exercise of group rights, on the one hand, and

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[44] *Acquisition of Polish Nationality Case*, PCIJ, Series B, No. 7 (1923), p. 16.

[45] Of course, it is necessary to categorise minority rights in terms of the concrete contents through which they can be implemented and enjoyed by persons belonging to minorities within international standards of minority rights, such as the right to identities, the right to existence, the right to use their mother tongue, etc. Yet, this type of minority rights distinction is understood as one in a narrow sense in this thesis.

[46] See Article 8 of the proposed convention in Chapter 8 below, pp. 266-268.

[47] See, generally, Akermrk, *Justifications of Minority Protection in International Law, op.cit.*, pp. 42-46; M.A Jovanović, "Recognizing Minority Identities Through Collective Rights", *HRQ*, Vol., 27, 2005, pp. 625-651.

often contributing to defining and enriching their actual content, on the other. It should be underscored that the right to self-determination is generally considered to a 'human right' while constituting the necessary condition for the exercise of all individual human rights.[48] The dynamic relation between the right to self-determination and the entire range of human rights, in combination with the evaluation of the importance of minority protection of both categories of rights in themselves tends to confirm the close link between individual rights and group rights for effective minority protection.[49] For the purposes of this thesis, 'group rights' may be understood as the aggregate sum of rights of individual group members. The group is a vehicle through which collective action can be taken on its members' behalf, usually in relation to discriminatory treatment. While the group as an aggregate of individuals sharing interests and jointly holding rights, may have better political leverage in its claim, the right still inheres in individual members. In other words, when the group secures the rights, the benefits rebound to its individual members belonging to the groups and are distributed as individual human rights.[50]

4. Methods and Structure

Chief reliance will be placed on the international legal documents on the rights of persons belonging to minorities, i.e. treaty provisions which are in force and customary international law, as well as international and European documents which are not, or not yet, legally binding, as the premises from which the relevant domestic

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[48] Several statements about the interrelation between the right to self-determination and individual human rights are based on Article 1 of the ICCPR. The United Nations Human Rights Committee (HRC) itself underscores in its General Comment on Article 1 of the ICCPR that: "the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights." HRC General Comment 12 (Article 1 ICCPR), UN Doc.HRI\GEN\1\Rev.1 at 12 (1994), para. 1. According to Thornberry, "the relationship between self-determination and individual human rights humanizes the former and lends to the latter a powerful meta-language to harness the totality of a people's demands and aspirations." P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism", in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993), p.137.

[49] In this regard, the present writer does agree with Müllerson's following view. He states as follows: "Application of the principle of the self-determination of peoples, which is one of the most important human rights norms, should not lead to the limitation of existing human rights- especially the rights of minorities. On the contrary, its implementation must result in greater protection of the rights and freedoms of individuals as well as minorities." R. Müllerson, *International Law, Rights and Politics* (London: Routledge, 1994), p. 72.

[50] See Chapter 5 below, pp. 129-131; See also *the Lubicon Lake Band v. Canada Case*, Chapter 5 below, p. 133.

laws of Latvia and Estonia will be analysed. Judicial decisions and advisory opinions by the International Court of Justice (ICJ) and other international, and regional tribunals are examined, along with the review of relevant scholarly articles.

Chapter 2 is confined to the consideration of the historical and legal background of the Baltic independence and citizenship matters with reference to the existence of the ethnic, linguistic Russian residents in Estonia and Latvia. The recent history of the Baltic countries in relation to the former Soviet rule is described and the so-called Baltic restorationism is discussed. On this premise, Chapter 2 also describes the Baltic citizenship laws.

Chapter 3 examines the question of citizenship matters under international law for the purpose of reviewing whether the Estonian and Latvian restrictive citizenship laws conform to international standards on nationality. This chapter also pays special attention to the fact that citizenship has a human rights aspect, as expressed in the phrase 'right to nationality' in various international and regional instruments. The examination of citizenship matters from the point of international law is necessary to investigate more detailed aspects of the Baltic issues from the perspective of minority protection under international law.

The purpose of Chapter 4 is to explore the definition of the concept of a minority under present international law. If international law is the legal foundation for the protection of persons belonging to minorities, the problem of identification of persons belonging to such minorities becomes a matter of international concern. Without identification of what constitutes the concept of a minority, the discussion on the protection of the rights of persons belonging to minorities under international law may lack effectiveness, as the ambiguities in defining the concept of a minority directly impinge on the protection of minority rights. In particular, this chapter is concerned with the problems of the citizenship criterion of the definition of a minority espoused by the traditional view on the definition of a minority.

Chapter 5 attempts to examine international legal standards on minority rights in a narrow sense or 'minorities-specific standards' with an emphasis on the protection of cultural identity for minorities, which have been reflected in international and European instruments relating to minority protection. For this purpose, the chapter focuses on the international and European instruments that are 'directly' related to the protection of the rights of persons belonging to minorities, along with the relevant case law and practice of the international tribunals and organisations. It is observed in this

chapter that the protection of minority rights in the sense of the protection of identity for minorities requires States concerned to protect and promote the cultural identity of persons belonging to minority groups in their State of residence through the implementation of protective measures at the domestic legal level under minorities-specific standards. Moreover, the protection of cultural identity for minorities under minorities-specific standards is presented as the legal and normative basis for the justification of the protection of the ethnic, linguistic Russians as a protected minority group in Estonia and Latvia.

In Chapter 6, general human rights standards with emphasis on the non-discrimination principle in the sense of substantive equality are presented as another basis for the protection of minority rights. It is argued that the non-discrimination principle should be understood in a positive way, which means substantive equality, not formal equality, for the applicability of the principle to various situations for the effective protection of persons belonging to minorities. Furthermore, it is critical that the non-discrimination principle in the sense of substantive equality be able to limit a State's policies to treat residents belonging to ethnic, religious or linguistic groups in a discriminatory way by means of citizenship.

Chapter 7 discusses internal self-determination for the effective protection of minority rights. This chapter attempts to link the right to internal self-determination to the guarantee of the political rights of the ethnic, linguistic Russians in Estonia and Latvia, thereby drawing the conclusion that internal self-determination may serve as a legal and normative basis for the justification of the protection of the ethnic, linguistic Russians in Estonia and Latvia.

The concluding chapter 8 provides a proposal for the effective protection of minority rights in the form of a mini-sample draft international convention as a recommendation with commentary based on the arguments developed in this research.

Chapter II

Historical and Legal Background to Contemporary Problems of the Ethnic, Linguistic Russians In Estonia and Latvia

1. Introduction

The changes caused by the dissolution of the former Soviet Union require an appraisal of the application of international law to the problem of minorities in connection with the problem of State succession and new laws which determine citizenship by reference to ethnic, or linguistic identity. The issue that has attracted much attention on the part of international legal experts concerns the restrictive citizenship laws of Estonia and Latvia with special reference to the protection of the ethnic, linguistic Russian residents under international law.

Estonia and Latvia became independent countries with the goal of establishing their own national identities, and getting rid of the negative legacies of the past Soviet rule. The urgently necessary and difficult problem for them has been how they could be independent States with a national identity while at the same time respecting the rights of the existing ethnic, linguistic Russian populations in their territories. Given the fact that many Russian residents in Estonia and Latvia supported the independence movements in Estonia and Latvia, the treatment of the Russian populations has been regarded as the crucial point by which the two countries could be said to be real democratic republics which integrated non-national ethnic, linguistic minority groups into the mainstream of their respective societies.[1] In this regard, it should be remembered that most ethnic, linguistic Russian residents in question hoped that their status would not be changed fundamentally after independence, even if they admitted

[1] Referenda for independence were held in each Baltic State. Most ethnic, linguistic Russians in Lithuania were opposed to independence, but a large minority in both Latvia and Estonia voted in favour. A. Lieven, *The Baltic Revolution: Estonia, Latvia, Lithuania and the Path to Independence* (New Haven: Yale University Press, 1993) p. 79; A. Klotins and B. Abraitiene, et al.(eds.), *The Baltic States: A Reference Book* (Tallinn, Riga, Vilnius: Estonian, Latvian and Lithuanian Encyclopedia

that there might be some changes in the laws governing citizenship. But the reality has been different from this common expectation. Estonia and Latvia enacted citizenship laws which grant automatic citizenship only to successive generations that had possessed Estonian and Latvian citizenships before the Soviet annexation of Estonia and Latvia in 1940. Other persons not included in this category had to apply for naturalisation in order to be citizens. A major requirement for naturalisation is knowledge of the Estonian and Latvian languages. Since competence in the Estonian and Latvian languages was very difficult for the Russian populations,[2] most of them gave up on seeking naturalisation and remained stateless in the territories which they had previously considered as their homelands when the former Soviet Union existed.[3]

The problems of the status of the ethnic, linguistic Russians in Estonia and Latvia, as a matter of fact, have their historical origin in the Soviet Russification policy of the Baltic States. The result of Russified policies was the structural change of demography in Estonia and Latvia. For example, by 1991, ethnic Latvians made up less than 52 percent of the country's population, down from 75.5 percent in 1935.[4] Some 42 percent of the country's population were Russian residents, most of whom settled in Latvia after World War II as a result of the USSR's Russification and Sovietisation policies. Thus, just as Latvians regained their independence after half a century of annexation, they found themselves barely the majority in their own country. In response, the Supreme Council of Latvia acted to limit automatic citizenship in the revived State to those who had possessed Latvian citizenship of June 17, 1940, and their descendants.[5]

Similar concerns prompted neighbouring Estonia to adopt a restrictive citizenship law in 1992. During five decades of Soviet rule, Estonia's demographics also changed dramatically as a result of Moscow's policies. While some 28,000 non-Estonians

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Publishers, 1991), p. 7.

[2] Russians are distinguished sharply from Estonians and Latvians from ethnic, linguistic, and religious standpoints. The Estonian language is part of the Finno-Ugric group, along with Finnish and Hungarian. Latvians speak the only two surviving varieties of the Indo-European Baltic family of languages. Russians, on the other hand, are Slavic in origin, and their language belongs to the Indo-European family. Latvians and Estonians, ruled for centuries by German barons, still share their protestant religion. Ethnic Russians claiming religious convictions tend to subscribe to the Orthodox faith.

[3] A. Fehervary, "Citizenship, Statelessness and Human Rights: Recent Development in the Baltic States", *International Journal of Refugee Law*, Vol., 5, 1993, pp. 392-423.

[4] United Nations Report of the Secretary-General on the Work of the Organization, The Situation of Human Rights in Estonia and Latvia, UN Doc. A/47/748, Annex, at 3, para. 4 (1992).

[5] Republic of Latvia Supreme Council Resolution, "On the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization," in the Republic of Latvia: Human Rights Issues (Riga: 5th Saeima's Standing Commission on Human Rights, 1993/1994, p. 76.

migrated to Estonia between 1944 and 1959, thousands of Estonians were deported to Siberia from 1944 to 1949[6] and thousands of others were killed. In 1939, ethnic Estonians constituted roughly 88 percent of Estonia's population, while approximately 8 percent of Estonia's population were ethnic Russians. By 1989, ethnic Estonians had decreased to 61 percent of Estonia's population, with ethnic Russians constituting some 30 percent. While most ethnic Estonians spoke Russian, only 10 percent of the non-Estonian population learned to communicate in Estonian.[7]

Resulting from the effects of the two world wars and the period of Soviet rule, the demographic changes in Estonia and Latvia have been a decisive element in the debate over citizenship in the two countries. Sharp decreases in the percentage of the titular nationality were seen in Estonia and Latvia. In the view of the Russian government, however, these citizenship laws were a sweeping infringement of human rights of the ethnic, linguistic Russians.[8] The Estonian and Latvian governments saw matters quite differently. From their point of view, Russian settlers could not lose a citizenship they never lawfully possessed. Russian migration to Estonia and Latvia was incidental to an illegal occupation by the Soviets. Taking into account the situation of the ethnic, linguistic Russian populations in Estonia and Latvia, the international community has expressed the desire that the two countries be more liberal on the status of their ethnic, linguistic Russian residents, and emphasised that this should be desirable for them to be democratic countries in Europe.[9] In Lithuania, however, the percentage of the Lithuanian population remained fairly constant during the 1990s, averaging around 80 percent. The differences between Lithuania and its Baltic neighbours, Estonia and

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[6] United Nations Report of Secretary-General, Situation of Human Rights in Estonia and Latvia, UN Doc. A/48/511, Annex, at 6, para. 20 (1993).

[7] *Ibid.*

[8] The Russian government reacted very harshly to the Estonian and Latvian citizenship policies, declaring them to be a violation of human rights law, and branding these policies on ethnic Russians as 'apartheid and racism'. See, "More Tough Talk From Moscow On Troop Withdrawal," REF/RL Daily Report, July 21, 1994.

[9] Letter from OSCE High Commissioner on National Minorities to Estonian President L. Meri, 1 July 1993, "Most of the Russian-speaking minority have lived in your country for many years and have established their roots in Estonia. They prefer to live in your country, and many of them have expressed their attachment to it by voting for its independence in the referendum. They were citizens of the former Soviet Union, living in Estonia. Now, under the new law, they would be considered to be aliens", in V. Poleshchuk, *Advice not welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the response* (New Brunswick and London: Transaction Publishers, 2001), p. 41. In this regard, Varennes's remark is very suggestive. As to the situation in Latvia, he noted that "in practice, that means that more than half a million people, many of them born in the country, have lost the right to vote in national elections since that country 'becomes' a democracy." See F. Varennes, "Towards Effective Political Participation and Representation of Minorities", Working Paper to the Fourth Session of the UN Working Group of Minorities (1998), p. 10.

Latvia are critical in understanding the 'Baltic issues'. For Lithuanians, there was no threat of 'cultural extermination', a rallying cry for both Estonian and Latvian nationalists, because of the smaller degree of Russian settlement. Lithuanians felt less threatened culturally than the Estonians and Latvians. Because of this social background, Lithuania could enact very liberal citizenship laws in contrast to Estonia and Latvia.

This chapter is confined to the consideration of the historical origin of the existence of the Russians residents in the Baltic region and the problems of citizenship matters for the ethnic, linguistic Russian residents in Estonia and Latvia. For this purpose, Chapter 2 will describe briefly the recent history of the two countries in relation to the former Soviet rule and discuss the Baltic restorationism upon which Estonian and Latvian citizenship laws are based. Finally, this chapter will describe the Baltic citizenship laws.

2. Recent History of Estonia and Latvia

2. 1. Russification in Estonia and Latvia

Estonia and Latvia enjoyed their own independent periods between the two world wars. During this period, they attempted to establish democratic parliamentary systems, and enjoyed the flourishing of their own national cultures and economic growth. They became members of the League of Nations. It is not a coincidence that the interwar period has served as a model for many Estonian and Latvian politicians in the post-Soviet period, who hoped to eliminate the effects of incorporation into the Soviet Union.[10]

World War II and its conclusion caused many changes in the countries lying between Germany and the USSR. There was much economic loss and heavy casualties. There were also significant geographic changes. Poland moved to the west, and the Soviet Union gained Moldavia, western Ukraine, and the Baltic States. These acquisitions were not the result of warfare. Rather, the incorporation of these

[10] G. Smith (ed.), *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania* (New York: St. Martin's Press, 1994).

territories was the result of the Nazi-Soviet pact and secret protocols[11] prior to the Soviet-German fighting which divided the area between Germany and the USSR into spheres of influence. Latvia, Estonia, Finland, Moldavia and later Lithuania were under the control of the Soviet Union. After the fighting, Finland was the only country not directly incorporated into the USSR.

While the Soviets temporarily lost control of the territory due to the German advance in 1941, by the end of the war the formerly independent Baltic States had become simply three of the union republics of the USSR.[12] Much of the population in the Baltic States as well as western countries did not recognise the legitimacy of the incorporation into the USSR.[13] The fiercest resistance was found in Lithuania, where armed conflict continued until 1953. As a result, Lithuanians were faced with repression and deportation campaigns. The situation was similar in Estonia and Latvia with the exception of much immigration. From the period of incorporation into the USSR until the German occupation, almost 350,000 people in Latvia were either deported to other parts of the Soviet Union, or fled to the West. World War II decreased the Latvian population by over a half million, or by about one-fourth.[14] After World War II another 100,000 people disappeared in Latvia. Many of these returned from Siberia after Stalin's death, but another 25,000 were killed in anti-Soviet guerrilla fighting.[15] From 1939 to 1955, the prewar Latvian population excluding the natural death rate declined by 36 percent, while new immigration accounted for the increase of 31 percent. Figures in Estonia were comparable.[16] Thus, Estonia and Latvia achieved their prewar population totals more quickly than Lithuania, but only through the addition of large numbers of mostly Russian immigrants.

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[11] The text of the Molotov-Ribbentrop Pact and its secret protocols is printed in R.J. Sontag and J.S. Beddie (eds.), *Nazi-Soviet Relations, 1939-1941: Documents from the Archives of the German Foreign Office* (Washington D.C: U.S. Department of State, 1948), pp. 76-77. Lithuania was also assigned to the Soviet sphere of influence in a supplementary agreement signed September 28, 1939.

[12] A.N. Tarulis, *Soviet Policy toward the Baltic States, 1918-1940* (Notre Dame: Notre Dame University Press, 1959), pp. 216-235. The Supreme Soviet of the USSR admitted Lithuania into the Soviet Union on August 3, 1940; Latvia on August 5, 1940; Estonia on August 6, 1940.

[13] W.J. Hough, "The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting the Forcible Seizure of Territory", *N.Y.L. Sch. J. Int'l & Comp. L,* Vol., 6, 1985, pp. 303-333. The effects of this policy of non-recognition were that Latvia, Lithuania, and Estonia continued to enjoy *de jure* statehood; A. Shtromas, "Political and Legal Aspects of the Soviet Occupation and Incorporation of the Baltic States", *Baltic Forum*, Vol.1, 1984, pp. 24-38; R.A. Vitas, *The United States and Lithuania: The Stimson Doctrine of Nonrecognition* (New York: Praeger, 1990).

[14] E. Vebers, "Demography and Ethnic Politics in Independent Latvia: Some Basic Facts", *Nationalities Papers*, Vol., XXI, No. 2, 1993, pp. 179-194.

[15] *Ibid.*

[16] R. Taagepera, "Lithuania, Latvia and Estonia 1940-1980: Similarities and Differences", *Baltic Forum*, Vol., 1, 1984, pp. 39-52.

Since the birth rates of the Estonian and Latvian nationalities were very low, the influx of Russian immigrants meant significant decreases in the percentage of the 'native' population of the republics. While the population of Russians in Estonia and Latvia increased by 585,000 from 1959-1989, the titular populations increased by only 160,000. In Lithuania, meanwhile, Russians increased by just 113,000, while ethnic Lithuanians grew by 773,000.[17] These differences in migration and birth rates had clear effects. In Estonia, the pre-World War II population was over 88 percent Estonian. In 1989, it was 61.5 percent. In Latvia, the decrease was even greater: from around 75 percent to just over 50 percent. Only in Lithuania did the percentage stay roughly the same: 80.6 percent before the war, 79.6 percent in 1989.[18] By the end of the Soviet period, the Lithuanian government faced as little or less of a threat from its minorities than it confronted in 1920.[19] The same could not be said about Estonia and Latvia. If the above-mentioned trends had continued after the 1980s, the Estonians and especially Latvians would have quickly become minorities of their own republics.

The substantial migration into the Baltic republics was due to the Soviet industrialisation policy. All three republics had gone through industrialisation, but Estonia and Latvia were more heavily targeted in part because their infrastructure was superior to that of Lithuania. In addition, while Lithuania's Communist elites generally came from within the republic, in Estonia and Latvia the high-level officials were usually either Russians or Balts who were born in Russia. Therefore, the Lithuanian Communist Party was more able than its counterparts to direct industrialisation to benefit the local population.[20]

At the same time, the influx of Russians meant that Russian had become a basic language in schools and the media. The non-Russians across the USSR during the Soviet period deeply felt the impact of 'Russification' during the Soviet period, particularly in the 1970s. Especially in areas where Russians constituted a significant part of the population Russian was stressed as the language for daily communication between nationalities. Thus, while many non-Russians learned the Russian language, Russians had little incentive to learn the local language.

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[17] R. Misiunas, "The Baltic Republics: Stagnation and Strivings for Sovereignty", in L. Hajda & M. Beissinger (eds.), *The Nationalities Factor in Soviet Politics and Society* (Boulder: Westview Press, 1990), p. 217.
[18] *Ibid.*, p. 214.
[19] A. Senn, "Comparing the Circumstances of Lithuanian Independence 1918-1922 and 1988-1992", *Journal of Baltic Studies*, Vol., XXV, No. 2, 1994, pp. 123-130.
[20] *Misiunas, The Baltic Republics: Stagnation and Strivings for Sovereignty, op.cit.*, p. 206.

The Soviets were able to reassert control by force in the face of postwar guerrilla resistance movements in the three Baltic republics. For the Soviets, however, it was not easy to find loyal cadres to fill positions in the administrative apparatus. As of 1940, there were only about 1,000 members of the Latvian Communist Party, while other non-Communist elites perished in the terror or fled to the West. The Soviets brought in loyal and trustworthy cadres from elsewhere to overcome this shortage.[21] Many of these were ethnic Latvians who had grown up in the Soviet Union and spoke only Russian.[22] These Russified Latvian were referred to as 'latovichi' by other Latvians, while in Estonia, the Russian-Estonians in the Estonian Communist Party were called 'Yestonians' because of their heavy Russian accents. The 'imported' Communists were considered the most reliable and thus were given the most prestigious and powerful positions. The Russian elements dominated the ruling hierarchy in Riga, while Latvians were given most of the posts in the countryside. In 1970, only two of the thirteen members of the politburo of the Latvian Communist Party were born in Latvia.[23] It was important that the ruling elite was primarily Russian, as this meant that Russian became the language of public administration and that promotion in the hierarchy required proficiency in Russian.

The infusion of reliable cadres from other parts of the Soviet Union was followed by massive waves of immigration of Russians, Belorussians and Ukrainians into Latvia. A similar process was occurring in Estonia, with about 210,000 new arrivals in the same period.[24] This trend continued for the next thirty-five years. This massive influx of Russians into Estonia and Latvia created additional social problems which led to anxiety and resentment on the part of Estonians and Latvians. Russian immigrants were often granted privileged access to housing as an inducement to settle in the Baltics.[25] But by far the greatest irritant to the Latvians and Estonians as a result of the immigration process was the growing dominance of the Russian language and the unwillingness of immigrants to learn the local languages. They would often

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[21] R. Misiunas and R. Taagepera, *The Baltic States: Years of Dependence 1940-1990* (Berkeley: University of California Press, 1993), p. 80.

[22] A. Silde, "The Role of Russian-Latvians in the Sovietization of Latvia," *Journal of Baltic Studies*, Vol., XVIII, No. 2, 1987, pp. 191-208.

[23] J. Dreifelds, "Latvian National Demands and Group Consciousness Since 1959", in G.W. Simmonds (ed.), *Nationalism in the USSR & Eastern Europe in the Era of Brezhnev & Kosygin* (Detroit: University of Detroit Press, 1977), pp. 136-156.

[24] *Misiunas and Taagepera, The Baltic State, op.cit.*, p. 112.

[25] A. Lieven, *The Baltic Revolution: Estonia, Latvia, Lithuania and the Path to Independence* (New Haven: Yale University Press, 1993), p. 184.

have to use Russian for daily communication, such as consulting a doctor or contacting telephone operators. Moreover, it was impossible for them to receive higher education without fluency in Russian during the Soviet period.[26] The competitive examinations for entrance to higher learning institutions were customarily taken in Russian, thereby providing a distinct advantage to those most thoroughly trained in Russian.[27] The prestige accorded to the Russian language was symbolic of the status of the Russian nation in the Soviet Union.[28]

2. 2. Regaining Independence and the Issue of Citizenship

It was Gorbachev's liberalising polices during the late 1980s that reawakened national sentiment in the Baltic republics and permitted the independence movements. Nearly two million people formed a human chain from Estonia and Latvia to demonstrate against the Molotov-Ribbentrop Pact in 1989. It was an unprecedented display of Baltic solidarity against the iniquities of the past. Within this social atmosphere, Lithuania proclaimed its independence, but subsequently backed down under pressure from Moscow. In the same year, Estonia and Latvia passed decrees announcing the beginning of transitional periods which were to end with the establishment of sovereignty.

In August 1991, hard-line communists attempted to overthrow President Gorbachev's regime and take control of Moscow. However, this coup failed, and the Baltic States successfully declared their full independence. Having gained diplomatic recognition from the international community,[29] including Russia under the new leadership of Yeltsin,[30] Lithuania and Estonia began enacting basic laws governing all

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[26] R. Misiunas, "Baltic Nationalism and Soviet Language Policy: From Russification to Constitutional Amendment", H. Huttenbach (ed.), *Soviet Nationality Policies: Ruling Ethnic Groups in the USSR* (London: Mansell, 1990), pp. 206-220.

[27] W. Connor, *The National Question in Marxist-Leninist Theory and Strategy* (Princeton: Princeton University Press, 1984), p. 261.

[28] The elevation of the Russians was begun by Stalin during World War II and continued in the postwar period. Stalin offered a victory toast on May 24, 1945, saying: "I drink above all to the health of the Russian people because it is the most outstanding nation of all the nations comprising the Soviet Union." *Pravda*, May 25, 1945, quoted in B. Nahaylo and V. Swoboda, *Soviet Disunion: A History of the Nationalities Problem in the USSR* (New York: The Free Press, 1990), p. 95.

[29] Denmark recognised the Baltic States on 26 August, other EU countries on 27 August. On 4 September, the USA recognised the independence of the Baltic States, and 6 September the newly created Council of the Federation, which was composed of leaders of all the republics of the Soviet Union, finally recognised the independence of the Baltic States.

[30] The Soviet Union adopted a law under which its constituent republics could secede. USSR Law on

aspects of life in their Republics. These included laws on citizenship and the rights of non-citizens residing in the Republic.

Lithuania, Estonia and Latvia each had citizenship laws governing who could become a citizen of the republic during the inter-war period. However, following the Baltic's annexation by the Soviet Union, individuals in the Republic became subject to Soviet citizenship law, which provided that every person residing within the Soviet Union was a citizen of the Soviet Union.[31] The Soviet citizenship law provided some jurisdiction for union-republics over citizenship issues. Article 26 of the Law of the Union of Soviet Socialist Republics on Citizenship of the USSR granted to the union-republics exclusive jurisdiction over petitions for admission to citizenship of the union-republics and, *ipso facto*, to citizenship of the USSR by citizens of foreign States or stateless persons who are residents of the USSR.[32]

When the Soviet Union collapsed, citizenship became a more acute concern because Soviet citizens were left holding the citizenship of a non-existent State. These people had three choices: taking the citizenship of the republics in which they resided, which may have strict language and residency requirements; accepting Russian citizenship and losing certain privileges such as voting; or becoming stateless, which carries its own significant implications. A number of international organisations, including the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and Helsinki Watch, actively took part in the enactment of the Baltic laws on citizenship and the question of the status of non-citizens.[33]

Procedure for Deciding Secession of a Union Republic, April, 3, 1990. Register of the Congress of the People's Deputies of USSR and Supreme Soviet of USSR. 1990, issue No. 13, p. 252.

[31] A distinction was drawn between the concept of citizenship and nationality under modern Soviet domestic law. Nationality has an ethno-linguistic connotation, whereas citizenship is purely a legal status. Under Soviet law, every Soviet person not only possesses Soviet citizenship, but also a nationality. Every Soviet citizen as such is officially regarded as belonging to one of the many nations that compromise the territory of the USSR. There are three levels of citizenship in the USSR, that is, federal, union-republican and autonomous-republican. A citizen of an autonomous-republic and/ or of a union-republic is *ipso facto* a citizen of the USSR. Citizenship of a union is not coterminous with permanent residence in a given union-republic, since an individual who is permanently resident in Lithuania, for example, may belong to the citizenship of Russia or Moldavia. Citizens of one union-republic enjoy equal protection of the laws in any other union-republic in which they may be resident. C. Osakwe, Comment, "Recent Soviet Citizenship Legislation", *Am. J. Comp. L*, Vol., 28, 1980, pp. 625-641.

[32] The Law of the Union of Soviet Socialist Republics on Citizenship of the USSR, July 1, 1979, 20 ILM 1207.

[33] For instance, Estonia's draft version of its Aliens Law generated international criticism and led to allegation that local Russian residents are targets of racial discrimination. The OSCE High Commissioner on National Minorities was concerned that its vague wording could lead to arbitrary interpretation and implementation by granting too much discretion to government officials. In particular, it did not guarantee that aliens would be granted a residency permit and those who did obtain permits

3. The Baltic Restorationism and International Law

3. 1. *Ex iniuria ius non oritur*

The Estonian and Latvian citizenship laws have been based on the Baltic States' restorationism or legal continuity theory. That is, the principle of *ex iniuria ius non oritur* (legal rights will not arise from wrongdoing). They have argued that as the incorporation of the Baltic States into the Soviet Union was illegal, it had no legal consequences for the Baltic States. The legal continuity theory produced other relevant legal consequences. As they are not successor States to the Soviet Union, absent their consent or some independent basis under international law, the Baltic States are not legally required to assume the rights and duties of the former Soviet Union.[34] At the same time, having been restored, the Baltic States logically cannot claim the 'clean slate' to which newly independent States may be entitled.[35] Instead, they purport to have retained the rights and obligations they possessed during the period prior to their independence.[36] In other words, Baltic States have the legal right to be returned to their earlier position under the principle of *restitutio in integrum.*

The legality of annexation depends upon whether the 'use of force' appears to be legitimate. Thus, the legality of the incorporation of the Baltic States into the Soviet Union in 1940 should be evaluated on the basis of international law in force in 1940. This is related to the rule of intertemporal law, but the jurisprudence regarding problems of intertemporal law has remained quite ambiguous. This was illustrated by *the South West Africa (1966) and Namibia (1971) Cases* at the International Court of Justice (ICJ). In the former, the ICJ ruled that:

> "...the Court must place itself at the point in time when the mandate system was being instituted...the Court must have regard to the situation as it was that time..."[37]

However, in *the Namibia Case*, the ICJ used contrary argumentation to support its judgment as follows:

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would be required to renew them every five years. Russian residents viewed this as a license for the authorities to expel them from the country. Estonian President L. Meri refused to sign the bill until it was endorsed by legal experts from the OSCE and the Council of Europe. *Poleshchuk, Advice Not Welcomed, op cit.,* pp. 37-42.

[34] R. Müllerson, "New Developments in the Former U.S.S.R and Yugoslavia", *Va.J. Int'l. L,* Vol., 33, 1993, pp. 299-315.

[35] M. N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1992), pp. 604-605.

[36] R. Müllerson, *International Law, Rights and Politics* (London: Routledge, 1994), p. 146.

[37] *South West Africa Case,* ICJ Reports, 1966, p. 23.

> "The Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law."[38]

In light of the ICJ dictum in *the Namibia Case*, it has been suggested that post-1940 development in the international prohibition of the use of force and threat cannot be completely disregarded in legal evaluations of the Baltic case.

With the adoption of the Kellogg-Briand Pact[39] in 1928 in which States banned war as an instrument of national policy, the prohibition of aggressive wars became a part of general international law. It is debatable whether the 'threat' of military force was equally prohibited in general international law before such a prohibition was explicitly expressed in the Charter of the United Nations, adopted in 1945. A conservative view maintains that before the entry into force of the United Nations Charter, general international law did not explicitly prohibit the 'threat' of military force.[40] Although this view is questionable, one needs to look at legal commitments between the USSR and the Baltic States.[41] Article 2 of the Convention on Definition of Aggression stated:

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[38] *Legal Consequences for States Case (Namibia Case)*, ICJ Reports, 1971, p. 31

[39] General Treaty for Renunciation of War as an Instrument of National Policy, 94 LNTS 57, entered into force on July 24, 1929.

[40] L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kustannus, 1988), p. 135.

[41] The Baltic States, Lithuania, Latvia and Estonia, gained their independence from Russia in 1920. Russia recognised their independence through a set of bilateral peace treaties. See the Treaty of Peace between Estonia-Russia, 1920, 11 LNTS 51. Article 2 of the Treaty states: "on the basis of the right of all peoples freely to decide their own destinies, and even to separate themselves completely from the State of which they form part, a right proclaimed by the Federal Socialist Republic of Soviet Russia, Russia unreservedly recognises the independence and autonomy of the State of Estonia, and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Estonian people and territory by virtue of the former legal situation, and by virtue of international treaties, which, in respect of such rights, shall henceforth lose their force." Russian treaties with Latvia, signed August 11, 1920, and Lithuania, signed July 12, 1920, contain similar clauses. The treaties also included the recognition by Russia of the internationally provided neutrality of the Baltic States. Bilateral relations between the Baltic States and the Soviet Union are also evidenced in several treaties. See Pact of Mutual Assistance Between the Republic of Latvia and the Union of Soviet Socialist Republics, 1939, Latvia-USSR, 198 LNTS 381; Pact of Mutual Assistance Between the Republic of Estonia and the Union of Soviet Socialist Republics, 1939, Estonia-USSR, 198 LNTS 227; Convention Relating to Conciliation Procedure Between Latvia and the Union of Soviet Socialist Republics, 1932, Latvia-USSR, 148 LNTS 129; Convention Between Lithuania and the Union of Soviet Socialist Republics for the Definition of Aggression, July 5, 1933, 148 LNTS 79; Conciliation Convention Between Estonia and the Union of Soviet Socialist Republics, 1932, Estonia-USSR, 131 LNTS 309; Treaty of Non-Aggression and Peaceful Settlement of Disputes Between Estonia and the Union of Soviet Socialist Republics, 1932, Estonia-USSR, 131 LNTS 297; Treaty of Non-Aggression Between the Republic of Lithuania and the Union of Soviet Socialist Republics, 1926, Lithuania-USSR, 60 LNTS 145. None of these documents had expiration dates before Dec. 31, 1945. The Baltic States were also legally related to the Soviet Union through a number of multilateral legal documents. These included the Convention for the Definition of Aggression (or the so-called Litvinov Convention, July 3, 1933, 147 LNTS 69), Treaty of Paris of 1928.

> "Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be the State which is the first to commit any of the following actions: (1) Declaration of war upon another State; (2) Invasion by its armed forces, with or without a declaration of war, of the territory of anther State; (3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of anther State; (4) Naval blockade of the coasts or ports of another State; (5) Provisions of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection."[42]

Moreover, Article 3 of the Convention for the Definition of Aggression provided:

> "No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 2."[43]

It can be stated that the international treaties binding the Soviet Union and the Baltic States prohibited any aggression or violent measures against any of the contracting States. In this regard, it is clear that the Soviet occupation of the Baltic Republics in the summer of 1940 was an illegal aggression or intervention under general international law.

The occupation of the Baltic States by the USSR in 1940 can be characterised as a quasi-belligerent occupation. As no belligerent confrontation occurred and there was no disruption of the diplomatic relations, a state of war between the Baltic States and the USSR never came into existence. Rather than war, the Soviet military advance can be characterised as illegal intervention.[44]

The Baltic States have argued that Russians entered their countries illegally and therefore, they have no legal right to stay. Based on this principle, the Baltic States have claimed that they fall under the provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[45] The following stipulation of the fourth Geneva Convention has been invoked in Estonia and Latvia:

> "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[46]

Yet, the view that the IV Geneva Convention became formally applicable in the Baltic States may be challenged. First, the Baltic States had been occupied and annexed for

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[42] Article 2 of the Convention, The Convention for the Definition of Aggression (or the so-called Litvinov Convention), 1933, 147 LNTS 69.

[43] Article 3 of the Convention.

[44] A. Roberts, "What is a Military Occupation?", *Brit. Y.B. Int'l L.*, Vol., 55, 1984, pp. 249-305.

[45] Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949,75 UNTS 287; J. Skolnick, "Grappling with the Legacy of Soviet Rule: Citizenship and Human Rights in the Baltic States", *U.T. Fac. L. Rev.*, Vol., 54, 1996, pp. 387-417.

ten years already when the Geneva Convention became binding for the USSR. Moreover, it was seldom argued during the Soviet annexation period that the USSR was bound to respect the Geneva Convention in the Baltic States. In addition, it remains open whether certain Geneva rules relating to foreign occupation were still legally applicable before 1949. However, it seems clear that the 1949 Soviet mass deportation from the Baltic States would be illegal both under 1907 and 1949 rules.[47]

Some Balts have considered the ethnic Russian civilian settlers as 'occupiers'. It is difficult to agree with this view, however, because most of the ethnic Russians moved to the Baltics after World War II. Furthermore, the Convention came into force four years after the War ended. But even if the Baltic claim is accepted, most Russians in question settled in the Baltic States 'individually' and the settlement of Russians should be separated from Soviet State polices.[48]

3.2. Inconsistent Practice and Controversial Aspects of the Non-Recognition Policy in the Baltic Case

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[46] The last passage of Article 49 of the Convention.

[47] In the context of World War II the applicability of the 1907 Hague Regulation to forcible peacetime occupation has been affirmed in legal practice and literature. It is then correct to conclude that the standards of the 1907 Hague rules were legally applicable in the occupied Baltic States. The bulk of the law of occupation, still largely applicable today, is contained in the annex to the IV Hague Convention, titled as Regulations respecting the laws and customs of war on land, adopted on October 18, 1907. The Hague law of occupation was applicable during both World Wars and serves as the important source for the analysis of the Baltic situations, whose origins lay in 1940. The gist of the law of occupation is contained in Article 43 of the 1907 Hague Regulation, which states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The civilian population in the occupied territory is, *inter alia*, protected by Articles 46 and 50 of the 1907 Hague Regulation. Article 46 read: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." These prescriptions for the occupant are complemented by Article 50: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." All of these fundamental rules protecting the ousted governments and the civilians living in occupied territories were massively violated during World War II.

[48] In this regard, it would be useful to deal with Russian minority issues in the Baltic States in terms of the protection of the right not to be displaced. The term 'displacement' is interpreted to mean 'forced' or 'forcible' or 'involuntary,' as opposed to 'voluntary' movement of people from their area of habitual residence. It is used interchangeably with terms such as 'flight', 'involuntary migration', or 'forced movement'. Displacement is defined broadly so as to include all cases of expulsion, deportation, forced resettlement, relocation, and transfer, whether across national borders or within the home country. Also, the term 'displaced' refers to refugees, asylum seekers, persons internally displaced or forcibly resettled, expellees, and uprooted individuals or groups, unless otherwise specified. The detailed assessment of this issue is beyond the scope of this thesis. However, it should be emphasised that the UN report approaches the problem of population transfer in the context of the protection of the inhabitants in the case of State succession. This is quite suggestive of the case for the protection of the ethnic Russian populations in Estonia and Latvia. See United Nations Report on Freedom of Movement: Human

In the case of the Baltic Republics, the situation created by illegal acts lasted for half a century. It must be asked whether the illegality of the annexation was by some means cured during this long period. The non-recognition of the annexation of the Baltic States by many Western countries has been presented as evidence of its illegality.[49] The United States, for instance, froze assets belonging to Baltic States to protect them from the seizure by the Soviets and permitted the maintenance of diplomatic representatives from the Baltic States.[50] As is widely known, this US's position had been based on the 'Stimson doctrine'. In 1932, Stimson, Secretary of State, stated that the United States did not recognise the Japanese occupation of Manchuria due to its violation of the prohibition against the use of force in the Kellogg-Briand Pact.[51] The non-recognition by the United States and Western countries continued unchanged, at least formally.

The non-recognition of the Soviet annexation by many States during such a long period was an unprecedented phenomenon. However, this practice was never unanimous. While non-recognition policy was adopted as a formal legal position, then in terms of 'political reality', there was the new world order established at the Yalta conference in February 1945. While the US and the UK never recognised the absorption of the Baltic States in terms of law, they occasionally had to accept it in terms of political reality. In the Atlantic Charter of August 14, 1941, President Roosevelt and Prime Minister Churchill had promised to stand for the freedom of all illegally subjugated peoples. However, during the conference at Teheran, Yalta and Potsdam, they 'tacitly' accepted Stalin's control over the Baltic States. According to Kissinger, "Roosevelt agreed to Stalin's plan to move the frontiers of Poland westward and indicated that he would not press Stalin on the question of the Baltics."[52] Benvenisti concluded that "the international community acquiesced to the Soviet resurrection of the 1940 international borders, although formal recognition of the incorporation was generally withheld."[53]

Rights and Population Transfer, E/CN.4/Sub.2/1997/23; A.F. Bayefsky and J. Fitzpatrick (eds.), *Human Rights and Forced Displacement* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2000).

[49] For the discussion on the international community's attitude toward the recognition of the Soviet annexation, see *Hough, The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, op.cit.*, pp. 326-328.

[50] *Ibid.*

[51] *Ibid.*

[52] H. Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), p. 394.

[53] E. Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993), p. 68.

The political dimension of the recognition of the virtual Baltic States by the US becomes apparent during 1987-1991 when the attitude of the US with respect to Baltic independence became much more reserved. In an effort to support Gorbachev's policies, the United States did not actively encourage the Baltic independence movements. Rather, the Bush administration, touching on self-determination within the Soviet Union, expressed concern about the devastating effects of the "suicidal nationalism" in the Baltic region.[54]

When one considers the fact that the USSR was one of the original members of the United Nations, one of the fundamental purposes of which is to prohibit the use of force, the question of inconsistent practice becomes more complex. The UN Charter distinguished between original and admitted members. The distinction was pointed out by the Rapporterur (Membership) of the Committee 1/2 to the Commission I at the San Francisco Conference:

> "As regards original members their participation in the Organization is considered as *'acquired by right'*, while that of future members is dependent on the fulfillment of certain conditions..."[55] (Emphasis added.)

The membership of the two constituent Republics of the USSR, Belorussia and Ukraine, deserves mention. Stalin had proposed that, pursuant to a 1944 amendment to the Soviet Constitution, all sixteen federal Republics should be admitted. At the Yalta Conference it was agreed that the United Kingdom and the United States would support the original membership of the two Republics. However, as a United States' memorandum pointed out, the Soviet constitution did not permit the Soviet Republics to control their own foreign policy or affairs and they were accordingly not sovereign States. Stetinnius and Eden supported the membership proposal at San Francisco on the basis of the contribution of the two Republics to the war effort, rather than on grounds of status.[56] As to the question of to what extent UN organs have conformed to the criteria of statehood in examining and approving application for membership, Higgins concluded that "variations in United Nations practice concerning claims of statehood are a result not of an abandonment of traditional legal criteria...but of the proper use of flexibility in interpreting these criteria in relation to the claim in which

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[54] M. H. Halperin& D.J. Scheffer, *Self-Determination in the New World Order* (Washington, D.C: Carnegie Endowment for International Peace, 1992), pp. 27-29.
[55] 7 United Nations Conference on International Organization, San Francisco (UNCIO) 324, Doc. 1178, 1945.
[56] *Ibid.*

they are presented."[57] She also pointed out that purely "political considerations" often intrude in decisions concerning admission.[58] This statement may be understood such that in considering claims to admissions under 'Article 4' of the UN Charter, legal and political factors may be difficult to separate. Moreover, if the UN Charter permits certain political considerations to be taken into account, it remains difficult to determine in specific cases whether the real political factors at issue have been permissible ones.

The world's most important international organisation, the United Nations, was created after the Baltic States had already been annexed by the USSR. The League of Nations, of which the Baltic Republics had been members, was abolished in 1946. Therefore, on 17 September, 1991, Estonia, Latvia and Lithuania were admitted as new members to the United Nations according to Article 4 of the Charter.[59] The President of the UN Security Council, in a brief statement made after the admission of the Baltic States to the UN, mentioned that these countries had 'regained' their independence.[60] However, at the same time, the UN determined the Baltic States' membership contribution on the basis of data supplied previously by the USSR.[61] Thus, the Baltic States were treated as if they were States that had separated from the USSR and not as States which had 'regained' their independence, at least for practical purposes.

3.3. The Problem of Effective Control

Under the Baltic restorationism or legal continuity theory, even if the former Soviet Union exercised effective control over their territories and inhabitants, the Baltic States theoretically were not extinguished and, instead, retained their legal personality under international law. Such an approach, however, went beyond traditional criteria to determine statehood: a permanent population, territory, government and capacity to enter into diplomatic relations.[62] Thus the restoration thesis or legal continuity theory does not conform to reality. It cannot explain the dissolution of the Baltic States'

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[57] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963), p. 54.
[58] *Ibid.*
[59] Estonia, UN GA-Res. 46/4, September 17, 1991; Latvia, UN GA-Res. 46/5, September 17, 1991; Lithuania, UN GA-Res. 46/6, September 17, 1991.
[60] UN Doc. S/INF/47, 1991, 48-49.
[61] UN Doc. A/49/11, 1994, para. 28.
[62] Montevideo Convention on Rights and Duties of States, Article 1, 165 LNTS 25 (1936).

boundaries, the demographic changes of the population in the region and the lack of consistent independent movements against the Soviet Union during the period of Soviet rule. Had the former Soviet Union ruled the Baltic States for more than one hundred years, the Soviet annexation of the Baltic States would undoubtedly have acquired legal consequences under international law.[63] In other words, the principle of *ex factus ius oritur* (i.e., law springs from facts) may replace the principle of *ex iniuria ius non oritur* at some points. In fact, it has been suggested that such a shift already had taken place in relation to the Baltic States. The grounds for this argument lay in the fact that the Baltic States had been independent, sovereign States for only two decades during the inter-war periods, while they had been occupied by the Soviet Union for over twice this period of time.[64] From this perspective, Baltic independence in the early 1990s was not a restoration of sovereignty to existing States, but the secession from the former Soviet Union of new, successor States, as may be found in the Hanneman's following statement that "the international recognition of Baltic secessionist movements in 1991 led to the emergence of three new states: Estonia, Latvia and Lithuania."[65] It may be argued that after more than 50 years as part of the Soviet Union, '*restitutio ad integrum*' is more a legal fiction than reality.[66] The passage of time causes legal consequences and obligations. Though Marek's following opinion was not directed to the situation of the status of the Russian settlers in Estonia and Latvia, her remark is quite relevant to the question:

> "To pretend that everything in an illegally occupied territory or under a puppet government is non-existent, is not only to press legal fiction beyond all reasonable limits, but to create a situation never to be disentangled in future. Apart from the sheer practical impossibility of enforcing such an extreme point of view, it would hardly be in the interest of the restored State itself to plunge the liberated country into endless chaos and anarchy."[67]

How long could it be said that the legal identity of the State is preserved, despite its lack of effective control, in face of effective but illegal annexation? International law does not provide a clear answer to this question.

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[63] Cassese's remark is relevant in this regard. He stated that "the survival of the international subjects rests on legal fiction-politically motivated-and warranted by the hope of recovering control over a particular territory. Once this prospect vanishes, the legal fiction is discarded by the other states." A. Cassese, *International Law in a Divide World* (Oxford: Clarendon Press, 1986), p. 78.

[64] *Hough, The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, op.cit.*, p. 330.

[65] A.J. Hanneman, "Independence and Group Rights in the Baltic States: A Double Minority Problem", *Va. J. Int'l L.*, Vol.,35, 1995, p. 485.

[66] *Müllerson, New Developments in the Former U.S.S.R. and Yugoslavia, op.cit.*, p. 310.

[67] K. Marek, *Identity and Continuity of States in Public International Law* (Geneva: Droz, 1968), p. 583, cited in *Müllerson, New Developments in the Former USSR and Yugoslavia, op.cit.*, p. 311.

4. Citizenship in the Baltic States and the Ethnic, Linguistic Russians in Estonia and Latvia

4. 1. Estonia

The Estonian citizenship law[68] of 1992 is based on the Supreme Council resolution, "On the Application of the Law on Citizenship".[69] This resolution essentially reinstated the 1938 citizenship law, establishing the base of post-independence citizens as those who were citizens before the Soviet period and their descendants. According to Article 3 of this law, only those who were citizens before 1940 and their direct descendants would be automatically granted citizenship. All other residents, irrespective of their length of residency, have to go through a naturalisation process.[70] A residency period of two years followed by a one-year application period, as well as proficiency in the Estonian language and an oath of loyalty to the State are required for naturalisation.

The Estonian Parliament amended the citizenship law on January 19, 1995.[71] The major change was the extension of the residency requirement to five years, followed by a one-year waiting period. This change applies only to new immigrants and does not affect persons who arrived in Estonia prior to July 1990. Under this new law, applicants have to pass not only the titular language test but also the test on the Estonian Constitution.

The Estonian citizenship law has been basically left alone since 1995. As in Latvia, however, discussion in 1997 and 1998 emerged about the need to amend the law. Since Estonia did not have the "window" naturalisation policy adopted in Latvia, the focus was on granting citizenship to children born to non-citizens following the restoration of independence. There were amendments to the Law on Citizenship concerning the children born in Estonia after 26 February 1992 if their parents were stateless persons. According to these amendments, parents have the right to apply for Estonian citizenship for their children. The draft was adopted by the Parliament in

[68] Estonian Citizenship Law 1992, RT, 1992, No. 7. For the English unofficial translation of the full text, Estonian Legal Translation Centre, http://www.legaltext.ee/indexen.htm.
[69] On the Application of the Law on Citizenship (1992), Resolution of the Estonian Supreme Council, RT (Riigi Teataja, Official Gazette), 1991, No. 39.
[70] Article 3 of the Estonian Citizenship Law, 1992.
[71] Estonian Citizenship Law 1995, RT I, 1995, No. 12.

December 1998 under international pressure.[72] To precipitate the proceedings, the members of the Russian faction of the Parliament introduced a bill on amendments to the Law on Citizenship in accordance with the European Convention on Nationality in March 1998. Their initiative, however, was rejected by other parliamentary factions.[73]

4. 2. Latvia

Latvia did not even adopt an official law following independence, but simply restored the citizenship of those who had it prior to the Soviet period and their descendants.[74] Latvian citizenship law,[75] adopted on 22 July, 1994, is based on the 1991 parliamentary resolution that restored citizenship to prewar citizens. Under the law, citizenship is automatically granted to all those who were Latvian citizens on 17 June, 1940 and to their descendants, as well as to orphans and foreign-born children of Latvian parents.[76]

Priority is given to several categories of people: those who have an ethnic Latvian or Livonian[77] parent and who are permanent residents of Latvia; those who have been married to a Latvian or Livonian for at least ten years and who have lived in Latvia for at least five years; former citizens of the Soviet Union and their descendants who were entitled to, but did not apply for citizenship under the 1919 Latvian citizenship law; those who were legally and permanently residing in Latvia on 17 June, 1940; those who were deported to Latvia during World War II and have lived there since that time;

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[72] RT I, 1998, No. 111; L. W. Barrington, "The Making of Citizenship Policy in the Baltic States", *Geo. Immigr. L.J,* Vol., 13, 1999, pp. 159-199.

[73] *Ibid.*

[74] Republic of Latvia Supreme Council Resolution, "On the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization", in the Republic of Latvia: Human Rights Issues (Riga: 5th Saeima's Standing Commission on Human Rights, 1993/1994), p. 76.

[75] Latvian Citizenship Law, Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs (Official Gazette), No. 17, 1994. For the English translation of the Latvian Citizenship Law, see *Latvian Human Rights Quarterly*, Documents, 3/4,1998; Five drafts of the Latvian citizenship law were considered. The bill that was finally adopted by the Latvian Parliament (Saeima) included a controversial provision on quotas that barred most of the Russian minorities in Latvia from applying for naturalisation until after the year 2000. Even then they could do so only at the annual rate of 0.1 percent of the previous year's total number of citizens. Thus, even if a resident fulfilled the language, residency, and other requirements, he or she could not predict when citizenship might be granted. Since approximately 2,000 Russian minorities would have been granted citizenship under the quota system each year, most Russian minorities would have been precluded from ever acquiring citizenship. This provision was deleted due to international pressure from the Council of Europe and the Organization for Security and Cooperation in Europe. Other draft proposals called for a residency requirement for naturalisation of ten or even 16 years, but the requirement was reduced to five years in the final version.

[76] Article 2 of Latvian Citizenship Law.

[77] Latvian and Estonian territory conquered several centuries ago by ethnic Germans called Livonia. A

those who have completed their education in a Latvian language school and have resided in the country for at least five years; and those who have performed outstanding services for Latvia.[78]

Others, who were not included for this priority case, may apply for naturalisation under the regular process if they have lived in Latvia for at least five years as of 4 May, 1990, have a basic command of the Latvian language, have sworn an oath of loyalty to Latvia, and have a legal source of income. Applicants will be considered according to a schedule based on age; residents who were born in the country and are between 16 and 20 years of age will be considered first. The review of all applicants is expected to take several years. Persons who have posed a threat to Latvian security, those who have worked for the Soviet Secret Service or who were KGB informants, and persons who, after 4 May, 1990, have promoted fascist or communist ideologies will never be eligible for naturalisation under the citizenship law.

Even though the Latvian government attempted to preclude ex-Soviet military officers from both residency and naturalisation processes, it made concessions on this issue because of its negotiation with Russia on the withdrawal of Russian troops from Latvian territory.[79] The Latvian government granted permanent residency and social benefits to Russian military pensioners who retired before 28 January, 1992, the date on which the former Soviet army was officially transferred to Russia under the provisions of a 15 March, 1994 withdrawal agreement.[80] These persons are eligible to apply for citizenship, too.

While amendments to the law were passed in March 1995, these were minor changes having little impact on the vast majority of the non-citizens.[81] This reluctance to make alterations in the law began to change in 1997, and in particular during 1998. Finally, the amendments were agreed to, and they were passed by the parliament on 22 June, 1998. The amendments eliminated the naturalisation schedule (the "window policy") and allowed children born to non-citizens in Latvia since the restoration of independence to claim automatic citizenship.[82]

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small group of Livonians still live in Latvia.

[78] Article 13 of Latvian citizenship law.

[79] RFL/RL Daily Report, No. 52, 16 March 1994.

[80] Under Latvian-Russian agreements, Russian troops withdrew from Latvia on 31August, 1994.

[81] Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs, No. 8, 1995; *Barrington, The Making of Citizenship Policy in the Baltic States, op.cit.*, pp.171-177.

4.3. Lithuania

Lithuania was the first of the Baltic States to declare independence from the Soviet Union. Lithuania also considered that the incorporation of the Lithuanian State into the Soviet Union was an illegal act in light of International Law. But unlike Estonia and Latvia, Lithuania did not extend the Soviet occupation to the question of citizenship. Lithuania adopted its official law on citizenship in December 1991.[83] But prior to the enactment of the law, in November 1989, it made citizenship freely available to any permanent resident of the Lithuanian SSR, regardless of nationality or language abilities. At the time, the requirements were two years' residence in Lithuania, a legal source of income/support, and an oath of allegiance to the Lithuanian constitution and laws.[84] Permanent residents had until November 1991 to register for citizenship through this very liberal law. Ninety percent of non-Lithuanian permanent residents opted for citizenship under these provisions.[85] Only 1% of the pre-independence electorate chose not to become citizens of the Republic of Lithuania, and thus were no longer eligible to vote.[86] Thus, due to this zero-option, Lithuania has not been criticized as harshly, if at all, for its treatment of its ethnic, linguistic minorities. Few stateless persons remained in Lithuania, since most qualified for citizenship under the simplified procedure. The December 1991 law, addressing those individuals who did not take citizenship in the period prescribed by the 1989 zero-option, requires similar qualifications.[87] The enactment of the liberal citizenship law has protected Lithuania from international criticism to an extent not enjoyed by Latvia and Estonia.

4. 4. The Ethnic, Linguistic Russian Non-Citizens and Stateless Persons in Estonia and Latvia

The ethnic, linguistic Russian residents in Estonia that became non-citizens after 1991 do not have any special status. However, they are protected by a special clause in

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[82] Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs, No. 5, 1997; *Ibid*; S. Johnson, People Get the Last Word on Citizenship Reform, BALTIC TIMES (July 2-8, 1998).
[83] *The Baltic States: A Reference Book, op.cit.*, p. 40
[84] Lithuanian Law on Citizenship, Nov. 3, 1989, Articles 1(3), 2.
[85] Report on the Application of the Republic of Lithuania for Membership of the Council of Europe, Eur. Consult. Ass., 44th Sess., 1993, Doc. No. 6787.
[86] *Ibid.*
[87] Article 12 of the Lithuanian Citizenship Law, 1991.

Article 20 (1) of the Law on Aliens.[88] It provides that:

> "An alien who applied for a residence permit before 12 July 1995 and to whom a residence permit has been issued...retains the rights and duties provided for in earlier legislation of Estonia."

This rule is not applied to, *inter alia*, members of former Soviet/Russian military service and security officers and their family members. Due to pressure of Western countries and organisations, however, in 1996 these people were entitled for special Alien's passports that can be used as an ID both internally and internationally.[89]

In Estonia, the term 'non-citizens' refers to all Estonian residents without domestic citizenship. Almost all of them resided on the territory of Estonia before 1991 when the country restored independence.[90] The term 'stateless persons' refers to Soviet-era residents who do not hold any citizenship. Estonian authorities normally call them "persons with undetermined citizenship".[91] Non-citizens in Latvia are a special category of persons defined by the Law on the Status of Those Former USSR Citizens Who are not Citizens of Latvia or Any Other State[92] as persons who resided in Latvia on 1 July 1991 and have not obtained the citizenship of any other country.

Estonians and Latvians have consistently maintained that the Russian settlers who did not qualify for automatic Estonian and Latvian citizenship retained their Soviet nationality until the USSR dissolved in December 1991. Thereafter, they have argued that they theoretically inherited Russian nationality by virtue of the Russian Federation's status as the continuation of the former Soviet Union. However, it should be noted that while Russia generally is considered a continuation of the former Soviet Union for most purposes such as the United Nations seat, it did not necessarily assume all of the rights and obligations of the former Soviet Union. Russia did not purport to inherit all the territories and populations of other former Soviet republics.

Prior to the enactment of citizenship laws in each of the newly independent Baltic States, individuals in the former Soviet Union became stateless. Although the Soviet government did not actually strip them of nationality, their State of nationality (the

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[88] Estonian Law on Aliens was adopted on 8th July 1993. By 2004, the parliament has made 23 amendments to this act. Law on Aliens, RT I, No. 44, 1993, consolidated text RT I, No. 50, 1999.

[89] Governmental regulations No. 16 of 16 January 1996, RT I, No. 5, 1996; V. Poleshchuk, *Report on Non-Citizens in Estonia* (Tallinn: Legal Information Centre For Human Rights, 2004), p. 9.

[90] *Ibid.*

[91] *Ibid.*, p. 5.

[92] The Law on the Status of Those Former USSR Citizens Who are not Citizens of Latvia or Any Other State, adopted on 12th, April 1995. It was amended on 18th June and 27th August 1998. Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs, No. 10, 1995; No. 16, 1997. For the English translation of the text of the Law that includes the amendments, see *Latvian Human Rights Quarterly*,

Soviet Union) ceased to exist, leaving them with the citizenship of a non-existent State. Citizens of the former Soviet Union could not receive Russian citizenship automatically, but the process for receiving it was easier than that of the Baltic republics.

In practice, 'stateless' often refers to *de facto* and *de jure* stateless persons. *De jure* stateless persons fit into a juristic definition; he or she is not seen as a State's citizens according to that State's law. *De facto* stateless persons often have formal citizenship of a given State, but do not enjoy or do not want to enjoy that State's protection. In other words, *de facto* stateless persons do not, for some reasons, want to be citizens of the State to which he or she would be entitled to citizenship.

The collapse of the Soviet Union naturally brought to and end Soviet citizenship. Still, many persons continued to hold the old Soviet time passports. They became literally stateless persons. However, *de jure* most of them did have the possibility to seek the citizenship of the Soviet successor States. As noted, in the case of Estonia and Latvia, those persons who did not receive Estonian or Latvian citizenship did have the possibility to apply for Russian citizenship.[93] Many of them have done so, but many also have not. They thus remain *de facto* stateless persons. There are many reasons why some ethnic, linguistic Russians in Estonia and Latvia might wish not to become Russian citizens, but rather Estonian and Latvian ones. The fact that living conditions in Estonia and Latvia were preferable, given long-term residency, may be a major reason for staying. It is thus possible to use the terms 'non-citizen' and 'stateless persons' to describe the status of the ethnic, linguistic Russians in Estonia and Latvia who have not received citizenship of the States in which they reside.

The overwhelming majority of all non-citizens are ethnic non-Estonians (97%). The largest groups of non-citizens are former Soviet citizens. Nearly 53% of ethnic, linguistic Russians were born in Estonia. The majority of stateless persons (52%) were born in Estonia and their first language is Russian.[94] According to more recent data (as of July 2005) non-citizens account for 20% of the total population. These figures include stateless persons who comprise 12% of the total population. The total percentage of persons of non-Estonian ethnic origin was 32% of the total population,

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Documents, 3/4,1998.

[93] See Chapter 1 above, footnote 17, pp. 20-21.

[94] V. Poleshchuk, *Report on Non-Citizens in Estonia* (Tallinn: Legal Information Centre For Human Rights, 2004), p. 9.

most of whom are Russian native-speakers.[95] Approximately one million residents are of non-Latvian ethnicity, including more than 700,000 ethnic, linguistic Russians. There are approximately 452,033 resident non-citizens, of whom an estimated 68 percent are ethnic, linguistic Russian.[96] This is quite a significant number. The United Nations Human Rights Committee (HRC) concluded that this situation has adverse consequences in terms of the enjoyment of the rights and freedoms included in the International Covenant on Civil and Political Rights (ICCPR). The HRC has recommended that the two countries should further strengthen their effort to reduce the number of stateless persons.[97]

5. Conclusions

(1). This chapter has examined the historical and legal background of the origins of conflicts regarding the status of ethnic, linguistic Russians in Estonia and Latvia with regard to their citizenship. All three Baltic States considered that their incorporation into the Soviet Union in 1940 was an illegal act and that their existence *de jure* never ceased. To some extent, it appears that the so-called Baltic claim to restorationism has grounds under international law.

(2). In Estonia and Latvia, the illegality of the Baltic incorporation into the former USSR was extended to cover also those persons who had migrated to these republics during the Soviet occupation. However, compared to other Baltic States, in Lithuania, the citizenship issue was solved much more easily. For Lithuanians, there was no threat of 'cultural extermination', a rallying cry for both Estonian and Latvian nationalists, because of the smaller degree of Russian settlement. These differences between Lithuania and its Baltic neighbours are important to keep in mind. Because a smaller percentage of the population was made up of Russians who came during the Soviet period, the ethnic, linguistic Russians in Lithuania were less likely to be seen as 'colonisers' or 'transients'. In Estonia and Latvia, however, the ethnic, linguistic Russians were considered as illegal immigrants and as representative of the Soviet

[95] *Ibid;* From the present writer's interview with Vadim Poleshchuk. He is a legal advisor of the Legal Information Centre for Human Rights, Tallinn, Estonia.

[96] Statistical data taken from the home page of the Latvian Naturalisation Department in July 2005, www.np.gov. lv/fakti/index.htm.

[97] Concluding Observation of the HRC: Latvia, CCPR/CO/79/LVA, 2003, para. 18; Concluding Observation of the HRC: Estonia, CCPR/CO/77/EST, 2003, para. 17.

occupation. To a large extent, this is the reason why they were excluded from citizenship. These Estonian and Latvian attitudes towards the Russian residents in question seem problematic in that those individuals have been accused of responsibility for the Soviet policies.

Chapter III

Nationality in International Law and the Baltic Implications

1. Introduction

Nationality is described by Starke as "the most frequent and sometimes the only link between an individual and a State, ensuring that effect be given to that individual's rights and obligations in international law."[1] Nationality or Citizenship laws define the nature and content of this legal status, the relationship and links between the citizen and the State, and the rights and obligations of the citizens and the State at the domestic legal level.[2] In today's world, citizenship plays a vital role- both for States and individuals. The international legal community has also recognised that statelessness leaves persons particularly vulnerable.[3]

This chapter continues from the previous chapter 2 and is concerned with the question of the Estonian and Latvian citizenship laws in the context of nationality matters in international law with an emphasis on the human rights aspect of citizenship. One of the most dramatic results of the end of the Cold War was the emergence of new States in the international community. After the break-up of the former Soviet Union, some of the former republics of the USSR and Eastern bloc countries sought independence. In the course of this process, each republic with the exception of the Russian Federation declared its independence. On 8 December 1991, the Commonwealth of Independent States (CIS) was founded in Minsk by Belarus, the Russian Federation and Ukraine, and eight other republics joined this community on 21 December 1991 in Alma-Ata. All these republics, with the exception of the Russian Federation, regarded themselves as 'successor States' to the former Soviet Union and declared their commitment to observing the obligation deriving from international

[1] J.G. Starke, *Introduction to International Law* (London: Butterworths, 1989), p.340.
[2] W. R. Brubaker, (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (Lenham and London: University Press of America, 1989).
[3] See section "The Right to Nationality under International Law" in this chapter, pp. 69-77.

treaties and agreements concluded by the former USSR.[4] By contrast, the Baltic States declared that they were never successor States to the former Soviet Union, but totally independent States. In particular, after regaining independence in Estonia and Latvia, long-settled ethnic, linguistic Russians were not allowed an opportunity to obtain automatic citizenship in the newly independent States of Estonia and Latvia. Whether the Estonian and Latvian citizenship laws conform to the international standards on nationality or not is the main concern of this chapter. This is important issue in that citizenship has been recognised as a human right in today's global society. As citizenship is basic in realising various rights of residents in their States of residence at the domestic legal level, it is necessary to examine the citizenship matters in public international law for the discussion on the protection of human rights of ethnic, linguistic Russians in Estonia and Latvia.

2. Nationality under International Law

2.1. Nationality and the Principle of the Genuine and Effective Link

As the presence of a sufficient population in a specified territory is one of the basic elements of statehood required by international law, the relationship between a State and its population is critical for the stable lives of the population within their State of residence. For a long time, the question of nationality has been recognised as a question of domestic jurisdiction of individual States.[5] Various international instruments have expressed this traditional view. Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws[6] (the Hague Convention) provided that "it is for each State to determine under its own laws who are its nationals." Under Article 2, "Any questions as to whether a person possesses the nationality of particular State shall be determined in accordance with the law of that State."[7]

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[4] The Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, 31 ILM 143.

[5] According to Professor Brownlie, the evidence of this traditional view dates back to the 19th century. See I. Brownlie, "The Relations of Nationality in Public International Law", *Brit. Y.B. Int'l. L*, Vol., 39, 1963, p. 286.

[6] Article 1 of the Hague Convention. The Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws, opened for signature on April 12, 1930, 179 LNTS 89 (entered into force on 1 July, 1937).

[7] Article 2 of the Hague Convention.

International tribunals have also taken the same position, which is found in the Permanent Court of International Justice (PCIJ) Advisory Opinion concerning the *Tunis and Morocco Nationality Decrees Case*:

> "In the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this *'reserved domain'* of domestic jurisdiction."[8] (Emphasis added.)

However, this does not mean that the 'traditional view' of nationality has been acknowledged unreservedly under international law. In fact, the limitation on the State's discretion over nationality matters is found in the *Tunis and Morocco Nationality Decrees Case*. Even though the PCIJ expressed the basic opinion that the questions of nationality matters were reserved to a State's domestic jurisdiction, the tribunal also made clear that the question is a 'relative' one, depending on the development of international law.[9] The Court thus showed the possibility that international law could 'evolve' to limit the States' discretion over nationality matters. The Court held the quite 'futuristic' view in the following terms:

> "For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law."[10]

The opinion of the Court is significant in that it has provided two critical propositions on the relationship between nationality and a State's power to regulate nationality: State discretion over nationality matters is subject to international law and these limitations by international law 'evolve' along with the development of international law.

The *Nottebohm Case* was the proceeding by Liechtenstein on behalf of a naturalised citizen, Nottebohm, for compensation for the damages arising from the acts of Guatemala.[11] It concerned a German national who had lived and conducted business in Guatemala for most of his adult life. Shortly after the outbreak of war in 1939, Nottebohm made moves to acquire the nationality of Liechtenstein and was granted it in October of that year. After the grant, Nottebohm stayed in Liechtenstein

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[8] *Tunis and Morocco Nationality Decrees Case*, PCIJ Series B, No. 4, 1923, p. 24.

[9] *Ibid.*, "The question whether a certain matter is solely within the jurisdiction of a State or not is an essentially relative question; it depends upon the development of international relations. Thus, in the present of international law, questions of nationality are, in the opinion of this Court, in principle within the reserved domain."

[10] *Ibid.*

[11] *Nottebohm Case*, ICJ Reports, 1955, p. 23.

for some seven years before returning to Guatemala, this time on Liechtenstein papers. Despite having acquired the nationality of Liechtenstein, Nottebohm was declared an enemy alien in Guatemala, was deported, and his property was confiscated. In response, Liechtenstein sought to seize the court, asserting an alleged breach of international law in relation to its national, Nottebohm. At the hearing, the preliminary question was whether Nottebohm's Liechtenstein nationality was effective under international law vis-à-vis Guatemala. In finding that it was not, the International Court of Justice (ICJ) held that: "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[12]

While municipal law regarding citizenship is binding within a State, it is only recognised in the international arena when "the legal bond of nationality accords with the individual's genuine connection with the state which assumes the defense of its citizens by means of protection against other states."[13]

The preference for social connections over legal formalities could be read to allow the recognition under international law of effective links of the persons to their States of residence in determining nationality, even though this does not appear to be main concern of the Court in the *Nottebohm Case.*[14] In this sense, the *Nottebohm Case* has provided an important clue in relation to the principle of 'dominant and effective nationality' in the sense that it emphasised the existence of a 'genuine link' of nationality in determining the status of one's nationality. The Court held that Nottebohm had no genuine and effective connection with Liechtenstein on which it could exercise diplomatic protection for its nationals:

> "Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of the belligerent State of Germany that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life, or of assuming its obligation... Guatemala is under no obligation to recognize a nationality granted in such circumstance."[15]

The Court looked beyond the formality of nationality to ascertain whether there were any effective factual ties between the person and the State concerned as found in the following statement:

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[12] *Ibid.*, p. 23
[13] *Ibid.*
[14] *Ibid.*, pp.20-21.
[15] *Ibid.*, pp. 23-26.

> "International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[16]

The Court went on to hold that:

> "a State can not claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State."[17]

The Iran-United States Claims Tribunal was established in 1981 and the goal of the Tribunal was to terminate all litigation between the two parties through deciding the claims of nationals of the United States and claims of Iran against the United States.[18] In the Decision in Case No. A/18 concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, the Tribunal noted the principle of the 'dominant and effective nationality' of the claimant and stated that it will determine jurisdiction.[19] The tribunal accepted this principle rejecting the traditional State-orientated view of nationality.[20] The individual is allowed an opportunity for redress if the fact is confirmed that he has a 'more' substantial connection with the claimant State than with the respondent State.[21]

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[16] *Ibid.*, p. 22. In this context, it is necessary to point out that Article 5 of the Hague Convention was keeping with the principle of dominant and effective nationality: " Within a third State, a person having more than one nationality shall be treated as if he had only one... A third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

[17] *Ibid.*, p. 23.

[18] The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and The Government of the Islamic Republic of Iran, *initialled* 19 January, 1981, United States-Iran, provides for the establishment of an international arbitral tribunal. 20 ILM 230 (1981).

[19] *Decision in Case No. A/18* Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, reprinted in 23 ILM 489, 496 (Iran-U.S. Claims Tribunal, 1984).

[20] Case No. A/18 is the most important case in the Tribunal's dual nationality jurisprudence. After Chamber Two issued awards finding jurisdiction over dual nationals in the Esphahanian and Golpira cases, the Iranian government asked the Full Tribunal to consider whether the claims of individuals who were nationals of Iran under Iranian law should ever be admissible against Iran. Iran argued that the Tribunal did not have jurisdiction over claims against Iran by those who were Iranian nationals under Iranian law, and that the fact that an individual was a US national under US law should not create an exception to this rule. The United States, in contrast, argued that the Tribunal had jurisdiction over claims against Iran by anyone who was a US citizen under US law, irrespective of whether that person was also an Iranian citizen under Iranian law. The Full Tribunal rejected both of these contentions. It then examined the 1930 Hague Convention, a number of arbitral and judicial decisions dealing with the conflict of nationality laws, and legal literature relating to conflict of nationality laws.

[21] I. Brownlie, *Principles of Public International Law, Sixth Edition* (Oxford: Oxford University Press,

The Tribunal asserted that the dominant and effective nationality is the prevailing rule of present international law.[22] The affirmation of the 'rule of dominant and effective nationality' may be understood as the application of the principle of 'dominant and effective' nationality articulated in the *Merge Case.*[23] The Italian-US Conciliation Commission in the *Merge Case* stated that the "principle of nonresponsibility, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State."[24] The Commission then established the standard by which the validity of the United States nationality would be evaluated:

> "Habitual residence can be one of the criteria along with the conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States...."[25]

The Case No. A/18 may be said to have represented the affirmative statement that the 'dominant and effective nationality' is the applicable principle of international law in the matter of dual nationals.[26] The Tribunal expressed its view of the principle of dominant and effective nationality in the following terms:

> "This trend toward modification of the Hague Convention rule of non-responsibility by the search for dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals."[27]

2.2. Determining Nationality in the Case of State succession: Theory and Practice

Political changes may create a situation where one State or a part thereof is replaced by another. This may occur in a variety of ways, for instance, by the transfer of territory to another State, whether pre-existing or newly established; unification of States; or dissolution of a State in such a way that various parts of its territory form two or more new States while the original States ceases to exist. State succession for

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2003), pp.396-406.

[22] *Case No.A/18, op.cit.,* p. 501. The Tribunal stated that "whatever the state of the law prior to 1945, the better rule at the time the... Declarations were concluded and today is the rule of dominant and effective nationality." *Ibid.*, p. 499.

[23] *Merge Case* (US. v. Italy), 14 RIAA 236 (1955).

[24] *Ibid.*, p. 247.

[25] *Ibid.*

[26] *Case No. A/18, op.cit.*, p. 501; A. I. Muchmore, "Passports and Nationality in International Law", *U.C. Davis J. Int'l L. & Pol'y*, Vol., 10, 2004, pp. 342-346; "Note: Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal", *Mich. L. Rev,* Vol., 83, 1984, pp. 597-624.

the purpose of international law is defined as the transfer of rights and duties to a successor State which arises from any change to the status of States as international subjects. [28] State succession concerning nationality is usually governed by international acts or similar legal treaties as well as by constitutional and the other internal laws of the States concerned. Professor O'Connell, one of the most distinguished writers on the problem of State succession explains:

> "The majority of writers have asserted that upon change of sovereignty the inhabitants of the territory concerned lose the nationality of the predecessor State and become *ipso facto* nationals of the successor. There is a collective naturalization which takes place the moment ratification of a treaty of cession are exchanged, or, if there is no treaty, upon the declaration of annexation or independence."[29]

The Harvard Draft Convention on Nationality in 1929 shares the same view:

> "When a part of the territory of a State is acquired by another State...the nationals of the first State who continue their habitual residence in such territory lose the nationality of the State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof."[30]

Brownlie, who deals with the nationality matter quite progressively, expresses the important proposition that the population must go with the territory. The successor States have an obligation to confer nationality on nationals of the predecessor State who have 'effective links' to the territory concerned:

> "The general principle is that of a substantial connection with the territory concerned by citizenship or residence or family relation to a qualified person. This principle is perhaps merely a special aspect of the general principle of the effective link."[31]

It needs to be emphasised that he argues that 'domicile' in the territory is the primary criterion for determining a natural person's nationality in the context of State succession. His perceptive statement is worth quoting at length:

> "The link, in cases of territorial transfer, has special characteristics. Territory, both socially and legally, is not to be regarded an empty plot: territory...connotes population, ethnic groupings, loyalty patterns, national aspiration, a part of humanity, or, if one is tolerant of the metaphor, an organism... The population goes with the territory: on the other hand, it would be illegal, and derogation from the grant of territory, for the transferor to try to retain the population as its own nationals, and, on the other hand, it would be illegal for the successor to take any steps which involved attempts to avoid

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[27] *Ibid.*, p. 501.

[28] *Brownlie, Principles of Public International Law, op.cit.*, p.621.

[29] D.P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge: Cambridge University Press, 1967), pp. 498-501.

[30] Draft Convention and Comments Prepared by the Research in International Law of the Harvard Law School on the Law of Nationality, *AJIL*, Vol., 23, 1929, pp. 11-13. Article 18 of the Draft Convention. The commentary on Article 18 states that this provision is believed to express a rule of international law which is generally recognized, although there might be differences of opinion with regard to its application under particular conditions.

[31] *Brownlie, The Relations of Nationality in Public International Law, op. cit.*, pp.324-325.

> responsibility for conditions on the territory, for example, by treating the population as *de facto* stateless or by failing to maintain order in the area. The position is that the population has a territorial or local status, and this is unaffected whether there is a universal or partial succession and whether there is a cession."[32]

However, O'Connell does not acknowledge that there are any positive obligations on the States concerned:

> "Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality."[33]

Weis has the similar view that he found no evidence of a positive rule of international law which imposes obligation on the States concerned. The effect is a merely presumptive. By examining State practice, he concludes in the following terms:

> "There is no rule of international law under which the nationals of the predecessor State acquire the nationality of the successor State. International law cannot have such a direct effect, and the practice of States does not bear out the contention that there is inevitably the result of the change of sovereignty. As a rule, however, States have conferred their nationality on the former nationals of the predecessor State, and in this regard one may say that there is, in the absence of statutory provision of municipal law, a presumption of international law that municipal law has this effect."[34]

If Estonia and Latvia should be regarded as new, successor States to part of the territory of the USSR, then there would be a growing body of State practice supporting the position that automatic citizenship should have been offered to all Soviet settlers residing in Estonia and Latvia. Until a new State defines its citizenship policies either through legislation or a treaty, it generally is presumed that natural persons who have been habitually resident in the territory of that State will automatically acquire its nationality.[35] This practice typically is enshrined in international legal instruments that are adopted by successor States. For instance, the Versailles Peace Treaties, which rearranged Europe at the end of World War I, generally conferred the nationality of the successor State upon persons who had been living in territory that was transferred. Similarly, when Ireland separated from the United Kingdom in 1922, Irish citizenship was offered to persons domiciled in Ireland who: had been born in Ireland, had a parent born in Ireland, or had been resident in

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[32] *Ibid.*, pp. 325-326.
[33] *O'Conell, State Succession in Municipal Law and International Law, op. cit.*, p.503.
[34] P. Weis, *Nationality and Statelessness in International Law* (London: Stevens & Sons, 1956), p. 149.
[35] J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), pp. 40-42; *Weis, Nationality and Statelessness in International Law, op.cit.*, pp. 140-149. (noting that while there is no rule, there is a presumption).

Ireland for at least seven years. Likewise, the peace treaty by which Italy ceded territory to various Allies at the conclusion of World War II provided that Italian citizens residing in such territory prior to the war would "become citizens with full civil and political rights of the State to which the territory was transferred."[36] Furthermore, in seceding from Pakistan in the early 1970s, Bangladesh gave residents who were not indigenous to its territory the option of accepting its nationality or returning to Pakistan.[37] More recently, upon separating from the USSR, Belarus, Moldova and Ukraine granted automatic citizenship to all permanent residents in their respective territories.[38] Soviet citizens who were citizens of the republics of Kyrgyzstan and Georgia were also extended automatic citizenship in those newly independent States.[39] One of the Baltic States, Lithuania followed suit. The new citizenship laws of the States emerging from the dissolution of Czechoslovakia and Yugoslavia are influenced by the pre-existing citizenship laws of these countries' parts. In their successor States, persons and their descendents possessing the citizenship of the respective federated entity which had become independent acquired *ipso facto* the new citizenship.[40] Based on such past practice, the Council of Europe's Venice Commission declared that successor State nationality should be granted in future cases of succession to all nationals of the predecessor State residing permanently on the transferred territory.[41]

However, even if a rule requiring the extension of citizenship has emerged in the case of State succession, it arguably cannot apply to Estonia and Latvia as long as post-occupation Estonia and Latvia can be regarded as being restored States. As a matter of fact, where control over territory has been 'restored', the approach to nationality issues often has resembled that of Estonia and Latvia. For instance, the restoration of French sovereignty over Alsace-Lorraine after almost fifty years of

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[36] Treaty of Peace with Italy, Feb. 10, 1947, art. 19(1), 61 Stat. 1245, 1257-58, 49 UNTS 3, 14-15.
[37] R. Donner, *The Regulation of Nationality in International Law* (New York: Transnational Publishers, 1994), pp. 286-87.
[38] *The Venice Commission, op.cit.,* pp. 29-39.
[39] In discussing the citizenship issue, the Russian Federation's Presidential Commission on Citizenship Matters stated: "The situation in Estonia and Latvia is different, and that is why our meeting today is devoted to the status of our countrymen there and to the solution of these problems of citizenship in those two states. Indeed, all the other newly emerging states, including Lithuania, have actually granted citizenship to all permanent residents in their territories who have applied for it." See Press Conference with the Russian Federation Presidential Commission on Citizenship Concerning the Situation in Latvia and Estonia (Official Kremlin Int'l News Broadcast, July 20, 1994). (Discussing 1991 recognition agreement).
[40] *The Venice Commission, op.cit.,* pp. 29-39.
[41] *Ibid.*, p 5.

German rule marked an exception to the general approach of the 1920 Versailles Peace Treaties. Rather than granting nationality automatically, France required Germans who were born in or residing in Alsace-Lorraine to go through naturalisation procedures if they wanted to become French nationals.[42] Another example is Austria, which claimed its annexation by Germany in 1938 had been unlawful. Austria therefore declined to extend its nationality to all residents and, instead, chose to "reinstate" as its nationals only those persons who had been Austrian nationals in 1938 and their descendants.[43]

Whatever the uniformity of State practice, it might be short of being an *opinio juris*. Nor is there evidence of *opinio juris* in the Special Rapporteur's investigation of State practice in this matter,[44] even if it should be admitted that the weight of recent State practice after the end of the Cold War has been for a successor State to confer nationality on the nationals of the predecessor State domiciled on the territory concerned.

3. The Right to Nationality under International Law

3.1. The Right to Nationality

Notwithstanding the past practice of other restored States and the discretion traditionally afforded to States in determining nationality rules, Estonia and Latvia's regulation of nationality should also be viewed in relation to their international obligations to protect human rights. Estonia and Latvia have expressed their commitment to observe international law. The principles and norms of international law are incorporated into domestic law under Article 3 of the Estonian Constitution.[45] The Latvian Declaration on the Renewal of Independence affirms the supremacy of

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[42] *Ibid.*, pp. 29-33.

[43] *Brownlie, Principles of Public International Law, op.cit.*, pp. 81-82.

[44] V. Mikulka's Second Report mentions 31 instances of State succession, ranging from the territorial transfer from Mexico to the United States in 1848 to the succession of Eritrea in 1992. See V. Mikulka, Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons, ILC, Forty-eighth Session, UN Doc. A./CN.4/474 (1996), at 19-38.

[45] "The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system." Article 3(1) of the Estonian Constitution translated by Estonian Legal Translation Centre. The Constitution of the Republic of Estonia, RT 26, 1992.

international law over municipal law.[46] Both States have also ratified principal international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESR), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[47]

The United Nations (UN) efforts to deal with the plight of stateless persons have alerted the international community to the problem of nationality in the context of the protection of human rights.[48] The UN issued a study denouncing statelessness, finding that "the fact that the stateless person has no nationality places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence."[49] Commentators have also observed that statelessness, at best, creates an unhappy lot for the individual, a vexatious problem for the nation and an undesirable phenomenon in modern civilisation, where every person has a right to expect the privileges and perform the duties incident to full citizenship status.[50] In other words, the nationality problem not only establishes a passive legal relationship between the State and its subjects, but also creates a 'human problem'. The failure to acquire legal status which is expressed as 'nationality' may have a negative impact on many important elements of life, including the right to vote, to own property, to be properly educated, to work and so on.

It seems that there is growing support for a human right to nationality. Such an inherent right to nationality is found in numerous international human rights conventions. For instance, Article 15 of the Universal Declaration of Human Rights[51] declares that: (1). Everyone has a right to a nationality. (2). No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. But, it does not explicitly indicate which State has a duty to grant nationality. Various other international legal instruments address the right to nationality. The 1957 Convention

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[46] Declaration of the Supreme Soviet of the Latvian SSR on the Renewal of the Independence of the Republic of Latvia, 4 May 1990, in *The Republic of Latvia: Human Rights Issues* (Riga: Saeima of the Republic of Latvia, Standing Commission on Human Rights, 1993), p. 58.

[47] International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3; the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; International Convention on the Elimination of All Forms of Racial Discrimination, 1966, 660 UNTS 195.

[48] Second Report on the Elimination or Reduction of Statelessness (1953), 2 *Y.B. Int'l L.* Comm'n 196, U.N. Doc. A/CN.4/75.

[49] United Nations Department of Social Affairs, A Study of Statelessness, at 139, UN Doc. E/1112, UN Sales No. 1949.XIV.2 (1949).

[50] P. Weis, *Nationality and Statelessness in International Law, op.cit.*, pp. 126-29 (commenting on the status of being stateless).

on the Nationality of Married Women[52] echoes the Universal Declaration of Human Rights by stipulating the right to nationality and the right not to be deprived of a nationality. The first two Articles of the Convention contain specific provisions concerning a wife's nationality. Article 1 of the Convention asserts that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife."[53] Article 2 states that "neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationals by the wife of such national."[54]

The 1965 Convention on the Elimination of All Forms of Racial Discrimination[55] obliges States to "guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law," particularly in the enjoyment of several fundamental human rights, including the right to nationality.[56] Article 24 of the 1966 International Covenant on Civil and Political Rights states that "every child has the right to acquire a nationality."[57] Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women[58] states that:

> "(1). States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her statelessness or force upon her the nationality of the husband. (2). States Parties shall grant women equal rights with men with respect to the nationality of their children."[59]

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[51] GA Res. 217 A, UN Doc. A/810 (1948), at 71.

[52] The Convention on the Nationality of Married Women, 309 UNTS 65. The Convention entered into force on 11 August 1958. As of 31 August 2005, it has 70 States parties. Latvia acceded to the Convention on 14 April 1992.

[53] Article 1 of the Convention.

[54] Article 2 of the Convention.

[55] International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195. This convention entered into force on 1 January 1969. There are 172 States parties to this convention as of 31 August 2005 including all member States of the Council of Europe.

[56] Article 5 of the Convention.

[57] Article 24 (3) of the Covenant. The International Covenant on Civil and Political Rights, 999 UNTS 171. The Covenant entered into force on 23 March 1976. It has 156 States parties. Estonia acceded to the Covenant on 21 October 1991. Latvia acceded to the Covenant on 14 April 1992.

[58] The Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13. The Convention entered into force on 3 September 1981. There are 180 States parties to this Convention as of 31 August 2005. Estonia acceded to this Convention on 21 October 1991 and Latvia acceded to it on 14 April 1992.

[59] Article 9 of the Convention.

The 1989 Convention on the Rights of the Child[60], which has been ratified by almost every State, contains two important articles relevant to nationality. Article 2 of the Convention stipulates that:

> "States Parties shall respect and ensure the rights set forth in the...Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[61]

Article 7 states that:

> "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents...States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under relevant international instruments in this field, in particular where the child would otherwise be stateless."[62]

Regional instruments, such as the 1969 American Convention on Human Rights[63] also provide for the right to a nationality. Article 20 of the American Convention provides that:

> "Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or the right to change it."[64]

Article 4 of the 1997 European Convention on Nationality[65] incorporates as a basic principle the right to a nationality for all, the avoidance of statelessness, the prohibition against arbitrary deprivation of nationality, and the preservation of nationality in marriage or the dissolution of marriage.[66] Article 6(3) of the Convention, for instance, takes a significant step forward in this matter. Article 6(3) provides:

> "Each State Party shall provide in its internal law for the possibility of naturalisation of

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[60]The Convention on the Rights of Child, 1989, 1577 UNTS 3. The Convention entered into force on 2 September 1990. There are 192 States parties to this convention as of 31 August 2005. Estonia acceded to this Convention on 21 October 1991 and Latvia acceded to on 14 April 1992.

[61] Article 2 of the Convention.

[62]Article 7 of the Convention.

[63] American Convention on Human Rights, 1144 UNTS 123. The Convention entered into force on 18 July 1978. There are 24 States parties to the Convention as of 31 August 2005.

[64] Article 20 of the Convention.

[65]The European Convention on Nationality, ETS No. 166. The Convention entered into force on 1 March 2000. The total number of signatures not followed by ratifications is 12 States, as of 31 August 2005. The total number of ratification/accessions is 15 States as of 31 August 2005. As all three Baltic republics are members of the Council of Europe, the Convention is of particular importance. Only Latvia is a signatory.

[66] Article 4 of the European Convention of Nationality.

> persons lawfully and habitually resident in its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application."[67]

Thus, habitual residence, along with place of birth and descent, is formally recognised as a source basis for the granting of nationality. The individual will have the right to apply for citizenship after a maximum period of 10 years of residence following which, the habitual residence in itself constitutes a sufficient basis upon which to ensure the individual is allowed to try to naturalise. Yet it needs to be noted that the 10-year period is for the normal process of naturalisation. It may be argued that this period of time will be less for stateless persons, refugees and persons belonging to ethnic, religious or linguistic minorities who have resided in their State of residence over a significant period of time, as, for instance, Article 6(4)(g) goes on to recommend that the access of such individuals to naturalisation procedures should be facilitated.[68]

In particular, in Chapter VI of the 1997 European Convention on Nationality, with provisions concerning State succession, habitual residence and a genuine and effective link are primary factors which the State should take into consideration in determining the attribution of nationality. The will of the person concerned should also be taken into account by the State, giving the individual the opportunity to indicate expressly which nationality is desired. States are encouraged, in Article 19 of the Convention, to promote the conclusion of treaties which shall respect the principles and rules contained and referred to in the chapter, including, non-discriminatory consideration of the genuine and effective link, habitual residence, and the will of the persons concerned, in particular, so as to avoid statelessness.[69] As a matter of fact, the European Convention on Nationality essentially adopted the approach of the 1961 Convention on the Reduction of Statelessness. Article 10 of the 1961 Reduction Convention declares that every treaty between States providing for the transfer of territory shall include provisions designed to ensure that no persons shall become

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[67] European Convention on Nationality and Explanatory Report, ETS No. 166, Council of Europe, Strasbourg, 1997.

[68] Article 6 (4) provides as follows: "Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: a. spouses of its nationals; b. children of one of its nationals, falling under the exception of Article 6, paragraph 1, sub-paragraph a; c. children one of whose parents acquires or has acquired its nationality; d. children adopted by one of its nationals; e. persons who were born on its territory and reside there lawfully and habitually; f. persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18, that period to be determined by the internal law of the State Party concerned; g. stateless persons and recognised refugees lawfully and habitually resident on its territory."; C. A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status", *International Journal of Refugee Law*, Vol.,10, 1998, pp.162-165.

[69] Article 19 of the European Convention on Nationality.

stateless as a result of the transfer.[70]

All above international and regional instruments show that international law has encroached on what once was considered a mainly domestic 'reserved domain' to effectuate the right to nationality, as the Inter-American Court of Human Rights has correctly held in the *Costa Rica Case*. The Court examined whether the proposed amendments were in conflict with the right to nationality enumerated in the American Convention on Human Rights:

> "It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area, and that the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by the obligations to ensure the full protection of human rights."[71]

The difference between the American Court's approach in *the Costa Rica Case* and the Permanent Court's approach in *Tunis and Morocco Nationality Decrees Case* is that in the latter case, the Court held that essentially the question of nationality is to be decided by each individual State and only if a State limited its power voluntarily by signing treaties to that effect, would it be obliged to adhere to the international obligations. In the *Costa Rica Case*, however, the Inter-American Court based its ruling on the premise that rules of international human rights laws on the issue of nationality are already in force. That being so, a State's capacity to decide on the issues of nationality is limited by the regulations already provided in the various law treaties.

3.2. The Duty to Prevent Statelessness under International Law

Closely related to the right to nationality is preventing statelessness. This may be conceived as a duty arising from the right to nationality. There are two international conventions, concluded under the auspices of the United Nations, which address the issue of statelessness. The first, the Convention Relating to the Status of Stateless Persons (the 1954 Status Convention), was concluded in New York on 28 September,

[70] Article 10 of the Convention.

1954. It came into force on 6 June, 1960.[72] The second, the Convention on the Reduction of Statelessness (the 1961 Reduction Convention), was concluded on 30 August, 1961. It came into force on 13 December, 1975.[73] Of the Baltic States, Latvia and Lithuania acceded to the 1954 Status Convention.[74]

Statelessness is generally understood as the legal condition of being without a nationality. What is serious for practical purposes is that being stateless renders the individual concerned unable to enjoy various rights and protections afforded by law.[75] Although Estonia is not bound by the language of the convention because it has not yet to sign it, if the convention's principles become customary international law, then it will be bound to them.

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[71] Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion No. OC-4/84, Inter-Am. C.H.R. paragraph 32 (Jan. 19, 1984), reprinted in 5 *HRLJ*, 161, 167 (1984).

[72] Convention Relating to the Status of Stateless Persons, 360 UNTS 130. The 1954 Status Convention presently has 66 States parties and 60 States have ratified it, as of 31 August 2005.

[73] Convention on the Reduction of Statelessness, 989 UNTS 176. The 1961 Reduction Convention has 34 States parties and 31 States have ratified it, as of 31 August 2005.

[74]Latvia made reservation in the application of the provisions of Articles 24 and 27 of the Convention as follows: "In accordance with article 38 of the [Convention] the Republic of Latvia reserves the right to apply the provisions of paragraph 1 (b) of Article 24 subject to limitations provided for by the national legislation." "In accordance with article 38 of the [Convention] the Republic of Latvia reserves the right to apply the provisions of Article 27 subject to limitations provided for by the national legislation."

[75]Statelessness is caused by the loss of nationality without the acquisition of another nationality by deprivation or by conflict of laws. Statelessness may also result at birth when the child fails to qualify for the nationality of a particular State. However, the case of being stateless at birth has received far more sympathy under international law. See P. Weis, "The United Nations Convention on the Reduction of Statelessness", *ICLQ*, Vol.,11, 1962, pp.1073-1075. Changes to citizenship laws are also a common mechanism of statelessness. Changes to citizenship laws often create the risk that persons who were considered citizens according to old laws might be rendered stateless by new laws. For example, in Zaire, a law passed in 1971 granted nationality to the Banyarwanda people, who thus obtained certain civil and political rights such as the right to stand for election and the right to vote. In 1981, however, Law No. 81-002 amended the previous legislation and retroactively denied nationality to thousands of Banyarwanda. These Banyarwanda, having no other nationality, have been rendered stateless. (*See Report on the Situation of Human Rights in Zaire, Prepared by the Special Rapporteur, Mr. Roberto Garreton, in Accordance with Commission Resolution 1994/87*, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., Agenda Item 12, 26, U.N. Doc. E/CN.4/1997/6/Add.1 (1995)).) Likewise, in 2001, Zimbabwe instituted laws that revoked Zimbabwean citizenship from Zimbabwean nationals who held a foreign citizenship or who had failed to renounce any claim to foreign citizenship, even if they did not know about the claim. Essentially, Zimbabweans with dual citizenship or with a potential claim to foreign citizenship had to renounce their foreign citizenship or their claims to foreign citizenship in order to keep their Zimbabwean status. The result of the Zimbabwean legislation was that millions of Zimbabweans with foreign parentage or with foreign sounding names, most of whom were born and raised in Zimbabwe, have had their citizenships withdrawn and have had their national identities confiscated by the State until they prove that they have renounced any claims to foreign citizenship. *Zimbabweans Team Up to Fight New Citizenship Act*, FINANCIAL GAZETTE, 20 December 2001. Indeed, whenever citizenship laws are changed, the possibility always exists that persons considered citizens according to the old laws might be rendered stateless by the new laws. Take, for example, an ethnic minority who was born and has always lived in the State of their nationality. The State's territory, however, is dissolved and succeeded by another State. The former citizen would expect to be given citizenship of the successor State, given that it took control of the territory in which the former citizen has always lived and resided. However, if the successor State strictly imposes *jus sanguinis* citizenship laws, and only grants citizenship to the territory's ethnic majority, then the former citizen would be

The 1954 Status Convention is the primary international instrument that aims to regulate and improve the status of stateless persons and to ensure that stateless persons are accorded their fundamental rights and freedom without discrimination. Although the Convention's drafters felt it was necessary to make the distinction between *de jure* stateless persons (those who have not received nationality automatically or through an individual decision under the operation of any State's laws) and *de facto* stateless persons (those who cannot establish their nationality), they did not recognise the similarity of their positions. Most of the 1954 Status Convention is devoted to the protection of stateless persons rather than the elimination of statelessness. However, the 1954 Status Convention, in Article 32, does require States parties to "as far as possible facilitate the assimilation and naturalization of stateless persons."[76]

The 1961 Convention on the Reduction of Statelessness focuses exclusively on decreasing statelessness. The 1961 Convention does not, however, require a contracting State to unconditionally grant its nationality to any stateless person but rather bases the right to nationality on ties held with a State based on either *jus soli* in Article 1 or *jus sanguinis* in Article 4. The granting of nationality is further contingent on the fact that a person "would otherwise be stateless."[77] Also, both Articles 1 and 4 present a contracting State with the opportunity to impose further conditions on the granting of its nationality to stateless persons, in addition to the *jus soli* or *jus sanguinis* links that exist. These conditions include: that an application under the Convention is lodged while the applicant is in a prescribed age range;[78] that the person has habitually resided in the State's territory for a fixed period of time;[79] that the person has not been convicted of an offence against national security;[80] also includes that a person has not been sentenced to imprisonment for five or more years on a criminal charge and that the person has always been stateless.[81] Furthermore, the 1961 Reduction Convention only provides for the granting of nationality to stateless individuals within a contracting States territory based on '*de jure* stateless' factors. As

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rendered stateless.

[76] Article 32 of the Convention.

[77] Article 1 provides: "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless." Article 4 provides: "A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State."

[78] Articles 1(2)(a) and 4(2)(a) of the Convention.

[79] Articles 1(2)(b) and 2(2)(b) of the Convention.

[80] Articles 1(2)(c) and 4(2)(c), Article 1(2)(c) of the Convention.

[81] Article 1(2)(d) and 4(2)(d) of the Convention.

a result there are a number of gaps in the prevention of statelessness that the 1961 Reduction Convention does not envisage or remedy. It is clear that the circumstances in which statelessness is created are much wider and varied than that which the 1961 Convention attempts to prevent.

Article 8 of the 1961 Reduction Convention provides that a contracting State shall not deprive a person of his or her nationality if that person would be rendered stateless.[82] This provision, however, is vaguely worded and subject to flexible interpretation. Under Article 9, persons may not be deprived of their nationality on racial, ethnic, religious, or political grounds.[83] Unlike Estonia, Latvia acceded to this convention on 14 April, 1992.

4. The Right to Nationality as a Part of Customary International Law?

The Statute of the International Court of Justice (ICJ) describes custom as "evidence of a general practice accepted as law."[84] Custom is generally considered to have two elements: State practice and *opinio juris*.[85] State practice refers to general and consistent practice by States, while *opinio juris* means that the practice is followed out of a belief of legal obligation. It is held by certain authors that global treaties (i.e., those that are open for participation by all States) with general provisions create law that is binding on all States in the international system, irrespective of whether they are parties to the treaty or not. Just how these treaties create obligations for third parties has been a matter of considerable discussion among international law scholars.[86] One of the ways suggested is that these treaties create 'instant customary international law' and since all States are obligated to obey customary international law, States are, *ipso facto*, obligated by the customary law created by the law-making treaty. Treaties can suggest new customary international law or articulate nascent customary international law, but in either case recognition by a substantial number of States in the international system is required before it can be converted into customary

[82] Article 8 of the Convention.
[83] Article 9 of the Convention.
[84] Article 38(1)b of the International Court of Justice Statute.
[85] *North Sea Continental Shelf Case* (FRG/Den.; FRG/Neth.), ICJ Reports, 1969, p. 44.
[86] See, generally, A. D'Amato (ed)., *International Law Anthology* (Cincinnati: Anderson, Pub.Co., 1994).

international law obligating all States. It is generally believed that widespread acceptance of a legal principle is necessary for it to be understood as part of customary international law. The ICJ in *the North Sea Continental Shelf Case* suggests the number of States parties to the multilateral convention is an important factor in identifying the evidence of the existence of State practice for customary international law.[87]

Opinio juris is one of the two requirements for the existence of a rule of customary international law. The standard formulation of *opinio juris* is that a practice must be accepted as law. However, the precise contours of *opinio juris* are somewhat uncertain. The ICJ, for its part, does not clearly identify which States must possess the psychological element that is *opinio juris*, but it seems to have in mind States as a group. For instance, in *the North Sea Continental Shelf Case*, the ICJ stated that "the States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[88]

International legal instruments which mention the right to nationality noted above are copious, but differ in their normative values. More than anything else, not all relevant treaties noted above are adhered to by the same number of States. The fact that the granting of citizenship is handled in international law by myriad treaties of varying normative values also makes the task of tracing the nature and legal effectiveness of the right to nationality as a human right very difficult. Of relevant international and regional instruments regarding the right to nationality, only the American Convention on Human Rights augments the 'general right' to a nationality by imposing a duty on States to grant nationality to persons born within their territory if such persons have no right to any other nationality.[89] No other relevant convention imposes a 'direct obligation' upon States to grant citizenship. As noted, the 1954 Status Convention merely instructs States to facilitate, as far as possible, the assimilation and naturalisation of stateless persons. As to the right to obtain citizenship, relevant international instruments do not instruct States when to attribute citizenship except in order to avoid statelessness. While the 1961 Reduction Convention makes this duty conditional upon either the age of the stateless person or the fact that he

[87] *North Sea Continental Shelf Case, op.cit.*, p. 43.
[88] *Ibid.*, p. 44.
[89] Article 20 (2) of the Convention. It provides that "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."

resides in his State of birth,[90] the American Convention on Human Rights establishes a general rule that every stateless person has a right to obtain the citizenship of his State of birth without further conditions.[91] The only instrument to speak explicitly about binding rules regarding State attribution of citizenship, other than in the cases of statelessness alone, is the European Convention on Nationality. This Convention calls upon States to apply the *jus sanguinis* principle as the basis rule for the acquisition of citizenship, alongside the principles of *jus soli* and habitual residence if application of the *jus sanguinis* leads to statelessness.[92]

A question also arises as to whether the duty to prevent statelessness has become a norm of 'customary international law'. In this regard, given that the 1954 and 1961 Conventions have been ratified by few States, it seems difficult to say that the duty to prevent statelessness has become a norm of customary international law.[93]

The 'persistent objector' doctrine also suggests that the sense of legal obligation must be held by States in general. According to the persistent objector doctrine, these objectors (States) shall be exempt from the norm after it becomes law, so long as the State can prove that it exercised clear and consistent objections throughout the norm's emergence. The only exceptions to the persistent objector doctrine are cases involving *jus cogens*. *Jus cogens* are a subset of norms deemed by the international community to be so important that absolutely no derogation from them will be tolerated.[94] Courts and scholars usually determine whether a norm is *jus cogens* based on qualitative, descriptive analyses. Currently, only a small number of human rights norms are considered *jus cogens*; they include proscriptions of only the most egregious acts such

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[90] Article 1 (2) of the 1961 Reduction Convention.
[91] Article 20 (2) of the Convention.
[92] Article 6 of the Convention.
[93] Although only few States have ratified the 1961 Reduction Convention, it is important to note that it elaborates on the general obligation set out in Article 15 of the UDHR, and the principles embodied in it are reflected in the European Convention on Nationality. Some authors have argued that its provisions therefore reflect reference points for determining customary international law and reflect an international consensus on minimum legal standards to be applied to nationality. Others have taken a more cautious position that, while with such a low level of ratifications it could hardly represent customary international law, it nevertheless does provide the right to nationality with some substantive content and is indicative of the extent of obligations of, or the international expectations of States in the elimination and reduction of statelessness. The UN Special Rapporteur on Zaire has gone as far as stating, despite the small number of ratifications, that the principles contained in the 1961 Convention are principles of international customary law that are impossible for States, even those which are not party to it, to disregard. UN Doc. E/CN.4/1996/66, para. 85. According to the Explanatory Report on the European Convention on Nationality, "the obligation to avoid statelessness has become part of customary international law." (European Convention on Nationality and Explanatory Report (Strasbourg: Council of Europe Publishing, 1997), p. 30.
[94] Article 53 of the Vienna Convention on the Law of Treaties, 8 ILM 679, 1969.

as genocide, slavery, and torture.[95] 'Preventing statelessness' does not belong to the category of *jus cogens* at present. In the case of Estonia and Latvia in relation to the existence of the ethnic, linguistic Russian stateless persons therein, given that they have consistently argued that the ethnic, linguistic Russian settlers are not stateless persons, Estonia and Latvia may be regarded as being 'persistent objectors'.

In sum, there has clearly been a widespread consensus on the right to a nationality and the right to nationality is clearly recognised in various international and regional instruments, but it has not yet reached the level of a 'general right to nationality' as part of customary international law in the sense that a State has a positive obligation to grant citizenship to everyone. Although there is an international 'expectation' for States' efforts to reduce the possibility of statelessness,[96] and the trend in international law suggests a strong presumption in favour of prevention of statelessness in the case of State succession,[97] it would be correct to say that the duty to prevent statelessness has not yet become a norm of customary international law.

5. Estonian and Latvian Citizenship Laws and the Problem of the Protection of Human Rights of the Ethnic, Linguistic Russians

5.1. Conformity of the Estonian and Latvian Citizenship Laws with Public International law on Nationality

From the preceding analysis, it would be correct to state that Estonia and Latvia have no public international law obligations to grant automatic citizenship to the ethnic, linguistic Russians in question. It seems that the Estonian and Latvian citizenship laws[98] conform to the rule of public international law on nationality in general. Estonia and Latvia derive their competence to legislate citizenship qualifications from the generally accepted principle of the domestic sovereignty of each State to regulate its own citizenship. It is observed that setting requirements of national language and

[95] H. Lau. "Rethinking the Persistent Objector Doctrine in International Human Rights Law", *Chi. J. Int'l L.*, Vol., 6, 2005, pp. 495-510.
[96] K. Knop & C. Chinkin, "Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law", *Mich. J. Int'l L.*, Vol., 22, 2001, pp. 562-563.
[97] J. L Blackman, "State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law", *Mich. J. Int'l L,* Vol., 19, 1998, pp. 1141-1145.
[98] See Chapter 2 above, pp. 52-54.

residency fall within the accepted range.[99]

States do grant citizenship to people. They do so either by applying the *jus soli* principle according to which birth in the territory of a State entitles a person to be a citizen of that State, or by applying the *jus sanguinis* principle, according to which citizenship is granted to descendants of persons who are already citizens of a State, or by a combination of the two systems. The problem is that the lack of uniformity in the laws of the various States can create situations in which people are left without citizenship.

One thing that cannot be ignored when one analyses citizenship matters of Estonia and Latvia is their unique historical situation which is quite different from neighbouring countries. Drawing simple comparisons with other European legislation would be pointless, to some extent. Even if the laws in question may conform to legislation in other European countries and international general standards in the area of nationality matters, they are not necessarily adequate for the situation of Estonia and Latvia. This was adequately pointed out in the letter by the Council of Europe in the following terms:

> "The experts are of the opinion that the status of persons already resident on the territory of Estonia cannot be compared to that of non-citizens not presently residing in Estonia, and that, whatever the historical background, the law must be subjected to a particular close scrutiny..."[100]

Even though the laws in question may be adequate for new immigrants, it is not 'fair' to place long-term settled ethnic, linguistic Russians in the same category. As a matter of fact, the citizenship laws of Estonia and Latvia are unique, as they are retrospective and aim to define the status of people presently living in the republics.[101] Conversely, the citizenship laws of most Western countries are prospective and address future immigration.[102] An individual who has resided in a country for decades and is suddenly faced with the prospect of being stateless has, in this writer's opinion, a greater claim to citizenship and protection by his or her State of residence, than an

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[99] F. Horn, "Conceptions and Principles of Citizenship in Modern Western Democracies", in *Citizenship and State Succession* (Strasbourg: European Commission for Democracy through Law, 1997), pp. 39-85.

[100] Letter from Council of Europe Secretary-General C. Lalumiere to Estonian President L. Meri (2 July 1993), cited in *"the Law on Aliens"* in *Controversy in the Republic of Estonia* (New York: UBA/BATUN, 1994), p. 22. UBA/BATUN is a New York-based non-governmental organisation concerned with human rights issues in the Baltic States.

[101] Report on the Application by Latvia for Membership of the Council of Europe, Eur. Consult. Ass., 44th Sess. Doc. No. 7169, app IX (1994).

[102] *Ibid.*

immigrant who has recently arrived in a country.[103]

Although Estonian and Latvian governments have repeatedly asserted that their laws meet international standards, however, mere adherence to the formal contents which are similar to provisions in Western European legislation does not tell the whole story. It should be noted that, while the United Nations, the Organisation for Security and Cooperation in Europe (OSCE) and the Council of Europe have expressed that the legislation is adequate, this may be seen as diplomatic rhetoric that expresses their criticism in moderate tones. Having been conscious of international criticism about the status of the ethnic, linguistic Russian populations in Estonia and Latvia, the Estonian and Latvian governments have provided invitations to international organisations that have visited, not only to investigate the social situation in relation to ethnic conflicts, but also to comment on domestic laws in question.[104]

5.2. The Controversial Aspects of the Estonian and Latvian Citizenship Laws from a Human Rights Perspective

There is no mention of ethnicity in the Estonian and Latvian citizenship laws, but it is evident that ethnic, linguistic Russians are targeted. 1940 is the cut-off date for automatic citizenship in both Estonian and Latvian legislation, and most ethnic, linguistic Russians settled in the Baltics after that date.[105] In Latvia, the draft citizenship law included the controversial provision of a quota system based on demographic situation for naturalising a large portion of the population, many of whom were born in Latvia, had lived most of their lives there, and which they considered their homeland. The quota system was obviously discriminatory and the provision was deleted under intense pressure from the international community. Article 9 of it, which stated that its purpose "is to ensure the development of Latvia as

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[103] As noted, Brownlie argued that the granting of citizenship to the residents of the new State was obligatory by virtue of the practice of States and amounted to an international binding custom. *Brownlie, The Relations of Nationality in Public International Law, op.cit.*, pp. 319-326. Brownlie's opinion was attacked as being too far reaching. However, it is important to note that the criticism was not directed at the idea that it was desirable and proper to grant the citizenship of a new State to the residents living within its boundaries, but rather at Brownlie's assertion that this principle amounted to a binding rule of customary international law.

[104] *Poleshchuk, Advice Not Welcome, op.cit.*, pp. 14-16.

[105] Helsinki Commission Reports, Human Rights and Democratization in Latvia (Washington, D.C., 1993), at 16-18; Helsinki Commission Reports, Human Rights and Democratization in Estonia (Washington, D.C., 1993), at 13.

a single nation-state," was the most troubling aspect.[106] Such a desire for ethnic purity and a mono-ethnic State contravenes a significant body of international human rights law.

In Estonia, the adoption of a series of laws, beginning with the language law in 1989, while not explicitly discriminating on the grounds of ethnic origin, in effect put most of the ethnic, linguistic Russians at a disadvantage.[107] Although the Estonian government argued that it was restoring its pre-World War II citizenship laws based on the principle of restorationism or legal continuity, it is interesting to note that no other pre-war laws were restored. According to Helsinki Watch, the denial of automatic citizenship to the ethnic, linguistic Russians under the restored 1938 Citizenship Law was "not an unfortunate, unforeseen by-product, but an intentional goal."[108]

It is somewhat incongruous that the Estonian and Latvian governments deny that they are targeting ethnic, linguistic Russians, while defending their positions based on legal continuity at the same time. As one commentator notes, "laws on citizenship and immigrants do more than regulate the entry and status of non-citizens; they reveal much about how a nation conceives of itself."[109] The Estonian and Latvian underlying goal of ethnic homogeneity is certainly troubling from the present international human rights law perspective.

A UN report on Estonia and Latvia stated as follows:

> "the specific factual situation of annexation accompanied by the influx of very large numbers of persons into a small State with a different ethnic origin, followed by 50 years of settlement and multi-ethnic coexistence, followed by the re-emergence of the original State as an independent entity, does not seem to have been envisaged by drafters of the relevant human rights instruments."[110]

It should be noted that most ethnic, linguistic Russian residents in Estonia and Latvia would have preferred the citizenship of the country in which they had resided at a time when Estonia and Latvia regained independence, either due to family and other ties or most importantly because they would have had little prospect of finding jobs and homes in Russia. For instance, the UN Report noted that over 91 percent of the

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[106] Article 9 of Draft Citizenship Law.
[107] *Poleshchuk, Advice Not Welcome, op.cit.*, pp. 14-16.
[108] C. Panico, *Integrating Estonia's Non-Citizen Minority* (New York: Helsinki Watch, 1993), p. 12.
[109] D. Kanstroom, "Wer Sind Wir Wieder? Laws of Asylum, immigration, and Citizenship in the Struggle for the Soul of the New Germany", *Yale J.Int'l. L,* Vol., 18, 1993, p. 158.
[110] Report of the Secretary-General: Situations of Human Rights in Estonia and Latvia, 1993, UN Doc.A/48/511, p. 7.

registered non-citizen population in Latvia wished to become Latvian citizens.[111] The majority of the ethnic, linguistic Russians in both countries did not apply for any citizenship, presumably because they did not want Russian citizenship and were not eligible for Latvian or Estonian citizenship.[112] Ethnic, linguistic Russians who have been living and working in what are now Estonia and Latvia, who have few substantial ties with Russia and who regarded Estonia and Latvia as their real home, could meet the 'genuine link' standard on the basis of long-term and habitual residence. In this case, one may arguably say that the change of sovereignty may not break that link.[113] Bildt's comment seems to point out accurately the essence of the problem:

> "They never felt that they were moving abroad when they settled in Estonia or Latvia. They do not consider themselves immigrants at all, and in some respects they are right. Most of them have no personal responsibility for past Soviet actions...they too are casualties of the Soviet system, now that they have lost the equal status with Estonians and Latvians that they used to enjoy by virtue of common Soviet citizenship."[114]

Estonia and Latvia, however, have argued that they were never successor States of the former Soviet Union because they claim *de jure* continuity during Soviet occupation. From the Baltic perspective, therefore, all consequences of illegal annexation are invalid. Demographic changes could not be an exception. However, regardless of whether Estonia and Latvia are restored States or successor States, the fact that Estonia and Latvia did not award automatic citizenship to the settlers of the Soviet period after independence is problematic, even if one admits that Estonia and Latvia had no direct public international law obligations to grant automatic citizenship to the ethnic, linguistic Russians in question. Estonia and Latvia have been criticised by the Russian Federation as discrimination for the Russians settlers. Russia has invoked the 1991 Fundamentals Treaties with Estonia and Latvia which in Articles 2 and 3 envisages for the residents the right to choose the nationality in accordance with the laws of the respective States. Russia and the respective Baltic States have interpreted this stipulation differently: while Russia lays emphasis at the 'right to choose citizenship', Estonia and Latvia have insisted that the qualification in accordance with the laws of the respective States only includes the right to apply for

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[111] *Ibid.* p. 11.
[112] *Poleshchuk, Advice not welcomed, op.cit.*, p. 41.
[113] See Article 10 of the proposed Convention in Chapter 8 below, pp. 270-271.
[114] C. Bildt, "The Baltic Litmus Test", *Foreign Affairs*, Vol., 73, 1994, pp. 72-79.

citizenship, subject to naturalisation conditions. According to this interpretation, Estonia and Latvia only committed themselves to not refusing naturalisation to these Soviet settlers who wish to become citizens of Estonia and Latvia.[115]

It is also true that in many ways the European institutions mentioned above took the view that these two States should extend nationality to persons who settled after 1940, which is to respect the genuine link of the ethnic, linguistic Russians to their States of residence. In this regard, it can be argued that Estonia and Latvia, even after accepting the legitimacy of their restoration thesis, have thus not accorded 'complete liberty' in regulating citizenship policies. A fundamentalist approach to the continuity of nationality principle is problematic in terms of the protection of human rights, given that the effective right to nationality or citizenship is emerging as a human right in international law, although admittedly vague in substance.[116]

Citizenship means 'membership' of a State. It represents the condition of integration of the individuals within the political and social framework of that State. Citizenship carries basic rights. It carries a set of rights pertaining to the empowerment of the individual: the right to vote, hold office and participate in decision-making in the allocation of the State's resources. Also included are rights to social action, protection and economic rights, which are key determinants of the quality of life for an individual. Granted by the State, citizenship confirms the individual's full membership in the national community and his or her right to enjoy the same rights and freedoms as any other member of that community.

The citizenship laws of Estonia and Latvia are problematic from the perspective of the protection of the ethnic, linguistic Russians as members of minority groups. If a State considers itself to be a nation-State and it grants citizenship solely to its members on the basis of ethnicity and language, persons who do not belong to that nation will not have the capacity to become full members of the State. As a matter of fact, the existence of a one-nation State is rare. Most States host more than one nation. A strict adherence to the majority's national (nexus to the past) criteria for granting citizenship is problematic for the other ethnic, linguistic minorities living in the State. When those who are not given citizenship coincide with ethnic and linguistic identity, the group's ability to protect itself through the political system and to maintain group

[115] R. Müllerson, "New Developments in the Former U.S.S.R and Yugoslavia", *Va.J. Int'l. L,* Vol., 33, 1993, pp. 310-315.
[116] See Article 10 in the proposed Convention in Chapter 8 below, pp. 270-271.

identity becomes severely limited. Given that citizenship generally connotes full membership, typically endowing its holder with the full range of domestic rights recognised by the State in which he or she resides, a distinct link between citizenship and the maintenance and promotion of identity for members of minority groups is evident.

6. Conclusions

(1). There is a clear tendency to substitute the classical view that the granting of nationality lies solely within the domestic jurisdiction of a State, with the more human rights-oriented view as to the nature of nationality. Moreover, the discussion of nationality matters in relation to the status of inhabitants who have been affected by State succession indicates an evolution in international law on nationality; it is evolving from the conferral of nationality as a negative function of delimiting the competence of States in their attribution of nationality to the assigning of positive obligations on States to confer nationality to the persons who have been in the territories of their States of residence based on the principle of genuine, dominant and effective links.

(2). Although there has clearly been a widespread consensus on the right to nationality, and this right is recognised under various international and regional instruments, its major practical limitation as a 'positive human right' is that it does not prescribe which nationality there may be a right to in any given situation. The genuine and effective link is strongly evidenced in State practice and is an appropriate and effective principle in determining which nationality an individual may have the right to. It seems clear that the ethnic, linguistic Russians who have been living and working in what are now Estonia and Latvia, who have few substantial ties with Russia and who regard Estonia and Latvia as their real home, could meet the 'genuine link' standard on the basis of long-term and habitual residence. However, the present state of international law does not support the conclusion that a State has a 'binding obligation' to grant nationality to a person who has a genuine and effective link on the basis of residence within that State.

(3). Even though the legal status and contents of the right to nationality and corresponding States' obligations to respect the right to nationality under international

law still remain unclear, the important point is that the right is developing, as evidenced in the increasing number of international Conventions and regional instruments that refer to it. As such, it is possible that through increased State willingness to protect the right to a nationality and subsequent State practice in granting individuals nationality on that basis, the right to nationality could become effectively a human right.

(4). As observed in Chapter 2 of this thesis, the Estonian and Latvian citizenship laws have undergone significant changes over the past few years. Under the present state of development of public international law on the matters of nationality, it cannot be said that the citizenship laws of Estonia and Latvia, under which automatic citizenship is not granted to the ethnic, linguistic Russians who had resided over a significant period of time in what are now Estonia and Latvia since before independence in 1991, are in violation of public international law regarding nationality matters.

(5). Aside from the Estonian and Latvian citizenship laws' conformity with the general standards of nationality matters under public international law, however, the citizenship laws of Estonia and Latvia can be problematic from the perspective of the protection of human rights of the ethnic, linguistic Russians, particularly from the perspective of the protection of such persons as members of minority groups. Given that citizenship is a basic legal element in materialising various human rights at the domestic legal level, including civil, political and social rights, as well as a condition for full membership of a State, the importance of citizenship as a critical element in maintaining and promoting identity for members of minority groups in their States of residence cannot be overestimated. The case of Estonian and Latvian restrictive citizenship laws, which basically ignore the historic and habitual residence of the ethnic, linguistic Russians in this regard, provides an opportunity to consider the effects of citizenship on the protection of persons belonging to ethnic, religious or linguistic minority groups in international law. This issue will be discussed in the subsequent chapters of this thesis.

Chapter IV

The Definitional Question of the Concept of a Minority

1. Introduction

The historical review of the origin of the existence of ethnic, linguistic Russian populations in Estonia and Latvia in Chapter 2 clearly illustrates the marginal status of being a minority within a State. The purpose of this chapter is to explore the definitional question of the concept of a minority in international law. If international law is the legal basis for the protection of minority groups in States, the problem of identification of persons belonging to such minorities becomes a matter of international concern. Without identification of what constitutes the concept of a minority, the discussion on the protection of minorities under international law may lack effectiveness, as the ambiguities in defining a concept of a minority directly impinge on the protection of minorities themselves.[1] One can easily imagine a situation in which a number of States can deny minority rights by arguing that they do not have minorities within their territory by reference to the definition of a minority in international law.[2] A study on the definition of a minority is thus a critically important task for the substantive and effective protection of persons belonging to minorities under international law.

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[1]However, this does not mean that international protection of minority groups is not possible in the absence of an official definition of the concept of a minority; this absence has nevertheless contributed to the insufficiency and weakness of the present international protection of minority rights. The positive role of the Organization for Security and Co-operation in Europe's (OSCE) High Commissioner on National Minorities (HCNM) illustrates this point. In the absence of a formal definition of the concept of a minority, the Commissioner has preferred a practical approach in defining a minority status. He has addressed minority issues regardless of traditional definitional criteria such as citizenship or historical presence in the territory. The HCNM has acted with regard to a variety of groups, including non-citizens, for instance, the ethnic Russian stateless persons in Estonia and Latvia. See V. Poleshchuk, *Advice not welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the response* (Transaction Publishers, New Brunswick and London, 2001).

[2] For example, the French government argued that they could not recognise "the existence of ethnic groups, whether minorities or not." Thailand found that the translation of "minority" has "no social and cultural connotation whatsoever." Special Rapporteur F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic* Minorities, UN Sub-Commission of Prevention of Discrimination and Protection of Minorities (New York: United Nations, 1991), p. 13; UN Doc. E/CN.4/Sub.2/384/Rev. 1, UN Sales No. E.78.XIV.1 (1979).

Despite this fundamental importance, however, the question of how to define the concept of a minority has not been solved in a consensual way that is internationally binding. There are many reasons for the lack of a legally binding definition of a minority, but the most apparent would be the concern of many States in which minorities reside that an official recognition of the existence of minorities might have a negative impact on national unity and domestic social order. However, this is a fundamentally flawed stance that fails to realise the nature of the protection of the rights of persons belonging to minorities under international law, because leaving the identification of minority status to the arbitrary discretion of States would be nothing less than the denial of the protection of minority rights under international law.[3] The problem of determining minority status to which various minority rights are attached, therefore, must be solved by examining relevant international practice and doctrinal views, thereby establishing a more precise and desirable definition of a minority for the purpose of international law.

This chapter attempts to propose a definition of the concept of a minority through investigating the traditional definition[4] of a minority. In particular, this chapter will highlight the requirement of holding nationality or citizenship of the State of residence for receiving minority status as right-holders of minority rights under the traditional definition. The Estonian and Latvian governments view their citizenship laws as 'justified' legislative measures derived from the domestic jurisdiction of independent States under international law, since regulating citizenship has long been recognised as one of the most basic rights of independent nation-States.[5] Aside from the recognition of Estonian and Latvian discretion to regulate citizenship under international law, it

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[3] In this sense, the view that defining minority status is not necessary for the protection of minorities cannot be accepted as such. Simon, for instance, argues as follows: "Adjudicatory mechanisms could help alleviate the harm experienced by innocent minorities. The quests for positive identities, however noble in certain contexts, have impeded judicial resolution of minority problems. A definition demands precision. The political reality of minorities yields not only imprecision but a phenomenon that defies clarity. The reality of how individuals form into minorities dooms any conceptual attempt to impose *a priori* limits on what counts as a minority and what does not. Minorities, by their very nature, create issues of exclusion and inclusion." Even if he considered the complexity in applying the unified rules of minority protection to particular factual situations when he commented on the feasibility of defining the concept of a minority, he seems to have devalued the importance of minority rights under present international law. As long as minority rights are recognised under international standards of minority rights, those who are considered holders of minority rights must be clarified for the cause of the protection of minority rights under international law. See T. W. Simon, "Minorities in International Law", *Can. J.L. & Juris*, Vol., 10, 1997, pp. 519.

[4] For the lack of a better term in referring to the majority view on the definition of the concept of a minority, the 'traditional definition' may be ussed for referring to the majority view on the question of a minority.

[5] R. Jennings & A. Watts, (eds.), *Oppenheim's International Law* (Harlow: Longman, 1992), p. 852.

should be noted that all disputes on the possibility of human rights violations of the ethnic, linguistic Russian populations with reference to 'citizenship matters' in Estonia and Latvia are basically related to how the concept of a minority is defined for the purpose of international law in terms of minority protection. The citizenship requirement is controversial in nature because under the traditional definition, even those persons who have met objective and subjective constitutive elements for receiving minority status, but who are not nationals or citizens of their State of residence, are not considered persons belonging to minorities, which means that they are not entitled to minority rights under international law.

2. Traditional Definition of a Minority

Article 27 of the International Covenant on Civil and Political Rights (ICCPR), one of the most representative binding legal provisions for minority rights under present international law, reads:

> "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."[6]

Article 27 neither defines its terms nor specifies who is to determine whether a minority exists. Although the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities[7] participated in the task of defining the concept of a minority at an early stage of its work, the most comprehensive study on minorities was done by the Special Rapporteur Capotorti of the UN Sub-Commission. His definition of a minority has often been cited in international law. Capotorti's 1977 study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities was made for the UN Sub-Commission to provide insights for further development of the principles enshrined in Article 27 of the ICCPR. However, it should be noted that his definition of a minority has no binding force on the States parties of the United Nations, even if it has been widely cited in the literature of international law. Capotorti relied on a broad range of material, such as the views of the Permanent Court of

[6] Article 27 of the ICCPR.

[7] In 1999, the Economic and Social Council changed its title from Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights.

International Justice (PCIJ), the proposals of the UN Sub-Commission[8] and the various discussions within the UN Commission on Human Rights. He defines a minority group as:

> "A group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their cultures, tradition, religion or language."[9]

The definition suggested by Deschenes in 1985 does not introduce true much of novelty. According to his definition, a minority is:

> "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ 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 is to achieve equality with the majority in fact and in law."

Thornberry, a leading scholar on the status of minorities in international law, predicts "it is doubtful if any international instrument of the future will depart greatly from this [Capotorti's] line of approach."[10] It is possible, then, to state that Capotorti's definition within which objective and subjective elements are constituted for the concept of a minority may thus be referred to as the 'traditional definition' of a minority.

From the definition given above, it is generally accepted that a distinction is made between objective and subjective elements for defining minority status. The objective elements include such features as having ethnic, religious or linguistic characteristics differing from the rest of the populations, a non-dominant position and holding the nationality of the State of residence. Conversely, the subjective element requires that the members of a minority group have a strong sense of community and a will to preserve and maintain their distinctive characteristics.

This traditional definition of a minority is confirmed by subsequent practice at the European level. A number of instruments were adopted and proposed within the Council of Europe which evidence continuity of the traditional definition of a minority.

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[8] The UN Sub-Commission prepared the following guidelines for the definition of a minority: A)the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions; B)such minorities should properly include a number of persons sufficient in themselves to develop such characteristics; C) the members of such minorities must be loyal to the State of which they are nationals. UN Doc. E/CN4/358.

[9] *Capotorti Study,op.cit.*, para. 568.

[10] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), p.7.

The concept of a minority essentially designates historical minority groups, namely groups which have long acquired a permanent status within a State and whose members are 'citizens', and desire to preserve their ethno-cultural traits that make them markedly different from the rest of the population.[11] With this background in mind, the next section will examine each element of the concept of a minority based on the traditional view from various angles, taking into account the relevant doctrinal views on the issue.

2. 1. Objective Elements

2. 1. 1. Ethnic, Religious or Linguistic Characteristics of the Group

Recognising ethnic, religious and linguistic characteristics differing from those of the rest of the population is considered a crucial factor in distinguishing a minority from the rest of the population within a State. It is widely recognised that this is an essential element of the definition of a minority in international law. Thus one may naturally raise the question why the international protection of minorities restricts the scope of its application of protection into the specific category of 'racial', 'ethnic', 'religious' or 'linguistic' minorities? Are there no other marginalised groups that are equally in need of protection with special measures for substantive equality with the rest of the population within a State? The answer to this question may be due to the fact that special attention for minorities which have ethnic, cultural, religious or linguistic characteristics has been thought necessary because of past experiences in which these characteristics have been often the basis for oppression and discrimination, and even so-called 'ethnic cleansing'. This is also the reason why the current international standards of minority rights are discussed in terms of these minorities.

There are a number of diverse views on the exact meaning of 'racial' and 'ethnic'. In the League of Nations, the term 'racial' was used to identify the minorities for the provisions relating to minority protection.[12] Although the UN Sub-Commission decided in 1950 to replace the term 'racial' by 'ethnic' in reference to minorities, the

[11] For instance, Article 2, paragraph 1, of the Proposal for a European Convention for the Protection of Minorities, adopted on 8 February 1991 by the Venice Commission of the Council of Europe; Article 1 of the European Charter for Regional or Minority Languages of 1992; Article 1 of the draft additional protocol on the rights of minorities to the ECHR, adopted by the Parliamentary Assembly of the Council of Europe in 1993 by Recommendation 1201.

term of 'racial' has not disappeared in the UN documents.[13] According to certain members of the Sub-Commission, the reason for the change from 'racial' to 'ethnic' is that the term 'racial' would not be a scientifically justified standard of distinction. However, the term ethnic is broader and includes all biological, cultural and historical characteristics. Other authors see 'ethnic' groups as being determined by an emotional relationship in a certain cultural background while ignoring special physical characteristics.[14] The 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is useful in discussing the meaning of 'racial' and 'ethnic'. The Convention uses a broad view of the term 'racial' in Article 1, which gives a definition of racial discrimination. Article 1 states that:

> "In this Convention, the term of 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin..."

It would be quite advisable, in this regard, to use both the expressions 'racial' and 'ethnic' to prevent any gaps of meaning in applying the minority protection provision.

Religious and linguistic minorities are often treated together and tend to overlap. Eide describes the relationship between religious and linguistic minorities in the following way:

> "I recognise that we cannot easily separate the ethnic identification from the religious. In many cases it is unclear whether a given group is essentially a religious or an ethnic community. The self-identification of a group may focus on its national or ethnic character while the Government or State in which it lives may prefer to define it as a religious entity."[15]

It should be noted that the fact that one is a member of a racial and ethnic minority does not necessarily mean that one has an objective tie with the religion or language that is connected to that community. In other words, several 'different ethnic minorities' can be a part of a particular religious or linguistic community. Like the term 'racial', the term 'religious' for the purpose of the concept of a minority is broad. Benino, Special Rapporteur of the UN Sub-Commission, concluded that 'religion and belief' not only include several theistic beliefs but also other systems of belief like agnosticism, atheism, etc.[16] In the case of the term 'linguistic', it is difficult to

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[12] *Thornberry, International Law and the Rights of Minorities, op.cit.*, p. 159.

[13] *Capotorti study, op. cit.*, p. 34. For instance, the General Assembly Resolution 217 c (III) entitled 'Fate of Minorities' referred to 'racial' minorities, not 'ethnic' minorities.

[14] P.V. Ramaga, "The Bases of Minority Identity", *HRQ* Vol., 14, 1992, p. 417.

[15] A. Eide, "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities", UN Doc.E/CN.4/Sub.2/1991/43, para.3.

[16] E.O. Benito, *Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief* (New York: United Nations, 1989), paras.2,3.

determine the precise scope of the 'language' for the purpose of a linguistic minority. According to several authors' views, the classification of a linguistic system as a dialect or language depends on a rather arbitrary standard, taking into account specific circumstances in combination with the proportionality principle.[17] Therefore, a flexible approach in determining the meaning of the terms of 'religious' and 'linguistic' is needed as is the case for 'racial' and 'ethnic' for the effective protection of minority rights.

Unlike Article 27 of the ICCPR and the large majority of UN instruments which use the expression 'ethnic, religious or linguistic minorities', some instruments, including the 1992 UN Declaration on the Rights of the Persons belonging to National or Ethnic, Cultural, Religious and Linguistic Minorities,[18] the 1995 Framework Convention of the Protection of National Minorities,[19] and the 1960 UNESCO Convention Against Discrimination in Education,[20] deal with 'national' minorities. As a matter of fact, the term 'national' has been traditionally used at the European level. The term 'national' minority has a political dimension which includes 'national self-consciousness', or 'political group consciousness'. States have been concerned by the possibility that this kind of consciousness could naturally be developed into political aspiration for independence. As Ermacora aptly pointed out, "the protection of national minorities is always closely linked to the issue of the territorial integrity of states."[21] This does not mean, however, that there is a consensus over the meaning of the term 'national'. The various European reports on the issue within the framework of the Council of Europe acknowledged that no concrete and conclusive answer is possible. Some authors have argued that the term of 'national minority' should be understood as including ethnic, religious or linguistic minorities.[22]

The above analysis indicates that it is difficult to define accurately the terms 'racial', 'ethnic', 'religious', 'national' and 'linguistic' as minority adjectives. However, the desirable solution to this difficulty would be to use the expressions simultaneously, depending on given minority situations. The merit of this approach is that such combination use would be that the widest category of persons can invoke

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[17] M. Tabory, "Language Rights as Human Rights", *Israel YB. H.R.*, Vol., 10, 1980, p.188.
[18] A/47/135.
[19] 34 ILM 351.
[20] 429 UNTS 93.
[21] F. Ermacora, "The Protection of Minorities before the United Nations", *Recueil des Cours*, 1983, p.295.

their relevant minority rights under international law.[23]

2. 1. 2. Numerical Inferiority

Setting an absolute percentage that can be used as a numerical factor in the definition of a minority is not easy. The prevailing stance on this factor is also a pragmatic approach. Capotorti noted that:

> "In principle, even quite a small group has the right to claim the protection provided for in article 27, to the extent to which it seems reasonable to expect the state to introduce special measures of protection."[24]

However, there seems to be a measure of agreement that order to be a minority, a group must be of a certain number that need not be large (e.g., the people of micro States), but must be more than a mere association of individuals within a State,[25] because the size of the population in question may have influence on the special measures of the government concerned for the protection of minority rights.

2. 1. 3. Non-Dominant Position

A non-dominant position is generally considered one of the essential components of the concept of a minority. The need to protect minorities is the natural and logical result of their vulnerable, weak and non-dominant position in the society in which they live.[26] Yet, as the word 'non-dominance' has a multi-dimensional meaning, it needs to be approached separately depending on each circumstance. The European definition of a minority provides a clue on this issue. The European Commission for Democracy through Law, which was established in 1990 by Resolution (90) 6 of the Committee of Ministers of the Council of Europe, has suggested a definition of the concept of a minority as a proposal for a European Convention for the Protection of Minorities.[27] Under Article 2 in the proposal, a minority is understood as follows:

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[22] M. Tabory, "Minority rights in the CSCE context", in Y. Disnstein & M. Tabory (eds.), *The Protection of Minorities and Human Rights* (Dordrecht: Martinus Nijhoff, 1992), pp.187-196.

[23] Except where otherwise indicated in this thesis, a minority means national, ethnic, religious or linguistic minority.

[24] *Capotorti study, op. cit.*, p. 12.

[25] J.Packer, "On the Definition of Minorities", in J.Packer & K. Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe* (Abo/ Turku: Abo Akademi University Press, 1993), p. 48.

[26] *Capotorti study, op.cit,,* p.12 , p. 96.

[27] European Commission for Democracy through Law, CDL (91) 7, 4 March 1991

> " a. For the purpose of this Convention, the term "minority" shall mean a group which is smaller in number than the rest of the population of a state, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from the those of the rest of the population and are guided by the will to safeguard their culture, traditions, religion or language. b. Any group coming within the terms of this definition shall be treated as an ethnic, religious or linguistic minority. c. To belong to a national minority shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice."

This definition appears to have followed the Capotorti's view in general, but is slightly different from it in that there is no requirement of non-dominance of a minority within a State. In a modern plural society, several ethnic, religious or linguistic groups could be regarded as minorities. It seems that the non-dominant position does not necessarily imply being oppressed or subordinated. Furthermore, as to the domains in which there can be dominance, not only political power relations but also the minority's economic and social or cultural status must be considered.[28]

2. 1. 4. State's Official Recognition

As will be observed in Chapter 5, whether or not a State has recognised the existence of ethnic, religious or linguistic minorities within its territory is irrelevant to its obligation to protect the rights of such persons under present international law. In other words, the existence of minorities in a given State does not depend upon recognition of it by the State, but instead is to be determined on the basis of objective criteria. This principle has been confirmed in the views of the Human Rights Committee (HRC) in the renowned case *Lovelace v. Canada,*[29] and its General Comment.[30] The HRC held the view in the *Lovelace v. Canada Case* that a State's recognition is not a decisive element for determining whether or not someone belongs to a minority. This principle was already enunciated in the *Greco-Bulgarian Communities Case* by the PCIJ as follows: "existence of communities is a fact, and not...of law."[31]

2. 1. 5. Nationality of the State of residence

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[28] P.V. Ramaga, "Relativity of the Minority Concept", *HRQ,*, Vol., 14, 1992, p. 114.
[29] *Lovelace v Canada*, HRC Communication No 24/1977, UN Doc/A36/40, paras. 166-172.
[30] General Comment No. 23, UN. Doc. CCPR/C/21/Rev.1/Add.5 (1994), reprinted in 15 *HRLJ* 234 (1994), p. 235.
[31] *Greco-Bulgarian Communities Case*, PCIJ Series A/B, No. 17, 1930, p. 22.

Whether being a national or citizen of one's State of residence is a prerequisite for minority status appears to be the most disputed criterion in the discussion on the definition of the concept of a minority in present international law. From a practical point of view, too, this requirement is critical, because depending on the stance of the interpretation of the nationality requirement in identifying a minority status as the holder of minority rights, the scope of minority protection itself could differ fundamentally.

One may ask the question whether the protection of minorities must be exclusively reserved for 'citizens' whose ethnic, religious or linguistic affiliation is different from that of the majority, or for other persons who belong to a different category, such as foreigners, stateless persons, or permanent residents. If minorities are identical to citizens of the State of residence, it logically follows that minority rights are essentially the citizens' rights. Thus, the question of whether the holding of citizenship of the State of residence is a required element for minority status has a direct impact on the protection of minority rights in general, since there is a possibility that States can ignore the existence of minorities arbitrarily in the form of the enactment of domestic legislature, arguing that persons belonging to the group in question are not citizens according to its internal laws. This requires more detailed analysis about the nationality or citizenship requirement in constructing minority status in international law. A separate section of this chapter will discuss this requirement in detail.

2. 2. Subjective Element of the Definition of a Minority

The PCIJ in 1930 gave an elaborate description of the subjective factor in the concept of a minority through the *Greco-Bulgarian Communities Case*. By way of interpreting the concept of 'communities' used in the Greco-Bulgarian Treaty of 1919, the Court explained the meaning of community taking note of the minoritarian character of the concept of communities within a State. According to the definition of the Court, a '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."[32]

[32] *Ibid.*, p. 33.

Ermacora also explains the critical aspect of the subjective element for determining a minority status in the following terms:

> "Those groups who are indifferent as to the problems of assimilation lose their interest to be protected as such and therefore they lose the qualification to be considered a minority in the sense of international law."[33]

Capotorti takes the same position, stating that "a group cannot have an identity throughout history if its members have no wish to help preserving it."[34] Thus, the existence of a minority group is questioned if that group is not conscious of itself as a distinct group, even if the objective requirements of differing from the rest of the population within a State are met. Without "a sentiment of solidarity" for preserving cultural identity, a group of persons cannot be called a minority.

Apart from accepting a subjective factor as one of the constitutive elements for receiving minority status, it is not clear how such a subjective factor should be identified. This is an important question from a practical point of view, because the States concerned can easily abuse this factor arbitrarily, arguing that they cannot identify the will of the minority groups to preserve their characteristics. It is persuasively argued that not too much emphasis should be put on the explicit expression of subjective expression from a minority group. It is quite advisable that determination of the subjective element should be made on the basis of 'case by case' approach, since one could imagine a situation that the members of a minority accept the *status quo* by the official policy of forced assimilation and a highly oppressed atmosphere by their State of residence so that opposing voices cannot be heard. Under these circumstances, 'silence' may be implied as being the expression of their will to preserve their characteristics. Eide's remark, in this sense, seems quite pertinent:

> "The presence or absence of will was closely linked to the policy of the State in relation to minorities. In countries with strong assimilationist policies, for example, the will of the minority to preserve its identity would obviously be less evident than in countries where minorities were granted a space to manifest their characteristics."[35]

It would be, therefore, appropriate to deal with this subjective element in a balanced way in the discussion of the concept of a minority by retaining the requirement while allowing for implicit ways of demonstrating the will to preserve distinctive characteristics of a minority. Accordingly, depending on a given situation, the mere 'continued existence' of a minority group can be regarded as relevant proof of being a

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[33] *Ermacora, The Protection of Minorities before the United Nations, op. cit.*, p. 300.
[34] *Capotorti study, op.cit.*, p. 12.

minority within a State.

2. 3. Traditional Definition of a Minority and Controversial Aspect of the Nationality Requirement in Defining Minority Status

The traditional definition of a minority can be summarised in the following way. The one criterion for identifying minority status is the subjective self-perception of the group as being distinct from the majority, and the desire of the individual members of the group to identify themselves as a group. This self-perception, while critical, is not sufficient to constitute a minority. A minority, at the same time, must fulfil another criterion, which is the existence of objective characteristics which distinguish the group from the rest of the population within their State of residence. Examples of such characteristics include ethnicity, language and religion.

Even though the traditional definition of a minority has not been incorporated into a specific provision in the international instruments regarding the protection of minority rights in a binding way, it seems valid on the whole in describing features of minority status as the holder of minority rights under international law.

However, the traditional definition has a fundamental defect in its requirement of 'holding the citizenship of the State of residence' for receiving minority status, since it has been based on the premise that 'minorities' are identical to 'citizens' of the State of residence. The requirement of holding citizenship also seems to be logically inconsistent, because the demand for the existence of the objective elements of having recognisable ethnic, religious and linguistic characteristics assumes long-term residence in the territory of the States in which the minorities reside. Yet, as the criterion for receiving citizen status is open to abuse by States' discretion in the language of citizenship laws, it is possible for the States concerned to exclude some particular ethnic, religious or linguistic groups from the category of 'minorities' as the holders of minority rights at the domestic legal level. As there is no guarantee that the criterion for citizenship is in harmony with full recognition of the existence of ethnic, religious or linguistic groups as protected minorities, demanding the holding of citizenship of the State of residence could likely result in offsetting the significance of the objective elements of the existence of minority groups in a State.

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[35] UN Working Group on Minorities, Report on its Third Session, UN Doc. E/CN.4/Sub.2/1997/18, para. 22.

Is it justified to argue that persons who have met all objective elements with a firmly subjective desire to maintain their ethnic, religious or linguistic identity can be denied minority status, simply because the demand of holding citizenship of their State of residence has not been met? Given that citizenship is one of the most basic elements in exercising various rights at the domestic legal level, should not the demand of holding citizenship of the State of residence for the determination of minority status be contrary to the idea of the protection of human rights?

In this regard, the existence of the ethnic Russian stateless persons or non-citizens in Estonia and Latvia, due to restrictive citizenship laws under which the fact of their historical residence in the territories of what are now Estonia and Latvia during the Soviet period was denied, clearly illustrates the controversial nature of the nationality requirement in the definition of a minority. Estonia, for instance, cites its Law on the Cultural Autonomy of National minorities as a legal justification for their argument that they are protecting minority rights at the domestic legal level. However, to be a minority as the holder of minority rights under this law, holding citizenship of Estonia is required, along with the requirement of "long-standing ties" with the territory of Estonia.[36] This provision clearly demonstrates the contradictory nature of the traditional definition of a minority in its requirement for holding citizenship of the State of residence. As the nationality requirement essentially grants Estonia the arbitrary discretion to decide if the ethnic, linguistic Russians in Estonia constitute a minority in the form of citizenship without reference to their other objective elements of the definition of a minority, it seems patently unfair.

3. The Polish Nationality Case and the Nationality Requirement for the Definition of a Minority

The review of the *Polish Nationality Case*[37] before the PCIJ reveals that citizenship was a critical and delicate matter with respect to the protection of persons belonging to minorities during the League of Nations period. Although it is difficult to generalise about the system of minority protection under the League period because each minority protection treaty reflected different situations in each State, *the Polish*

[36]Article 1 of the Law on Cultural Autonomy of National Minorities, RT I, No. 71, 1993. Unofficial English translation from the Estonian Language Translation Centre.

Nationality Case can provide a useful reference for the matter of nationality in relation to the definitional question of a minority.[38]

3. 1. Conflicting Aspect of Article 91 of the Versailles Treaty

Article 91 of the Versailles Treaty, concerning the territories transferred from German to Polish sovereignty provides that:

> "[I.] German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality *ipso facto* and will lose their German nationality."[39]

This paragraph enshrined the rule that citizenship follows cession. It assumed that German nationals were 'nationals' in both the ethnic and State senses, and automatically underwent a change of citizenship by virtue of the territorial cession to Poland. Article 91 also recognised the right of options to nationality in the following manner:

> "[3.] Within a period of two years after the coming into force of the present Treaty, German nationals over 18 years of age habitually resident in any of the territories recognised as forming part of Poland will be entitled to opt for German nationality."[40]

Poland was given the discretion to refuse citizenship to certain residents of the newly Polish territory:

> "[2.] German nationals, however, or their descendants who became resident in these territories after January 1, 1908, will not acquire Polish nationality without a special authorisation from the state."[41]

This provision was clearly directed against 'German nationals' in both the ethnic senses. The recent date of arrival of such Germans in the newly Polish territory raised the suspicion that their presence was due to the Prussian policy of germanising Poland.[42] Article 91(2) thus augmented Poland's sovereign power in an obvious way.

Article 91 (2) was thus a symbolic provision in which the drafters of the peace settlement seemed to be guided by conflicting concepts of a minority within a State. Article 91 embodied the rule that citizenship follows territory, as well as the

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[37] *Acquisition of Polish Nationality Case*, PCIJ Series B, No. 7, 1923.
[38] N. Berman, "But the alternative is despair: European Nationalism and the Modernist Renewal of International Law", *Harv. L. Rev.*, Vol., 106, 1993, pp. 1792-1903.
[39] Treaty of Versailles, art. 91, 225 Consol. T.S. 188, p. 240.
[40] *Ibid.*
[41] *Treaty of Versailles, op,cit.*, art. 91, p. 240.
[42] *See* Speech by Sir Ernest Pollock, *German Settlers in Poland* 1923 PCIJ Series C, No. 3, pp.496-498 (Aug. 3) (citing the statute). The statute's first article declared that its purpose was "strengthening the German element...against Polish endeavors (or strivings)...by settling German peasants and workmen." *Ibid.* p. 499.

modifications of that rule. Each of these modifications reflected inherent difficulties in defining the concept of a minority group in harmony with State 'territorial' sovereignty. Article 91 also illustrates that the matter of nationality was the most delicate and difficult aspect in defining the concept of a minority.

3. 2. The PCIJ's *Polish Nationality Case*

The Advisory Opinion requested of the PCIJ by the League Council in the *Polish Nationality Case* concerned the recognition of citizenship of the minorities of non-Polish origin. The interpretation of Article 4(1) of the Polish Minorities Treaty was one of the major concerns.[43] That Article extended Article 91 of the Versailles Treaty by requiring that Polish citizenship be granted even to certain persons not resident in Poland at the time of the coming into force of the treaty. Article 4 (1) provides that:

> "Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there."[44]

The ambiguity concerned the requirement that the parents be "habitually resident" in Poland. According to Poland, the parents had to reside in Poland at the time of the coming into force of the Treaty.[45] According to Germany, whose German minorities had resided in territory now belonging to Poland, such residence was required only at the time of the birth of the children now seeking Polish citizenship.[46] Before turning to the substance, however, the Court had to decide whether disputes over the acquisition of Polish citizenship were included in the international guarantee embodied in Article 12. Article 12 of the Polish Treaty provides that:

> "Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations."[47]

Poland argued that Article 12's guarantees for "persons belonging to minorities" could not apply to provisions concerning the granting of Polish citizenship to former

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[43] Minorities Treaty Between the Principal Allied and Associated Powers and Poland, 225 Consol. T.S. 412.
[44] *Ibid.*, art. 4, pp. 416-17.
[45] *Acquisition of Polish Nationality Case, op.cit.*, p.7.
[46] Discours Prononce de M. Schiffer (Ger.), *Ibid.*, p.783, pp.798-805.
[47] *The Treaty of Poland, op.cit.*, art. 12, pp. 418-19.

German citizens.[48] For Poland, the term "minority" could only refer to a group of Polish citizens constituting a minority as opposed to non-Polish citizens.[49] The international guarantee, therefore, did not apply to the citizenship provisions of the Treaty: prior to their acquisition of Polish citizenship, persons inhabiting Polish territory could not be viewed as belonging to a "minority" within Polish society. According to Poland, the treaties must be strictly construed, because of their derogation from a cardinal principle of the respect of State sovereignty. The Polish position is illustrated in the following terms:

> "This Treaty . . . falls outside the orbit of the general sphere of international law [*un traite exorbitant du droit commun*], in that it contains . . . provisions whereby Poland binds herself . . . to treat a certain category of her own nationals in a certain way."[50]

Poland rejected the concept of ethnic, religious or linguistic minorities within an international legal framework, rather the identity of such groups must be structured and recognised by a sovereign State.[51]

The Court's position, however, reflected a far different interpretation. The Court focused on the significance of the simultaneity of the genesis of Poland and of its obligations under the treaty:

> "The first question...is what must be understood by a minority...in the present case a German minority-within the meaning of the Polish Minorities Treaty. In order to reply to this question it is necessary to bear in mind the conditions under which the Minorities Treaty was concluded and the relations existing between that Treaty and the Treaty of Peace which was signed on the same day...Poland...at the moment of her final recognition as an independent state and of the delimitation of her frontiers, signed provisions which establish a right to Polish nationality, and these provisions, in so far as they are inserted in the Minorities Treaty, are recognized by Poland as fundamental laws with which no law, regulation or official action may conflict or interfere."[52]

Hence, the Court did not view the treaties' terms as limited to the State-centered definition of 'Poland' and its 'majority' and 'minority'. Both Article 93 of the Peace Treaty and the preamble to the Minorities Treaty refer to Poland's agreement to protect those 'inhabitants' who composed a racial, linguistic, or religious minority - and not merely Polish 'citizens' so defined.[53] The Court noted that these clauses considerably

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[48] *Acquisition of Polish Nationality Case, op.cit.*, p. 13.
[49] *Ibid.*
[50] Discours Prononce par M. Le Comte Michel Rostworowski (Pol.), *German Settlers Case in Poland (PCIJ Series C, No. 3), op.cit.*, p. 419, p. 420, *translated in ibid.,,* p. 458, p. 459
[51] Discours Prononce par M. Le Comte Rostworowski (Pol.) in *the Acquisition of Polish Nationality, op.cit.*, pp. 753-756, translated in *ibid.*, pp.768-771.
[52] *Ibid.*, pp. 13-16 (citing Polish Minorities Protection Treaty, art. 1).
[53] *Treaty of Versailles, op.cit.*, art. 93 ("Poland accepts and agrees to embody in a Treaty with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the inhabitants of Poland who differ from the majority of the population in race,

extended the concept of a minority and population, since they alluded on one hand to the inhabitants of the territory over which Poland had assumed sovereignty and on the other hand to inhabitants who differed from the majority of the population in race, language and religion.[54] For the Court, an international legal community charged with the restructuring of Central Europe according to new, far-reaching principles could define the concept of a minority without reference to existing sovereign legal systems.

Turning to the substance of the dispute, Poland asserted that its sovereign obligations had to be construed in light of the "nationalness" of the Polish State; in effect, it contended that the recognition of States' power to regulate nationality in international law requires a heightened deference to the sovereignty of nation States. Poland contended that non-resident individuals born in Poland should only be allowed to acquire Polish citizenship if their parents were "habitually resident" in Poland at the time of the coming into force of the Treaty.[55] Poland asserted that this extraordinary requirement was necessary to protect the "Polishness" of the new State, due to the ethnically denationalising effects of German control over Poland; it urged the Court to recall the countless army of ethnic Germans who had moved to Poland during more than a century of Prussian rule.[56] Article 4's ambiguity must, therefore, be interpreted in the most restricted way possible. In the closely related *German Settlers Case,* Poland had argued that its policy of 'de-germanization' was sanctioned by certain provisions of the Peace Treaty; in particular, it cited Article 91(2), the provision allowing it to refuse citizenship to Germans who had settled after 1908.[57]

The Court rejected the Polish contention.[58] The Court held that the disputed clause of Article 4 clearly referred to the "habitual residence" of the parents only at the time of the birth of the person in question.[59] It declared that this combination of the criteria of origin and domicile provided the individual with a moral link to Polish territory that required that he or she be granted Polish citizenship.[60]

The collapse of the imperial States in which diverse ethnic groups resided after the

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language or religion."), p. 242; *Polish Minorities Protection Treaty, op.cit,,* preamble, p. 413 ("Poland . . . desir[es] to . . . give a sure guarantee to the inhabitants of the territory over which she has assumed sovereignty.").

[54] *Acquisition of Polish Nationality Case, op.cit.*, p. 14

[55] *Ibid.*

[56] Discours Prononce par M. Le Comte Rostworowski (Pol.), *German Settlers Case in Poland (PCIJ Series C, No. 3), op.cit.*, p.753, pp.763-764, translated in *ibid.*, p. 768, pp. 778-79.

[57] *Ibid.*, p. 37.

[58] *Acquisition of Polish Nationality Case, op.cit.*, p. 17.

[59] *Ibid.*, p. 14.

[60] *Ibid.*, p. 18.

end of the World War I did not give way to a transparent new order based on ethnicity. On the contrary, the old order gave way to a complex situation marked by a tangle of national and State identities, a situation that called for increased international authority. The Court explained that it was precisely the complexity of the post-war situation that justified heightened international competence over the citizenship issue in the context of the protection of ethnic, religious or linguistic minorities. The Court made the following statement that:

> "one of the first problems which presented itself in connection with the protection of minorities was that of preventing [... new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States."[61]

The approach of the PCIJ toward the construction of a nation-State and its population gives critical reference to the question of the concept of a minority in relation to the nationality requirement of the State of residence. It seems that the Court gave more priority for the protection of the existing ethnic, religious or linguistic groups within territorial States over the recognition of the States' discretion to regulate citizenship. The PCIJ's following statement confirms this priority:

> "The term of minority seems to include inhabitants who differ from the population in race, language or religion, that is to say, amongst other inhabitants of the territory of non-Polish origin, whether they are Polish nationals or not."[62]

The PCIJ's approach to the concept of a minority in this case vividly indicates that the definition of the concept of a minority must be understood broadly in a way to embrace ethnic, religious or linguistic groups as protected minorities, irrespective of whether they are 'nationals' or 'citizens' of their State of residence in such a way that minority protection can be effective and meaningful within the domestic legal order.

4. A Recent Development of the Discussion in the Problem of Definition of a Minority with regard to the Nationality Requirement

4. 1. United Nations

First of all, note should be taken of the wording in Article 27 of the ICCPR as

[61] *Ibid.*, p. 15.

"persons belonging to...minorities." The holder of minority rights recognised under Article 27 cannot be restricted to 'nationals', because it refers to 'persons' not nationals or citizens. Moreover, all member States have an obligation to secure the conventional rights for 'all persons' under their jurisdiction without distinction as to nationality under Article 2 (1) of the ICCPR. Since Article 2 (1) is a type of general rule, exceptional provisions should be made explicitly as in Article 25, which is related to political right of citizens. However, Article just refers to "persons belonging to minorities..." It is interesting to note that the UN Declaration on the Rights of Persons belonging to National or Ethnic, Cultural, Religious and Linguistic Minorities (The UN Declaration on Minority Rights) also does not restrict minority rights to citizens. Unlike Article 27 of the ICCPR, the Declaration on Minority Rights does not refer to minorities "in those states" which was designed to restrict its application to historic or 'old minorities'. This matter was sharply debated during the Declaration's drafting process. In contrast to Germany's restrictive reading confining the Declaration's application to 'State citizens', Nigeria contemplated that the Declaration addressed the question relating to the "public intolerance of immigrants, including refugees" and "widespread xenophobia" directed against foreigners.[63] It seems that the UN Declaration relates the status of minority to the base of residence. Article 1(1) of the Declaration provides that:

> "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities *'within their respective territories'...*"[64] (Emphasis added.)

The Human Rights Committee (HRC) under the Optional Protocol to the ICCPR through its General Comments has presented a very broad concept of a minority, embracing non-citizens in the category of a minority. This is a profound development in terms of the new construction of the definition of a minority, particularly given that HRC is in a position to represent UN practice in some parts. The HRC's General Comment on Article 27 states unequivocally as follows:

> "The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party... A State party may not, therefore, restrict the rights under article 27 to citizens alone."[65]

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[62] *Ibid.*
[63] E/CN.4/1992/SR.19, paras. 34-35.
[64] Article 1 (1) of the UN Declaration on Minority Rights.
[65] HRC General Comment 23, Article 27, UN Doc.HRI\GEN\1\Rev.1 at 38 (1994), paras., 5-1.

The HRC's view seems basically to have followed the subjective and objective criteria by the traditional definition of a minority, but it is a new version in that it does not require the holding of citizenship of the State of residence in identifying a minority status. Furthermore, the HRC held the view on the status of a minority in relation to the positions of aliens protected under the ICCPR:

> "...In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."[66]

In this context, an attempt to define a concept of a minority for international law made by Special Rapporteur Eide of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, indicates the United Nations approach to the concept of a minority, which is not limited to citizens of the State concerned. He defines a minority as follows:

> "For the purpose of this study, a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population."[67]

It is critical to note that Eide has effectively replaced the nationality criterion with the standard of place of residence. The populations whose members share common characteristics of an ethnic, religious or linguistic nature and have resided in the territory of the States concerned are the critical indicators for identifying a minority status. If this is the case, it will be more cogent to focus on whether the members of a minority group have 'durable ties' with the State in which they live. This requirement is present in the preparatory work of Article 27 and is expressed in the word 'exist' in that Article.

The General Comment of the HRC on Article 27 reflects a broad approach in this sense. The Committee does not only reject the nationality criterion but also proclaims that the length of the residence in the State is irrelevant and that therefore immigrants and even visitors could qualify as minorities in the sense of Article 27, depending on other factors. The HRC made the statement that:

> "Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not

[66] HRC General Comment 15, UN Doc. HRI\GEN\1\Rev.1 at 18 (1994), paras.7.

[67] A. Eide, "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities", E/CN4/Sub2/1993/34 (1993), p. 7.

> relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights."[68]

Although the inclusion of visitors in the category of a minority is unrealistic and difficult to defend, a broad approach to the category of a minority is evident and is desirable as it will be conducive to the effective protection of persons belonging to minorities within a State. The point is that a factual and flexible approach to the concept of a minority under which factual aspects of minority, such as long-lasting and habitual residence of existing ethnic, religious or linguistic groups are noted, seems to be prevalent in recent UN practice.

4. 2. European Level

Firstly, the Ad hoc Committee for the Protection of National Minorities (CAHMIN)'s proposal for the definition of a minority needs to be noted.[69] The CAHMIN formulated a Framework Convention for the Protection of National Minorities (FCNM).[70] On the matters of the definition of the concept of a minority, the Explanatory Report[71] to the FCNM made an important remark orientated to a flexible approach to the question of the concept of a minority, having explained the reason for the absence of the definition of a minority in the FCNM. It was explained that the position of not having a definitional provision of the concept of a minority was adopted, because it was impossible to formulate a definition of a minority that could be approved by all the member States of the Council of Europe.

However, it can be argued that the CAHMIN intended to leave the definitional question of a minority to constant interpretation of minority rights and the development of State practice on the protection of minority groups in Europe. What is certain is that the FCNM does not require the holding of citizenship of the State of residence for the identification of a minority in terms of literal context. The omission of having a nationality criterion for the purpose of defining a minority may arguably

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[68] UN Doc. HRI\GEN\1\Rev. 1, at 38, 1994.
[69] CAHMIN is the ad hoc committee which was given a mandate by the Council of Ministers.
[70] ETS 157 (1994). The Framework Convention entered into force on 1 February 1998.
[71] The Framework Convention together with its Explanatory Report have been published as Document H (95) 10, February 1995 and in *HRLJ*, 1995, Vol.,16, No. 1-3, pp. 92-115.

lead to the proposition that the FCNM shall be applied to 'all persons' living in the territory of States parties who have objective as well as subjective elements[72] for receiving minority status. Furthermore, the jurisprudence of minority rights under the FCNM seems to indicate that the citizenship criterion is not relevant.

The beneficiaries of the provisions of the FCNM are "persons belonging to national minorities". In the absence of a definition in the text, the Advisory Committee under the FCNM has accepted that States parties enjoy a certain margin of appreciation in defining the scope of application of the FCNM in order to take the specific circumstances prevailing in their country into account. However, it is important to note that this margin of appreciation must be exercised in accordance with the general principles of international law and those recognised in the FCNM, and it should not be a source of arbitrary or unjustified distinctions.[73] Article 5 (1) of the FCNM refers to the essential elements of the identity of persons belonging to national minorities, namely their religion, language, traditions and cultural heritage. The provision lists the essential elements of the identity of a national minority. Upon signing the FCNM, a number of States parties issued declarations on its scope of application.[74] Some of these simply identify the relevant beneficiaries of the provisions, i.e. the States parties' national minority groups. The declarations by Austria, Estonia and Switzerland consider that the term national minority applies to those ethnic, religious or linguistic groups that can point to long-standing, firm and lasting ties with the relevant State party, and whose members are citizens of the State.[75] The declaration by Austria defined national minorities as "those groups which come within the scope of application of the Law on Ethnic Groups...and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic

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[72] The discussion on objective as well as subjective components for the definition of the concept of a minority at the UN level is also applied to the European level of definition.

[73] Opinion on Albania, ACFC/INF/OPI (2003), para. 18.

[74] On the legal status of the declarations of States parties to the FCNM, see M. Telalian, "Europe Framework Convention for the Protection of National Minorities and its personal scope of application", In G. Alfredsson and M. Stvropoulou (eds.), *Justice pending: indigenous peoples and other causes* (The Hague: Kluwer Law International, 2002), p. 117, pp. 127-132.

[75] On the requirement of citizenship, see also the declarations by Germany (Opinion on Germany, ACFC/INF/OPI (2002)008, para. 13, the declaration by Germany provides that the provisions of the FCNM will apply with respect to the 'the Dane of German citizenship and members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship', Opinion on Germany, para. 12; Poland (Opinion on Poland, ACFC/INF/OP/I (2004)005, para. 15).

cultures."[76] Estonia referred to the following criteria: citizens of Estonia who reside on the territory of Estonia; maintain long-standing, firm and lasting ties with Estonia; are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics; and are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.[77]

However, citizenship may not, by itself, constitute the basis for excluding a group of persons from the scope of application of the FCNM. The exclusion of persons who would otherwise fall under its scope of application on the basis that they are not citizens may be interpreted as being incompatible with the objects and purposes of the FCNM. The Advisory Committee has called on Estonia to "re-examine its approach reflected in the declarations in consultation with those concerned and consider the inclusion of additional persons belonging to minorities, particular non-citizens, in the application of the FCNM."[78] It seems possible to state that ethnic, cultural, religious or linguistic communities that have enjoyed a historical presence in a State party may not be denied their right to recognition as national minorities under the FCNM.

Secondly, perhaps the most important clue in the definitional question within the Council of Europe may be found in the Strasbourg mechanism of the individual complaint before the European Court of Human Rights (ECHR).[79] As for the standing for an individual petition before the Court, there is no legal obstacle for members of a minority who are not citizens of their State of residence to use the Strasbourg mechanism for the protection of their minority rights. Article 14 of the European Convention on Human Rights and Fundamental Freedoms (European Convention on Human Rights),[80] which refers to 'minority', declares the non-discrimination principle. According to the ECHR, to treat any person, nongovernmental organization or group of individuals in a discriminatory fashion with respect to one of the listed

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[76] Opinion on Austria, ACFC/INF/OPI (2002), para. 12.

[77] Opinion on Estonia, ACFC/INF/OPI (2002), para. 13.

[78] Opinion on Estonia (2002), para. 18. See, also declaration by the Russian Federation "attempts to exclude from its scope...persons who permanently reside in the territory of States Parties...and who previously had a citizenship but have been arbitrarily deprived of it. This contradicts the purpose of the FCNM," Opinion on Russian Federation, ACFC/INF/OPI (2003)005, footnote at para. 20.

[79] G. Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", *HRQ*, Vol., 24, 2002, pp. 736-780. See also Chapter 6 below, pp. 180-192.

[80] ETS, No. 5. Article 14 of the European Convention on Human Rights provides that "The enjoyment of rights and freedom 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."

grounds in Article 14 without reasonable and objective justification is contrary to the European Convention on Human Rights (ECHR).[81] The citizenship of the applicant is not a precondition for the individual petition before the Court.

Lastly, the practices on the protection of the rights of minorities within the framework of the Organisation of the Security and Co-operation in Europe (OSCE) provide a reference to the definitional question on minorities with respect to the nationality requirement. The Final Act, like other Concluding Documents of any OSCE meetings, does not contain an official definition of the concept of a minority. However, in paragraph 32 of the Copenhagen Document, it is stipulated that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to develop their culture in all its aspects.[82] This shows that ethnic, cultural, linguistic, or religious characteristics are defining features in identifying minority groups.[83] However, all these differences do not lead automatically to the creation of 'standing' for a minority. According to the 1991 Moscow Conference on the Human Dimension, the rights of minority groups are distinguished from those of migrant workers. By drawing a distinction between migrant workers who are residing lawfully in participating States and the members of minorities, the 1991 Moscow Conference seems to have implied that citizenship or at least eligibility to become a citizen in participating States is a requirement of being a member of a minority group.[84]

The mandate of the High Commissioner on National Minorities (HCNM) shows, however, a different approach to the question of nationality requirement, focusing on flexibility depending on given situations of participating States. First of all, the High Commissioner has argued that the existence of a minority is a question of fact. Based on this flexibility, he has proposed a definition of a minority in the following terms:

> "First of all, a minority is a group with linguistic, ethnic, or cultural characteristics which distinguish it from the majority. Secondly, a minority group usually not only seeks to maintain its identity but also tries to give stronger expression to that identity."[85]

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[81] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), ECHR Series A, No. 6, at 252, 1968.

[82] Paragraph 32 of the Copenhagen Document, The Copenhagen Meeting of the Conference of Human Dimension, 1990, 29 ILM 1305.

[83] Report of the CSCE Meeting of Experts on National Minorities, 1991, 30 ILM 1692.

[84] Document of the Moscow Meeting on the Human Dimension, Emphasising Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedure for Fact-Finding, 1991, 30 ILM 1670.

[85] See Factsheet of the HCNM, http://www.osce.org/inst/hcnm/fsheet/factsh.

While the High Commissioner took into account the special characteristics with respect to language, ethnicity and culture as the basis for the components of minority membership, he emphasised that deciding whether a minority exists or not for the purpose of protection is a question of 'fact'. It can thus be stated that it is the task of the High Commissioner himself to decide in each case whether certain population groups can be regarded as the members of a minority. In particular, the activities of the High Commissioner in the Baltic States regarding the status of the ethnic Russian population indicate that 'citizenship' is not a mandatory requirement for being a member of a minority.[86] Even though one cannot find an officially accepted definition of a minority in the official OSCE documents, it is possible to construct a definition of a minority at the OSCE level as follows: a minority is a group whose members are persons who are citizens or non-citizens sharing common characteristics in relation to language, ethnicity, culture or religion in their State of residence.

The preceding analysis clearly indicates that the European definition of a minority follows the UN's flexible posture toward the nationality requirement in defining the concept of a minority.

5. The Status of Ethnic, Linguistic Russian Populations in Estonia and Latvia and the Definition of a Minority under Present International law

The existence of the ethnic, linguistic Russian non-citizens and stateless persons in Estonia and Latvia after independence from Soviet Russia in 1991 may illustrate a typical case in confirming the problems of the traditional definition of a minority with reference to the nationality criterion. As noted, in Estonia, Article 1 of the Law on Cultural Autonomy of National Minorities Law stipulates an official definition of a minority in the following terms:

> "They are citizens of Estonia; they reside in the territory of Estonia; they have time-honored, stable and strong links with Estonia; they differ from Estonia by their ethnic affiliation, cultural and religious idiosyncrasies, or language; they are guided by the desire to conserve, by joint efforts their cultural tradition, religion and language,

[86] For instance, as noted in Chapter 2, the HCNM criticised the Estonian government against adopting restrictive citizenship requirements that might exclude large numbers of Russian minority groups with reference to the protection of minority rights.

underlying their common identity.[87]

In other words, persons within a population sharing the same ethnic, linguistic and cultural traditions and history may have a different legal status which threatens the preservation of their identity as result of the implementation of the restrictive citizenship laws under which proficiency of the Estonian language is required for the naturalisation procedure and historical and habitual residence is not considered.

However, it is quite obvious that the ethnic, linguistic Russian populations in Estonia and Latvia who were denationalised after the independence of Estonia and Latvia from the former Soviet Union in 1991 must be persons belonging to minorities for the purpose of the definition of a minority. As observed, the traditional definition of a minority includes the following elements for receiving minority status as the holder of minority rights; numerical inferiority, non-dominance, fairly non-changeable ethnic, religious or linguistic characteristics, the desire to preserve one's culture and lastly holding citizenship of their State of residence. This last element can be problematic, given that minority status is determined according to the objective and subjective elements and it can grant the State concerned the arbitrary right to decide if a particular group constitutes a minority without reference to objective characteristics.

The ethnic, linguistic Russian non-citizens or stateless persons in Estonia and Latvia easily fulfil the objective and subjective elements advanced by the traditional definition of a minority, except the problematic nationality requirement in the case of Estonia. Numerically, they are a minority. Their non-dominant position is evident, as clearly demonstrated in the presence of the ethnic, linguistic Russian non-citizens and stateless persons in Estonia and Latvia. That the ethnic, linguistic Russians in Estonia and Latvia have in fact preserved their language, customs and identity through nearly five decades is sufficient evidence to satisfy the requirement of a desire to preserve their culture and language. Finally, the ethnic, linguistic Russians in Estonia and Latvia have a number of fairly non-changeable ethnic and linguistic characteristics.

The opinions of the Advisory Committee on the FCNM on the situations of the ethnic, linguistic Russians in Estonia confirm the controversial nature of the nationality requirement for receiving minority status. On citizenship and political rights in Estonia, the Advisory Committee questioned the Estonian State's definition of

[87]Article 1 of the Law on Cultural Autonomy of National Minorities. The same definition was again declared by Estonia upon the ratification of the Framework Convention for the Protection of National Minorities.

a minority as including only citizens. It viewed the definition as "restrictive in nature" and pointed out that:

> "the citizenship requirement does not appear suited for the existing situation in Estonia, where a substantial proportion of persons belonging to minorities are persons who arrived in Estonia prior to the re-establishment of independence in 1991 and who do not at present have the citizenship of Estonia."[88]

Based on this reasoning, the Advisory Committee called upon the Estonian government to reconsider the definition of a minority:

> "Estonia should re-examine its approach...and consider the inclusion of additional persons belonging to minorities, in particular non-citizens, in the application of the Framework Convention."[89]

The view of the Advisory Committee on Estonia clearly demonstrates that the decisive criterion in defining minority status must be the recognisable fact of having maintained objective characteristics with respect to ethnicity, religion, or language and sharing subjective common sentiment to maintain such cultural identity in their State of residence over a significant period of time. This position is in line with that of recent developments of the United Nations and European organisations with regard to the question of the definition of a minority.

Hence, it can be argued persuasively that the status of long established or settled ethnic, linguistic non-citizens or stateless persons, like those in Estonia and Latvia, regardless of the reason for this status, should be recognised as persons belonging to minorities, on the condition that they have met the objective and subjective elements for the definition of a minority, apart from the nationality requirement. The fact that preparatory works did not exclude immigrants from the protection of Article 27 of the ICCPR supports this argument.[90]

It is thus submitted that in review of the problems with the definition of a minority reflected in recent developments of the United Nations, European regional practice generally supports the argument that it is more appropriate to use the requirement of 'durable ties' as an alternative to the nationality criterion for the identification of membership of a minority in present international law. This interpretation is also justified in that States' recognition of the existence of minorities is not a requirement for defining minority status as observed, rather the existence of minorities is a

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[88] Advisory Comm. on the Framework Convention for the Protection of National Minorities, Comm. of Ministers, (Advisory Committee), Opinion on Estonia, adopted on 14 Sept. 2001, ACFC/INF/OP/I (2002)/005, Specific comments with respect to articles 1-19, paras. 17-18.

[89] *Ibid.*

question of fact, which logically means that States cannot deny the existence of minority groups within their territory. Based on the above analysis in this chapter, this writer proposes a working definition of the concept of a minority[91] for present international law as follows: a national or ethnic, religious and linguistic minority is a group numerically smaller than the rest of the population of a State, having lived for long time in their State of residence. The members of the group have ethnic, religious or linguistic features differing from the rest of the population and show a sense of mutual solidarity for the preservation of their unique culture, tradition or language.

6. Conclusions

(1). The definition of the concept of a minority for present international law is one of the most critical aspects in the discussion of the effective protection of minority rights; depending on how the constitutive elements for receiving a minority status as the holder of minority rights are viewed, the scope of minority protection under international law could differ widely.

(2). Even though the traditional definition of a minority has been accepted generally as the definition of a minority at the theoretical level, it has an inherent fundamental problem in its demand of holding nationality of the State of residence for recognising ethnic, religious, and linguistic minorities. Given that citizenship has the comprehensive elements of civil, political, social and cultural rights within the domestic legal order, the citizenship criterion in determining minority status has a vital dimension for the effectiveness of the protection of persons belonging to minorities, for determining citizenship is likely to be abused by the States' discretionary interpretation of citizenship criteria.

(3). At the same time, the attempts to define the concept of a minority made by the UN and European levels on the basis of flexibility clearly indicate the controversial nature of the nationality requirement in determining minority status. Unlike the definition under the traditional view, the recent approach does not appear to require a nationality or citizenship of a State in which the members of minorities allegedly reside, and is more concerned with factual elements such as a close relationship with the State

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[90] M. Nowak, *The UN Convenant on Civl and Political Rights, Commentary on CCPR* (Kehl:NP Engel, 1993), p. 490.

[91] See Article 4 of the proposed convention in Chapter 8 below, pp. 258-260.

concerned and the residential linkage with it by persons belonging to ethnic, religious or linguistic groups, while at the same time respecting the traditionally accepted objective and subjective elements for the determination of a minority.

(4). This means that the scope of the definition of persons belonging to minority groups for the purpose of minority protection in present international law is being expanded and this is a meaningful development, indeed, in the sense of providing effective minority protection. Accordingly, the 'persons' who belong to minorities within a State, having met subjective and objective elements, such as unique characteristics of culture, language, religion, and the sharing of a common sentiment for maintaining their cultural identity, but holding no citizenship of their State of residence, due to restrictive, unreasonable legislative measures by the State concerned, may be included in the category of a minority for the purpose of the protection of persons belonging to minorities under international law.

(5). Based on the analysis in this chapter, this writer has proposed a working definition of the concept of a minority in the following terms: a national or ethnic, religious and linguistic minority is a group numerically smaller than the rest of the population in their State of residence, having lived for a significant period of time in its territory. The members of the group have ethnic, religious or linguistic features differing from the rest of the population and show a sense of mutual solidarity for the preservation of their unique culture, tradition or language. This definition differs from the traditional one in that it has made clear that no requirement of holding the nationality of the State of residence is needed for receiving minority status, and is more concerned with the historical and factual aspects of persons belonging to minorities to their State of residence.

Chapter V

The Protection of Cultural Identity for Minorities under Minorities-Specific Standards

1. Introduction

This chapter is primarily concerned with the examination of 'minorities-specific standards'. By these the present writer means the standards on the protection of the rights of persons belonging to ethnic, religious or linguistic minorities reflected within the League of Nations, the United Nations and European instruments, as well as their relevant juridical views and practice which are directly related to the protection of minority rights in the sense of having made specific references to "minorities, minority rights or minority protection". The aim of this chapter, therefore, is to identify such standards and examine their content for the purpose of seeking to establish the basic framework within which the international legal protection of minority rights is effectuated. This is a necessary step for advancing the argument that an international juridical approach to the protection of persons belonging to minorities should be undertaken in a comprehensive and integrative manner so as to protect persons belonging to minorities fully and effectively, beyond the 'minorities specific standards' upon which this chapter primarily focuses.

The concept of minority rights should be broadly understood, which embraces not only cultural aspects of minority rights, but also political and participatory aspects of their dimension. However, it also true that that respecting the cultural identity of persons belonging to minorities has traditionally been regarded as the most essential aspect of minority protection under international law of minority protection, which has been reflected in minorities-specific standards as examined below. Therefore, the examination of minorities-specific standards in this chapter focuses on the protection of cultural identity for minorities. The protection of political and participatory aspects of minority rights will be examined in Chapter 7 of this thesis within the framework of internal self-determination.

At the same time, the reality of the status of ethnic, linguistic Russians in Estonia

and Latvia since independence from the former Soviet Union in 1991, many of whom remain stateless or non-citizens, due to Estonian and Latvian restrictive citizenship laws, will be examined with reference to minorities-specific standards. The examples of Estonia and Latvia with reference to the protection of the ethnic, linguistic Russians in question illustrates why an integrative approach to the protection of minority rights under international law is necessary.

2. Minority Protection at the League of Nations

2. 1. Main Characteristics of Minority Protection under Minorities Treaties

In 1919, following World War I, the most comprehensive attempt to protect minorities through international legal means developed under the auspices of the League of Nations in the form of minority treaties, which incorporated protections taken from earlier treaty provisions. Concern about the protection of persons belonging to ethnic, religious or linguistic minorities in certain European countries following World War I, gave rise to the issue of the protection of minorities at the international level. A comprehensive and systematic regime of minority protection was needed to protect minorities against discrimination in enlarged and newly established States. Formulations of standards of minority protection were established through the series of treaties called Minorities Treaties.

The Minority Treaties can be divided into three general categories. The first category of treaties applied to the defeated States of Austria, Hungary, Bulgaria, and Turkey. The second group of treaties applied to newly created States, and to those States whose borders were fundamentally changed to meet particular minority problems. Examples of Czechoslovakia, Greece, Poland, Romania, and Yugoslavia could be included within this category. Finally, treaties applying to certain States such as Albania, Estonia, Latvia, Lithuania, and Iraq, required them to provide minority protection as a condition to their admission to the League of Nations.[1]

As the general provisions of the treaties and declaration which constituted the

[1] Some of the League of Nations treaties on minorities were published in the LNTS. For instance, Treaty with Romania, LNTS, V. p. 337; Treaty with Greece, LNTS, XXVIII; See J.I.L. Claude, *National Minorities : An International Problem* (Cambridge : Harvard University Press, 1955), p. 16.

'Minorities Treaties' followed the pattern of the Treaty of Poland,[2] the latter can be used as a frame of reference to appreciate the main aims of minority protections under the League of Nations. However, it should be noted that as each of the different instruments within the Minorities Treaties regulate the situations of specific States and certain population groups, it is difficult to generalise the standards of minority protection during this League of Nations period. Rather, it may be correct to say that respective documents were not identical, which were related to the distinctive and different characters of the given situations in the specific documents at this time.[3] Despite this limitation, however, some characteristics of the minority protection may be identified.

First, as to the scope of the application of the Treaty for the protection of minorities, the Polish Minority Treaty divided 'persons' into three types: inhabitants, nationals, and members of ethnic, religious and linguistic minorities who are nationals. The inhabitants were granted the right to full and complete protection of life and liberty and to the free exercise, in public or in private, of any creed, religion or belief. In the case of the nationals belonging to minorities, equality before the law, equality of civil and political rights, equality of treatment and security in law, and equal access to public employment and to the exercise of profession or industries were guaranteed. Not only was the freedom to use any language in private relations, in commerce, in religion, in the press or at public meetings ensured, but also adequate facilities were promised to make it possible for a minority language to be used before the court in context of special measure for the protection of minorities.[4]

Secondly, the Treaty included citizenship clauses intended to protect individuals

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[2] Minorities Treaty Between the Principal Allied and Associated Powers and Poland (Treaty of Poland), June 28, 1919, 225 Consol. T.S 412; Annex I, in P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

[3] *Ibid.*, pp. 42-44.

[4] Article 2 of the Polish treaty provided for "protection of life and liberty" and religious freedom to all "inhabitants of Poland". *Treaty of Poland, op.cit.*, art. 2, p. 416. Article 7 guaranteed to "all Polish nationals" equality before the law, civil and political rights, and the right to use one's own language both in private life and in judicial proceedings. *Ibid.*, art 7, p.417. Article 8 provided "the same treatment and security in law and in fact" to members of minorities, in particular the right to "establish, manage and control at their own expense charitable, religious and social institutions . . . and . . . educational establishments." *Ibid.*, art 8. Article 9 guaranteed primary instruction in their own language for pupils belonging to minority linguistic groups in those areas of Poland "in which a considerable proportion of Polish nationals of other than Polish speech are residents." *Ibid.*, art 9, p. 418. Article 9 also provided that in areas of Poland "where there is a considerable proportion of Polish nationals belonging to racial, religious, or linguistic minorities," an "equitable share" of public funds should go to those minority groups for "educational, religious or charitable purposes." *Ibid.* Articles 10 and 11 provided special guarantees for Jews. *Ibid.* Article 12 placed the provisions of the treaty under the guarantee of the League to the extent that "they affect persons belonging" to minority groups. *Ibid.*

against the danger of becoming stateless persons as a result of the transfer of State territory. Those of other nationality living in Poland were given the right to choose their nationality.[5]

Thirdly, Minority Treaties were recognised in supremacy over other domestic statutes. Under Article 1 of the Treaty, minority provisions were regarded as 'fundamental law' in such a way that they could not be modified by any domestic law. At the external level, only amendments formally approved by a majority in the Council of the League of Nations would be permitted. This meant that the protection of minorities was considered fall under 'international obligations'.[6]

Lastly, it is remarkable that various procedures were established to enforce minority treaty provisions. Minorities themselves had the right of petition to bring an alleged infraction to the attention of the League of Nations under the supervision of Minorities Committees. And the creation of the Permanent Court of International Justice (PCIJ) under the League of Nations was significant in that it had jurisdiction to review cases where there was a difference of opinion concerning the interpretation or application of minority provisions.[7]

2. 2. The Principles of Minority Protection under the League of Nations and their Limitation

The principles of minority protection during the League of Nations period may be deduced from the jurisprudence on minority protection at the PCIJ. The legal opinions of the PCIJ on the protection of minorities contributed to elucidating the principles of the protection of minorities under modern international law that are still valid today.[8]

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[5] *Ibid.*, Articles 3-6.

[6] Article 1 provides as follows: "Poland undertakes that the stipulations in Articles 2 to 8 of this Chapter shall be recognised as fundamental laws, and no laws, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation, or official action prevail over them." For an excellent article about the jurisprudence during the League of Nations period, see N. Berman, "But the alternative is despair: European nationalism and the modernist renewal of international law", *Harv. L.Rev.*,, Vol., 106, 1993, pp. 1792-1903. Berman argues that the jurisprudence of minority protection during the League of Nations should be appreciated positively in that it showed a rather innovative approach to the rights of minorities within a new perspective of international law that deserves careful attention for contemporary international law. Gilbert also argues that modern mechanisms to guarantee minority rights can be seen to have developed from the perceived need to make minority rights a matter of international concern, as illustrated in the case of minority protection under the League of Nations. See G. Gilbert, "Religio-nationalist minorities and the development of minority rights law", *Review of International Studies*, Vol., 25, 1999, pp. 389-410.

[7] *Thornberry, International Law and the Rights of Minorities, op.cit.*, pp. 44-46.

[8] The Permanent Court of International Justice issued a number of advisory opinions on minorities:

Moreover, the PCIJ, in developing the jurisprudence of minority protection, through a series of relevant cases, used the teleological or contextual method of interpretation in international law. Given that the treaties or laws related to the status of minorities tend to be formulated in negative and vague terms as will be examined in subsequent sections of this chapter, a method of teleological interpretation which would give a treaty text the most extensive possible meaning and effect is critical for the effective protection of minorities.[9] For instance, the PCIJ sought a teleological approach to the problems concerning the land rights of *German settlers in Poland Case* by the Versailles Peace Treaty[10] through its advisory opinion. The PCIJ found that:

> "The main object of the Minority Treaty is to assure respect for the rights of Minorities and to prevent discrimination against them by any act whatsoever of the Polish State. It does not matter whether the rights of the infraction of which is alleged are derived from a legislative, judicial or administrative act, or from an international engagement. If the Council ceased to be competent whenever the subject before it involved the interpretation of such an international engagement, the Minorities Treaty would to a great extent be deprived of value... In order that the pledged protection may be certain and effective, it is essential that the Council, when acting under the Minorities Treaty, should be competent, incidentally, to consider and interpret the laws or treaties on which the rights claimed to be infringed are dependent."[11]

The PCIJ also stated, taking into account the nature of the non-discrimination principle in the protection of persons belonging to minorities, 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."[12]

In the *Acquisition of Polish Nationality Case*, the PCIJ also used the teleological method of interpretation in dealing with the Polish government's refusal to grant citizenship to its German minority residents in the country:

> "It seems therefore evident that since the Minority Treaty in general, and Article 4 in particular, does not exclusively contemplate minorities composed of Polish nationals or of inhabitants of Polish territory, Poland, by consenting, in Article 12 of the Treaty, to the preceding Articles being placed under the guarantee of the League of Nations in so far as they concern persons belonging to racial or linguistic minorities, also consents to the extension of this protection to the application of Articles 3 to 6. If this were not the case, the value and sphere of application of the Treaty would be greatly diminished."[13]

Minority Schools in Albania, PCIJ Series A/B, No. 64, 1935; *German Settlers in Poland*, PCIJ Series B, No. 6, 1923; *Acquisition of Polish Nationality*, PCIJ Series B, No. 7, 1923; *Access to German Minority Schools in Polish Upper Silesia*, PCIJ Series A/B, No. 40, 1931; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig*, PCIJ Series A/B, No. 44, 1932.

[9] Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in the light of its object and purpose." Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331

[10] *German Setters in Poland Case, op.cit.*, pp. 19-26.

[11] *Ibid.*, p. 25.

[12] *Ibid.*, p. 24.

[13] *Acquisition of Polish Nationality Case, op.cit.*, pp. 16-17.

The most important product of the teleological method of interpretation regarding the protection of minorities by the PCIJ may be the Advisory Opinion on the *Greek Minority Schools in Albania Case.* The principles on the protection of minorities in modern international law were clearly enunciated in this case. Regarding the attempt by the Albanian government to close all private schools, and the likely effect of that decision on the equality of Albania's Greek minority,[14] the Court made the following statement:

> "The idea underlying the treaties for the protection of minorities is 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 peacefully alongside the 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. In order to attain this object, two things are regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State. The second is to ensure for the minority element suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. 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 a minority."[15]

The Court recognised that the Minorities Treaties granted special, differential rights for persons belonging to ethnic, religious or linguistic minorities and emphasised that differential treatment was a necessary means for achieving real equality for the protection of persons belonging to such minorities. The protection of minorities means not only the protection of their basic equal rights as opposed to the rest of population in their State of residence, but also the protection of their inherent interests to maintain cultural identities. The equality for persons belonging to minorities continues to be the main element of the principle of the protection of minorities under the Untied Nations and European organisations.

Even though the Minorities Treaties system under the League of Nations was not perfect in that it was not intended to have universal application, but 'imposed' upon vanquished States, it must be emphasised that the PCIJ through the '*Minority School in Albania Case*' declared the principles of minority protection for modern

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[14] The Court referred to the Albanian Declaration with which it was admitted to a membership to the League of Nations. Paragraph 1 of Article 5 of the Albanian Declaration read: "Albanian nationals who belong to racial, linguistic or religious minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular, they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion", *Minority Schools in Albania, op.cit.,* p. 5.

[15] *Ibid.*, p. 17

international law. General recognition that the treatment of persons belonging to minorities within the territories of States is an 'international concern', which is beyond the boundary of domestic jurisdiction, was also an important achievement during this period. It is thus proper to state that the jurisprudence of minority protection by the PCIJ during the League of Nations period had a tremendous impact towards the establishment of a minority protection system within the United Nations and European organisations, thereby providing the basic foundations upon which the jurisprudence of minority protection under the UN and other European organisations primarily rest.[16]

Despite the significance of the jurisprudence of minority protection during the League of Nations period, it is observed that there were some problems that must be clarified in the context of the effective protection of minorities under international law. This is conspicuous in the problem of citizenship matters of persons belonging to ethnic, religious or linguistic minorities in relation to the scope of the application of the non-discrimination principle. Despite the PCIJ's having approached the citizenship matter in *the Polish Nationality Case* in a positive way to protect the existing ethnically, religiously or linguistically distinct minority 'inhabitants' as opposed to the majority population as 'protected minorities', irrespective of whether such inhabitants belonging to minority groups were citizens or not of their State of residence,[17] the fact that the holding citizenship of State of residence was a determining criterion for receiving minority status under the Treaty of Poland is problematic. As noted, rights were different among inhabitants, nationals, and nationals belonging to minority groups under the Treaty of Poland. It seemed to assume that minority protection was guaranteed only for persons who held citizenship of their State of residence among all residing 'inhabitants'.[18]

This confusion of what is really meant by 'minorities' for minority protection with reference to citizenship may be also understood as the question of the ineffectiveness of applicability of the non-discrimination principle as an element of the principles of

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[16] W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1984), p. 43.

[17] For a discussion on the significance of the *Polish Nationality Case*, see Chapter 4 above, pp.100-105.

[18] Articles 7-9 of the Treaty of Poland. See also the case of *Treatment of Polish Nationals in the Danzig Territory*. The PCIJ noted that "The members of minorities who are not citizens of the State enjoy protection-guaranteed by the League of Nations- of life and liberty and the free exercise of their religion, while minorities in narrow sense, that is minorities the members of which are citizens of State, enjoy-under the same guarantee-among other rights, equality of rights in civil and political matters, and in matters related to primary education..." *Treatment of Polish Nationals in Danzig Territory, op.cit.*, p. 39.

the protection of minorities in its precise scope of application. Although the significance of the declaration of the non-discrimination principle as being indispensable for minority protection is undoubtedly evident, whether the principle's scope of application was equally applied to all ethnic, religious or linguistic groups or only to nationals (citizens) belonging to such groups is an extremely important matter in the context of the effective protection of minorities. This is so, because if the principle were understood as being applicable only to groups whose members held citizenship of their State of residence, the effectiveness of the non-discrimination principle would be questionable for the purpose of the effective protection of minorities, as the scope of minority protection would differ completely depending on the citizenship policies of States.

In short, the jurisprudence of minority protection during the League of Nations period declared the non-discrimination principle as a critical element of minority protection, yet it did not elaborate the precise scope of its application.

3. The Protection of Minority Rights at the Untied Nations Level

3. 1. Problem of the Protection of Minorities at the United Nations

The events of World War II fundamentally changed the dimensions of the discussion of minority protection, and a new approach was developed. It was based on the liberalist philosophy of human rights that was represented in the United Nations Charter and the 1948 Universal Declaration of Human Rights. However, neither document contains any reference to the protection of minorities. Instead, the UN Charter proclaims a universal respect for human rights and fundamental freedom, equality, and non-discrimination.[19]

The Preamble of the Charter states that the Participating States "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." These statements are all made in the context of the respect of individual human rights. There seem to have been two reasons for the shift from a group-oriented to individualistic perspective of minority protection following World War II. One was the response to the atrocities

[19] UN Charter preamble, art. 1, para. 3, and arts. 13, 55, 56, 62, 76.

caused by the Nazi regime and the other was a reflection of individualistic ideologies of the time.

In a study conducted by the Secretariat of the UN at the request of the Economic and Social Council, the Secretary-General of the UN argued that the system of minority protection under the League of Nations had ceased to exist. Arguments presented by the Secretariat of the United Nations in this study may be summarised in three parts:

(a) first, that the whole minorities regime in 1919 was an integral part of the system established to regulate the outcome of the First World War and create the League of Nations. One principle of that system was that certain States only, i.e. newly reconstituted or enlarged, should be subject to obligations and international control in the matter of minorities;

(b) secondly, that from the strictly legal point of view, the formal liquidation of the war had been completed by the conclusion of peace treaties. The provisions of such treaties, and the opinions expressed by their authors imply that the former minorities protection regime had ceased to exist so far as it concerned former enemy States with which those treaties had been concluded;

(c) Thirdly, the whole system of minorities protection was overthrown by the Second World War. After this, and since 1945, a different philosophy ushered in the idea of a general protection of human rights and fundamental freedom.[20]

The general view was that the minority-protection system was replaced by the principle of universal respect for human rights and fundamental freedoms and that the conduct of the States parties vis-à-vis the Minorities Treaties since World War II justified the termination of the Treaties. However, it should be noted that the emphasis on the respect of universal human rights and fundamental freedoms did not necessarily mean that the protection of persons belonging to ethnic, religious or linguistic minorities was no longer fundamental in international law. There is no doubt that the assumption of the UN at its early period seemed to have relied on the view that universal protection of human rights and fundamental freedoms could embrace minority protection as well. Yet, this approach is faulty in that the universal protection of human rights is not always identical with that of minority rights. Thornberry's view, with which the present writer agrees is quite relevant in this regard. He explains as

[20] Study on the Legal Validity of the Undertakings Concerning Minorities, UN ESCOR, 6th Sess., at chap. XIV, UN Doc. E/CN.4/367 and Add. 1 (1950).

follows:

> "Perhaps what was rejected was the League system as symbol and spectre: its lack of generalization, its misuse by powerful States, its failed political purpose, its limited humanitarian concern. But in rejecting its structure and practice, there need not be an equal rejection of its norms. Even if it may not have generated customary law, the norms may none the less form part of a consistent pattern of international law...It is incorrect to set up an antithetical relationship between human rights and minority rights as was done in the post-war years."[21]

It would be thus more appropriate to state that the omission of the provision on minority protection in the Universal Declaration of Human Rights, and in the Charter of the United Nations, was due to the fact that there existed no consensus on how best to deal with the minority problem, rather than a total rejection of the concept of the protection of minorities.

An important development related to the protection of minorities was the establishment of the UN Human Rights Commission under the auspices of the Economic and Social Council (ECOSOC). The Commission's purpose was to develop and implement provisions of the Charter relating to human rights and fundamental freedoms. To this end, the Commission established a Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission), which focused specifically on minorities from 1947 to 1954. From 1954 until 1971 the Sub-Commission focused almost exclusively on the question of discrimination. In 1971, the issue of the protection of the status of minorities regained attention with a decision to undertake a study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities.[22] The protection of minorities was thus again acknowledged as 'a domain of concern' within the UN framework. It was recognition of the need to make, for the benefit of persons belonging to ethnic, religious or linguistic minorities, a special provision capable of ensuring that they received genuinely equal treatment compared with the other majority inhabitants in their State of residence.[23]

3. 2. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the Protection of Minority Rights[24]

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[21] Thornberry, *International law and the rights of minorities, op.cit.*, p. 117.

[22] Special Rapporteur F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic* Minorities, UN Sub-Commission of Prevention of Discrimination and Protection of Minorities (New York: United Nations, 1991), p. 28.

[23] *Thornberry, International law and the rights of minorities, op.cit.*, pp. 116-117.

[24] The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171. The Covenant entered into force 23 March 1976. It has 156 States parties as of 31 August 2005. Estonia acceded to the Covenant on 21 October 1991. Latvia acceded to the Covenant on 14 April 1992.

As already noted in Chapter 4, Article 27 of the ICCPR constitutes evidence of the recognition of universal minority rights under present international law. The agreement on the provision of Article 27 of the ICCPR means that the need for 'special protection' for the protection of minority rights was recognised simply beyond the declaration of the non-discrimination principle within the United Nations Charter. International lawyers have been concerned with examining the nature of the protection afforded to minorities under Article 27 of the ICCPR. Although Article 27 of the ICCPR recognises the existence of minority rights in terms of their literal context, protection of such rights is worded in negative rather than positive terms, as is in the phrase "persons...shall not be denied the right".[25] Furthermore, as the Covenant fails to define minority status, there is a possibility that States may declare that no minority population exists within their territories, thus avoiding the applicability of Article 27 completely.[26]

Scholarly views are divided over whether Article 27 places affirmative duties on States to ensure rights for persons belonging to minorities in addition to the non-discrimination principle contained in the Covenant. The question of whether or not positive obligation derives from Article 27 is thus directly related to the legal nature of Article 27. In order to clarify this issue, it is necessary to discuss three types of doctrinal views as applied to Article 27.

3. 2. 1. Negative Views

Certain authors interpret Article 27 'negatively', believing that no positive State obligations exist directly from it. Their views seem to be based on historical interpretation of the Article. The negative approach relies on the 'preparatory work', which underscores the intention of the contracting States to avoid such affirmative obligations toward minorities. According to their views, States' duties are only obliged to adopt a tolerant attitude towards minorities. Tomuschat asserts that extending the

[25] *Ibid.*

[26] The attitude of the French government is a prime example. The French government argued that there are no minorities in France. France's view may be found in its initial and second periodic reports submitted to the HRC under Article 40 of the ICCPR. It reads as follows: "Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, Article 27 is not applicable as far as the Republic is concerned." Consideration of Reports submitted by States Parties under Article 40 of the Covenant: France, UN GAOR, Hum.Rts.Comn., 26 Aug., 1987, 540, UN Doc. CCPR/C/46/Add.2(1987).

scope of Article 27 to include positive State obligations could lead to an outright breakdown of its guiding value and a total loss of credibility.[27] Modeen holds the same view that States are not required to take positive measures to protect minorities within their territories, contending that Article 27 cannot be understood as affording any collective rights to minorities.[28]

However, these views are flawed, because they cannot explain the reasons why the ICCPR provides particular provision of Article 27 for the protection of the rights of persons belonging to minorities, apart from the protection by the non-discrimination principle. Were not it for the clear intention of protection of persons belonging to minorities by way of a particular provision for the purpose of protection, Article 27 would not have existed.

3. 2. 2. Positive Stance

On the other hand, other authors approach Article 27 as 'positive'. This position is based on a teleological and systematic interpretation of the provision. They abandon the so-called historical interpretation which relies heavily on *travaux préparatoires.* Thus they assert that the rights explicitly awarded should be interpreted in such a way that they can be realised and are capable of having legal effects.[29]

A systematic interpretation pays attention to the place of a certain article in the overall framework of the convention and focuses on the possible contribution offered by that article to the purpose and objective of the convention. They argue that Article 27 would be meaningless in light of the non-discrimination provision in the Covenant without the recognition of positive State obligations to protect minority rights. According to this thinking, because of the enormous material and human resources which would be needed for full development, for instance, in the area of culture, without positive State assistance to protect and promote minority rights, the rights

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[27] C. Tomuschat, "Protection of Minorities under Article 27 of the International Covenant of Civil and Political Rights", in R. Bernhardt et al., *Völkerrechat als Rechtordnung Internationale Gerichtsbarkeit Menschenrechte, Festschrift für Hermann Mosler* (Berlin/Heidelberg/New York, 1983), p.969. However, it is interesting to note that Article 27, according to Tomuschat, could give rise to "derivative rights to positive State action" by virtue of the principle of non-discrimination. *Ibid.*, p. 970.

[28] T. Modeen, *The International Protection of National Minorities in Europe* (Abo: Abo Akademi, 1969), p. 108.

[29] *Capotorti study, op. cit.*, pp. 36-37; *Thornberry, International Law and the Rights of Minorities, op.cit.*, pp. 185-186;R. Cholewinski, "State Duty towards Ethnic Minorities: Positive or Negative?", *HRQ*, Vol., 10, 1988, pp. 344-371.

granted to minorities under Article 27 would lose much of their meaning.

3. 2. 3. Moderate Views

Finally, some authors take a moderate stance to understanding of the nature of Article 27. Basically, they postulate that Article 27 contains a State obligation to 'abstain', but also an obligation to take some measures to protect minorities depending on given circumstances.

For Higgins, that Article 27 is written in negative terms does not necessarily mean that it should be interpreted as placing no positive State obligations at all upon parties.[30] This line of thought is followed by Nowak, who emphasises the State's obligation to refrain from certain types of actions which threaten the cultural lives of minorities. However, in his view, the right of minorities to establish educational institutions may be derived from Article 27.[31]

This position has some defects in that it admits a rather broad discretion of States to determine the scope of the positive measures for the protection of minority rights. Even though their qualification seems reasonable in terms of State interventions according to certain circumstances, it cannot be denied that generous granting of discretion to States carries the risk of States' attempting to avoid their obligations to minorities.

3. 3. The Nature of Minority Rights within these Contexts: individual rights or group rights?

On the surface Article 27, in terms of negative wording such as "persons... shall not be denied...", it appears logical to States that minority rights can only be enjoyed 'individually' by persons belonging to minorities. But as the expression "in community with" also indicates, minority rights under Article 27 cannot be absolutely individual in nature.

Human beings are social creatures. Most individuals belong to various units,

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[30] R. Higgins, "Minority Rights: Discrepancies and Divergences Between the International Covenant and the Council of Europe system", in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe*, Essays in Honour of Henry G. Schermers, Vol., III (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994), p. 201.

[31] M. Nowak, *UN Covenant on Civil and Political Rights* (Kehl: NP Engel, 1993), p. 501.

groups, and communities. It is not surprising, therefore, that international law not only recognises the inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. As will be examined in Chapter 7 of this thesis, self-determination is a prime example in this dual aspect of a particular human right combining individual aspects with collective ones. As the purpose of the protection of minorities is primarily concerned with the respect of identity of persons belonging to such minorities and the protection of their interests, the respect and guarantee of the collective aspect of minority grouping is a precondition to the effective exercise of minority rights. In other words, minority rights are a 'hybrid' between individual and collective rights. When the minority group secures the rights in question, then the benefits rebound to its individual members and are distributed as individual human rights. Thornberry notes the difficulty of the contemporary international law of minorities to grapple with the group dimension within the individualistic framework of human rights work, and considers minority rights as a hybrid between individual and group rights because of the community requirement.[32] In sum, Article 27 recognises individual rights premised on the existence of a distinctive community.

The existence of a collective aspect of minority rights will naturally assume that States must take positive measures to protect minority interests, because the realisation of minority rights cannot be fully achieved without implementing States' positive policy measures to protect and promote this collective aspect of minority rights at the domestic legal level. Therefore, to regard minority rights as only individual or collective rights is simplistic. Rather, it would be more correct to state that minority rights have a collective aspect.[33]

At the same time, this collective aspect of minority rights also raises the question of whether minority rights are 'positive' or 'negative' rights, as the distinction is said to speak to the nature of obligations that rights create.[34] A negative right creates an obligation of non-interference of States concerned. A negative right requires the States' authorities not to interfere with the exercise of the right in question. By contrast, a positive right requires 'action' by the States' authorities concerned for the benefit to the right holders in question. However, it should also be noted that the distinction

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[32] *Thornberry, International law and the rights of minorities, op.cit.*, p. 12.
[33] See Article 4 (4) of the proposed convention in Chapter 8 below, pp. 258-260.
[34] I. Berlin, "Two Concepts of Liberty", in I. Berlin, *Four Essays on Liberty* (London: Oxford

between negative and positive rights is less secure than it initially might appear. For instance, a right of privacy initially presents itself as a negative right, in the sense that it suggests that governments should not act in certain ways. But a right of privacy also requires State action in that State action is required in the form of the establishment and enforcement of real property and contractual entitlement. In this context, it can be argued that minority rights are positive rights, since they create a State's positive obligation to protect minority rights. Minority rights could not be truly achieved without positive State intervention to correct existing unequal realities and to protect their interests in maintaining their identities with respect to ethnic, religious or linguistic characteristics as opposed to the majority population. The validity of this argument is evidenced by the practice of the United Nations, as will be examined below.

3. 4. Obligatory Nature of the Protection of Minority Rights

The views put forward by the Human Rights Committee (HRC) on Article 27[35] are instructive of the affirmation of the existence of States' positive legal obligations to protect persons belonging to ethnic, religious or linguistic minorities within their territories. The views of the HRC are not legally binding on the contracting States, but they have a certain degree of legal authority that cannot be ignored. Moreover, examination of the State Reports from the HRC may be regarded as a primary and supplementary means of interpretation under Articles 31-32 of the Vienna Convention on the Law of Treaties.[36]

The HRC through the process of reviewing State Reports has emphasised that States have 'positive obligations' to ensure that persons belonging to minorities enjoy minority rights as provided in the ICCPR. The HRC made clear that negative tolerance by States in which persons belonging to minorities reside is not enough for the protection of minority rights. Rather, it requires States concerned to take concrete measures to realise and promote minority rights. For instance, the HRC questioned the

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University Press, 1969), pp, 121-172.

[35] For the general assessment of the HRC activities, T. Opsahl, "The Human Rights Committee", in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992), pp. 369-443.

[36] In the same context, see L.B. Sohn, "The Rights of Minorities", in L. Henkin (ed.), *The International Bill of Rights-The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 285.

Mexican government on 'concrete measures' taken in order to provide political and economic opportunities for ethnic minority groups. The Mexican government explained that new economic, social and cultural measures had been adopted for protecting land ownership and their natural resources.[37] The HRC also held that the United States should bear in mind the obligation to provide the Covenant's rights in fact as well as in law when determining affirmative actions, criticising the withdrawal of the US's policies on minorities.[38]

In 1993, the Third Committee of the General Assembly at its 47th session asked the HRC to proceed with the preparation of General Comment on Article 27 of the ICCPR. Even though the purpose of the General Comment is to promote and maintain a dialogue channel between the HRC and State Parties, they are critical in that they reflect the expression of accumulated experiences of an independent expert human rights body of 'universal character' in consideration of the contents and implementation of each Article under the Covenant. As to the meaning of Article 27, the General Comment made clear that a State's positive measures for minority protection are required not only against the acts of State parties but also even against acts of other persons within the State party. It reads as follows:

> "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 is 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."[39]

The HRC went on to state that:

> "The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end."[40]

The HRC's view clearly gives support to the proposition that a State is obliged to protect persons belonging to minorities residing within its territory, by way of implementing protective measures to that effect.

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[37] A/44/40 (1989), paras. 135-136.
[38] A/50/40 (1995), para. 303.
[39] General Comment No. 23, UN Doc.HRI\GEN\1\REV.1\ at 35 (1994), para. 6.1.

The Lubicon Lake Band v. Canada Case[41] deserves note reflecting the legal nature of Article 27. Chief Ominayak is the leader and representative of the Lubicon Lake Band, an Indian band living within the borders of Canada in the Province of Alberta. The Band submitted to the HRC a communication claming that the government of Canada denied their right of self-determination and the right to dispose freely of their natural resources through Chief Ominayak. He alleged that serious damage to their traditional way of life had been caused, because of expropriation of land by the government. He asserted that the acts of the government had violated Articles, 1,2,6,7,14,17,18,23,26, and 27 of the ICCPR.

The HRC asserted that the rights enshrined in Article 27 include the rights of persons in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. In this regard, it is important to note that the HRC sees 'minority rights' with group aspects and the scope of minority rights within Article 27 in such a broad sense that includes economic and social activities. The HRC concluded by saying:

> "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant."[42]

The Committee thus held the view that the contracting State not only has a duty of abstention regarding the activities of minorities within its territory but also has an obligation to adopt concrete measures to correct the marginal situations of minorities.

Moreover, positive measures designed to facilitate the rights of members of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their religion, or to use their own language constitute a legitimate differentiation under the Covenant, provided that they are "aimed at correcting conditions which prevent or impair the enjoyment guaranteed under Article 27", and "provided that they are based on reasonable and objective criteria."[43]

Although Article 27 is formulated in negative terms, a contracting State is nevertheless obliged to ensure that the existence and the exercise of rights specified in

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[40] *Ibid.*, para. 9.

[41] *The Lubicon Lake Band v. Canada Case*, Communication No. 167/1984, UN Doc. Supplement No. 40, A/45/40 (1990).

[42] The HRC found that the offer of the Canadian government to set aside 95 square miles of land for a reserve for the Band and 45 million Canadian dollars as compensation for the historical inequities was an appropriate remedy.

Article 27 are protected against their denial and violations. This means that the negative wording has been reversed through the interpretative practice of the HRC: a State is obliged to undertake special measures to protect the rights of persons belonging to minorities. Article 27 establishes rights of individuals belonging to minorities, but individuals are to enjoy minority rights "in community with other members of their group". The realisation of rights, therefore, relates to the ability of a group to maintain its identity.

Furthermore, it is critical to note that the protection of the rights of persons belonging to minorities has become a norm or principle of general international law. The HRC states as follow: "The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances."[44] According to the Badinter Commission's Opinion No.1, Article 27 of the ICCPR reflects a "peremptory norm of international law", which refers to the "rights of peoples and minorities" as "peremptory norms of general international law."[45] Upon accession to the ICCPR, France declared that "Article 27 is not applicable so far as the Republic is concerned."[46] The HRC concluded that it was "not competent to consider complaints directed against France concerning alleged violations of Article 27 of the Covenant."[47] However, in its Concluding Observations on the State Party report by France, the HRC made the following point:

> "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."[48]

3. 5. Citizenship and Minorities Protected under Article 27

As observed in Chapter 4, Capotorti's definition of a minority refers to a "group...whose members are nationals of the State." Deschenes' definition refers to "a

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[43] HRC General Comment No. 23, *op.cit.*, para. 6.2.
[44] HRC General Comment No. 29, "Derogations During a State of Emergency (Article 4)", adopted 31 August 2001, reprinted in "Compilation of General Comments and General Recommendations", p. 184, para. 13(c).
[45] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM 1488 (1992), Opinion No. 1, para. 1(e).
[46] *H.K. v. France*, Communication No. 222/1987), UN Doc. CCPR/C/37/D/222/1987, 8 December 1989, para. 8.5.
[47] *Ibid.*, para. 8.6.
[48] HRC, Concluding Observations on France, UN Doc. CCPR/C/79/Add.80, 4 August 1997, para. 24.

group of citizens of a State." Where some, but not all, of the members of a particular group are citizens, it follows that if non-citizens or stateless persons belonging to minority groups of long-term residence are excluded from the scope of minority protection by their State of residence, it would be contrary to the object and purpose of the ICCPR: the protection of ethnic, religious or linguistic identity of persons belonging to minorities in States parties. The HRC General Comment on Article 27 is clear on the issue: "a State party may not restrict the rights under Article 27 to its citizens alone."[49]

3. 6. The UN Declaration of the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities

In 1992, the General Assembly of the United Nations adopted the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minority Rights).[50] The Declaration was the end product of nearly 14 years of efforts by the special Working Group, established by the UN Commission on Human Rights on recommendation by the UN Sub-Commission.[51]

Even though the Declaration was not adopted in the form of a law-making treaty, it is the first comprehensive, universal standard-setting instrument on the protection of minority rights. It clarified the contents of Article 27 of the ICCPR and reconfirmed that States have obligations to protect minorities through the adoption of various policy measures. The Declaration is not legally binding as such but it has a special importance as it 'declares' rather than proposes legal standards. Moreover, it needs to be noted that it was adopted by the General Assembly by 'consensus'.[52] Therefore, it may be argued that the Declaration expresses some sense of *opinio juris*, which could be international customary law for the protection of minority rights. This is the very reason why despite the Declaration's status as soft law in nature, it may be described as a universal standard for the protection of minority rights under present international

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[49] HRC General Comment No. 23, *op.cit.*, para. 5.1.
[50] Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, GA Res. 135, UN GAOR, UN Doc. A/RES/47/135 (1992).
[51] P. Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observation and an Update", in A. Phillips & A. Rosas (eds.), *Universal Minority Rights* (Abo: Abo Akademis Tryckeri, 1995), pp. 11-71.
[52] *Ibid.*, pp. 26-60.

law.

The Preamble recognises that protecting minority rights will "contribute to the political and social stability of States in which they live." Despite the individualistic framing of the title, the Declaration asserts that persons belonging to minorities may exercise their rights collectively as well as individually.[53] It calls for State positive action to promote and protect the development of minority languages, cultures, religions, and traditions, as well as to encourage full minority participation in the economic progress of their country.[54]

Despite the significance of the Declaration with respect to extending the scope of Article 27 of the ICCPR and its codification, it is also observable that the rights of persons belonging to minorities are described in vague terms which limit and even question the extent and degree of States' positive obligations to protect and promote minority rights. Such phrases as "whenever possible", "where appropriate",[55] inevitably seem to concede a large degree of discretion to the States concerned as well as to provide grounds for avoiding their obligations to protect the rights of persons belonging to minorities by indirect means.

4. Article 27 of the ICCPR and Customary International Law

Does Article 27 of the ICCPR reflect of rule of customary international law? Thornberry argues that "Article 27...appears to be a right granted by a treaty without wider repercussions in customary law".[56] His view was essentially based on the following arguments: the travaux of the ICCPR do not support a contrary view; the considerations of the ICJ in the Barcelona Traction Case (Second Phase) do not specifically address minority rights and, as confirmed by such consideration, it is difficult to establish human rights rules of customary law, except for a few cases; and there is no evidence that domestic arrangements concerning particular minorities are made in fulfilment of a general obligation to do so under international law. In recent years, however, Thornberry has pointed out that "the concept of an underlying

[53] Article 3 of the UN Declaration on Minority Rights.
[54] *Ibid.*, Article 4.
[55] For instance, Article 2 (3) of the UN Declaration on Minority Rights.
[56] *Thornberry, International law and the rights of minorities* , *op.cit.*, p. 246.

customary law of minoirty rights should not be lightly dismissed."[57] In fact, some commentators believe that Article 27 has become customary international law.[58] The view was already insinuated, albeit indrectly, by the Inter-American Commission on Human Rights of the OAS in *the Yanomami Case* of 1985.[59] On this occasion, the commission invoked Article 27 rights even though Brazil was not a party to the ICCPR. It delineated principles of international law aimed at protecting the cultural identity of ethnic minority groups.

More recently, justifications for customary law status of Article 27 rights include reference to the current large number of States bound by the article as parties to the ICCPR, the connection between Article 27 requirements and the geneneral principle of equality and non-discrimination. Support for the view that Article 27 rights are part of customary law can also be found in the General Comment No. 24 on reservation, adopted by the HRC in 1994. The Committee contends that the provisions reflecting customary may not be the subejcts of reservation; among such provisions is the one concerning minority rights.[60] Finally, as noted before, the Badinter Commission made an innovative statement to the effect that "peremptory norms of international law require States to ensure respect for the rights of minorities."[61] Although the Commission did not expressly refer to Article 27 of the ICCPR, its reference to "the right to recognistion of minority identity under international law" suggested a close connection with Article 27.

Basic aspects of protection under Article 27, such as the right to the equal enjoyment of one's culture, and to assert and preserve it free of any attempt at assimilation against one's will, currently enjoy wide support from the internaiotnal community. Although specific contours of Article 27 rights requires further clarification, at least the aspects above could arguably be considered strong candidates

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[57] P. Thornberry, "Minority Rights", in Collected Courses of the Academy of European Law, VI-2, 1995, pp. 307-390.

[58]Dinstein took the clearest view that Article 27 of the ICCPR represented customary international law. Y. Dinstein, "Collective Human Rights of Peoples and Minorities", *ICLQ*, Vol., 25, 1976, p. 118. Müllerson takes the same position. He stated as follows: "I believe that article 27 requirements have become part and parcel of universal customary international law. It is not, of course, due only to the fact that by the end of 1993 there were 124 state parties to ICCPR...Confirmation of my view that article 27 is a customary norm of international law may be found in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE." R. Müllerson, *International Law, Rights and Politics* (London, New York: Routledge, 1994), pp. 108-109.

[59] *Case No. 7615 (Brazil), Resolution No. 12/85,* 5 March 1985, OAS Doc. OEA/Ser.L/V/II.66, Doc.10,rev.1, 1985 (concerning the Yanomami of Brazil).

[60]HRC General Comment No. 24, "Reservation", CCPR/C/21/Rev.1/Add.6, 1994, para. 8.

[61] Badinter Arbitration Commission Opinion No. 1, *op.cit.*, para. 1(e).

for customary law through State practice and *opinio juris*.

The 1994 Report of the European Commission for Democracy Through Law, based on responses by 26 States to a questionnaire on the status of minority rights protection in their respective national legal systems, reveals that a significant number of States do grant special rights to minority groups with regard to language, education and culture.[62] This shows that there is arguably a tendency discernible on the part of State to acknowledge that mere non-discrimination and formal equality are not sufficient for the protection of minority rights in the sense of protection of identity for minorities. According to the Report, virtually all States which responded to the questionnaire have regulated the issue of linguistic minority protection in the form of law. In Greece, Poland and Turkey, the question of the right of minority groups to use their mother-tongues is regulated by international treaties, which are, in principle, directly applicable in domestic law. The question of the use of languages in the public sphere is much more complex. In Germany, German is the only official language of the country. According to federal law, only German may be used in the public sphere. However, the Sorban minority has the right to use its language in judicial and administrative matters at the level of the Land. In Austria, it is guaranteed that persons belonging to Slovene and Croat minorities have the right to use their language before the judicial and administrative authorities of the regions where they are represented. In Belgium, the three languages, French, Dutch and German, have the status of official languages. Their use in relation with government departments, as well as in the fields of justice and social affairs, is the subject of very detailed legislation. This principle is also seen in Switzerland, where German, French, Italian and Romansh constitute the four national languages, the first three being official languages. In Canada, the use of languages in the official sphere has produced abundant measures of regulations. English and French are the two official languages, and linguistic laws are tending to establish a generalised official bilingualism. In Cyprus, legislative, executive and administrative acts and documents must be written in the two official languages (Greek and Turkish). In Italy, while Italian is the only official language of the Republic, German enjoys exactly the same status as an official language in the region of Trentino-Alto-Adige, particularly in the province of Bolzano where the German-speaking minority which constitutes about two-thirds of the population is concentrated.

[62] European Commission for Democracy Through Law, "The Protection of Minorities", Collected Texts No.9, 1994.

It can therefore be used in the public sphere on the same basis as Italian. In Finland, the constitution gives both principal languages, Finnish and Swedish, exactly the same official status. The Slovak Republic provides that Slovakian is the official language throughout its territory, but the constitution, in its Article 34, guarantees to persons belonging to a national minority, the right to use their language in official communications.[63] In the legislative elevation of the Maori language to an official language of New Zealand in 1987, persons were given the right to speak Maori in legal proceedings.[64] However, the system and organisation of teaching of the languages of minorities, or in those languages, vary from State to State.

Whatever conclusions for customary law on the matter, it is clear that contemporary practice reveals broader contexts where the emergence of customary law might be of major significance.[65] In this regard, the 1992 UN Declaration on Minority Rights is significant in that it was adopted by the UN General Assembly by 'consensus' and it has acquired legal force through bilateral treaties incorporating its standards, providing that such commitments were to be applied as legal obligations, e.g. Treaty on Good-Neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic of 19 March 1995.[66]

5. The Protection of Minority Rights at the European Level

This section will review European instruments related to the protection of the rights of persons belonging to minorities. The Framework Convention on the Protection of National Minorities (FCNM) under the Council of Europe and relevant documents at the Organisation on Security and Cooperation in Europe (OSCE) are the main object of the discussion. The European Convention on Human Rights is also indirectly related to the protection of minority rights, even though the main purpose and objective of the Convention was not the protection of minority rights as such.[67] The

[63] *Ibid.*, pp. 63-64.
[64] CCPR/C/37/Add. 8 (1988), para. 149.
[65] European Commission for Democracy Through Law, "Local self-government, territorial integrity and protection of minorities", Collection No. 16, Council of Europe, 1997.
[66] See section 6 of this chapter "Minority Protection through Bilateral Treaties in Central and Eastern Europe", pp. 147-150.
[67] Estonia and Latvia joined the European Union with eight other new member States on 1 May 2004. It is true that the European Union (EU) is also paying more attention to the protection of minorities as is revealed by the establishment of the Arbitration Commission for Yugoslavia and the requirement that

protection of minority rights under the European Convention on Human Rights will be discussed in Chapter 6 of this thesis.

5. 1. The Framework Convention for the Protection of National Minorities[68]

The entry into force of the Framework Convention for the Protection of National Minorities (FCNM) is a remarkable development for the protection of the rights of persons belonging to minorities at the European level, as it represents the first international treaty with a multilateral general regime for the protection of minority rights. As the FCNM was adopted within the framework of the Council of Europe, it can also be stated that the deficiencies of the European Convention of Human Rights concerning the protection of minority rights may be partially rectified. The monitoring of States parties compliance with their commitments under the FCNM is the responsibility of the Committee of Ministers of the Council of Europe.[69] States parties are obliged to transmit periodic reports providing information on legislative and other measures taken to give effect to the principles set out in the FCNM.[70] The FCNM is a milestone for the Council of Europe as it provides its first comprehensive statement of

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States wanting to join the membership of the union must ensure the protection of minority rights as envisaged by the OSCE. However, as minority protection at the EU level is not currently extensively developed and there seems to be no general policy about minority issues yet. Of course, various new procedures in the Maastricht and Amsterdam treaties are relevant for the protection of minorities and could likely develop in a more elaborate way within the framework of the EU. In particular, the EU has been devising a range of ways and means of committing Eastern European countries to the protection of minorities as a condition to their accession to the EU. C. Hillion "On Enlargement of the European Union: The discrepancy between membership obligations and accession conditions as regards the protection of minorities", *Fordham Int'l L.J*, Vol., 27, 2004, pp. 715-740; M. Johns, " "Do As I Say, Not As I Do": The European Union, Eastern Europe and Minority Rights", *East European Politics and Societies*, Vol., 17, 2003, p. 682-699.

[68] The Convention was adopted by the Committee of Ministers on 10 November 1994 and entered into force on 2 January, 1998. ETS, 157 (1994). As of 31 August, 2005, the total number of ratifications/accessions is 39 States, including Estonia and Latvia.

[69] Article 24 (1) of the FCNM.

[70] The FCNM establishes a reporting system requiring signatories, one year after the instrument has entered into force, to transmit "full information on the legislative and other measures taken to give effect to the principles set out" in the document. See Article 25 (1) of the FCNM. Upon receiving the information, the Committee of Ministers is assisted in "evaluating the adequacy of the measures taken by the Parties" by an Advisory Committee, composed of "recognized experts in the field of the protection of national minorities." *Ibid.* Article 26 (1). The FCNM requires States parties to transmit "information of relevance to implementation" to the Secretary-General of the Council of Europe every five years "and whenever the Committee of Ministers so requests." *Ibid*,, Article 25 (2). See Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the FCNM, Res. 97(10), Comm. of Ministers, P 21 (1997) Once a State report is received, the Advisory Committee evaluates it, preparing an opinion that is submitted to the Committee of Ministers. In drawing up this document, the Advisory Committee is not limited to the information contained in the State's report. For example, it may "request additional information from the Party whose report is under

the rights to which national minorities are entitled and specifies the scope of the obligations that signatories have to ensure the "effective protection" of those rights and freedoms. Noting that the "upheavals of European history have shown that the protection of minorities is essential to stability, democratic security and peace in this continent", the FCNM underlines that "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."[71]

The core of the FCNM, the sixteen articles of Section II, specify the rights of persons belonging to minorities that are to be protected. They include: the right of equality and equal protection of the law (Article 4); the rights of freedom of peaceful assembly, association, and expression, and thought, conscience, and religion (Article 7); the right for persons to manifest religion or belief and to establish religious institutions, organisations, and associations (Article 8); the right to use freely and without interference the minority language, in private and in public, orally and in writing, and the right for persons to be informed, in a language they understand, of the reasons for arrest, the nature of the accusation, and the right to defend themselves in this language (Article 10, (1), (3)); the right for persons to use their names in the minority language (with official recognition) and the right to display signs in the minority language (Article 11(1), (2)); the right to set up and manage their own private educational and training establishments (Article 13); and the right to learn the minority language (Article 14).

The Framework Convention does not simply recognise rights, but also attempts to influence State behavior towards national minorities. On the one hand, signatories pledge to limit specific types of State action that may prove injurious to the interests of national minorities. Hence, parties undertake to refrain from:
"policies or practices aimed at assimilation of persons belonging to national minorities against their will";[72] acts that would "hinder the creation and the use of printed media by persons belonging to national minorities";[73] "measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined

consideration." *Ibid.*,P 29, or "hold meetings" with its government's representatives. *Ibid.*, P 32.
[71] Preamble of the FCNM, paragraphs 6-7.
[72] Article 5 (2) of the FCNM.

in the present framework Convention";[74] initiatives that would either "interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers ... in particular [with] those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage";[75] and initiatives that would "interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations (NGOs), both at the national and international levels."[76]

In addition to respecting rights and constraining their behavior, States parties to the FCNM agree to take positive measures to advance the status of national minorities. For example, the States 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";[77] "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential element of their identity, namely their religion language, traditions and cultural heritage";[78] "to encourage a spirit of tolerance and intercultural dialogue, to promote mutual respect and understanding and co-operation among all persons living on their territory";[79] "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";[80] "to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and ... to promote tolerance and permit cultural pluralism";[81] "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";[82] "to foster knowledge of the culture, history, language, and religion of their national minorities and of the majority";[83] "to provide adequate

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[73] Article 9 (3) of the FCNM.
[74] Article 16 of the FCNM.
[75] Article 17 (1) of the FCNM.
[76] Article 17 (2) of the FCNM.
[77] Article 4 (2) of the FCNM.
[78] Article 5 (1) of the FCNM.
[79] Article 6 (1) of the FCNM.
[80] Article 6 (2) of the FCNM.
[81] Article 9 (4) of the FCNM.
[82] Article 10 (2) of the FCNM.
[83] Article 12 (1) of the FCNM.

opportunities for teacher training and access to textbooks";[84] "to promote equal opportunities for access to education at all levels for persons belonging to national minorities";[85] "if there is sufficient demand, ... [to] endeavor to ensure ... that persons belonging to those minorities [in areas in which they constitute dense populations] have adequate opportunities for being taught the minority language or for receiving instruction in this language";[86] and to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs."[87]

It is important to note that the FCNM does mirror Article 27 of the ICCPR in its call to promote the conditions necessary for national minorities "to maintain and develop their culture" and to preserve their identity, "namely their religion, language, traditions and cultural heritage."[88] It also recalls Article 27 of the ICCPR in its recognition that "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."[89]

Article 10 notes a right to use the minority language in public and private.[90] Article 11 stresses the right to use names and the right to exhibit signs and other information in the minority language, and also provides that, in areas of traditional habitation, States parties should endeavor, in given circumstances, to display local names and street signs in the minority language.[91]

Article 14 calls for the recognition that every member of a minority has the right to learn his or her minority language. While the Explanatory Report to the FCNM notes that this "does not imply ... action, notably of a financial nature, on the part of the State,"[92] Article 14 also calls upon States Parties to endeavor to ensure, under given circumstances, that "persons belonging to ... minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."[93]

In adopting the FCNM, the Council of Europe did much to address the deficiencies

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[84] Article 12 (2) of the FCNM.
[85] Article 12 (3) of the FCNM.
[86] Article 14 (2) of the FCNM.
[87] Article 15 of the FCNM.
[88] Article 5 (1) of the FCNM.
[89] Article 3 (2) of the FCNM.
[90] Article 10 (1) of the FCNM.
[91] Article 11 of the FCNM.
[92] Explanatory Report of the FCNM (Strasbourg: Council of Europe, 1999), pp. 34-35.
[93] Article 14 of the FCNM.

of its pre-existing system of minority protection. By championing minority rights as an obligation of international law, it incorporated standards that had long been part of Article 27 of the ICCPR and reinforced the consensus that minority protection was a critical element of global security. By explicitly specifying the rights necessary to minority protection, the Council of Europe gave content to prerogatives that were undefined under the European Convention on Human Rights and Fundamental Freedoms.[94]

However, it is also true that FCNM has exposed its limitations in terms of the effective protection of the rights of persons belonging to minorities. First, while this instrument explicitly recognises a broad series of rights for national minorities and underlines affirmative measures that States should take to advance these prerogatives, that the exercise of minority rights is qualified by the so-called escape clause with phrasing like "where such a request corresponds to a real need" and "as far as possible" is problematic for the effectiveness of this right.[95] For example, in Article 10, States parties "shall endeavour to ensure" the conditions making it possible to use the minority language in relations with administrative authorities, but only 1) in areas traditionally inhabited by minorities, 2) if minorities so request, and 3) when that request corresponds to a real need.[96]

5.2. Minority Protection in the Organisation on Security and Co-operation in Europe (OSCE)

The Organisation on Security and Co-operation in Europe (OSCE)[97] is a regional security organisation with fifty-six participating States drawn from Europe, Central Asia and America. Initially, the OSCE process began with the signing of the Helsinki Final Act[98] of the Conference on Security and Co-operation in Europe (CSCE) in 1975. The most significant event that changed the nature of the CSCE forum was the collapse of Communism in Eastern Europe. This fundamental change in the character

[94] See, generally, M. Weller, ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005).

[95] K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights* (The Hague and London: Martinus Nijhoff, 2000), p. 212.

[96] Article 10 (2) of the FCNM.

[97] For the main documents for the OSCE, see A. Bloed (ed.), *From Helsinki to Vienna: Basic Documents of the Helsinki Process* (The Hague: Martinus Nijhoff, 1990).

[98] Helsinki Final Act, 14 ILM 1272 (1975).

of the forum was clearly expressed in the Charter of Paris for a New Europe,[99] which 'unanimously' accepted the inalienability of human rights and the connection between democracy and the market economy as the basis for sound economic, social and political development. The CSCE shifted focus towards the prevention and management of conflict in Europe, and this change required it to institutionalise itself at a more advanced level. New structures and new implementation mechanisms were developed, and the renaming of the forum to the Organisation for Security and Cooperation in Europe (OSCE) was one of those efforts to respond to different situations.

A fundamental expansion of human rights commitments came following the end of the Cold War and the 1990 Copenhagen Meeting of the Conference on the Human Dimension[100] was 'revolutionary' in its expansion of the OSCE human rights commitments. The OSCE States agreed on the principles of free elections, representative government, the rule of law, separation of States from political parties, and the independence of the judiciary. The will of the people, freely and fairly expressed through periodic and genuine elections, the participating States declared, is the basis of the authority and legitimacy of all government.[101] Furthermore, the Document contained a number of specific pledges for the protection of minority rights.[102] OSCE commitments are politically, not legally, binding, although they do establish standards of behaviour which the participating States are committed to upholding. These political commitments may harden into legal norms.[103]

The Helsinki Final Act and the Concluding Document of the Copenhagen Meeting on Human Dimension (Copenhagen Document) are the basic documents which give substance to the standards of minority rights in the OSCE.[104] The basis for the

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[99] Charter of Paris for a New Europe, 30 ILM 190 (1991).
[100] The Copenhagen Meeting of the Conference of Human Dimension, 29 ILM 1305 (1990).
[101] *Ibid.*, p. 1309.
[102] *Ibid.*, pp. 1318-1320.
[103] *Sidiropoulos and 5 others v. Greece*, No. 26695/95, 10 July 1998, Reports of Judgments and Decisions, 1998-IV, http://cmiskp.echr.coe.int, see Chapter 6 below, pp. 185-186. It has been emphasised that the binding force of such OSCE documents cannot be questioned. Van Dijk states that: "A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force." P. Van Dijk, "The Final Act of Helsinki: basis for a pan-European system?", *Netherlands Yearbook of International Law*, Vol., XI, 1980, p. 110. Although non-compliance with a non-legally binding commitment may not *per se* generate legal responsibility, a violation of politically binding commitments is also unacceptable as a violation of norms of international law. The provisions contained in these OSCE texts often reflect principles of international law.
[104] The Copenhagen Document has been called a European Constitution of Human Rights, whose expression shows the legal significance of the Document in examining minority rights standards in

protection of minority rights stems from Principle VII of the Final Act, which guarantees equality before the law to members of minorities as well as the protection of all the general human rights provisions of the OSCE. Principle VII of the Final Act contains the following statement:

> "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."[105]

The Third Basket on "Co-operation and Exchange in the Field of Education" in the Final Act, contains another statement concerning minorities:

> "National minorities or regional cultures. The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of culture, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members."

The important question to answer from the above provisions is how to interpret the 'escape clause' concerning the existence of minorities in the participating States, "The participating States on whose territory national minorities exist..."and "...when such minorities or cultures exist within their territory..." Are these expressions to be taken to mean a certain degree of discretion on the part of the participating States to decide on the existence of minorities? As the wording of the above provision is similar to that of Article 27 of the ICCPR, it would be useful to recall the legal nature of Article 27. As observed, the wording of Article 27 of the ICCPR does not give discretion to States to accept or refuse the existence of minorities. The existence of a minority in a State is an objective issue and does not depend on legal recognition of the State in which the persons belonging to minorities reside.[106] This principle is also to be applied to the above provisions of the Final Act regarding minority protection.

Europe. See A. Bloed., "Successful Meeting of the Conference on the Human Dimension of CSCE", *Netherlands Quarterly of Human Rights*, Vol., 8, 1990, pp. 235-260. See also, M. Tabory, "Minority Rights in the CSCE Context", *Israel YB. H.R,* Vol., 20, 1991, pp. 197-221. The Copenhagen provisions have also been incorporated as 'legal obligations' in important bilateral treaties, such as the 1995 basic treaty between Hungary and Slovakia. The OSCE provisions may also develop into customary law through State practice and *opinio juris*. According to Hofmann, at least some of the Copenhagen provisions may have even developed into customary international law. R. Hofmann, "Minorities: Addendum 1995" in P. Macalister-Smith., (ed.), *Encyclopedia of Public International Law* (Amsterdam: Elsevier Science B.V., 1993), Vol., 3, pp. 420-421.

[105] Reference only to "national minorities" in the Final Act, not national, ethnic and linguistic minorities must not be seen as a limitation of the concept of a minority. According to Tabory, the term of "national minorities" was chosen as a "hybrid" between the terminology in the international human rights documents and the Eastern European concept of 'nationalities'. The use of the term of 'nationalities' is primarily for historical reasons relating to Eastern Europe. *Tobory, Minority Rights in the CSCE Context, op.cit.,* p.208.

The Copenhagen Document contains important commitments in respect of rights of persons belonging to minorities. The participating States recognised the right of persons belonging to national minorities "to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will."[107] Persons belonging to national minorities have the right to use freely their mother tongue in private as well as in public,[108] and to establish and maintain educational institutions, and to seek voluntary financial and other contributions as well as public assistance.[109] Participating States further committed themselves to "endeavour to ensure" that persons belonging to national minorities, notwithstanding the need to learn the official languages, have adequate opportunities for instruction in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.[110]

The Copenhagen Document recognises both the negative and the positive aspects of the right to ethnic, religious or linguistic identity: participating States are to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity." [111] The commitments do not extend to the introduction of territorial self-government for national minorities, although the OSCE participating States have recognised the value of "autonomous administrations corresponding to the specific historical and territorial circumstances of national minorities" as one mechanism by which the identity of national minorities may be protected and promoted.[112]

6 Minority Protection through Bilateral Treaties in Central and Eastern Europe[113]

The protection of ethnic, religious or linguistic minorities through inter-State treaties

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[106] *The Greco-Bulgarian Communities Case*, PCIJ Series A/B, No. 17, 1930, p. 22.
[107] Para. 32 of the Copenhagen Document.
[108] Para. 32. 1 of the Copenhagen Document.
[109] Para. 32. 2 of the Copenhagen Document.
[110] Para. 34 of the Copenhagen Document.
[111] Para. 33 of the Copenhagen Document.
[112] Para. 33 of the Copenhagen Document.
[113] See Article 2 of the proposed Convention in Chapter 8 below, pp. 257-258.

does not constitute a new phenomenon in international law, as it was already made in the practice of the League of Nations. The idea of minority protection through bilateral treaties reappeared after World War II in the peace treaties with Romania, Hungary and Bulgaria, as well as in the agreement on the status of South Tyrol. The practice of the protection of minority groups through bilateral treaties was reinvented by Germany after 1991. The reasons are rooted in German reunification and the related need to guarantee the frontiers resulting from World War II, as well as in the presence of minorities of German origin in Central and Eastern Europe whose protection needed to be ensured. In addition to treaties on neighbourly relations with each of its Central European neighbours, Germany has also concluded treaties on friendly co-operation and partnership with Bulgaria (1991), Hungary (1992) and Romania (1992). A similar policy was pursued during this period by Hungary, which concluded bilateral agreements with five of its neighbours to deal with the problems of the Hungarian minorities. Parallel to this trend, the European Union has also promoted a policy aimed at guaranteeing stability in Central and Eastern Europe through bilateral agreements on a good neighbourliness, such as the treaties between Poland and its neighbours, the treaties between Russia and the CIS States (such as Kazakhstan and Kyrgyzstan), the treaties signed by Ukraine with Moldova and Lithuania as well as the bilateral treaties adopted by Hungary and its neighbours.[114] As for the Baltic States, it seems that they consider that the negotiations with Russia have not resulted in a major change in the delicate relations with their powerful neighbour, particularly with reference to the protection of the Russian minorities.[115]

The main differences between the earlier treaties on minorities (following World War I and World War II respectively) and the recent bilateral treaties are of a conceptual nature. Whereas the former refer to minorities as such and include different concepts and provisions of autonomy, the recent treaties in Central and Eastern Europe explicitly provide individuals belonging to minorities with certain individual rights and do not envisage autonomies as a means of protecting minority rights. However, the examples of the Aland Islands and South Tyrol prove that bilateral agreements may be suitable for establishing autonomous and or special statues for regions inhabited by

[114]See, generally, M. Avbelij, European Parliament review of the situations of national and ethnic minorities in the selected member States (Brussels: European Parliament, 2005), pp. 6-32;

[115] R. Müllerson, "New Developments in the Former U.S.S.R and Yugoslavia", *Va.J. Int'l. L,* Vol., 33, 1993, pp. 299-315; See, generally, R. Müllerson, *International Law, Rights and Politics* (London: Routledge, 1994).

national minorities, or for establishing personal autonomy where the minorities live dispersed. Nevertheless, it must be kept in mind that every minority situation presents its own particular characteristics. There is consequently no standard means of resolving the multitude of concrete problems which each case presents in a national context. No definition of minorities appears explicitly in most of the treaties, although in almost every case there is an underlying definition: the treaties refer in general to national minorities of the same ethnic origin as the majority in the neighbouring country. Therefore, the subjects of the minority-related provisions of the bilateral treaties are rather restricted, as they do not refer to all the minorities in the respective country.[116] The only advantage of this restrictive perspective could be the possibility of taking into account the specific historical and traditional needs of the minority communities concerned more specifically, which is not the case in general minority regulations. The minority provisions listed in the bilateral treaties can be grouped around some basic rights, such as the right to free expression, the right to maintain and develop one's ethnic, cultural, linguistic or religious identity in general, and linguistic rights, educational rights, the right to profess and practice one's own religion, and the right to establish organisations, the right to effective participation in the decision-making procedures, in particular.[117]

More importantly, several provisions dealing with minority rights in the bilateral treaties strongly bear the imprint of international and regional instruments on minority issues. One can find in these treaties provisions quoted almost verbatim from several documents on the protection of minority rights, such as the UN Declaration on Minority Rights and the OSCE Copenhagen Document. For instance, the treaty between Germany and the Czech and Slovak Federal Republic of 27 February 1992 (art. 20) declares that both parties will "fulfil as legal obligations the political commitments laid down in CSCE documents, and especially those laid down in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990." Even more explicit is the wording of Article 15 of the Romanian-German Treaty on Friendly Relations and Partnership in Europe of 21 April 1992 which declares that both parties should apply the minority rights laid down in the Copenhagen Document and other OSCE text as legal obligations. Similar provisions

[116] *Avbelij, European Parliament review of the situations of national and ethnic minorities in the selected member States, op.cit.*, p. 30.

were enshrined in the treaty between Hungary and Slovakia (arts. 2 and 15): "in the interest of defending the rights of persons belonging to the Slovak minority living in the Hungarian Republic, as well as the Hungarian minority living in the Slovak Republic, shall apply as legal obligations the rules and political commitments laid down in the following documents..." The provisions then list the Copenhagen Document and the UN Declaration on Minority Rights. However, the wordings used in the minority provisions of the treaties are very often limited by vagueness and formulations which are difficult to interpret, such as "within the framework of their domestic legislation". These vague expressions could hinder the effective implementation of the provisions enshrined in these treaties.[118]

7. The Protection of Cultural Identity and the Baltic Implications

7. 1. The Protection of Minority Rights and the Status of the Ethnic, Linguistic Russian Populations in Estonia and Latvia

Even if the principles of the protection of minority rights are identified as above, this does not mean that rights of persons belonging to minorities are necessarily fully and effectively protected in their true sense at the domestic legal level. The gap between the reality and ideal of the protection of persons belonging to minorities under international standards of minority rights is evidently illustrated in the case of the fragile status of the ethnic, linguistic Russian populations in Estonia and Latvia. In this regard, it is ironic that Estonia and Latvia have both declared their commitments to protect minority rights through their own constitutions. For instance, the Constitution of Latvia proclaims their commitment to protect the rights of persons belonging to minority groups in the following terms:

> "Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity."[119]

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[117] G.E. Edwards, "Hungarian national minorities: recent developments and perspectives", *International Journal on Minority and Group Rights*, Vol., 5, 1998, pp. 345-367.

[118] K. Gal, "Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?", ECMI Working Paper, 1999, p. 12.

[119] Article 114 of the Latvian Constitution. The Constitution of the Republic of Latvia of 1922, officially published in Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs (Official Gazette), No. 6, 1994 and in Latvijas Vestnesis (LV, Official Gazette), No. 43, 1993. Estonia has similar provisions of minority protection in Articles 37 and 52 under Estonian Constitution. The Constitution of the Republic of Estonia, RT 26, 1992.

As noted, the Law on Cultural Autonomy for National Minorities in Estonia only applies to citizens. The right of all individuals belonging to ethnic, religious or linguistic minorities to identify with such a minority group with no disadvantage deriving from that choice is guaranteed under present international standards of minority rights.[120] The right of identity is essential in the international protection of minority rights, without which the protection of minority rights would be meaningless. Despite what the FCNM refers to "all persons living on a State's territory",[121] and exhortations from the OSCE HCNM not to restrict minority status only to "non-ethnic Estonians who are Estonian citizens" in ratifying the FCNM, Estonia has narrowed the scope of the application of the right to identity basically to Estonian citizens by entering a declaration when it ratified the FCNM.[122] In Estonia, the Law on Cultural Autonomy of National Minorities of 1993 specifically addresses the issue of the protection of minority rights. Article 1 of the Law stipulates an official definition of a minority as follows:

> "they are citizens of Estonia; they reside in the territory of Estonia; they have time-honored, stable and strong links with Estonia; they differ from Estonian by their ethnic affiliation, cultural and religious idiosyncrasies, or language; they are guided by the desire to conserve, by joint efforts their cultural tradition, religion and language, underlying their common identity."[123]

This means that in Estonia this stipulation effectively excludes 20 percent of the country's population or more than half of the Russian minorities from protection under the FCNM.[124] The Law enumerates basic rights of minority members, stipulating the procedure and rules for foundation of cultural autonomies which are supposed to maintain the system of minority educational and cultural organisation. However, no cultural autonomy for the ethnic, linguistic Russians has been established in Estonia since 1993.[125]

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[120] FCNM, Article 3(1); See also Article 4 (5) of the proposed Convention in Chapter 8 below, pp. 258-260.

[121] Article 6 (1) of the FCNM provides that "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."

[122] Letter to the Minister of Foreign Affairs of the Republic of Estonia, S. Kallas, 28 October, 1996, http://www.osce.org/hcnm/recommendations/estonia/1996/41hc17.html.

[123] Law on Cultural Autonomy of National Minorities of 1993, Unofficial translation from the Estonian Translation Centre. The same definition was again declared by Estonia upon the ratification of the Framework Convention for the Protection of National Minorities.

[124] Legal Information Centre for Human Rights, Non-Estonians in Figures 2, at http://www.lichr.ee/eng/researchers.analysis/non-estonians<uscore>in<uscore>figures2.htm

[125] Opinion on Estonia, ACFC/INF/OPI (2002), para. 29; *Poleshchuk, Non-citizens in Estonia, op.cit.*, p. 43; From the present writer's interview with Vadim Poleshchuk.

Latvia recently ratified the FCNM.[126] The Law on the Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups in Latvia, provides that "Republic of Latvia residents are guaranteed, irregardless of their nationalities, equal human rights which correspond to international standards."[127] However, there is no definition of a minority under this law. This law has not had any real practical effect for the protection of the Russian population due to its prevailing declarative nature.[128] Paragraph 4 of this law provides as follows:

> "The Republic of Latvia government and administration institutions are responsible for the preservation of the national identity and historical cultural environment of Latvia's ancient indigenous nationality, the Lives and for the renewal and development of the socio-economic infrastructure of their inhabited territories."[129]

Paragraph 5 also provides that:

> "All Republic of Latvia permanent residents are guaranteed the right to establish their own national societies, associations and organizations. The government's responsibility is to promote their activity and material provisions."[130]

However, this law has not provided any concrete mechanism for the implementation of its principles and goals. Latvia continues the Soviet-era practice of mandatory registration of ethnic origin in passports, a practice criticised in the review of the United Nations Committee of Elimination of Racial Discrimination (CERD). The CERD expressed its 'concern' as follows:

> "It is noted with concern that the legislation of the State party requires a person's ethnic origin to be recorded in his or her passport, which may expose members of some

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[126]Latvia issued declarations upon ratifying the FCNM (2005) as follows: "the notion "national minorities" which has not been defined in the Framework Convention for the Protection of National Minorities, shall, in the meaning of the Framework Convention, apply to citizens of Latvia who differ from Latvians in terms of their culture, religion or language, who have traditionally lived in Latvia for generations and consider themselves to belong to the State and society of Latvia, who wish to preserve and develop their culture, religion or language. Persons who are not citizens of Latvia or another State but who permanently and legally reside in the Republic of Latvia, who do not belong to a national minority within the meaning of the Framework Convention for the Protection of National Minorities as defined in this declaration, but who identify themselves with a national minority that meets the definition contained in this declaration, shall enjoy the rights prescribed in the Framework Convention, unless specific exceptions are prescribed by law."

[127] Law on the unrestricted development and right to cultural autonomy, Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs, No. 21, 1991; Human Rights Debate in Latvia 1995-1997, *Latvian Human Rights Quarterly*, 3/4, 1998.

[128] European Parliament Report on Citizenship and Constitutional Affairs (Brussels: European Parliament, 2005), pp. 17-18. In its comment on Ukraine's report under the FCNM, the Advisory Committee criticises the government for the vagueness of the provisions in the minority protection law. It stated the following: "Article 6 of the Law on National Minorities guarantees cultural autonomy for national minorities. This is however formulated only in an extremely general fashion, and the Advisory Committee considers that the content and the reach of this concept would merit being defined and developed in more detail." Ukraine State Report, ACFC/SR (99) 14, para. 32.

[129]Paragraph 4 of the Law.

[130] Paragraph 5 of the Law.

minorities to discrimination on grounds of their origin."[131]

The Latvian government further requires that, in order to register a change in ethnicity, an individual must prove ancestry of the desired ethnicity within two generations.[132]

The right to receive education is critical for the maintenance of identity of minority groups. The right to receive education in one's mother tongue is set forth in relevant instruments. For instance, Article 14 (2) of the FCNM stipulates that:

> "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 system, the persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."[133]

Minority rights related instruments require States to foster knowledge of the culture, history, language, and religion of their minorities.[134] The FCNM provides that minorities have the right to establish and manage educational facilities,[135] and while there is no obligation upon States to fund them, a separate provision in the Copenhagen Document explicitly notes that such facilities may "seek public assistance in conformity with national legislation."[136]

In Estonia and Latvia, many ethnic, linguistic Russians have complained that the governments have not allocated sufficient funding for teacher training in minority languages.[137] The Latvian government's so-called "Integration Programme" stresses the need to create a unified educational system in order to ensure the development of Latvian society as a civic society with common values and responsibilities. In particular, it stresses the importance of a common language for successful integration and therefore the need for Latvian language training, especially so that the younger generation is able to use it freely as a mean of communication. The main goals of the Integration Programme in the field of education are the development and implementation of minority education programmes and the promotion of collaboration between Latvian and minority schools.[138] However, the measures proposed in the

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[131] Concluding observation of the CERD on Latvia, A/54/18, para. 399.
[132] Law on Change of Name, Surname, and Ethnicity Record, Art. 11 (1). LV. 05. 07, 1994. Amendments LV, No. 98, 1996; LV, No. 29, 1997; LV, No. 333, 1998; LV, No. 45.46, 1999. LV is Latvijas Vestnesis (Official Gazzete).
[133] Article 14 (2) of the FCNM; Article 4 of the UN Declaration on Minority Rights.
[134] Article 12 (1) of the FCNM; Article 4 of the UN Declaration on Minority Rights; Article 7 (3), (4) of the proposed convention in Chapter 8 below, pp. 263-266.
[135] Article 13 of the FCNM.
[136] Paragraph 32 (2) of the Copenhagen Document.
[137] *Minority Protection in Latvia* (Budapest: Open Society Institute, 2002), pp. 340-344.
[138] *Ibid.*, p. 324.

field of education are viewed as the most controversial by many civil society representatives and minority parents, as they are based on the 1998 Education Law. According to this law, on 1 September 2004, teaching will occur only in the Latvian language in all ten grades of State and municipal general education and institutions.[139] The United Nations Human Rights Committee (HRC) stated as follows:

> While noting the explanation provided by the State party for the adoption of the Education Law of 1998, particularly the gradual transition to Latvian as the language of instruction, the Committee remains concerned about the impact of the current time-limit on the move to Latvian as the language of instruction, in particular in secondary schools, on Russian speakers and other minorities. Furthermore, the Committee is concerned about the distinction made in providing state support to private schools based on the language of instruction (Articles 26, 27 of the ICCPR). The State party should take all necessary measures to prevent negative effects on minorities of the transition to Latvian as the language of instruction. It should also ensure that if state subsidies are provided to private schools, they are provided in a non-discriminatory manner."[140]

The Estonian government's approach has shifted considerably over the past few years. Originally, the government announced that Russian language education would be completely discontinued in Estonian schools in 2007. However, with the adoption of amendments to the Basic Schools and Upper Secondary Schools Act,[141] the Estonian authorities eased their stance on this issue. The reform called for the elimination of stand-alone Russian schools in 2007, but allowed forty percent of the instruction within Estonian language schools to be in the Russian language. This treatment was to occur whether or not the school was located in an area of concentrated minority settlement. The Estonian Parliament relaxed these restrictions completely under Western pressure, however, adopting an amendment that would allow "state-funded high school education in the Russian language in Estonia after the year 2007."[142] Estonia's original objectives in moving toward an Estonian-language curriculum is to provide secondary school attendees with a knowledge of the Estonian language sufficient for daily and occupational communication, as well as the ability to study in the Estonian language for integrating non-ethnic citizens into the Estonian society. Yet, it appears that the ethnic, linguistic Russians do not take such an

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[139] Latvian Education Law, Article 9 (3). Latvian Education Law, LV. No. 343/344, 1998.

[140] Concluding observations of the Human Rights Committee: Latvia. 06/11/2003. CCPR/CO/79/LVA, para. 20.

[141] 1999-2000 Amendments to the Basic Schools and Upper Secondary Schools Act of 1993, RT I, No.33, 2000.

[142] Estonia Passes Amendment Leaving Russian Classes in High Schools After 2007, *Estonian Review*, Mar. 25-31, 2002, http://www.vm.ee/eng/kat<uscore>137/1729.html.

optimistic view of this programme.[143] The UN CERD has expressed concern that, in both Estonia and Latvia, instruments in minority languages may be reduced in the future.[144]

The right to language is essential for the preservation of the identity for minority groups and international standards of minority rights require States concerned to take steps to facilitate the use of minority languages in contacts between public officials and individuals belonging to minorities. These standards also underline the right of everyone belonging to minorities to "use freely and without interference his or her minority languages, in public and in private, orally and in writing."[145] In certain circumstances, the FCNM requires States parties to "make possible the use of minority languages in communication with administrative authorities."[146] This requirement applies "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..."[147] The protection of language rights for minority groups causes serious concerns in Estonia and Latvia, whose minority languages are officially "foreign" despite being spoken by more than 30 percent of inhabitants.[148] In both countries, legal provisions require that all communication with the pubic authorities must be carried out in the majority language. In Latvia, where about 40 percent of the population do not speak Latvian as a first language,[149] State authorities are nevertheless explicitly prohibited from receiving written submission in language other than the State language, except in emergency cases. Latvian State Language Law prohibits acceptance and consideration of any application or complaints from individuals if they are not now written in the State language or not supplied with a certified translation into the State language. Article 10 (2) provides that:

> "State and municipal institutions, courts and agencies belonging to the judicial system, as

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[143] *Minority Protection in the EU Accession Process* (Budapest: Open Society Institute, 2001), pp. 54-56.

[144] Concluding observation of CERD on Latvia, 12/04/2001. CERD/C/304/Add.79, para. 18; Concluding observation of the Committee on the CERD: Estonia, 19/04/2000, CERD/C/304/Add. 98, para. 12.

[145] Article 10 (1) of the FCNM.

[146] Article 10 (2) of the FCNM.

[147] *Ibid.*

[148] Article 5 of Latvian Law on State Language provides that "For the purpose of this Law, any other language used in the Republic of Latvia, except the Liv language, shall be regarded as a foreign language." Latvian Law on State Language, LV. No. 428/433, 1999. Estonian Language law, Article 2 (1) provides that: "For the purposes of this Act, any language other than Estonian is a foreign language." Law on Language, RT, No. 23, 1995.

[149] Data from the Latvian Naturalisation Board, in July 2005; See also *Minority Protection in the EU Accession Process, op.cit.*, p. 52.

> well as state and municipal enterprises (or companies) shall accept and examine documents from persons only in the state language, except for cases set forth in paragraphs 3 and 4 of this Article and in other laws. The provisions of this Article do not refer to the statements of persons submitted to the police and medical institutions, rescue services and other institutions when urgent medical assistance is summoned, when a crime or other violation of the law has been committed or when emergency assistance is requested in case of fire, traffic accident or any other accident."[150]

This provision has resulted in widespread official refusal to consider appeals and petitions submitted to various State institutions by ethnic, linguistic Russian minorities under investigation. The UN HRC expressed its concern as follows:

> "The Committee is concerned about the impact of the state language policy on the full enjoyment of rights stipulated in the Covenant. Areas of concern include the possible negative impact of the requirement to communicate in Latvian except under limited conditions, on access of non-Latvian speakers to public institutions and communication with public authorities. The State party should take all necessary measures to prevent negative effects of this policy on the rights of individuals under the Covenant, and, if required, adopt measures such as the further development of translation services."[151]

In Estonia, local governments may adopt languages other than Estonian as their official working language where minorities make up at least 50 percent of permanent residents, upon the approval by the national government of a formal local government request.[152] However, no such requests have been approved.[153] Moreover, the Advisory Committee on the FCNM is seriously concerned about Article 23 of the Language Act, which provides that public signs, signposts, announcements, notices and advertisements shall be in Estonian. The Advisory Committee is of the opinion that this provision is so wide in its scope that it hinders the implementation of the rights of persons belonging to minorities, especially since the term "public" appears in this context to encompass also a range of information provided by private actors and since the obligation to use Estonian is largely interpreted as excluding the additional use of a minority language. The Advisory Committee stresses that, to the extent that the provision at issue prevents a person belonging to a national minority from displaying signs and other information of a private nature visible to the public, it is not compatible with Article 11 of the FCNM. Bearing in mind that the expression "of a

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[150] Latvian Law on the State Language, Article 10(2)

[151] Concluding observations of the Human Rights Committee: Latvia. 06/11/2003. CCPR/CO/79/LVA, para. 19.

[152] Article 10 (1) of the Estonian Language Law provides that: "In local governments where at least half of the permanent residents belong to a national minority, everyone has the right to receive answers from state agencies operating in the territory of the corresponding local government and from the corresponding local government and officials thereof in the language of the national minority as well as in Estonian."

[153] V. Poleshchuk, *Non-Citizens in Estonia* (Tallinn: Legal Information Centre for Human Rights, 2004), pp. 15-16.

private nature" in Article 11 of the FCNM refers to all that is not official, there should not be a prohibition to use a minority language for example in a sign, poster or an advertisement of a private enterprise by persons belonging to a national minority. Against this background, the Advisory Committee is of the opinion that Estonia should revise the relevant legislation and practice with a view to guaranteeing full implementation of the FCNM.[154]

The question of the protection of persons belonging to minority groups is inseparable from language issues in Estonia and Latvia. At the same time, language usage is intimately related to citizenship status and community membership and, fundamentally, to national identity: language is the chief marker of both the ethnic, linguistic Russian minority populations and Estonian and Latvian majorities.[155] This issue, in relation to the protection of the ethnic, linguistic Russians was dealt with within the European Court of Human Rights.[156] The view of the Advisory Committee on the FCNM also reflects this contradictory reality of the protection of minority rights in Estonia. The Advisory Committee addressed Estonia's requirement of language proficiency in areas of public and private employment. While it acknowledged that a certain level of language proficiency may be legitimately required in a number of areas of employment and that this can cause difficulties for persons belonging to ethnic, religious or linguistic minorities in their attempts to gain access to employment, it emphasised that it was "nevertheless concerned that the current language legislation of Estonia contains provisions that could be interpreted in a manner that would make such proficiency requirements overly extensive and further exacerbate problems related to the implementation of Article 15 of the Framework Convention of the Protection of National Minorities."[157] Singling out the passed proficiency requirements for service and sales employees, it underlined that "the application of this and other proficiency requirements must be strictly limited to the situations where they are necessary to protect a specified public interest."[158] The UN HRC also stated as follows:

> "The Committee is concerned at the practical implementation of Estonian language proficiency requirements, including in the private sector, and the effect this may have on the availability of employment to the Russian-speaking minority. It is also concerned that,

[154]Opinion on Estonia, ACFC/INF/OPI (2002), para. 43.
[155] N. Maveety & A. Grosskopf, "Constitutional Articulation: "Constrained" Constitutional Courts as Conduits for Democratic Consolidation", *Law & Soc'y Rev.*, Vol., 38, 2004, pp. 463-486.
[156] See the *Podkolzina Case* in Chapter 6 below, pp. 188-190.
[157]Opinion on Estonia, ACFC/INF/OPI (2002), para. 60.
[158] *Ibid.*

in those areas where a substantial minority speaks primarily Russian, public signs are not posted also in Russian. The State party is invited to ensure that, pursuant to article 27 of the Covenant, minorities are able in practice to enjoy their own culture and to use their own language."[159]

7. 2. The Protection of the ethnic, linguistic Russians under Minorities-Specific Standards and its Implications

The preceding examinations of minorities-specific standards in this chapter have demonstrated that the ethnic, linguistic Russians in Estonia and Latvia are entitled to the enjoyment of minority rights under present international law and that Estonia and Latvia, as the parties of the ICCPR and the FCNM, are obliged to protect their cultural identities by way of implementing protective measures at the domestic legal level. Citizenship is not relevant to the determination of the members of minority groups as the holders of minority rights, provided that they have met objective and subjective criteria for the determination of minority status, as examined in Chapter 4. In this regard, Estonia's limited granting of minority rights with reference to the status of citizenship at the domestic legal level is contrary to the aim of minority protection under minorities-specific standards, since it would result in leaving a substantial part of persons belonging to ethnic, religious or linguistic minority groups outside the scope of minority protection.[160] In the case of Latvia, even though it does not require citizenship to grant minority status at least in formal terms, given that many ethnic, linguistic Russians remain stateless and non-citizens because of Latvia's restrictive citizenship law, the effectiveness of minority protection is dubious. Furthermore, whether the Law on Unrestricted Development of National or Ethnic Groups in Latvia and the Rights to Cultural Autonomy 1991 can be regarded as a special law for the protection of minority rights is uncertain, as there is no concrete mechanism for the protection of cultural identity for ethnic, religious or linguistic minority groups.[161]

More seriously, even if the ethnic, linguistic Russians in Estonia and Latvia are entitled to minority rights in principle, irrespective of whether the persons in question are citizens of Estonia and Latvia under minorities-specific standards, it seems clear that the protection of cultural identity alone is not sufficient for the effective protection

[159] Concluding observations of the Human Rights Committee: Estonia 15/04/2003. CCPR/CO/77/EST, para. 16.
[160] See Article 1 of the proposed convention in Chapter 8 below, pp. 256-257.
[161] European Parliament Report on Citizenship and Constitutional Affairs (Brussels: European Parliament, 2005), pp. 17-18.

of ethnic, linguistic Russians, considering the existence of stateless persons and non-citizens as persons belonging to the Russian minority. For instance, the protection of minority rights in Estonia and Latvia may lack effectiveness in that the realisation of minority rights in its real sense is, to a larger extent, intimately related to the enjoyment of the rights derived from citizenship status, such as the exercise of the right to political participation. Under the FCNM, States parties are obligated to respect the rights of persons belonging to minorities to effective participation in public affairs, including matters relating to minority identity, and in regional and national decision-making.[162] The FCNM requires States Parties to "create" conditions necessary for such participation.[163] However, in Estonia and Latvia, many ethnic, linguistic Russians still lack citizenship, and therefore face limitations to full political participation in their States of residence. An estimated 555,000 stateless 'non-citizens' in Latvia, the majority of whom are ethnic, linguistic Russians were under-represented in both the national legislation and the municipal level.[164] In Estonia, provision was made for Soviet-era settlers to vote in local elections, although non-citizen ethnic, linguistic Russians that make up approximately 20 percent of the total population are still unable to participate in national elections.[165] Moreover, until recently legislation in Latvia prescribed language requirements for members of Parliament and candidates for positions in representative bodies, with the consequence that ethnic, linguistic Russian 'citizen' candidates could be barred from running for public office. In both Estonia and Latvia, citizenship laws and language legislation restrict the employment of non-citizens in a wide range of public and private positions.[166] This is the reason why the right to political or public participation of persons belonging to minorities in relevant decision-making processes in their States of residence is central to the effective protection of persons belonging to minority groups. This issue is examined in Chapter 7 of this thesis.

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[162] Article 15 of the FCNM.

[163] *Ibid.*

[164] Data from the Latvian Naturalisation Board, 2005; *Minority Protection in the EU Accession Process, op.cit.*, p. 60.

[165] Under Article 41 of the Estonian Constitution, only Estonian citizens can be members of a political party. See also, *Poleshchuk, Non-Citizens in Estonia, op.cit.*, p. 25.

[166] *Minority Protection in the EU Accession Process, op.cit.*, pp. 60-61 and Appendix A; *Ibid.*, pp. 21-31.

8. Conclusions

(1). The jurisprudence underlying the protection of ethnic, religious or linguistic minority groups by the PCIJ has provided the principles of the protection of minority rights in modern international law that are still valid today. They are non-discriminatory of persons belonging to ethnic, religious or linguistic minorities as opposed to the majority population of their State of residence and the protection of their ethnic, linguistic and religious characteristics made effective by positive measures of the States concerned. Yet, it is also observable that the effectiveness of the principle of non-discrimination for the protection of such minorities during the League of Nations period was questionable in terms of the exact scope of its applicability to concrete situations, as illustrated by the differences of the enjoyment of rights, according to citizenship status under the Treaty of Poland. However, it also should be noted that the PCIJ's Advisory Opinion in *the Polish Nationality Case* rejected this restricted version of minority protection.

(2). Article 27 of the ICCPR and the UN Declaration on Minority Rights can be taken as evidence of the existence of the rights of persons belonging to minorities at the United Nations level. The range of relevant legal opinions and UN practice studied above on the nature of Article 27 of the ICCPR as well as the review of the UN Declaration on Minority Rights have indicated that a State's positive measures are required to protect the identity of persons belonging to minority groups at the domestic legal level. It may be stated that the principles of minority protection under the League of Nations by way of justified and proportionate differential treatment for the benefits of persons belonging to minorities are incorporated in the spirit and aim of Article 27 of the ICCPR and the UN Declaration on Minority Rights, constituting the principles of minority protection at the UN level.

(3). The weak basis of the protection of minority rights under the European Convention on Human Rights has been overtaken by the FCNM and the normative authority of the OSCE Documents relating to the protection of minority rights. The FCNM keep in line with the principles of the protection of minority rights affirmed at the UN level.

(4). Although the question of whether the legal status of Article 27 of the ICCPR has become a norm of customary international law or not is not certain at present, it can be interpreted that the protection of minority rights in the sense of the protection of

identity for minorities requires States concerned to protect and promote the cultural identity of persons belonging to minority groups in their State of residence through the implementation of protective measures at the domestic legal level under minorities-specific standards.

(5). The examination of minorities-specific standards in this chapter as well as the definitional question of a minority in Chapter 4 have indicated that the ethnic, linguistic Russians stateless persons and non-citizens in Estonia and Latvia are entitled to minority rights. The practice of Estonia under which only citizens can be members of a minority as holders of minority rights is contrary to the aim of minority protection under minorities-specific standards. Even though Latvia does not require citizenship as a requirement for receiving minority status, given that many people have remained stateless and non-citizens because of restrictive citizenship laws and that there is no special law for minority protection, the effective protection of minority rights in Latvia is hardly secured. States' policies concerning minority protection will be decided within domestic institutions, so concrete State practice may vary from State to State. But the important point is that minorities-specific standards require States concerned to protect the cultural identity of persons belonging to minorities by way of providing protective measures for the purpose of protecting and promoting their ethnic, religious or linguistic characteristics in principle.

(6). It is thus possible to argue that, as the parties of the ICCPR and the FCNM, Estonia and Latvia are obliged to protect the ethnic, linguistic Russians in order for them to maintain and promote their ethnic, religious or linguistic characteristics at the domestic legal level. The practice in Estonia and Latvia in relation to the protection of the ethnic, linguistic Russians seems to fall short of this demand in terms of effective minority protection. However, it is also true that the examples of Estonia and Latvia with reference to the existence of ethnic, linguistic Russian non-citizens and stateless persons have shown that cultural protection of minority rights in terms of the protection and promotion of identity for persons belonging to minorities under minorities-specific standards is not sufficient for the effective protection of persons belonging to minorities, because in many cases citizenship status has been linked to the ability to enjoy various human rights at the domestic legal level, which obviously affects the question of the effectiveness of minority protection in its real sense.

Chapter VI

Minority Protection under General Human Rights Standards with an Emphasis on the Principle of Substantive Equality

1. Introduction

The legal basis for the protection of minority rights can be found in general human rights standards beyond minorities-specific standards. There is no doubt that minority rights form an integral part of the international protection of human rights.[1] For instance, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) situates the issue of minorities within a wider context of human rights entitlements. The Framework Convention on the Protection of National Minorities (FCNM) also confirms this by explicitly recognising minority rights as a human rights issue.[2] However, these considerations also reveal that minority rights and human rights are not identical notions. The concept of human rights is something qualitatively different in that the rights of all individuals are placed under international protection, whereas minority rights can be described as special rights recognised to the exclusive benefit of persons belonging to minority groups. However, human rights and minority rights are complementary and mutually reinforcing for the purpose of effective minority protection. For instance, as will be examined in this chapter, the European Convention on Human Rights and Fundamental Freedoms (European Convention on Human Rights) does not have specific minority rights provisions. However, there are in fact many rights which minorities will find protected under the European Convention on Human Rights. Although not always well understood, there are a growing number of decisions which are creating a framework which minorities may be able to use for their greater protection under the European Convention on Human Rights.

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[1] See Article 1 of the proposed convention in Chapter 8 below, pp. 256-257.

[2] Article 1 of the FCNM states that "The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operaton."

In particular, this chapter shall pay a special attention to the non-discrimination principle and its positive effects on the protection of minority rights. As observed in Chapter 5, the non-discrimination principle is the critical element for achieving the objective of protecting minority rights in the context of the protection and promotion of cultural identity for persons belonging to minority groups within minorities-specific standards. The important point is that the non-discrimination principle has not only been one of the most essential norms for the protection of human rights, but also a necessary element to achieve the objective of protecting persons belonging to ethnic, religious or linguistic minority groups under international law.[3] However, the non-discrimination principle can be applied extensively to minority protection beyond the protection of the cultural identity for minorities within minorities-specific standards. Bearing this wide-ranging scope of the non-discrimination principle and its positive effects on the protection of minority rights in mind, this chapter is primarily concerned with discussing the non-discrimination principle for the protection of minority rights with a special emphasis on the 'substantive equality principle', as the scope of application of the non-discrimination principle could differ depending on whether it will be considered as formal equality or substantive equality.

As to the question of the protection of the ethnic, linguistic Russians in Estonia and Latvia, the native language requirements in the Estonian and Latvian citizenship laws raise an important question about discrimination for members of the Russian minority with regard to citizenship.[4] The important aspect of this chapter within the present thesis is to show that the substantive equality principle under general human rights standards may be a basis for requiring States in which persons belonging to minorities have resided to protect their rights and interests in an effective way, and will serve to consolidate the legal and normative bases for the effective protection of minority rights under international law.

2. The Non-Discrimination Principle and International Protection of Human Rights

[3] For a general discussion, see W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1985); P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

[4] For a general review of citizenship policies of Estonia and Latvia, see Chapter 2 of this thesis and L. Barrington, "The Domestic and International Consequences of Citizenship in the Soviet Successor State", *Europe-Asia Studies*, Vol., 47, 1995, pp. 731-764.

2.1. The Development of the Non-Discrimination Principle in International Law

The Universal Declaration on Human Rights declares the non-discrimination principle:

> "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."[5]

Article 1 (3) of the United Nations Charter includes among the purposes of the United Nations "promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion..."[6] Article 55(c) of the Charter also commits the United Nations to promote non-discrimination.[7] Prohibitions against discrimination are included in major human rights instruments, such as the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[8] the 1966 Convention on the Elimination of All Forms of Racial Discrimination 1966, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1989 Convention on the Rights of the Child, and the 1960 UNESCO Convention against Discrimination in Education.[9] These instruments illustrate that the non-discrimination principle prohibits distinctions based on various characteristics such as race, sex, religion, language, or nationality.[10] Moreover, non-discrimination is widely considered as a customary norm of international law.[11]

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[5] Universal Declaration of Human Rights, GA Res. 217 A, UN GAOR, 3d Sess., Article 2, UN Doc. A/810 (1948).

[6] Article 1 (3) of the United Nations Charter.

[7] Article 55(C) of the United Nations Charter.

[8] International Covenant on Civil and Political Rights, 1966, 999 UNTS 174; International Covenant on Economic, Social and Cultural Rights, 1966, 999 UNTS 3.

[9] International Convention on the Elimination of All Forms of Racial Discrimination, 1966, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13; Convention on the Rights of the Child, 1989, 1577 UNTS 3; Convention Against Discrimination in Education, 1960, 429 UNTS 93.

[10] For an excellent study on the concept of discrimination in international law, see H. Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945); N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991);W. McKean, *Equality and Discrimination under International Law* (Oxford: Oxford University Press, 1983); E.W. Vierdag, *The concept of discrimination in international law, with special reference to human rights* (The Hague: Nijhoff, 1973); S. Fredman (ed.), *Discrimination and Human Rights* (Oxford: Oxford University Press, 2001).

[11] As Ramcharan aptly pointed out, "equality and non-discrimination constitute the most dominant single theme of the ICCPR." B.G. Ramcharan, "Equality and Non-discrimination", in Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 246-269.

A detailed structure of the non-discrimination principle in general and the prohibition of racial discrimination in particular have been formulated in the Untied Nations Convention on the Elimination of All Forms of Racial Discrimination (ICERD). There is no doubt that prohibition of 'racial discrimination' now forms a *'jus cogens'*.[12] According to Schwelb's view, "if there is a subject matter in the present day international law which appears to be a successful candidate for regulation by peremptory norms, it is certainly the prohibition of racial discrimination."[13] Judge Tanaka also stated that:

> "...we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law as is contended by the Applicants, and as a result, Respondant's obligation as mandatory is governed by this legal norm in its capacity as a member of the United Nations."[14]

Judge Tanaka went on to state that the principle of non-racial discrimination belongs to peremptory norms of *jus cogens,*[15] and the Court has said it belongs to the category of obligations, *erga omnes*.[16] Thus, non-discrimination as a fundamental foundational human rights principle can be invoked for the protection of ethnic, linguistic and religious minorities from racial discrimination in the international legal order.

2.2. The Theoretical Consideration of the Non-Discrimination Principle and the Protection of Persons belonging to Minority Groups[17]

That like should be treated alike conforms to a basic notion of justice. However, this assumes that an initial judgment as to two individuals, A and B, being alike had been made under given circumstances. As noted above, non-discrimination is an established international legal principle under which characteristics based on race, sex, religion, colour, ethnic origin or others should not in themselves constitute grounds of justification for treating some people differently. However, if one understands this notion of non-discrimination as being equal under 'given situations', it is inherently limited, because, 'a given norm under a given situation' has not eradicated all

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[12] Dicta in the Barcelona Traction, the Namibia, Western Sahara and East Timor cases support this assertion. *The Barcelona Traction, Light and Power Company Limited*, ICJ Reports, 1970, p. 3, para. 33; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* ICJ Reports, 1971, p.16; *Western Sahara Case,* ICJ Reports, 1975, p. 12; *East Timor Case (Port. v. Austl),* ICJ Reports, 1995, p. 90.

[13] E. Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", *AJIL*, Vol., 61, 1967, p. 956.

[14] *South West Africa Case* (Second Phase), ICJ Reports, 1966, p. 293.

[15] *Ibid.*, pp. 208-209.

[16] *Barcelona Traction Case, op.cit.*, p. 3.

exclusionary rules and regulations from the start. For instance, controlling immigration according to citizenship criteria could be a source of racial discrimination; yet it can be accepted that a State has the discretion to exclude from citizenship anyone whom it wishes, arguing that those criteria do not involve stripping 'existing citizens' of their right to domicile. In other words, 'formal equality' is based on assumption of conformity to 'given norms' in a society.[18]

According to Parekh, this will lead to a forced assimilation in which all members of a society share a common a national culture. He observes that:

> "The choice before minorities is simple. If they wish to become part of and be treated like the rest of the community, they should think and live like the latter."[19]

An individual can be considered in abstract terms within the concept of formal equality, yet this is not always immediately visible. For instance, 'abstract' individuals may be the members of the majority in respect of race, sex, religion and culture in a society. This means that the right to equality and non-discrimination is reserved to those who confirm to a 'given norm'.

The unreasonable outcome of the application of formal equality seems to lie in the limitations of formal equality as a concept. It is satisfied so long as likes are treated alike. Once two individuals are found to be relatively alike and are treated equally, it demands no more than like treatment. It does not make a distinction about whether the individuals in questions are treated equally badly or equally well.[20] Yet, this has profound consequences for the persons whose status is the object of the application of equality, because it may well be the refusal to recognise the needs and aspirations of distinct minority groups against the backdrop of the overall structure of a society. A series of negative problems in the application of a qualified equality principle will emerge, because of the inherent limitations of formal equality.

Formal equality can also ignore the group aspect of minority status. In focusing on the individualistic approach in the protection of human rights according to his or her own qualities or merits, and not on the basis of negative stereotypes of race, sex, or nationality, formal equality can deny the value of the group aspect in defining an individual's identity. This is nothing less then to deny the very legal philosophical

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[17] See Article 6 of the proposed convention in Chapter 8 below, pp. 262-263.
[18] S. Fredman, "Combating Racism with Human Rights: The Right to Equality", in *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press, 2001), pp. 16-18; C. Barnard and B. Hepple, "Substantive Equality", *Cambridge Law Journal*, Vol., 59, 2000, pp. 562-585.
[19] B.C. Parekh, "Integrating Minorities", in *Race Relations in Britain* (London: Routledge, 1998), p. 2
[20] *Fredman, Combating Racism with Human Rights, op.cit.*, pp. 16-18.

foundation for the protection of the rights of persons belonging to minorities. As a logical result, it has also had inevitable limits on the protection of the ethnic, religious or linguistic groups, since States have only negative obligations to refrain from discrimination on the grounds of race, ethnicity, religion and language. No positive obligations are imposed under this individualistic perspective of equality. Yet racial discrimination extends far beyond individual acts of racial prejudice, which requires a State's positive actions to correct the problems of existing unequal situations. Of course, international instruments on minority rights require a State's positive action for the protection of persons belonging to minorities. However, as the application of the non-discrimination principle is primarily concerned with the protection of the cultural identity of minorities in minorities-specific standards, it is possible for States to argue that they are respecting the non-discrimination principle, even if it does not mean 'substantive equality' in its true sense.

It should be noted that substantive equality is fundamentally different from formal equality, because the former goes beyond consistent treatment of likes. Substantive equality can be secured by way of guaranteeing 'equality of opportunity' and 'equality of results'.[21] Equality of opportunity pays attention to the fact that the discriminatory aspect of a 'given norm' can make it extremely difficult for members of particular groups such as ethnic, religious or linguistic groups to cross the threshold condition of similarity required to trigger the right to like treatment. It asserts that real equality cannot be achieved without guaranteeing the equality of opportunity. If individuals begin the race from different starting points, equality in its fullest extent cannot be secured. Therefore, equality of opportunity demands 'necessary State action' for disadvantaged or marginalised groups in order to equalise the starting point of the race.[22]

Williams's distinction between a procedural and a substantive sense of equality is instructive in materialising States' positive actions to protect disadvantaged groups in a society. On a procedural level, equality of opportunities requires the removal of obstacles to the advancement of disadvantaged groups such as ethnic, religious or linguistic minorities and women.[23] But this does not itself guarantee greater substantive fairness in the results. The substantive sense of equality of opportunities,

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[21] *Ibid.*, pp. 19-22.
[22] *Ibid.*, pp. 20-21.
[23] B. Williams, "The Idea of Equality", in P. Laslett and W. G. Runciman (eds.), *Philosophies, Politics*

by contrast, requires measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good.[24] This requires not only that States have negative obligations to abstain from discriminating but also should reconsider existing criteria of merit. That is, a State is not securing genuine equality of opportunity if that State applies an unchallenged criterion of merit to people who have been deprived of the opportunity to acquire 'merit'.

'Equality of results' requires that the result be equal. Equality of results would be the more obviously redistributive aim of requiring an equal outcome, for instance, equal representation of minorities in a particular grade. Equality of results assumes that specific and concrete measures are required to meet the needs and desires of disadvantaged groups to achieve equality and non-discrimination.[25] A definition of substantive equality is provided by Justice L'Heureux Dube of the Supreme Court of Canada in the following manner:

> "This term reflects the underlying goal of achieving an equality of outcome or substance among all members of society, regardless of differences... This ideal can be contrasted with the concept of "formal equality" or sameness of treatment in the law, which does little to overcome patterns of social disadvantage and indeed, may perpetuate them."[26]

It can be observed from the above that formal equality may play some role in prohibiting blatant racial prejudice and discrimination. But, at the very least, it cannot 'guarantee' the protection of the interests of persons belonging to ethnic, religious or linguistic minority groups in a fully satisfactory way. Formal equality would be empty, if there were no obligatory concrete policy measures to correct the existing unequal reality. A State's obligations to protect the rights of persons belonging to minorities must be based on the objective of achieving substantive equality.[27]

The critical question then to be answered would be whether equality and non-discrimination provisions in major international human rights conventions are based on substantive equality or formal equality, which requires an in-depth analysis of the nature of the non-discrimination principle with reference to relevant positive legal provisions. It is important to note that these non-discrimination provisions in relevant conventions should be approached in light of a contextual interpretation in a way that

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and Society (New Haven: Yale University Press, 1965), p. 110.

[24] *Ibid.*, pp. 125-126.

[25] *Fredman, Combating Racism with Human Rights, op.cit.*, p. 19.

[26] C. L'Heureux Dube, "Making a difference: The pursuit of equality and a compassionate justice", *SAJHR*, Vol., 13, 1997, p. 338.

[27] See Article 6 (2) of the proposed convention in Chapter 8 below, pp. 262-263.

will maximise the aims of each provision in those conventions for the achievement of the non-discrimination principle.[28]

3. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[29]

3. 1. The Definition of Racial Discrimination and the Comprehensive Scope of the ICERD

According to Article 1, paragraph 1 of the ICERD, racial discrimination is "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms on the political, economic, social, cultural or other field of public life."[30]

Racial discrimination occurs when there has been an act or omission that can be described as a distinction, exclusion, restriction or preference; the act or omission was based on one of more of the following grounds; race, colour, descent, or national or ethnic origin; the action has the purpose or effect of nullifying the exercise of an individual's human rights and fundamental freedoms in a political, economic, social, cultural or other field of public life. However, the list of protected fields is not exhaustive. It covers an area of human rights and fundamental freedoms, including equality before the law, the right to security, political and civil rights as well as economic, social and cultural rights.[31]

That the term "race" is not used in a narrow biological sense is significant for the protection of ethnic, religious and linguistic groups as the ICERD uses the race concept in its sociological context. The definition of racial discrimination is thus not limited to physical characteristics; it also covers various phases of discrimination such

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[28] Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in the light of its object and purpose". Vienna Convention on the Law of Treaties, 23 May, 1969, 1155 UNTS 331.

[29] International Convention on the Elimination of All Forms of Racial Discrimination, 1966, 660 UNTS 195. This convention entered into force on January 1, 1969. There are 172 States parties to this convention as of 31 August 2005 including all member States of the Council of Europe.

[30] Article 1 (1) of the ICERD.

[31] P. Justesen, "Equality for Ethnic Minorities-International and Danish Perspectives", *International*

as historical and cultural discrimination. The socially constructed term 'race' has significant impact in terms of addressing the problem of discrimination, because it can defend the rights of all individuals, while at the same time dealing with racial discrimination.[32]

States are obliged to prohibit both 'direct and indirect racial discrimination' under the ICERD. Discriminatory intent, therefore, is not required. If a superficially neutral measure has the effect of denying certain ethnic, religious or linguistic groups a specific right, it may be an act of illegal indirect discrimination, because it has perpetrated a 'discriminatory outcome'. The Committee of Elimination of Racial Discrimination (the CERD Committee) under the ICERD made it clear that racial discrimination is comprehensive, which includes 'indirect discrimination' within the meaning of 'discrimination'. Recognition of the concepts of direct discrimination and indirect discrimination can be found in the Committee's following views:

> "...There is, thus, no question of direct discrimination (purpose or intent) in the case. The Committee furthermore noted that, on the basis of the information provided by the author it is not possible to reach the conclusion that the system works to the detriment of persons of a particular race or national origin. There is no question of *'indirect discrimination (effect) either.*"[33] (Emphasis added.)

3. 2. The State's Required Obligations to Eliminate Racial Discrimination

States are obliged to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms" under Article 2 of the Convention. Article 2 is characterised as a 'promotional provision', which means that States are obligated to promote a defined objective rather than maintain a defined standard.[34] According to the view of the CERD Committee, the State's obligations under Article 2 will not simply be satisfied by incorporating the Convention into a domestic law. Nor is a general pronouncement of the prohibition of racial discrimination in domestic law sufficient. The prohibition of discrimination has to be discrete, and its enforcement must be effective. This means that if a legal prohibition of discrimination does not become generally effective, the State is obligated to

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Journal on Minority and Group Rights, Vol., 10, 2003, pp. 1-43.

[32] K.J. Partsch, "Fundamental Principles of Human Rights: Self-determination, Equality and Non-discrimination", in K. Vasak (ed.), *The International Dimensions of Human Rights* (Westport: Greenwood Press, 1982), p. 76.

[33] *B.M.S. v. Australia*, Case No. 8/1996, Views adopted on 12 March 1999, CERD/C/54/D/8/1996, para. 9-2.

[34] E. Schwelb, "The International Convention on the Elimination of all forms of Racial Discrimination", *ICLQ*, Vol., 15, 1966, p. 1016.

strengthen its efforts against discrimination by various means. The demand of a 'concrete obligation' of States to establish and implement a policy against racial discrimination is clearly illustrated by an individual communication to the Committee. The Committee stated that:

> "The Committee cannot accept any claim by the Dutch government that the enactment of law making racial discrimination a criminal act, in itself, represents the full compliance with the obligations of states parties under the Convention."[35]

The Committee's opinion demonstrates that even if apparently comprehensive legislation exists, this will not automatically satisfy the requirements of the Convention, as long as the law in question is not effectively enforced in a positive way to prohibit racial discrimination. That the ICERD requires the States' positive measures to eliminate racial discrimination indicates that the Convention goes further than just establishing formal equality before the law and equal protection of law.

This also can be inferred from the goals of the Convention. The preamble refers to the right of every individual to human rights without distinction as to race, colour, or national origin and it underscores that State parties must secure the earliest adoption of positive measures to eliminate racial discrimination.[36] That the preamble of the treaty forms an integral part of the treaty for the purpose of interpretation is an established principle of international law. This was observed by the International Law Commission (ILC) in 1966 in its Draft Articles on the Law of Treaties when the Commission declared that "that preamble forms part of a treaty for the purpose of interpretation is too well settled to require comment."[37]

As to the States' positive measures, Article 1 (4) of the Convention provides as follows:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment of or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."[38]

This qualification of the positive measures, however, must not be interpreted as restrictive in terms of the States' obligations to eliminate racial discrimination, since

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[35] *L.K. v. The Netherlands*, Communication No. 4/1991, UN Doc. A/48/18 at 131 (1993), para. 6-4.
[36] The preamble to the ICERD, paras. 2 and 12.
[37] Paragraph 13, Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, Official Records of the United Nations Conference on the Law of Treaties (first and second secession), Documents of the Conference, 1969, UN Doc. A/Conf. 39/11/Add 2., p. 41.

Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing advancement of certain racial groups requiring such protection in the definition of non-discrimination. A contextual interpretation of relevant provisions also supports this argument. Article 5 requires equality before the law, and Article 2 declares the prohibition of racial discrimination. Article 2, paragraph 2 contains the States' obligations to protect the equal enjoyment of human rights through the establishment of special measures. The definition of racial discrimination in Article 1 incorporates special measures, defined in Article 1 (4) as a necessary corollary to the prohibition of discrimination and not as an exception to the principle of non-discrimination.[39] According to Articles 1(4) and 2(2), the ICERD indicates that special measures must fulfil the following requirements:

- Special measures must be in the interests of ethnic minorities and must be voluntary for ethnic minorities;
- Special measures must be established with the aim of securing *de facto* equality;
- Special measures are necessary to secure this aim;
- Special measures must be limited in time; they must be stopped when the goal of equality has been reached.

This shows that mere legislation securing formal equality for minority groups is not sufficient under Article 2 (2). Ethnic, religious or linguistic groups must be guaranteed *de facto* equality. Nevertheless, States might still have a considerable measure of discretion, since special measures according to Article 2 must only be taken "when the circumstances so warrant." Yet, Article 2 does not provide standards for determining "when circumstances so warrant." No matter how the text is read, it is clear that States do not have unlimited discretion in appreciating "when circumstances so warrant." In the concluding observation to the United States on the question of affirmative action in 2001, the CERD Committee indicated a frame of reference for determining the "circumstances" in the following manner:

> "With regard to affirmative action, the Committee notes with concern the position taken by the State Party that the provisions of the Convention permit, but do not require States Parties to adopt affirmative action measures. The Committee emphasized that the adoption of special measures by State parties when the circumstances so warrant, such as in the case of *'persistent disparities'*, is an obligation stemming from Article 2(2) of the

[38] Article 1(4) of the Convention.
[39] *Mckean, Equality and Discrimination under International Law, op.cit.*, p. 159.

Convention."[40] (Emphasis added.)

In other words, the existence of administrative, legislative or social practice that will virtually result in "persistent disparities" as regards the interests of persons belonging to ethnic, religious or linguistic groups within an overall social structure of a State will require the State concerned to implement special measures to correct the persistent disparities. This statement of the Committee seems to have confirmed substantive equality for which the States positive measures should be designed.

Taken together, theses provisions create a systematic unity, which establishes the States' obligations to secure real or factual equality by way of law. In this regard, Meron's observation of "equality of result" as the principle object of the ICERD seems to have sharply pointed out the essence of the Convention in which substantive equality is implied.[41]

3. 3. Discrimination permitted with regard to Non-Citizens

Article 1 (2) provides an exception to the applicability of the Convention. It allows States parties to make "distinction, exclusion, restrictions or preferences...between citizens and non-citizens." It gives due regard to State sovereignty in matters of citizenship, nationality, and naturalisation, provided States do not discriminate against categories of foreigners (Article 1(3)).[42] Under the wording of Article 1 (2), there might be a situation that a State discriminating on the basis of race or ethnic origin may try to justify their actual discriminatory measures, arguing that they are based upon alienage. However, other articles have been interpreted to ensure that non-citizens are not completely unprotected under the Convention. The inclusion of non-citizens within the reach of Article 4 has never been disputed nor that equality before the law must be guaranteed to 'everyone' without distinction as to race or ethnic origin (Article 5). The distinction established in Article 1(2) should have no impact on the implementation of Article 6. Article 6 provides that:

> "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental

[40] The Committee on the Elimination of Racial Discrimination, Concluding Observation: United States of America, 14/08/2001, UN Doc. A/56/18 para. 399.
[41] T. Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", *AJIL*, Vol., 79, 1985, p. 287.
[42] Article 1(3) of the ICERD.

freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damages suffered as a result of such discrimination."[43]

There is no doubt that the fact that many non-nationals, such as immigrants, are visibly different from the majority of the population makes them an easier target of racial discrimination. The Convention would be undermined if the protection it affords did not extend to such categories of people. ICERD has recognised that States have the sovereign right to impose a distinction between citizens and non-citizens insofar as their purpose or effect contains no element of discrimination based on race, colour, descent, or national or ethnic origin. However, it has also held that Article 1 (2) "must not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in other human rights instruments."[44] It is critically important to note that CERD has been consistent in asking States parties to report on the status of non-citizens on the question of access to citizenship, particularly migrant workers and refugees, who usually belong to a single ethnic group. Denial of access to citizenship is frequently directed against ethnic, linguistic minorities, even when relevant legislation does not say so directly. There is scope under the Convention for calling on States to facilitate naturalisation of non-nationals as a means of combating racial prejudice and discrimination.[45]

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[43] Article 6 of the ICERD.

[44] ICERD, General Recommendation XI on Non-citizens, Forty-second session, 1993, UN Doc. A/48/18 at 112 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.6 at 202 (2003).

[45] CERD/C/60/CO/14, paras.10 and 14, Switzerland; A/57/18, para.464, Yemen; A/56/18, para.334, Sri Lanka; CERD/C/60/CO/4, para. 14, Croatia; CERD/60/CO/11, para. 11, Qatar; "The Committee expresses concern at the continued practice of segregation of Roma children within the educational system and at the reports of discrimination against the Roma regarding access to employment, health, political representation and citizenship rights...The Committee...encourages the State party to reinforce its efforts to train and recruit Roma teachers and to prevent discrimination against the Roma in access to employment, health, political representation and citizenship rights." Croatia, CERD, A/57/18 (2002) 24 at paras. 97, 99 and 100."The Committee notes the information provided by the delegation on the conditions governing the acquisition of the nationality of Qatar. It is nonetheless concerned at the distinction made in article 3 of Act No. 3/1963, as amended by Act No. 3/1969, between nationals of Arab countries and others as regards the length of time they must reside in Qatar before they can submit an application for naturalization. The Committee requests the State party to consider the possibility of modifying this provision in order to conform to article 5 (d) (iii) of the Convention..." Qatar, CERD, A/57/18 (2002) 38 at paras. 193, 194 and 196."The Committee notes the information given by the delegation regarding the conditions governing the acquisition of Yemeni nationality. The Committee recommends that the State party take effective measures to ensure the right to acquire nationality for non-citizens, including for non-Muslims and children of mixed couples, without any discrimination." Yemen, CERD, A/57/18 (2002) 74 at para. 464; The CERD also recommends that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures: that ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents; recognize that deprivation of citizenship on the basis of race,

4. Articles 2 and 26 of the International Covenant and Civil and Political Rights (ICCPR)[46]

The International Covenant on Civil and Political Rights (ICCPR) applies to all individuals within a State party's territory and subject to its jurisdiction. Article 2 (1) prohibits distinctions based on race among other categories, as follows:

> "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."[47]

Article 2(2) of the ICCPR also provides that:

> "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary step, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[48]

The Human Rights Committee (HRC) has stated that Article 2 is to be interpreted as meaning that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party."[49] Similarly, the International Court of Justice (ICJ) has stated that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[50]

Despite this wide field of application, certain rights are expressly limited to specific classes of persons. For instance, the enjoyment of certain political rights is limited to citizens, thus excluding non-citizens or stateless persons from the scope of

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colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality; take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles; reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children; regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State Party. The CERD General Recommendations 30, CERD/C/64/Misc.11/rev.3 , 2004.

[46]The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). It has 156 parties, and Estonia acceded on 21 October, 1991. Latvia acceded to the Covenant on 14 April, 1992.

[47] Article 2(1) of the ICCPR.

[48] Article 2(2) of the ICCPR.

[49] HRC General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, ICJ No. 131, at 111 (July 9, 2004).

the provision. Further, Article 13, regulating expulsion from a State, applies solely to aliens lawfully in that State.[51] It has also been questioned whether the provision on minority rights applies to non-citizens.[52]

Turning to the non-discrimination clause of the ICCPR, Article 2(1) ensures to "all individuals" the rights contained in the ICCPR "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." What is most pertinent to the protection of the rights of non-citizens or stateless persons is that discrimination is not explicitly prohibited on the ground of nationality or citizenship. While reference is made to "national origin", as was considered above, this cannot be assumed to mean that discrimination on the ground of nationality is prohibited.[53] It is clear, however, that the grounds of discrimination in Article 2 of the ICCPR are illustrative and not exhaustive. Thus, Bossuyt notes that "proposals to add 'association with minority groups', 'economic or other opinion' and 'educational attainment' to the enumeration were thought to be unnecessary since they were deemed adequately covered by the expressions 'discrimination on any ground' and 'other status.'"[54] In light of the non-exhaustive nature of the list, Bayefsky argues that "if a distinction of any kind has been made the right is engaged and the issue of whether or not it has been violated does not turn on questions such as whether 'sex' includes sexual orientation or pregnancy, or whether 'national origin' includes nationality or citizenship."[55] The point was raised in the context of Article 26 of the ICCPR. However, the same reasoning can be applied to Article 2 of the ICCPR.

As regards whether discrimination on the ground of nationality or citizenship is prohibited, the point of departure is that discrimination against aliens is prohibited in principle. That this should be so is evident from the fact that a suggestion to replace the word "persons" in Article 2(1) of the Covenant with the word "nationals" or "citizens" was not pressed.[56] The express limitation of certain specified rights to nationals or persons lawfully present in the territory of the State also suggests that all

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[51] Articles 12, 13 of the ICCPR.
[52] UN Doc. HRI\GEN\1\Rev. 1, at 38, 1994.
[53] R. Cholewinski, *Migrant Workers in International Human Right Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997), p. 51.
[54] M.J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff ,1987), p. 486.
[55] A.F. Bayefsky, "The Principle of Equality or Non-discrimination in International Law", *HRLJ*, Vol., 11, 1990, p. 6.
[56] *Ramcharan, Equality and Non-discrimination, op.cit.*, p. 263.

other rights are to be afforded to each and every person irrespective of his or her nationality. Further, the HRC has stated that "aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof,"[57] and that "there shall be no discrimination between aliens and citizens in the application of these rights."[58] Thus, in the case of *Gueye and Others v. France,* the HRC held the term "other status" in Article 26 of the Covenant to encompass nationality.[59]

Thus, the principle is that the ICCPR affords its protections to all persons, including persons belonging to minorities. The position of aliens under the Covenant has been the subject of a General Comment by the HRC. The relevant paragraph is worth quoting again:

> "In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."[60]

From the above interpretation of the nature of Article 2 of the ICCPR, it is evident that the restrictions which are imposed by law on the minority rights provided in Article 27 of the ICCPR with reference to citizenship status are contrary to the non-discrimination principle.

At the heart of equality and non-discrimination in the ICCPR lies Article 26. It provides that:

> "All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status."[61]

Even a derogation clause in Article 4 which permits signatories to deviate from protection of certain rights "to the extent strictly required" in times of public emergency contains a proviso that derogation does "not involve discrimination solely on the ground of race."[62] Hence, it is clear that racial discrimination as such is

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[57] HRC General Comment 15, UN Doc. HRI\GEN\1\Rev.1 at 18 (1994), para 2..
[58] *Ibid.*, para. 7.
[59] *Gucye and Others v. France*, Communication No. 196/1983 (3 Apr. 1989), UN Doc. Supp. No. A/44/40, at 189 (1989).
[60] HRC General Comment 15, *op.cit.*, para. 7.
[61] Article 26 of the ICCPR.
[62] Article 4 of the ICCPR.

generally not permissible under the ICCPR.

The crucial issue is whether the prohibition of discrimination is limited to the rights in the Covenant or beyond them. The issue was settled through the cases *Broeks v. Netherlands*[63] and *Zwaan-de Vries v. Netherlands*[64] before the Human Rights Committee (HRC). The issue before the Committee was whether discriminatory provisions in the Dutch Unemployment Benefits Act fell within the scope of Article 26. The Dutch government submitted that discrimination in social security benefit provision was not within the scope of Article 26, as the right was contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), not the ICCPR. They contended that Article 26 did not extend to the social, economic, and cultural rights contained in the ICESCR. The Committee rejected this, arguing that Article 26 applied to rights beyond the Covenant including the rights in other international treaties such as the right to social security in the ICESCR:

> "Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation...However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant."[65]

The legal reasoning in the *Broeks Case* was confirmed in the HRC's General Comment 18 in the following terms:

> "While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitation. That is to say, article 26 provides that all persons are equal before the law and entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an *'autonomous right'*. It prohibits 'discrimination in law or in fact in any field' regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant".[66] (Emphasis added.)

The General Comment 18 clearly affirms that Article 26 is a freestanding non-discrimination provision and as such it is not ancillary to any other Covenant right. A requirement to take positive measures may be found in the call by Article 26 for State parties to guarantee to all persons equal and "effective protection" against

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[63] *S. W. M. Brooks v. The Netherlands*, Communication No. 172/1984, UN Doc. Supp. No. 40 (A/42/40) at 139 (1987).

[64] *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 160 (1987).

[65] *S.W.M. Broeks v. The Netherlands, op.cit.*, para. 12.4

discrimination.[67] The Comment made it clear that the prohibition on discrimination does not prohibit a State party taking affirmative action on the basis of substantive equality. It reads as follows:

> "...the principle of equality sometimes requires States parties to take affirmative actions in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, 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. Such actions 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. However, as long as such action is needed to correct discrimination *'in fact'*, it is a case of legitimate differentiation under the Covenant."[68] (Emphasis added.)

This view reflects the essence of equality and non-discrimination in the sense of substantive equality for which States' positive actions are required. The HRC, in its concluding Comment on the State report by the Czech Republic, said that the State party should, in order to assist the Roma community, take "all necessary measures to eliminate discrimination against members of minorities...and to enhance the practical enjoyment of their rights."[69]

An intention to discriminate is not needed to establish a violation of Article 26.[70] But, at the same time, if there is an intent to discriminate, a reasonable and objective basis for different treatment may become unreasonable. In the *Diergaardt Case,*[71] the authors were members of the Rehoboth Baster community. Originally from the Cape, they moved to their present location in Namibia in 1872, living as an autonomous community. Their language was Afrikaans. However, upon independence, English became the official language in Namibia. A Namibian government circular instructed civil servants not to reply in Afrikaans to the authors' written communication, even when the civil servants were perfectly capable of doing so. The Committee has consistently held that distinctions between official and unofficial languages are objective and reasonable and do not constitute discrimination. However, in this Communication, the majority found that the facts reveal a violation of Article 26. The

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[66] HRC General Comment No. 18, UN Doc., HRI/GEN/1 (1992).
[67] M. Nowak, *U.N. Covenant on Civil and Political Rights-CCPR Commentary* (Kehl:NP Engel, 1993), p. 476.
[68] HRC General Comment No. 18, *op.cit.*, para. 10.
[69] UN Doc. CCPR/CO/72/CZE, paras. 8., 2001.
[70] *Simunek, et al. v. The Czech Republic*, Communication No. 516/1992, UN Doc. CCPR/C/54/D/516/1992 (1995), para. 11.7. "The Committee is of the view that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory."
[71] *Diergaard, et al. v. Namibia,* Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000).

majority view took note that the government instructions to civil servants indicated that the authors were being singled out for different treatment. The Committee was therefore required to give "due weight to the allegations of the authors that the circular in question was intentionally targeted against the possibility to use Afrikaans when dealing with pubic authorities."[72] The majority upheld the authors' argument that the circular had indicated an intention to discriminate against them.

The ICCPR, Article 13, contains special provisions on the expulsion of aliens. The ICCPR, Article 25, limits citizens to the right to vote and the right to be elected. In these two situations it is permissible to distinguish on the basis of citizenship. A systematic interpretation of Article 26 with reference to the ICERD leads to the preliminary conclusion that States may distinguish between citizens and non-citizens only with regard to these two specific civil and political rights: the right to vote and the right to be elected. In light of the above noted HRC's General Comment criteria, States may distinguish on account of citizenship status if the distinction is reasonable and objective, and the aim of the limitation on the rights of non-citizens is intended to achieve a legitimate purpose. At the same time, if the reasoning of the HRC in the noted *Diergaardt Case* is applied to the protection of persons belonging to minorities with reference to citizenship status, where citizenship status is used in reality as a form of racial discrimination, it follows that it will be an impermissible discrimination. In other words, if a restriction on account of citizenship has a discriminatory impact on particular ethnic, religious or linguistic groups, it can be an impermissible indirect racial discrimination under Article 26 of the ICCPR.

5. The Protection of Minority Rights under the European Convention on Human Rights and Fundamental Freedoms[73]

5. 1. Minority Protection under the European Convention on Human Rights and Fundamental Freedoms

[72] *Ibid.*, para. 10.10.

[73] 213 UNTS 221; ETS 5., The Convention entered into force on 3 September, 1953. As of 31 August, 2005, the total number of ratifications/accessions of the European Convention on Human Rights and Fundamental Freedom is 46. Estonia ratified the Convention on 16 April, 1996 and Latvia ratified the Convention on 27 June, 1997.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) has no 'direct binding minority provision' akin to Article 27 of the ICCPR. At first glance, it would seem that since no specific minority rights are recognised, there is no direct way for members of a minority to claim minority rights before the European Court of Human Rights (ECHR).[74] This is, however, a mistaken view. There is a burgeoning minority rights jurisprudence of the Court based on interpretation and application of the European Convention on Human Rights.[75] A number of individual rights guaranteed in the Convention are relevant to the protection of persons belonging to minority groups. In addition, many minority rights are in fact based on general human rights standards, and can therefore also successfully be claimed and protected under the European Convention on Human rights. It is thus important to examine to what extent the fundamental rights and freedoms enshrined in the Convention relate to the protection of the rights of persons belonging to minorities. Cases have been dealt with the Court on expulsion, degrading treatment, freedom of expression, language and religion, family and private life, all of which are directly and indirectly related to the protection of minority rights. National minority is undefined in the European Convention on Human Rights, as is the case with every other international instrument dealing with minority rights. However, it should be noted that it is contrary to the European Convention to treat "any person, non-governmental organization or group of individuals" in a discriminatory fashion with respect to one of the listed grounds without reasonable and objective justification.[76] At the same time, that groups or organisations might have standing opens up various possibilities for protecting interests of members of minority groups, even though there is no express minority rights provision in the Convention. The European Convention on Human Rights is a human rights instrument, but since groups can claim to be victims, discrimination in the enjoyment of rights as between the minority group and the majority groups might

[74] The European Court of Human Rights (ECHR) is an institution created pursuant to the European Convention on Human Rights and is a constituent part of the Council of Europe, which was created in 1949 after World War II. In 1998, Protocol 11 of the Convention revamped its institutional structure to phase out the European Commission on Human Rights, which previously reviewed all cases prior to their submission to the ECHR, and the creation of single European Court of Human Rights. Protocol 11, ETS, No. 155, reprinted in 33 ILM 943 (1994).

[75] G. Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", *HRQ*, Vol., 24, 2002, pp. 736-780.

[76] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), 1 EUR. HUM. RTS. REP. 252 (1968).

well give rise to a violation by the State justiciable before the Court.[77]

While it appears that the ECHR is willing to admit the existence of a minority is an objective, factual determination, it was less willing to admit to the existence of any special category of minorities which could bring about special legal entitlements in a State's domestic legal regime. In *Gorzelick and Others v. Poland*,[78] "registered association of national minorities" were in parliamentary elections entitled to a number of privileges under the electoral law of Poland. When members of the Silesian minority tried to register as a "national minority' association, it was claimed by Polish authorities that they would automatically have been afforded an unqualified and legally enforceable claim to special privileges granted to national minorities by their relevant legislation. The Court decided that since it would have been simple to change a few words in order to be registered with no real consequences for the applicants, and without risking recognition of special privileges by using the words "national minority", there was no violation of freedom of association in not registering the association as a "national minority". The Court stated that:

> "65. ...the applicants could easily have dispelled the doubts voiced by the authorities, in particular by slightly changing the name of their association and by sacrificing, or amending, a single provision of the memorandum of association...Those alterations would not, in the Court's view', have had harmful consequences for the Union's existence as an association and would not have prevented its members from achieving the objectives they set for themselves. 66. The Court accordingly considers that, in the particular circumstances of the present case, it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the state, a system which is an indispensable element of the proper functioning of a "democratic society" within the meaning of Article 11."[79]

In other words, the Court was acknowledging that the individuals were members of the Silesian minority, but unwilling to propose their registration as a "national minority" because the legal consequences this might have had in Poland in relation to the electoral system.[80] However, the important point is that in the increasingly numerous cases,[81] there has never been a difficulty for the Court to acknowledge their objective, factual presence within a State, often referring to them specifically as

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[77] *Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", op.cit.*, pp. 736-739.

[78] *Gorzelick and Others v. Poland*, Application Number 444158/98, Judgment of 20 December 2001.

[79] *Ibid.*, paras. 65-66.

[80] In this regard, it is also true that the *Gorzelik and Others v. Poland Case* has illustrated the point that the lack of a definition of a minority produces significant disadvantage for the concrete minority groups in the States in which they might not be even be able to achieve a formal legal recognition of their minority status. This situation, of course, will lead to an inadequate legal treatment of these groups.

[81] *Özgür Gündem v.Turkey*, judgment of 16 March 2000; *Anguelova v. Bulgaria*, Judgment of 6 June 2000; *Noack v. Germany*, Judgment of 25 May 2000; *Podkolzina v. Latvia*, Judgment of 9 April 2002.

minorities, regardless of their status or of a country's recognition.

A number of cases under the European Court of Human Rights (ECHR) have dealt with linguistic rights of persons belonging to minorities, but the Strasbourg institutions have consistently held that there is no right to use a particular language in contacts with the government authorities. In the case of judicial proceedings, however, everyone has the right to be informed promptly, in a language he or she understands, of the reasons for arrest (Article 5.2) and the nature of any criminal charges (Article 6.3.a). There is also the right to a free interpreter if a defendant cannot speak or understand the language used in the Court (Article 6.3.e).

Even though there is no direct reference to the protection of linguistic rights of the members of minorities, 'freedom of expression' under Article 10 guarantees the use of a minority language in private or among members of minorities. Thus, minorities have a right to publish their own newspapers or use other media without interference by the State or others.

The State must allow minorities free political expression, even if this will lead to questioning the social and political structure of the State in which persons belonging to minorities reside. *Incal v. Turkey*[82] was the case which addressed the conviction of the applicant, Mr. Incal, a Turkish national and member of the executive committee of the Izmir section of the People's Labour Party, on account of his contribution to the preparation of a leaflet criticising measures taken by the local authorities of Izmir, Turkey. The leaflets in question criticised the hostility created against the Kurdish minorities and were seized because they allegedly contained separatist propaganda, which violated Turkish domestic law. In this case, the Court confirmed the freedom of expression in a democratic society:

> "...the freedom of expression enshrined in Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 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; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."[83]

The Court then considered the relevant passage of the leaflet to assess whether State interference was necessary or not. The Court held the view that the content of the leaflet could not be taken as incitement to the use of violence, hostility or hatred

[82] *Incal v. Turkey*, no. 22678/93, Reports of Judgements and Decisions, 1998-IV, http://cmiskp.echr.coe.
[83] *Ibid.*, §. 46.

between citizens, even though the pamphlet contains "appeals to the population of Kurdish origin, urging them to band together to raise certain political demands."[84] The Court, consequently, ruled that Mr. Incal's conviction was disproportionate, violating Article 10 of the European Convention on Human Rights.[85]

Although the Court did not comment upon the issue of minority protection as such, the enhanced protection of the political freedoms of persons belonging to minorities may be interpreted as providing a necessary legal foundation for the protection of the freedom of expression of minorities in general. In the *Arslan v. Turkey Case,* the Court reiterates the fundamental principles underlying its judgments relating to Article 10 that (i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established.[86]

The *Belgian Linguistic Case* may be taken as a case for analysing the possible linguistic aspects of the right to education for persons belonging to minorities. The case concerned the French-speaking minority in Belgium and the applicants wanted their children to be taught in French at school in a region considered Flemish-speaking by law. The case raised issues related to the right to education[87] and the protection of family life[88] in conjunction with the right to non-discrimination.[89] The Court remarked that the right to education does not mean the right to establish or receive subsidisation for schools offering education in the language of choice. The contracting States have no general obligation to finance 'private' educational institutions.[90] The Court, however, found a violation of the first sentence of Article 2 of the First Protocol in connection with Article 14 insofar as Dutch-speaking pupils from the Dutch regions

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[84] *Ibid.*, §. 50.
[85] *Ibid.*, §. 59.
[86] *Arslan v. Turkey Case*, Application Number 23462/94, 1999, at 44.
[87] Article 2 of Protocol I.
[88] Article 8
[89] Article 14 of the Convention.
[90] *Belgian Linguistic Case*, ECHR Series A, No. 6, 1968, pp. 35-36.

in Belgium had free access to education in their own language, while the French-speaking pupils did not have such access. The Court's view is problematic in that it approached the question simply as the problems of 'residence', not that of the right to language for persons belonging to minority groups.[91]

However, the Commission came to a different conclusion.[92] The Commission stated that the Belgian regulation in question had as its goal to prevent the spread of a different language and culture into one region, and also to assimilate minorities against their will into the language of their surrounding. The Commission expressed its view:

> "In the view of the majority of the Commission, the intention of the Belgian Government and of the Belgian legislature was to place the French-speaking population in the Flemish region at a disadvantage in relation to the Dutch-speaking inhabitants."[93]

In the area of the protection of right to religion for persons belonging to minority groups, Article 9 of the European Convention of Human Rights deserves to be noted. The individual right to freedom of religion includes the right to manifest that religion, which can be interpreted as allowing a minority the necessary degree of control over community religious matters.[94] In the *Kokkinakis v. Greece Case*,[95] the Court held that the State must not interfere in the internal affairs of the church:

> "...freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention...The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[96]

Persons belonging to minorities also need to be able to participate effectively in social, economic and public life[97] for the effective realisation of their rights. The *Sidiropoulos & 5 others v. Greece Case* is relevant for Article 11, which has implications for the protection of political rights of persons belonging to minorities. The applicants, who claimed to be of Macedonian ethnic origin and with a Macedonian national conscience, established an association, the "Home of Macedonian Civilisation". The aims of the organisation were the development of

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[91] A.S. Akermark, *Justification of Minority Protection in International Law* (Kluwer Law International: London-the Hague-Boston, 1997), p. 207.

[92] Even though the European Court of Human Rights had priority over the European Commission on Human Rights, it is also true that the case laws developed by the Commission still have influence for the examination of European human rights jurisprudence. Thus, it would be appropriate to include the views of the Commission for the discussion on the protection of minority rights in this section.

[93] *Belgian Linguistic Case, op.cit.*, p. 41.

[94] Article 9 of the European Convention of Human Rights.

[95] *Kokkinakis v. Greece*, No. 14307/88, 25 May 1993 ECHR, Series A No. 260-A, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.

[96] *Ibid.*, § 31.

[97] Articles 3, 11 of the European Convention of Human Rights.

traditional culture and the protection of the natural and cultural environment of the region. The Greek courts, however, refused its registration on the grounds that the association engaged in promoting the idea of the existence of a Macedonian minority in Greece, undermining the national sovereignty of Greece. [98] The Court acknowledged the State's 'margin of appreciation' in the evaluation of the necessity of limitation in a democratic society, but they concluded that they violated the spirit of Article 11 of the Convention. The Court stated that even if the refusal of the Greek courts to register the association was aimed at protecting national security and public safety, there was nothing in the case file to suggest that any of the applicants had wished to undermine Greece's territorial integrity, national security or public order. Moreover, the Court affirmed that democratic States' obligations to protect minority rights are in accordance with general principles of international law:

> "...Territorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region's culture, even supposing that it also aimed partly to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a "democratic society" had to tolerate and even protect and support according to the principles of international law."[99]

That the Court made an explicit statement in accepting the international legal obligation to the protection of minority rights, referring to the Organisation for Security and Co-operation in Europe's (OSCE) Copenhagen Document is also critical. The Court stated as follows:

> "...the aims of the association called "Home of Macedonian Civilisation", as set out in its memorandum of association, were exclusively to preserve and develop the traditions and folk culture of the Florina region... Such aims appear to the Court to be perfectly clear and legitimate; the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons. Even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November1990 – which Greece has signed – allow them to form associations to protect their cultural and spiritual heritage."[100]

Nevertheless, it is also true that the *Buckley v. UK Case* has illustrated the negative attitude of the Court toward the protection of minority rights in a cultural context. Ms. Buckley was a British citizen and a Gypsy. She lived with her three children in caravans parked on land owned by her off Meadow Drove, Willingham, South Cambridgeshire, England. She complained of their eviction from a site on which they

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[98] *Sidiropoulos and 5 others v. Greece*, No. 26695/95, 10 July 1998, Reports of Judgments and Decisions, 1998-IV, http://cmiskp.echr.coe.int.

[99] *Ibid.*, §. 41.

[100] *Ibid.*, § 44.

had lived for 16 years. They claimed that the eviction violated Articles 8 and 14 of the Convention. The applicant's complaint that her prevention from living with her family in her caravans on her land was basically related to the right to a traditional lifestyle.

The Commission concluded that there had been a violation of Article 8 of the Convention. But the Court reversed the decision, focusing solely on the applicant's right to a home, not to a particular way of life. The Court restricted its assessment to the 'individual right' of Ms. Buckley to respect her home on the one hand, and the interests of society that the planning regulations would be respected on the other. This is flawed in that the Court totally ignored the fact that she belonged to the gypsy group and the related concerns of indirect discrimination arising from that membership. In this context, two dissenting opinions of the case should be noted, which took the legitimacy of Article 8 as the legal basis for a right to a traditional way of life. Judge Repik expressed his opinion that:

> "...In these circumstances, the Court, in order to fulfil its supervisory role, ought itself to have considered whether the interference was proportionate to the right in issue and to its importance to the applicant, all the more so as where a fundamental right of a member of a minority is concerned, especially a minority as vulnerable as the Gypsies, the Court has an obligation to subject any such interference to particularly close scrutiny. In my opinion, the Court has not fully performed its duty as it has not taken into account all the relevant matters adduced by the Commission and was too hasty in invoking the margin of appreciation left to the State."[101]

Judge Lohmus furthered the essential appreciation of the nature of the protection of minority rights in the following terms:

> "It has been stated before the Court that the applicant as a Gypsy has the same rights and duties as all the other members of the community. I think that this is an oversimplification of the question of minority rights. It may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage."[102]

A similar line of reasoning is found in the *Chapman Case* under which the question arose whether the traditional lifestyle of the Roma should be facilitated by positive State protective measures for that purpose. The Court stated that:

> "...although the fact of being a member of a minority with a 'traditional lifestyle' different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. As intimated in the Buckley judgment, the 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 planning framework and in arriving at the

[101] *Buckley v. UK Case*, no. 20348/92, 25 September 1996, Reports of Judgments and Decisions, 1996-IV, http://cmiskp.echr.coe.int/, Dissenting opinion of Judge Repik.
[102] *Ibid.*, Dissenting opinion of Judge Lohmus.

> decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life."[103]

The dissenting opinions in the *Buckley Case* as well as the significant comment on the nature of the protection of traditional life style in the *Chapman Case* above reflects precisely the potential implication of the obligatory nature of States' positive measures for minority protection under the European Convention on Human Rights. The Court has underlined in several judgments that Article 8 not only prohibits interference by States, but also imposes certain positive obligations on the contracting States, even though these are not specifically attuned to the protection of minority rights.[104]

An action from Latvia, Affaire Podkolzina c. Lettonie, demonstrates that the European Court of Human Rights may be willing to rule on protection for national minorities in a very positive way.[105] In this case, Ms. Podkolzina, a member of the Russian minority in Latvia, complained that Latvian authorities had wrongly struck her from the list of candidates for parliamentary election for insufficient knowledge of the Latvian language.[106] The State's actions, she charged, not only violated her right to stand for election (under Article 3 of the First Optional Protocol to the European Convention) and to have an effective remedy (under Article 13), but also violated the Article 14 prohibition against discrimination on the basis of language, national origin, or association with a national minority.[107] Although she had already obtained certification of her knowledge of Latvian by the relevant commission in the city of Daugavpils, she was subjected to an oral examination at her place of work by an inspector from the State Language Inspectorate. During the course of this examination, the inspector asked her why she had chosen to run for the National Harmony Party and not another political organisation. The next day, the inspector, with three witnesses in tow, returned and subjected the plaintiff to yet another written examination, allegedly to determine if she exhibited "third-level" proficiency in Latvian.[108] Two weeks later, on 21 August, 1998, the Central Electoral Commission struck her from the list of

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[103] *Chapman v. UK*, No. 27238/95, 18 January 2001, Reports of Judgments and Decisions 2001-1, http://cmiskp.echr.coe.int, § 96. See also *Marckx v. Belgium*, judgment of 13 June 1979, ECHR Series A No. 31, p. 15, § 31; *Keegan v. Ireland*, judgment of 26 May 1994, ECHR Series A, No. 290, p. 19, § 49; and *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, ECHR Series A, No. 297-C, p. 56, § 31.

[104] *Gaskin v. UK*, ECHR Series A , No.160, 7 July 1989; *Johnston et al v. Netherlands*, ECHR Series A., No. 112. 18 December 1986.

[105] *Affaire Podkolzina c. Lettonie* (Podkolzina v. Latvia), App. No. 46726/99 (Eur. Ct. H.R. Apr. 9, 2002), at http://www.echr.coe.int/Eng/judgments.htm.

[106] *Ibid.*, pp. 3, 8.

[107] *Ibid.*, p. 4.

candidates for lack of proficiency in Latvian.[109] The Party of National Harmony appealed the ruling, but it was upheld by both the Riga regional court and the President of the Civil Division of the Supreme Court.[110]

In its ruling, the Court noted that the right to stand for election under Article 3 of the First Optional Protocol was not absolute. The Court observed that States had great latitude to establish criteria for eligibility in their parliamentary statutes, and concluded that the requirement that "a candidate for election to the national Parliament have sufficient knowledge of the official language pursues a legitimate aim."[111] However, the Court stressed that State decisions on these questions "must be reached by a body which can provide a minimum of guarantees of its impartiality."[112] In the instant case, it found that the decision did not meet this requirement. The Court expressed "grave doubts about the legal basis" for requiring the plaintiff (along with eight others) to take a second examination.[113] Further, it found that this test did not conform to the requirements established by the electoral law as it vested full discretion in a lone functionary. The Court, finding that the procedures were incompatible with procedural fairness and legal certainty, therefore held that Latvia violated Article 3 of the First Optional Protocol.[114] Having resolved the case on this basis, the Court did not proceed to examine the complaints under Articles 13 and 14.[115] As compensation, the Court required Latvia to pay damages to the plaintiff for the associated mental anguish and humiliation, as well as for fees, expenses, and interest.[116]

The *Podkolzina Case* also has significant implications for the protection of the rights of ethnic, linguistic Russians in Estonia within the framework of the European Convention on Human Rights. Although Estonia has recently repealed a similar law requiring linguistic competence from candidates for State and national office, there are provisions on the books that could serve as the basis for a challenge under the European Convention. For example, the Advisory Committee of the FCNM has noted that Article 23 of the Language Law is so wide in its scope that it hinders the implementation of the rights of persons belonging to national minorities, especially

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[108] *Ibid.*, p. 11.
[109] *Ibid.*, p. 13.
[110] *Ibid.*, pp. 14-16.
[111] *Ibid.*, p. 34.
[112] *Ibid.*, p. 35.
[113] *Ibid.*, p. 36.
[114] *Ibid.*, pp. 36, 38.
[115] *Ibid.*, pp. 42, 45.
[116] *Ibid.*, pp. 46-56.

since the term "public" appears in this context to encompass also a range of information provided by private actors and since the obligation to use Estonian is largely interpreted as excluding the use of a minority language.[117] Accordingly, it may be argued that Article 23 may violate the ethnic, linguistic Russians' Article 8 right to respect for private and family life and home, their Article 10 right to freedom of expression without interference by public authority, and their Article 14 right to be free from discrimination based on language, national origin, or association with a national minority. The decision in *the Podkolzina Case* is significant because it demonstrates that the European Court of Human Rights will uphold the rights of persons belonging to minorities. As such, it sends a message to those States that have taken a harder line against their minorities- Estonia and Latvia included - that there are limits and, if invoked in the context of an appropriate case, they will be enforced.

5. 2. Article 14 of the European Convention on Human Rights and Fundamental Freedoms

Equality and non-discrimination provision is provided for in Article 14 of the European Convention on Human Rights and Fundamental Freedoms (European Convention on Human Rights), including a reference to 'minorities' as follows:

> "The enjoyment of rights and freedom 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."[118] (Emphasis added.)

Article 14 has been understood as not being a freestanding clause like Article 26 of the ICCPR, which means that it can only be invoked in conjunction with another substantive right in the Convention. However, the Council of Europe promulgated Protocol 12, on 4 November 2000, to the European Convention on Human Rights that will provide a right to non-discrimination separate from other substantive provisions in the Convention. Article 1 of Protocol No. 12 provides as follows:

> "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."[119]

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[117]Opinion on Estonia, ACFC/INF/OPI (2002), para. 43.

[118] Article 14 of the European Convention on Human Rights.

[119] Protocol No. 12 to the European Convention on Human Rights entered into force on 1 April, 2005, ETS. No. 177. The total number of signature not followed by ratifications is 22 and the total

With the entry into force of Protocol 12, it is not necessary to prove a link between the discrimination and one of the other rights in the Convention. The autonomous application of Article 14 will be critical in that the equality and non-discrimination principle can be substantiated within a single free-standing anti-discrimination provision.

Nevertheless, apart from the positive effects of the Protocol 12, it bears repeating that the jurisprudence of the European Court of Human Rights has interpreted the accessory character of Article 14 with increasing flexibility. The formulation of Article 14 reveals that the enumerated grounds of prohibited discrimination are merely examples.[120] Consequently, the members of ethnic, linguistic or religious minorities can invoke these grounds when relying on the prohibition of discrimination.

More importantly, as an explicit reference to 'minorities' is included in Article 14, the contracting States of the European Convention on Human Rights should take into account 'effective' protection of minority rights in conjunction with Article 14, as a reference to "minorities" as explicitly expressed in Article 14. Otherwise, it may be argued that the contracting States are in violation of the general rule of treaty interpretation in which treaty terms must not be 'devoid of purpose or effect'.[121]

5. 3. Article 16 and Article 14 of the Convention

Article 16 of the European Convention on Human Rights provides that "Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."[122] The first two articles address freedom of expression and association, the last the prohibition of discrimination.[123]

However, it appears that the possibility of restriction on the rights of 'aliens' under Article 16 may decrease with the entry into force of Protocol No. 12 to the European Convention. In Article 3, Protocol No. 12 notes: "As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles

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number of ratifications/accessions is 13. Estonia and Latvia had not yet as of 31 August, 2005.

[120] K. Henrard, *Devising an Adequate System of Minority Protection* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2000), pp. 72-73; D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Buttersworth, 1995), p. 465.

[121] Article 33 (4) of the Vienna Convention on the Law of the Treaties, 8 ILM 679, 1969.

[122] Article 16 of the European Convention on Human Rights.

[123] *Ibid.*

to the Convention, and all the provisions of the Convention shall apply accordingly."[124] The explanatory Report accompanying Protocol No. 12 notes that while "all the provisions of the European Convention shall apply in respect of Articles 1 and 2 of the Protocol" - making special reference to Article 53 and its future application "in the relations between the present Protocol and the Convention itself"-it observes in the next sentence: "It was decided not to include a reference to Article 16 of the Convention in this Protocol."[125] This means that the Protocol is separate from Article 16's limitations on Article 14. That is, Article 16 of the Convention does not apply to Article 1 of Protocol No. 12, hence, Article 1 of Protocol 12 overrules Article 16 of the Convention rather than being conditioned by the latter provision.

Given that Protocol No. 12 will expand the protection afforded aliens under the European Convention on Human Rights, it may be argued that it will provide stateless persons or non-citizens belonging to ethnic, religious or linguistic groups, such as the ethnic or linguistic Russian stateless persons or non-citizens of Estonia and Latvia with more effective legal grounds to contest discriminatory treatment by State authorities.

5. 4. Margin of Appreciation and the Protection of Minority Rights

A critical question, then, would be the assessment of criteria to determine 'discrimination' within the meaning of Article 14. It is likely to clarify the scope of the non-discrimination principle reflected in Article 14 of the Convention. According to the jurisprudence of the European Court of Human Rights (ECHR),[126] the non-discrimination principle provided in Article 14 is deemed to have been violated when the difference in treatment of comparable situations did not have an objective and reasonable justification.

Not every differential treatment of the Convention's rights amounts to a violation of Article 14. The equality and non-discrimination principle is violated if the distinction or differential treatment has no 'objective and reasonable justification', and that the existence of such a justification has to be evaluated in relation to the aims and

[124] *Protocol No. 12, op.cit.*, Article 3.
[125] Explanatory Report to Protocol No.12 to the European Convention on Human Rights, at http://conventions.coe.int/ Treaty/en/Reports/Html/177.htm (2000).
[126] *Belgian Linguistic Case*, ECHR, Series A., No. 6, 1968; *Petrovic v. Austria*, Reports of Judgments and Decisions, 1998-II, 1998; *Larkos v. Cyprus*, Reports of Judgments and Decisions,1999-I, 1999.

effects of the measure in question against the background of the principles inherent in democratic societies. The measures taken must be 'proportionate' to the 'aim' sought to be realised. In evaluating the proportionality, emphasis is put on the basic values of democratic societies, such as broadmindedness, tolerance and mutual respect.[127]

States have been given a certain degree of margin of appreciation in putting into practice those special measures to realise 'legitimate aims'.[128] However, as far as the margin of appreciation is concerned, it is also true that it has been described as a negative practice limiting the protection and expansion of minority rights at the European level.[129] Under this doctrine,[130] States' authorities or national governments are given a certain degree of discretion regarding the specific manner in which they implement the rights in the European Convention on Human Rights.

The doctrine, which permeates the jurisprudence of the ECHR, is based on the primacy of national implementation of rights and the notion that State authorities are often better situated to judge local conditions and the various public interests that inevitably compete with the claims of individuals.[131] A critical question in relation to the non-discrimination principle would be, however, whether the doctrine of margin of appreciation is really compatible with the idea of universal human rights and protection of the rights of minorities. The emphasis of supporting the doctrine and the lack of corresponding emphasis on universal standards of human rights may undermine the effectiveness and credibility of the protection of the rights of minorities under international law. As Henrard notes:

> "The interests of the contracting states have a tendency to predominate the balancing process and the states also enjoy a wide margin of appreciation, which is not conducive to the realization of minority protection goals."[132]

However, the ECHR, while recognising the need for a State to be able to act within its own national discretion, has also repeatedly noted that the margin is limited by the concept of European supervision. Under this principle, the EHCR, as the final arbiter of European Convention on Human Rights, must assert its role to determine the

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[127] *Henrard, Devising an Adequate System of Minority Protection, op.cit.*, pp. 74-75.

[128] In the European Court's jurisprudence, "legitimate aim" is often used synonymously with "objective and reasonable justification". See L. Clements et al., *European Human Rights: Taking a Case Under the Convention* (London : Sweet & Maxwell 1994), pp. 216-217.

[129] *Henrard, Devising an Adequate System of Minority Protection, op.cit.*, p. 75.

[130] For a general approach to the concept of margin of appreciation, H.Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996).

[131] *Lawless v. U.K.*, ECHR Series A-3, 1961; *Ireland v. United Kingdom*, ECHR, Series A-25, 1978; *Brannigan & McBride v. United Kingdom*, ECHR, Series A-258-B,1993.

consistency of State conduct with the European Convention on Human Rights. Therefore, the margin doctrine is essentially not static, but dynamic. The ECHR's teleological treaty interpretation, demanding scrutiny of State justification and emphasis on the effectiveness of the rights in question, explains the dynamic nature of the concept of the margin of appreciation, which tends to be limited by European supervision.[133]

Although not strictly limited to such rights, the doctrine is frequently invoked when the ECHR is evaluating the scope of personal liberties under Articles 8 to 11, which inevitably implicate the exception clauses of those provisions, requiring a balance between individual and public interests. Freedom of speech, religion, family life, and privacy are included in these Articles, which address personal liberties. These Articles expressly allow for limitations on those rights in order to protect certain categories of public interests which are "necessary in a democratic society".[134] The ECHR has relied on this language to formulate tests for evaluating and limiting the exercise of States' discretion allowed national authorities in their implementation of rights. Thus, limitation on such rights by States must be with the intention of achieving a pressing social need in a democratic society, and the means sought must be proportionate to those ends. It is important, in this regard, to note that the exact measure of proportionality will vary depending upon the context and the rights involved. More 'exacting proportionality' has been required when States have justified restrictions on personal freedoms, as opposed to State restrictions affecting property rights. The more exacting proportionality principle is also used in the context of non-discrimination under Article 14 of the Convention.[135]

The area of tension between the two paragraphs of Article 8 of the Convention became obvious in the *Slivenko Case*.[136] The applicants in this case, Tatjana Slivenko and her daughter Karina, were permanent Latvian residents of Russian origin. Tatjana Slivenko, whose father was an officer in the Soviet army, moved to Latvia when she was one month old. She married Nikolay Slivenko, who served as a Soviet military

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[132] *Henrard, Devising an Adequate System of Minority Protection, op.cit.*, p. 144.
[133] *Yourow, The Margin of Appreciation Doctrine, op.cit.*, p.15.
[134] The language of Article 8 is typical among these provisions. It explicitly allows for restrictions "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."
[135] P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Boston: Kluwer Law International, 1990), p. 81.
[136] *Slivenko v. Latvia*, Application Number, 48321/99, judgment of 9 October, 2003.

officer in Latvia. Their daughter, Karina, was born in Riga, Latvia, in 1981. After Latvia regained independence in 1991, Tatjana and Karina Slivenko were entered in the register of Latvian residents as 'ex-USSR-citizens'. In 1994, however, the Latvian immigration authorities annulled this registration, relying on the fact that Soviet military officers and their families were required to leave Latvia under the terms of the Latvian-Russian treaty on the withdrawal of Russian troops. Consequently, the Slivenko family received a deportation order. Only Tatjana Slivenko's parents were allowed to stay because the Latvian-Russian treaty did not affect military officers that had retired from office before 28 January 1992, as was the case with Tatjana's father. The applicants proclaimed that their removal from Latvia had violated their right to respect for their 'private life', their 'family life' and their 'home' within the meaning of Article 8. The Latvian government, on the other hand, maintained that this decision pursued the legitimate aims of the protection of national security and the prevention of disorder and crime in a democratic society.[137] The Court accepted that the Latvian-Russian Treaty and its implementing measures sought to protect the interests of national security. Accordingly, the obligation to leave the country was not in itself objectionable from the perspective of the Convention. However, application of removal orders without any possibility of taking into account individual circumstances is deemed to be incompatible with the requirement of Article 8.[138] The Court referred to the applicant's 'personal, social and economic ties' in Latvia and concluded that they were sufficiently integrated into Latvian society.[139] According to the Court, these elements were not taken into consideration by the Latvian authorities. Moreover, the Latvian government had based its decision on the family links with Tatjana Slivenko's father, who was not himself considered to present a danger to the national security of the country. The Court, therefore, concluded that the Latvian authorities "overstepped their margin of appreciation" and awarded a compensation amount of 10,000 Euro to each of the applicants.[140]

The margin of appreciation has been noted as being justified as a means to promote democracy within communities in a State. The delicate problem is, as far as the protection of minority rights is concerned, democracy with the superiority of the views of the majority is prone to undermine the interests of persons belonging to

[137] *Ibid.*, p. 77.
[138] *Ibid.*, p. 122.
[139] *Ibid.*, p. 125.

minority groups. As majorities dominate political processes with the numerical superiority of voting power, the democratic practice can be utilised as a means to secure the interests of the majority at the expense of minorities. If the interests of the members of minority groups were secured to the fullest extent that such protection of the interests and benefits of the members of minorities were guaranteed, the doctrine of margin of appreciation would not be problematic. However, when the guarantees of democratic practices for the equal status of persons belonging to minorities are not secured, no margin must be tolerated.

While the doctrine may be justified in certain matters that affect the general population in a society, it is not appropriate when the issue of the protection of the rights of minorities arises. In the case of conflicts between majorities and minorities, the doctrine must not be applied, because applying the doctrine under those circumstances will eventually result in restrictions exclusively on the rights of persons belonging to minority groups. Hence, the application of the margin doctrine is only justified with regard to policies that affect the 'general population' equally, such as restriction on hate speech towards persons belonging to ethnic, religious or linguistic groups, as a way to protect public order and morality.[141] On the other hand, no margin is called for when the rights of the members of a minority group are restricted, for instance, in the field of the freedom of speech or freedom to set up an association, educational opportunities and allocation of resources affecting minority rights, because giving wide discretion to States in these instances, in fact, is to give unfair benefits to the majorities by constraining minority rights. Benvenisti's following argument, in this sense, seems to have got the point:

> "To grant a margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities."[142]

Granting a margin of appreciation to States in regulating the matters of the protection of minority rights in which formal equality treatment of minorities is likely to result in factual inequalities is to violate the equality and non-discrimination provision. In such cases, the margin doctrine must be rejected and, rather the margin must be used for the protection of persons belonging to minorities on the basis of

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[140] *Ibid.*

[141] *Jersild v.Denmark*, ECHR Ser. A-19, 1994.

[142] E. Benvenisti, "Margin of appreciation, consensus, and universal standards", *N.Y.U. J. Int'l L. & Pol.*, Vol., 31, 1999, p. 850.

substantive equality.

In this context, it is possible and necessary to link the concept of "the legitimate aim" within the equality and non-discrimination jurisprudence of the ECHR in a positive way to implement substantive equality for the protection of the rights of persons belonging to minorities. The concept of the legitimate aim relates to the basic interests of a society, such as 'national security', 'public safety', 'economic well-being', 'public interest', etc.[143] Referring to the jurisprudence of Dworkin, it seems to the present writer that the concept of 'legitimate aims' is similar to 'collective goals', which is not only advisable but also 'essential' in a democratic society.[144] According to Akermark, the concept of 'legitimate aims' shows the link between the permissibility of distinctions under Article 14 and the grounds of restrictions under each substantive provision of the Convention and its protocols. She went on to state with reference to the *Belgian Linguistic Case,*[145] that:

> "Cultural preferences and politics such as, in this case, the aim of "linguistic homogeneity" and the effort to strengthen the Flemish-speaking group, may come under this term and the organs of the Convention must evaluate whether they are consistent with Article 14."[146]

The ECHR has indicated that these legitimate aims may well prevail over individual rights under certain circumstances. Thus, it is possible to conceive of the protection of ethnic, religious or linguistic minority groups as a 'legitimate aim' in view of the ECHR jurisprudence, as Akermark suggested, since a State's positive measures to protect minority rights may be included within the legitimate aims, assuming that the measures are proportionate to the aims of the protection of minority rights in a society.[147] The requirement of an objective and reasonable justification of 'legitimate difference' for achieving the 'legitimate aims' in a society seems to conform to 'substantive equality' in the context of equality and non-discrimination. Substantive equality seeks to introduce a different treatment for the benefits of the members of minority groups in which temporary differential policies by States are justified and States are obligated to correct the existing 'factual' inequalities. Therefore, it may be argued that legislative or administrative measures designed to

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[143] See Articles 8 (2), 9(2), 10(2), 11(2) of the Convention; *P. van Dijk & G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, op.cit.,* pp. 583-585.
[144] R.Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).
[145] *Belgian Linguistic Case*, ECHR Series A, No. 6, 1968.
[146] A. S. Akermark, *Justification of Minority Protection in International Law* (London/The Hague/Boston: Kluwer Law International, 1997), p. 208.
[147] *Ibid.*

protect the rights of the members of such ethnic, religious or linguistic minorities for the purpose of correcting unequal situations are justifiable and necessary to achieve the 'legitimate aims'.

6. More Solid Legal Bases for the Protection of Minority Rights by Linking Minorities-Specific Standards to General Human Rights Standards

The non-discrimination provisions in the ICERD, Articles 2 and 26 of the ICCPR, and Article 14 of the European Convention on Human Rights all appear to contain substantive equality within the meaning of the non-discrimination principle. Unlike the ICERD under which a State's positive action to achieve substantive equality is explicitly stipulated, Articles 2, 26 of the ICCPR and Article 14 of the European Convention on Human Rights have not provided an explicit expression for substantive equality in each provision. Nevertheless, contextual and systematic interpretation of the provisions with reference to the ICERD, as well as the review of the HRC General Comments and the examination of the ECHR's jurisprudence support the substantive equality in the nature of those provisions.

Articles 1 (2), and 4 (2) of the UN Declaration on Minority Rights imply that States are expected to "create special structures or conditions" ensuring the preservation of minority cultures.[148] If this provision is understood as being applicable for the protection of minority rights in the sense of formal equality, effective protection could not be achieved. In the same context, paragraph 33 of the Copenhagen Document provides that:

> "The Participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and *'create conditions'* for the promotion of that identity..."[149] (Emphasis added.)

This provision would also be empty without the possible applicability of substantive equality, as "creating conditions" would naturally mean the necessity of providing positive State actions for the full equality of persons belonging to minorities. Paragraph 31 of the Copenhagen document provides that:

> "...The Participating State will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities *'full equality with other citizens'*

[148] Articles 1 (2), and 4 (2) of the UN Declaration on Minority Rights.
[149] Paragraph 33 of the Copenhagen Document.

in the exercise and enjoyment of human rights and fundamental freedoms."[150] (Emphasis added.)

The expression of "full equality with other citizens in the exercise and enjoyment of human rights and fundamental freedoms" seems to encapsulate exactly substantive equality within the meaning of the equality and non-discrimination principle for the protection of persons belonging to minorities.

As to the limitation on qualification for political candidacy for the ethnic, linguistic Russians in Latvia, the Advisory Committee on the FCNM, referring to the *Podkolzina Case*[151] before the ECHR, concluded that such restrictions have violated norms of minority protection, not because they have intruded upon an individual's procedural due process rights, but because they are incompatible with the duties undertaken by States parties to "create the conditions necessary for the effective participation" of national minorities.[152] The Advisory Committee's view illustrates that substantive equality must be a reference of interpretation for instruments on the protection of minority rights, without which it would be difficult to achieve the goals of the protection of minority rights under international law.

However, it also should be noted that the scope of the non-discrimination principle with respect to its application needs to be carefully co-ordinated. Under general human rights standards, the non-discrimination principle can be invoked for everyone, including women, persons who hold particular views, persons identified with particular political causes, and others. Persons belonging to minorities often feel discriminated against, and they, too may invoke the anti-discrimination provisions. Yet the non-discrimination provisions under general human rights standards are not reserved for ethnic, religious or linguistic minorities as such. In contrast, minorities-specific standards, such as Article 27 of the ICCPR and the FCNM, provide certain guarantees which are available only to persons belonging to national, ethnic, religious or linguistic minority groups. In this regard, it would be correct to say that minorities-specific standards and general human rights standards are complementary and may be used in a constructive way to protect minority rights effectively. This reasoning is confirmed in the HRC General Comment No. 23. Some States argue that they have no minorities, hence no minority rights to protect, as they comply with anti-

[150] *Ibid.*, Paragraph 31.of the Copenhagen Document.
[151] *Podkolzina v. Latvia*, No. 46726/99, Apr. 9, 2002, at http://www.echr.coe.int/Eng/judgments.htm.
[152]Opinion on Estonia, ACFC/INF/OPI (2002), paras. 52-55.

discrimination clauses. This argument is aptly dismissed by the HRC as follows:

> "The Covenant also distinguishes the rights protected under article 27 from the guarantees under article 2(1) and 26. Under these articles on non-discrimination rights are conferred on individuals within the jurisdiction on the State Party irrespective of whether they belong to the minorities specified in article 27 or not. Some states parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities"[153]

7. The Substantive Equality Principle and the Baltic Implications

Article 12 of the Estonian Constitution, for instance, establishes an explicit ban of discrimination as follows:

> "Everyone is equal before the law. No one shall be discriminated against on the basis of ethnicity, race, color, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. The incitement of national, racial or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable."[154]

Article 9 also provides that:

> "The rights, freedom and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia."[155]

In October 1998, a new section devoted to "Fundamental Human Rights" was added to the Constitution of the Republic of Latvia. The Constitution, as amended, provides for the non-discrimination of all human beings before the law and stipulates that human rights shall be realised without discrimination of any kind.[156] The right of persons belonging to minorities to preserve and develop their language and their ethnic and cultural identity is enshrined in Article 114. Article 105 guarantees to everybody the right to own property and makes property rights subject to restriction only in accordance with the law.[157]

The main problem for the ethnic, linguistic Russian stateless persons or non-citizens in access to citizenship in Estonia and Latvia seems to consist of two aspects. One is the Estonian and Latvian language examination test and the other is the requirement of knowledge of Estonian and Latvian history and their constitutions as

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[153] HRC General Comment No. 23 (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 1994, para. 4.
[154] Article 12 of the Estonian Constitution.
[155] Article 9 of the Estonian Constitution.
[156] Article 91 of the Latvian Constitution. English language text provided by the Translation and Terminology Centre for Information only.
[157] Article 105 of the Latvian Constitution.

part of the naturalisation procedure. During the Soviet period, learning the Estonian and Latvian languages was not necessary and therefore many ethnic, linguistic Russians living in the territories of what are now Estonia and Latvia do not speak, write or understand the titular languages of Estonian and Latvian. Moreover, for elderly people, preparing for the examination on one's own can be very difficult, while attending language courses and obtaining the necessary course materials can incur additional expenses.[158] At the same time, during the former Soviet Union times it was compulsory to learn only the history of Soviet Russia. However, in the naturalisation procedure for the citizenship of Estonia and Latvia, this uniqueness of the existence of ethnic, linguistic Russians is almost ignored, which means that the history of Latvia and Estonia should be learned from the beginning. More serious is that these ethnic, linguistic Russians cannot easily accept these requirements internally, simply because they think they deserve citizenship of Estonia and Latvia by reference to their long-term and habitual residence in Estonia and Latvia.[159]

In spite of the existence of restrictive citizenship criteria for the ethnic, linguistic Russians in Estonia and Latvia, as noted above, it is ironic that these countries claim non-discrimination of all persons, particularly on the grounds of race or ethnicity

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[158]The Language laws of Estonia and Latvia seem to have made worse the marginalisation of the ethnic, linguistic Russian groups rather than integrating them into the Estonian and Latvian societies. The core legal act of Estonian ethnic policies is the Law on Language. Article 1(1) of the Law repeats Article 6 of the Constitution that "Estonian is a State language of Estonia". According to Article 4 (1) of the Law, "everyone has the right to access public administration and to communicate in Estonian in state agencies, local governments, bureaus of notaries, bailiffs and certified interpreters and translators, cultural autonomy bodies and institutions, companies, non-profit associations and foundations"' According to the 1989 national census, only 15% of local ethnic Russians can speak the Estonian language. In 2000 this figure rose to 40%. The level of proficiency was much higher among representatives of the young generation. (59% of persons aged 15-19.) Under these circumstances, unification of Estonian society on the basis of the language is hardly possible. V. Poleshchuk, *Non-Citizens in Estonia* (Tallinn: Legal Information Centre For Human Rights, 2004), p. 15. According to Article 1 of the new Latvian State Language Law (adopted in December 1999 and entered into force on 1 September 2000), the purpose of the law is to ensure: the preservation, protection and development of the Latvian language; the preservation of cultural and historical heritage of the Latvian nation; the right to use the Latvian language freely in any spheres of life in the whole territory of Latvia; the integration of national minorities in the society while observing their right to use their mother tongue or any other language; and the increase of the influence of the Latvian language in the cultural environment or Latvia by promoting a faster integration of society. Article 5 of the Law, stipulates that any languages used in Latvia other than Latvian, with the exception of the Liv language (spoken by the Livs, long-established ethnic group in the territory of Latvia), shall be considered as 'other' languages. However, this provision can be problematic in that it appears to contribute to the creation of an atmosphere of antagonism in language policy with regard to use of all other languages of the territory of Latvia which might qualify as regional or minority languages. *European Commission against Racism and Intolerance, Second Report on Latvia*, adopted on 14 December 2001, pp. 9-11.

[159] According to Vadim Poleshchuk, the language test is the most often mentioned by stateless or non-citizens as the most difficult barrier in access to citizenship. From the present writer's interview with Vadim Poleshchuk in July 2005; *Poleshchuk, Non-citizens in Estonia, op.cit.*, pp. 19-20.

under their respective constitutions. While declaring adherence to the non-discrimination principle, the Estonian and Latvian governments have also denied the historical fact of the long-term residence of the ethnic, linguistic Russians during the Soviet period by setting restrictive criteria in the citizenship laws.[160]

Racial discrimination and discrimination on the grounds of nationality or citizenship often overlap such that distinguishing between the two is not easy. As a result, the grounds for a particular discriminatory act may not always be clear. As noted, the prohibition of racial discrimination is a *jus cogens* norm. But the ICERD specifically exempts from its application the "legal provisions of States Parties concerning nationality, citizenship or naturalisation."[161] However, it also prohibits "discriminating against any particular nationality".[162] It needs to be emphasised that the legal philosophical foundation of the international protection of human rights is built upon the premise that 'all persons' should enjoy human rights "unless exceptional distinctions serve a legitimate State objective and are proportional to the achievement of that objective."[163] The HRC's General Comment on the position of aliens emphasises the universality of human rights as follows:

> "...the rights set forth in the International Covenant on Civil and Political Rights apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness... The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[164]

The limited attention given to the rights of non-citizens[165] by human rights monitoring organs has meant that the particulars of the legal regime governing discrimination against non-citizens are not clear. The less developed nature of the prohibition against discrimination on the grounds of citizenship status is a serious problem for the effective protection of persons belonging to minority groups.[166] The

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[160] This required proficiency and knowledge for the naturalisation procedure was criticised by the HCNM for demanding high threshold, Letter to V. Birkavs, Minister for Foreign Affairs of the Republic of Latvia from OSCE HCNM, Max van der Stoel, see H. M. Morris, "EU Enlargement and Latvian Citizenship Policy", *JEMIE*, Issue 1/2003, p. 14.

[161] Article 1(2) of the ICERD.

[162] Article 1 (3) of the ICERD.

[163] UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "Prevention of Discrimination: The rights of non-citizens-Final Report of the Special Rapporteur, Mr. D. Weissbrodt", 26 May, 2003, E/CN.4/Sub.2/2003/23, para. 6.

[164] HRC General Comment 15 on the position of aliens under the Covenant (1986), 11/04/86, paras., 1-2.

[165] The broad category of 'non-citizens' must not detract from the different groups of persons covered by it. It indeed covers such diverse groups as stateless persons and asylum seekers. The Committee on the Elimination of Racial Discrimination (CERD) has appealed to States to reduce statelessness in this context. See Concluding Observations on Switzerland, 21 May 2002, CERD/C/60/CO/14, para.10.

[166] D. A. Martin, "The Authority and Responsibility of States", in T. Aleinikoff and V. Chetail (eds.),

gap between the declaration of the prohibition against racial discrimination as such in general and the much more mixed protection against discrimination against persons belonging to ethnic, religious or linguistic groups at the domestic legal level creates a difficult problem, because what is in fact racial discrimination can sometimes be confused with or justified as a problem of citizenship for which States may have their own discretion.

Lady Hale's opinion in the Belmarsh Case in the UK, in this regard, has nicely illustrated the problem. The case in which the Law Lords gave judgment relates to the internment of foreign terrorist suspects under the Anti-terrorism, Crime and Security Act 2001 (ATCSA). The internment law required the government to issue a derogation from Article 5 of the European Convention on Human Rights (the right to liberty), which it could only do in cases of a "public emergency threatening the life of the nation". The Lords were asked to decide firstly whether the government was entitled to claim that there was such a public emergency justifying the law; secondly, whether the internment law was proportionate to the threat of terrorism, and finally, whether it was discriminatory. The differential treatment of foreigners versus British suspects had been justified by the Attorney-General on the basis that the foreigners, unlike the British suspects, had no right to be in the country. This argument had held sway in the Court of Appeal. But, said the Lords, that was irrelevant to the threat of terrorism, which was as real in relation to the British terror suspects as it was in relation to the foreign ones. Lady Hale described the law in question was disproportionate precisely because it discriminated between British and foreign suspects. Her opinion, which is significant in the appreciation of the essence of the equality principle, is worth quoting at length:

> " The Government knew about certain foreign nationals presenting this problem, because they were identified during the usual immigration appeals process. But there is absolutely no reason to think that the problem applies only to foreigners. Quite the reverse. There is every reason to think that there are British nationals living here who are international terrorists within the meaning of the Act...who cannot be deported to another country because they have every right to be here. Yet the Government does not think that it is necessary to lock them up...It is also inconsistent with our other obligations under international law from which there has been no derogation, principally article 14 of the European Convention...the fact that it is sometimes permissible to treat foreigners differently does not mean that every difference in treatment serves a legitimate aim...Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities."[167]

Migration and international legal Norms (Cambridge: Cambridge University Press, 2003), pp. 34-35.

[167] *A and others v. Secretary of State for the Home Department, X and another v. Secretary of State for the Home Department*, 2004 UKHL 56, paras. 228-237.

Both problems, that is, the confusion of racial discrimination with citizenship-based distinctions and the use of language of citizenship to justify racial discrimination, are compounded by States' possible arbitrary determination of citizenship. A State's discretion to define the contours of citizenship has been recognised under public international law. Determining membership in the territorially circumscribed political community remains one of the core attributes of State sovereignty under the present state of public international law. However, aside from the recognition of a State's discretion in regulating citizenship under international law, restrictive citizenship criteria in citizenship law can be assessed from the principle of substantive equality in relation to the effective minority protection.

As observed above, the scope of Article 26 of the ICCPR is not confined to its application to the rights set forth in the Covenant. The critical point is that Article 26 applies 'autonomously' to all legislative acts by State parties, including nationality legislation, and not merely those in furtherance of the other rights secured by the Covenant. The autonomous nature of the non-discrimination provision in Article 26 of the ICCPR is critical for the protection of persons belonging to ethnic, religious or linguistic minority groups, particularly in the context of State succession in relation to citizenship. A new State is naturally faced with the task of creating its national identity, a process of defining itself as a 'people'. Sometimes, this process tends to be quite volatile given the determination of one group in a State to define its identity as against other groups in the State. The main tool for the objective of forming 'national unity' is to set restrictive citizenship criteria in citizenship law in a way to exclude different ethnic, religious or linguistic minority groups. These types of restrictive criteria in citizenship laws, however, would seem to be contrary to the non-discrimination principle.

In the same context, Article 2 (c) of the ICERD requires States parties to "nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination."[168] Hence, States parties of the ICERD could be in breach of Article 2 (c) if some criteria in their citizenship laws and policy have the effect of discriminating against persons of a particular ethnic, religious or linguistic origin.

The existence of the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia is a case in point. After the fall of the former Soviet Union, over a

[168] Article 2 (c) of the ICERD.

third of the Estonian and Latvian populations became non-citizens, since nationality legislation of the two countries, unlike the case of Lithuania, only permitted those who were Estonians and Latvians by birth to become citizens. A language requirement was added to the naturalisation requirements- a very considerable obstacle to overcome for those who have only used Russian. Half the population was required to register to obtain resident permits- a very humiliating and difficult process that they were forced to undertake in a foreign language. Many of these ethnic, linguistic Russians were classified as illegal residents and ran the risk of being deported to Russia, where, having lived in Estonia and Latvia their whole lives, they had no families and no social connections.[169]

Despite the reality of the marginal status of the Russian residents in question, the Estonian and Latvian laws proclaim that universally recognised principles and norms of international law shall be an inseparable part of the Estonian and Latvian legal system.[170] Such international norms and practices, to be sure, include the non-discrimination principle. The opinions of the Advisory Committee on the FCNM on the situation of the ethnic, linguistic Russians in Estonia, in this regard, appear to have provided critical evidence of Estonia's violation of the non-discrimination principle under international law. Even though these opinions have dealt with the Estonian situation, this legal reasoning could be equally applied to the case of Latvia. On the matter of Estonia's minority policies, the Advisory Committee questioned the effectiveness of the Estonian government's provision of the National Minorities Cultural Autonomy Act of 1993. Estonia's definition of national minority was the object of criticism.[171] It concluded that "the law excludes non-citizens from the leading bodies of the cultural autonomies, despite the fact that a high proportion of the minority population does not have Estonian citizenship, and it leaves out some of the numerically smallest minorities from its scope altogether."[172] To address this deficiency of minority protection in Estonia, the Committee advocated "initiatives to revise or replace this legislation with a view to strengthening the applicable norms and

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[169] *Poleshchuk, Non-Citizens in Estonia, op.cit.*, pp. 12-13; *Human Rights in Latvia, op.cit.*, pp. 23-24.

[170] For instance, Article 3 (1) of the Estonian constitution provides that "The state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system." Translated by Estonian Legal Translation Centre.

[171] Advisory Comm. on the Framework Convention for the Protection of National Minorities, Comm. of Ministers, (Advisory Committee), Opinion on Estonia, adopted on 14 September 2001, ACFC/INF/OP/I (2002)/005, Specific comments in respect of articles 1-19, para. 29.

[172] *Ibid.*

to adapting them to the current minority situation of Estonia."[173] Moreover, as to the issue of naturalisation, the Committee emphasised that the lack of citizenship can bring inequality for the ethnic, linguistic Russian stateless persons and non-citizens, arguing that:

> "...lack of citizenship often has a detrimental impact on the enjoyment of full and effective equality and can give rise to discriminatory practices."[174]

It further made clear that this lack of citizenship has a "detrimental impact on the enjoyment of full and effective equality" for the ethnic, linguistic Russian residents and that practice is the violation of the duties of States Parties to adopt adequate measures to promote such equality under Article 4(2) of the FCNM.[175]

The United Nations Human Rights Committee (HRC) under the ICCPR's assessment of Latvian citizenship law also provides an important reference in this matter. The Committee stated as follows:

> "The Committee is concerned at the possible obstacles posed by the requirement to pass a language examination, The State party should further strengthen its efforts to effectively address the lack of applications for naturalization as well as possible obstacles posed by the requirement to pass a language examination, in order to ensure full compliance with article 2 of the Covenant...the Committee is also concerned about the large proportion of non-citizens in the State party, who by law are treated neither as foreigners nor as stateless persons but as a distinct category of persons with long-lasting and effective ties to Latvia, in many respects comparable to citizens but in other respects without the rights that come with full citizenship. The Committee expresses its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population...The State party should prevent the perpetuation of a situation where a considerable part of the population is classified as "non-citizens".[176]

It concluded that Latvia must take more positive measures to increase the rate of naturalisation and improve the integration of ethnic, linguistic Russians into Latvian society. Latvia was also required to ensure general equality of treatment for non-citizens and ethnic, linguistic minorities, in particular in job opportunities and participation in the democratic process.[177]

It is possible to argue that the requirements of language proficiency for naturalisation in citizenship laws in Estonia and Latvia have a 'discriminatory impact' on the ethnic, linguistic Russians. It denies the historical fact that those ethnic, linguistic Russians had long resided there using the Russian language during the

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[173] *Ibid.*
[174] *Ibid.*, para. 26.
[175] *Ibid.*, para. 23.
[176] Concluding observations of the United Nations Human Rights Committee: Latvia, 6 November 2003, CCPR/CO/79/LVA, paras. 16-18.

period of the former Soviet Union, thereby establishing emotional, factual and social connections to what are now Estonia and Latvia. Therefore, it can be argued that a language requirement for naturalisation in the citizenship laws is contrary to the non-discrimination principle in the sense of substantive equality under international law.

8. Conclusions

(1). Equality and non-discrimination are universally accepted principles of human rights as well as critical elements for achieving the objective of protecting minority rights under international law. In particular, prohibition of racial discrimination is a *jus cogens* norm that binds all member States of the international community.

(2). Aside from the irrelevance of citizenship to the enjoyment of minority rights under minorities-specific standards, it is also observed that the limitation of the personal scope of the enjoyment of minority rights with reference to citizenship status is contrary to the non-discrimination principle under general human rights standards. In this sense, Estonia's limitation of the enjoyment of minority rights to only 'Estonian citizens' is contrary to the non-discrimination principle.

(3). Despite the absence of positive minority rights provisions, the European Court of Human Rights nevertheless sets out a rights agenda which interacts with essential concerns of minorities. Moreover, with the entry into force of Protocol 12, it is not necessary to prove a link between the discrimination and one of the other rights in the European Convention on Human Rights. The autonomous application of Article 14 of the Convention will be critical in the context of the protection of minority rights. With the entry into force of Protocol No. 12, it is possible to interpret that equality and non-discrimination extend the protections accorded to individuals by scrutinising whether restrictions that are superficially neutral are nonetheless violations, because they discriminate in the restriction of Convention rights on the basis of "association with a national minority."

(4). Examination of the nature of the non-discrimination principle at the theoretical level as well as relevant equality and non-discrimination provisions in the major human rights conventions such as the ICCPR, ICERD and the European Convention on Human Rights beyond minorities-specific standards indicates that equality and

[177] *Ibid.*, para. 18.

non-discrimination under those conventions do arguably conform to 'substantive equality' within the meaning of the non-discrimination principle. On this basis, it may be argued that States parties to those conventions in which ethnic, religious or linguistic groups have resided have obligations to protect the interests of members of such minority groups 'effectively', by way of providing positive measures to correct existing 'factual' and 'indirect' discrimination including citizenship matters that persons belonging to such groups have suffered or are suffering in such a way to achieve substantive equality.

(5). The linkage of the prohibition of racial discrimination as such to that of discrimination on the basis of citizenship within the non-discrimination principle is critical in resolving the problem of the protection of persons belonging to minority groups caused by restrictive citizenship measures of States in which they reside. Although a State has broad discretion in regulating citizenship matters under international law, if eligibility criteria for citizenship have 'discriminatory impacts' on particular ethnic, religious or linguistic groups, they can be contrary to the non-discrimination principle in the sense of substantive equality under international law.

(6). The language requirement for naturalisation in the citizenship laws of Estonia and Latvia, both of which are parties of the ICCPR, ICERD and the European Convention on Human Rights, may be stated as being contrary to the non-discrimination principle, since it ignores the historic and habitual residence of the ethnic, linguistic Russians in the territories of what are now Estonia and Latvia, thereby justifying factual and indirect discrimination or inequalities in the language of citizenship laws.

(7). The linkage of minorities-specific standards to general human rights standards with emphasis on 'substantive equality' is significant in the sense of the consolidation of the legal and normative bases for the effective protection of minority rights under international law. Members of minority groups may be protected in the sense that they are protected individual human beings on the basis of the substantive equality principle under general human rights standards, beyond the protection as members of minority groups under minorities-specific standards.

Chapter VII

Minority Protection under Internal Self-determination

1. Introduction

When one considers the existence of the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia, who can be considered persons belonging to ethnic, religious or linguistic minorities by reference to a new definition of the concept of a minority observed in Chapter 4 of this thesis, the question of protecting their right to political participation in their State of residence becomes more serious and urgent. In this sense, the vagueness of the legal basis for the participation rights of persons belonging to minorities in international law is a fundamental problem in the context of the effective protection of the rights of persons belonging to minority groups. Even if the maintenance of cultural identity of minorities were guaranteed, if the right to participate in the public and political process by persons belonging to such minorities in their States of residence were not secured, the protection of persons belonging to minority groups would be purely theoretical.

This chapter is primarily concerned with the examination of the right to self-determination as a legal and normative basis for the protection of minority rights in the context of the guarantee of political and public participation, with special reference to the conceptual aspects of peoples and minorities in the right to self-determination. This approach seems quite necessary, because the definition of the concept of peoples, as the holders of the right to self-determination under international law, has consequences with respect to the protection of minority rights.[1] Depending on how the concept of peoples as the holders of the right to self-determination is defined, the extent and degree of the protection of minority rights will be affected accordingly, since persons belonging to minorities have resided in a particular State to which self-

[1] The terms 'people' and 'peoples' are used alternatively in this chapter depending on given contexts. This is necessary to avoid terminological confusion in discussing the right to self-determination under international law. In this chapter, the term 'people' refers to the entire body of persons who satisfy the criteria generally accepted for determining the existence of a people in a territorial unit. However, if the holders of the right to self-determination are to be referred to universally beyond a single territorial unit, the expression 'peoples' will be used instead.

determination is being applied as an organising and governing principle.

However, it is also necessary to note from the outset that self-determination has evolved gradually as a legal norm under present international law[2] in terms of its contents and effects, even though it was declared as a peremptory norm of *jus cogen* by the International Court of Justice (ICJ).[3] For a coherent and effective norm from which relevant legal rights spring, it needs to be developed in order to resolve the potentially competing claims and obligations arising from it.[4] It needs, therefore, to be narrowed down for the purposes of the present limited research objective of a productive discussion on self-determination in relation to the protection of minority rights. This chapter shall pay special attention to the development of the internal aspect of self-determination, under which members of the people are entitled to representative governance and government in their State of residence, as it may be a relevant legal and normative basis for the effective protection of minority rights under present international law.

2. Internal Self-Determination in International Law

The United Nations Charter mentions self-determination twice, Article 1 (2) and Article 55. Article 1(2) speaks of one of the purposes of the UN "to develop friendly

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[2] The theoretical and doctrinal elements of self-determination are extensively addressed in a number of works. See, e.g., M. Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982); M H. Halperin, et al., *Self-Determination in the New World Order* (Washington D.C: Carnegie Endowment for International Peace, 1992); H. Hannum, *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1990); A. Heraclides, *The Self-Determination of Minorities in International Law and Politics* (London: Frank Cass, 1991); C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993); A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995);T.D. Musgrave, *Self-Determination and National Minorities* (Oxford: Oxford University Press, 1997); J. Crawford, "The Right of Self-Determination in International Law: Its Development and Future", in P. Alston (ed.), *Peoples' Rights* (Oxford: Oxford University Press, 2001), pp. 7-67.

[3] See, e.g., *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase), ICJ Reports, 1966, p.4; *Frontier Dispute Case* (Burkina Faso v. Republic of Mali), ICJ Reports, 1986, p. 554, p.662; *Western Sahara Case*, ICJ Reports, 1975, p.55; H.G Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions, at 11, UN Doc. E/CN.4/Sub.2/405/Rev.1, UN Sales No. E.79.XIV.5 (1980). The ICJ has reaffirmed the *erga omnes* character of the right to self-determination as "irreproachable" in the case of *East Timor* (Port. v. Austl.), ICJ Reports, 1995, p. 90, reprinted in 34 ILM1583, 1589.

[4] According to Falk, a positivist exercise in the case of self-determination is difficult. He noted that: "The right has been continuously evolving conceptually and experientially in response to the pressure of events, geopolitical priorities, and the prevailing moral and political climate. This combination of factors tends to produce a confusing pattern of historically conditioned precedents, leaving considerable room for widely disparate interpretations bearing on legal doctrine." R. Falk, *Human Rights Horizons*

relations based on the respect for the principle of equal rights and self-determination of peoples."[5] Article 55 also prescribes that "stability and well-being...are necessary for peaceful and friendly relations among nations based on respect for the principle of equality and self-determination of peoples."[6]

Self-determination has been upgraded from a political and moral principle to a 'legal right'. In 1960, the UN General Assembly declared that:

> "All peoples have the *'right'* to self-determination; by virtue of that 'right' they freely determine and freely pursue their political, economic, social and cultural development."[7] (Emphasis added.)

However, this declaration limits the scope of the right in a way so as not to permit secession by residing ethnic, religious or linguistic groups from the existing State in the following manner:

> "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[8]

While Self-determination might have attained some measure of normative consistency for the purpose of decolonisation,[9] self-determination with emphasis on decolonisation seemed to have ignored the internal problems of those States which had benefited from self-determination, as illustrated in the case of South African apartheid, or Rhodesia after its Unilateral Declaration of Independence from the United Kingdom.[10] The ICJ affirmed the principle of self-determination for non-self governing territories in the *Namibia Case*, which has generally been regarded as giving a right to self-determination to colonial peoples.[11] In the *Western Sahara Case*, the ICJ through its Advisory Opinion held that the right to self-determination requires a free and genuine expression of the will of the peoples concerned for liberation from

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(New York, London: Routledge, 2000), p.109.

[5] Article 1(2) of the UN Charter.

[6] Article 55 of the UN Charter.

[7] Declaration on the Granting of Independence, GA Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, at 15 (1960).

[8] *Ibid.*, para., 6.

[9] G. J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stan. J Int'l L*, Vol., 32, 1996, p. 273.

[10] *Ibid*; C.J. Iorns, "Indigenous Peoples and Self Determination: Challenging State Sovereignty", *Case W. Res. J. Int'l L*, Vol., 24, 1992, pp. 253-54. She argues that the Declaration of the Granting of Independence to Colonial Countries and Peoples neglected the possible applicability of the right to self-determination to ethnic minorities and rather its purpose was to achieve independence and self-government of colonies.

[11] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), ICJ Reports, 1971, p.16.

colonial rule.[12] The emphasis of the requirement of "a free and genuine expression of the will of the people concerned" in the *Namibia Case* was significant in that it noted the necessity of having a democratic character for a political and territorial entity to achieve independence in the context of self-determination, but its implication seemed to have been confined within the context of decolonisation.

From the 1970s on, however, decolonisation declined as the dominant reason for self-determination.[13] Higgins has argued that self-determination as set out in the UN Charter was never intended to be the basis of a right to decolonisation, let alone that it should develop into a general right for ethnic minority groups in a State. She meant by this statement that self-determination as a norm of international law is evolving and dynamic in its nature.[14] Her view can equally be applied to the development of internal self-determination.[15]

Common Article 1 of the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (IESCR) provides that:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[16]

As to the nature of the self-determination provisions in the Covenants above, Cassese explains that:

> "First - and here lies the primary significance of the provision - Article 1(1) requires that the people choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves."[17]

For Cassese, Article 1 of both Covenants constitutes a codification of the internal aspect of self-determination in international law. In this regard, it must be remembered that a number of State parties to the Covenants rejected India's declaration regarding Article 1 of the ICCPR, which provides that the right does not apply "to sovereign independent States or to a section of a people - which is the essence of national

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[12] *Western Sahara Case, op.cit.*, 1975, p.55.

[13] For instance, the colonial period has since ended. One of the last major official colonies, Palau, has become independent. See, SC Res. 956, UN SCOR, 49th sess., 3455th mtg., UN Doc. S/RES/956 (1994).

[14] See R. Higgins, "Postmodern Tribalism and the Right to Secession, Comments", in *Peoples and Minorities in International Law* (Dordrecht, London : Martinus Nijhoff, 1993), C. Brumlmann et al (eds.), p. 29.

[15] For a general observation, R. Higgins, *Problems and Process: International Law and How to Use It* (Oxford: Clarendon Press, 1994), p. 111-128; H. Hannum, "Rethinking Self-Determination", *Va. J. Int'L.* Vol., 34, 1993, pp. 1-69

[16] GA Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. X (1966); 999 UNTS 171; 6 ILM 368 (1967).

[17] Cassese, *Self-Determination of Peoples: A Legal Reappraisal, op.cit.*, p. 53.

integrity."[18] In its General Comment on Article 1 of the ICCPR, the Human Rights Committee (HRC) suggested a generally internal focus of the right to self-determination beyond the context of decolonisation by requiring State parties to describe in their reports "the constitutional and political processes which in practice allow the exercise of this right."[19] In paragraph 6, the General Comment states as follows:

> "all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination."[20]

The 1970 Declaration on Principles on International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations [21] (Declaration on Friendly Relations) links self-determination to the upholding of fundamental human rights.[22] The final version of the 1970 Declaration included a clause which attempted to construe the principle as not "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[23] However, the penultimate paragraph of that clause also contained the critical statement on self-determination:

> "...States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and *'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'*." (Emphasis added.)

Cassese has made a distinction between external and internal self-determination in the following manner:

> "a. All peoples subjected to colonial rule have a right to self-determination, that is to "freely determine their political status and freely pursue their economic, social and cultural development" (operative paragraph 2 of Resolution 1514(XV);
> b. This right only concerns external self-determination, that is, the choice of the international status of the people and the territory where it lives;...
> c. Once a people has exercised its right to external self-determination, the right expires. This may be inferred from paragraph VI of the Principle on self-determination laid down in the Declaration on Friendly Relations..."[24] (Emphasis in original.)

Sohn also writes about the nature of Articles 1 of the ICCPR and IESCR:

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[18] Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December, 1993, at 116 (declaration), 134-37 (objections), UN Doc. ST/LEG/SER.E/12 (1994).
[19] General Comment 12/21, A/39/40 (1984).
[20] *Ibid.*, para. 6.
[21] United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970).
[22] *Ibid.*
[23] *Ibid.*, at 279.

> "The Covenants clearly endorse not only the right of external self-determination, but also the right of internal self-determination: the right of a people to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution... A people should be free both from interference by other peoples or states and from deprivation of its right to self-determination by a tyrant or dictator."[25]

'Internal' self-determination is thus not a separate norm distinguished from external self-determination, rather it is the 'internal aspect' of self-determination. Internal self-determination concerns the right of a people 'within' a State to choose their political status, "the extent of their political participation and the form of their government".[26] Self-determination has come to operate in such a way as to affect the very structure of a State for the protection of human rights of the persons living 'within' the self-determining regime.[27]

Furthermore, the notion of democracy has begun to take hold as a critical element for the right to internal self-determination, as it implies that the exercise of the right to self-determination is made 'within' a State except on rare occasions. As Franck points out, self-determination has begun to make possible the right of a people organised in an established territory to determine its political destiny in a democratic fashion.[28] Self-determination, therefore, is not only confined to the right of oppressed peoples under colonial or alien domination, but also must be exercised in a democratic way for the protection of a people 'within' the boundary of an independent State.

The shift of emphasis toward the internal aspect of self-determination found clearer expression in the European Union's Declaration on Yugoslavia and the Guidelines on the Recognition of New States (EU Declaration), which the European Union applied to the newly independent States that emerged after the break-up of both the former Soviet Union and Yugoslavia. The EU Declaration invoked the standards and values expressed by the Helsinki, Copenhagen, and Paris texts:

> "The European Community and its Member States confirmed their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination."[29]

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[24] *Cassese, Self-Determination of Peoples: A Legal Reappraisal, op.cit.*, pp. 72-73.

[25] L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States", *AM. U. L. Rev.*, Vol., 32, 1982, p.50.

[26] R. McCorquodale, "Self-Determination: A Human Rights Approach", *ICLQ*, Vol., 43, 1994, p. 864.

[27] H.J. Steiner, "Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities", *Notre Dame L. Rev*, Vol., 66, 1991, p.1539. Rosas also argues that the practice of international human rights organs, State practice and legal doctrine are moving towards the internal aspect of self-determination. A. Rosas, "Internal Self-Determination", in *Modern Law of Self-Determination, op.cit.*, pp. 225-229.

[28] T. M. Franck, "The Emerging Right to Democratic Governance", *AJIL*, Vol., 86, 1992, pp. 46-52.

[29] Declaration on Yugoslavia and the Guidelines of the Recognition of New States, Dec. 16, 1991, European Community, 31 ILM 1485, 1486 (1992).

At the same time, internal self-determination is 'constant' in its applicability, as it is implemented and realised in a democratic way in a State's overall structure. The British government's account of internal self-determination, in this regard, seems to have properly elucidated the nature of internal self-determination. The UK's representative in the Third Committee of the UN General Assembly stated the following:

> "Self-determination is not a one-off exercise. It cannot be achieved for any people by one revolution or one election. It is a continuous process. It requires that peoples be given continuing opportunities to choose their governments and social systems, and to change them when they so choose ... Many peoples today are deprived of their right of self-determination, by elites of their own countrymen... through the concentration of power in a particular political party, in a particular ethnic or religious group, or in a certain social class."[30]

However, this does not mean that internal self-determination requires a certain type of political system, because the method of implementation of internal self-determination at the domestic level would differ from State to State.[31] Therefore, self-government for ethnic, religious or linguistic minority groups who have resided in a particular region in their State of residence would not necessarily be the only way for realising internal self-determination.[32]

3. Internal Self-Determination and the Definition of the Term People: Baltic Implications

3. 1. The Definitional Problem of the Term People[33]

There are doubts, however, as to whether the legitimate interests of ethnic, religious or linguistic groups can be effectively secured under such internal self-determination, even if the normative basis for the protection of minority groups may be established in

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[30] Statements by its representative to the Third Committee of the UN General Assembly (Mr. R. Fursland), 12 Oct. 1984, *B.Y.I.L*, Vol., 55, 1984, p.432, quoted in *McCorquodale, Self-Determination: A Human Rights Approach, op.cit.,* p.865; Pomerance also notes that "If...self-determination is seen as a continuum of rights, it also, in a real sense, comes closer to the idea of a continuing right." *Pomerance, Self-determination in Law and Practice, op.cit.,* p. 75.

[31] *MaCorquodale, Self-Determination: A Human Rights Approach, op.cit.*, p. 865; A. J. Hanneman, "Independence and Group Rights in the Baltics: A Double Minority Problem", *Va. J. Int'l L.*, Vol., 35,1995, pp. 485-527.

[32] G. Gilbert, "Autonomy and Minority Groups: A Right in International Law?", *Cornell Int'l L.J*, Vol., 35, 2002, pp. 340-341.

[33] See, generally, R.N. Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights", *AJIL*, Vol., 82, 1988, pp. 80-101.

the internal aspect of self-determination. The problem is acute in countries where 'democratic decisions' have led to the progressive disenfranchisement of ethnic, religious or linguistic groups. Even when the territory is relatively undisputed in terms of potential secessionist movements by minority groups, the question of citizenship for persons belonging to such groups can arise in the context of political participation.

Estonia and Latvia in the Baltic region, for instance, have argued that the presence of the ethnic Russians in these republics is a denial of self-determination for all Estonians and Latvians. A Latvian delegate at the Unrepresented Peoples and Nations Assembly in the Hague in 1991 even argued that to allow these Russians to vote in democratic elections would imply the end of Latvia as an independent State.[34]

The status of the ethnic, linguistic Russians in Estonia and Latvia has been the main cause of the conflicts between titular Estonian and titular Latvian nationals on the one hand and the ethnic, linguistic Russian populations in Estonia and Latvia on the other. The Baltic States put the question of independence to a referendum as they underwent historical transformation in the 1990s. Relying on the social contract theory of State legitimacy and on claims to the right of self-determination, the Balts argued that if their populations voted for self-governance, then continued rule from Moscow would be impermissible.[35] In Estonia, 78% of those who turned out to vote chose independence, while in Latvia the corresponding figure was 74%.[36] Voting results showed that 30-40% of the ethnic, linguistic Russians supported separation from the USSR as well.[37] Despite the fact that a significant number of the Russians in the Baltic States supported the move to independence, Estonia and Latvia disenfranchised most of their ethnic, linguistic Russian populations through restrictive citizenship laws.[38] The new native Estonian and Latvian majorities were suspicious of the resident Russians' loyalties, and as a result, those Russians who supported secession felt disillusioned. A 1991 poll of the population of Latvia found that many ethnic,

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[34] UNPO Report, Unrepresented Nations and Peoples Organization (UNPO), Self-Determination in Relation to Individual Human Rights, Democracy and the Protection of the Environment, UNPO GA/1993/CR/1 (Conference Report 1993), at 3; See also, I. Grazin, "The International Recognition of National Rights: The Baltic States' Case", *Notre Dame L. Rev*, Vol., 66, 1991, pp. 1385-1419.

[35] G. Smith, A. Aasland & R. Mole, "Statehood, Ethic Relations and Citizenship," in G. Smith (ed.), *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania* (London: Macmillan Press, 1996), pp. 181-205.

[36] K. Gerner & S. Hedlund, *The Baltic States and the End of Soviet Empire* (London, New York: Routledge, 1993), p. 155.

[37] D. M. Crowe, *The Baltic States and the Great Powers: Foreign Relations, 1938-1940* (Oxford: Westview Press, 1993), p. 181.

[38] For an overview of the citizenship laws in Estonia and Latvia, see Chapter 2 above, pp. 52-54.

linguistic Russians fully supported secession, believing it to be an act "in the mainstream of the democratic transformations".[39] In 1994 many of the non-native peoples believed that they were misled, saying that Latvia's "democracy for all had been used to build a Republic of South Africa in the Center of Europe."[40]

Although the Latvian Declaration of Independence on 4 May, 1990 called for guaranteed rights to all permanent residents of Latvian territory, the ethnic, linguistic Russians in Latvia claimed that they had been denied these rights.[41] They complained that they had been denied the opportunity to participate in the political process and that they had been labelled as "invaders".[42] Even Latvian-born Russians were not citizens and found themselves in danger of losing their jobs because of laws that required knowledge of Latvia. The situation in Estonia showed similar patterns. Many ethnic, linguistic Russians, worried about their unprotected status in Estonia and Latvia, have been fleeing to Russia and to other countries. This is precisely the action advocated by ultra-nationalists in Estonia and Latvia.[43]

It is important to note that both the Balts and the ethnic, linguistic Russians have relied on the right to self-determination to emphasise the validity of their own views in the territories of Estonia and Latvia. Ethnic Latvians and Estonians on the one hand, and the ethnic, linguistic Russians, on the other, all view themselves as victimised minorities.[44] Under former Soviet rule, the Baltic peoples experienced discrimination and believed that they were in danger of becoming minorities in their own States. Since independence, they have been determined to safeguard their language, identity, and nationhood. Baltic attitudes toward citizenship are coloured by fears of ethnic extinction, as well as resentment of the non-titular population that they identify with the former Soviet regime. Following the break-up of the former Soviet Union, however, the Russians in the Baltic States lost their former privileged status; they are no longer associated with the ruling power and dominant culture, and are now in a

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[39] Non-Latvians Hold Riga Protest Meeting, *FBIS-SOV*, Mar. 10, 1994, at 39.

[40] *Ibid.* Of course, this comparison may no longer be valid following the elections in South Africa in April 1994.

[41] V. Alksnis, "Suffering from Self-Determination", *Foreign Policy*, Fall 1991, pp. 61-63.

[42] *Ibid.*

[43] The Foreign Relations Commission of the Citizen's Congress of the Latvian Republic is committed to the repatriation of all Russians who came to Latvia during the Soviet period. When asked whether he would advocate the use of force towards this end, V. Brinkmanis, the Commission's head, replied, "We will arrange it so that they leave voluntarily," R. Krickus, Latvia's "Russian Question", *RFE/RL Research Report*, Apr. 30, 1993, p. 34.

[44] R C. Visek, "Creating the ethnic electorate through legal restorationism: citizenship rights in Estonia", *Harv. Int'l L.J,* Vol.,38, 1997, pp. 315-373.

minority. They feel that they have been unjustly denied automatic citizenship, considering their long-term residence prior to the independence of Estonia and Latvia in 1991. Most of them do not think they should have to apply for citizenship status or even be required to learn the local language for that purpose.[45]

As peoples who had managed to free themselves from the yoke of foreign domination, it seems clear that the titular Estonians and Latvians have the right to self-determination. If the right to self-determination did grant the Estonians and Latvians the right to pursue their political, economic, social, and cultural development as peoples, should there not be any room within this right that could provide the same entitlement to the ethnic, linguistic Russians who had lived and even participated in the Estonian and Latvian independence movements from the former Soviet Union?

The case of the status of the ethnic, linguistic Russian non-citizens and stateless persons in Estonia and Latvia illustrates that minority protection under internal self-determination is also a problem of how to define the term 'peoples' for the purpose of self-determination. Because even if the democratic character based on 'representative government' without distinction of race, creed or colour of a State is required by internal self-determination in the context of a normative basis, what is not clear is what is meant by the 'peoples' who shall enjoy the right to self-determination. The marginal status of the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia clearly illustrates that a State can arbitrarily limit the membership of the people as holders of the right to self-determination, thereby excluding some particular ethic, religious or linguistic groups in the political process in the form of citizenship. This is the reason why the question of how to define the term peoples as holders of the right to self-determination is a critical task in terms of the protection of persons belonging to ethnic, religious or linguistic groups under internal self-determination. This is evident, given that the larger the definition of peoples for self-determination is, the larger the number of persons who can enjoy the right to self-determination will be in its internal aspect.

The UN Charter was adopted in the name of "We the Peoples..." and it recognises, in Article 1(2), the principle of "self-determination of peoples." Common Article 1 of the 1966 International Human Rights Covenants declares the right of "peoples" to self-determination. In spite of this concern for "peoples" and peoples' rights, the term

[45] *Ibid.*, pp. 320-322.

"people" has not been authoritatively defined in any of the instruments that employ it.[46] As the text of the UN Charter and the *traveaux prepatoire* provide little insight into identifying what was meant by the term peoples, the definition of the term people must be examined by reviewing international practice and making theoretical observations.

The HRC has made it clear, as recently confirmed in *Apirana Mahuika et al. v. New Zealand* that, unlike Article 27 rights, self-determination is not a recognisable right under the Optional Protocol to the ICCPR.[47] However, the HRC's rejection of the claim to self-determination by an individual should be understood such that the right to self-determination is exercised by individuals comprising peoples 'as a whole', rather than the total rejection of the subject of self-determination, since self-determination is a 'legal right' and a legal right assumes the existence of the holder of the right. In the same context, as to the enforceability of the right to self-determination in relation to a legal right of self-determination, Gilbert argues that:

> "The fact that the right can only be concretized by reference to local facts does not mean that the right itself is uncertain; merely that its implementation must be case specific...And just because it is non-justiciable in most instances, that again does not detract from its status as a right in international law."[48]

What is clear is that the right to self-determination is vested in peoples not governments, as the UN Charter and the two International Covenants expressly declare.

3. 2. Peoples and Territorial Connection

The review of practices of the UN in supervising the decolonisation of dependent territories after World War II and the election monitoring missions in some 'failed' territories since the end of the Cold War may be instructive in assessing the definition

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[46] Crawford notes that the key feature of the phrase in 'rights of peoples' is not the term 'rights, but the term 'people'. See, J. Crawford, "The Rights of Peoples : 'People' or 'Governments'?", in J. Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988), p.55.

[47] *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, views of 27 October 2000, CCPR/C/70/D/541/1993. See also, *Ominayak and the Lubicon Lake Band v. Canada*, "...that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant, which deals with the rights conferred on peoples, as such." HRC Report Doc.A/45/40, Vol. II, Annex IX, p. 1 at. 27, para. 32.1.

[48] *Gilbert, Autonomy and Minority Groups, op.cit.*, p. 353.

of peoples as the holders of the right to self-determination.[49] At the same time, the negative response of the international community toward the secessionist movements of ethnic, religious or linguistic minority groups from the existing territorial boundary can also help make clear the concept of peoples, because it supports a proposition that the holders of the right to self-determination should remain 'within' the existing State.

In the decolonisation setting, the UN consistently applied the principle of self-determination solely to the 'inhabitants' of the pre-existing political State.[50] The UN, in supervising the decolonisation of Africa, accepted the territorial divisions of the colonial powers despite the arbitrariness with which they were originally drawn.[51] The practice of the UN in overseeing the decolonisation process suggests that the right to self-determination is to be applied to 'all inhabitants' of a unified pre-existing territorial unit rather than to any particular ethnic, religious or linguistic groups within it.[52] Post-Cold War self-determination, which is moving in the direction of internal self-determination also appears to focus on the aspect of an existing territorial boundary in which inhabitants have lived, observing basically the territorial integrity of States. In other words, the internal focus of self-determination in the post-colonial and Cold War eras appears to regard the 'territorial State' as the 'self'.[53] The new States of the 1990s seem to have owed more to territorial coherence than any former discrimination against a particular ethnic, religious or linguistic groups within some larger 'former' State.[54] Recent practice invites further reflection. Despite the strong ethnic characterisation of the Yugoslav constituent republics and thus its crucial significance in the context of the crisis, the overall approach eventually taken by the international community has appeared conceptually and operationally unchanged with regard to the material identification of the 'self'. Self-determination has been recognised as a whole unit, not to minorities or other specific ethnic communities living within those units. This principle may be inferred from the Opinion of the

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[49] For a general observation, Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-determination and Transition to Democracy* (Drodrecht/Boston/London: Martinus Nijhoff Publishers, 1994).

[50] S.J. Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", *Iowa L.Rev*, Vol., 75, 1990, pp. 841-844..

[51] L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", *Yale J. Int'l L*, Vol.,16, 1991, pp. 177-182.

[52] *Ibid.*, pp. 182-183.

[53] G. H. Fox, "Self-determination in the post-Cold War era: A new internal focus?", *Mich. J. Int'l L*, Vol., 16, 1995, pp. 733-781.

[54] *Ibid.*, pp. 752-756. See also Opinion No. 3, International Conference on the Former Yugoslavia, Arbitration Commission, 1992, 31 ILM 1499.

Badinter Commission of the International Conference on the Former Yugoslavia. It was asked for its opinion as to whether the Serbian populations of Bosnia and Croatia had the right to self-determination. The Commission answered that while they did indeed have such a right, its exercise could not (in the absence of agreement) result in changes to State borders existing at the time of independence. Rather, the right required acknowledgment of peoples' cultural identity and their legal protection as minorities under relevant international instruments.[55]

The question of defining 'people' for self-determination purposes was also incidentally addressed by the Canadian Supreme Court in its Opinion in Reference re Secession of Quebec of 20 August 1998.[56] The proceeding arose from a reference by the Government of Canada in relation to the secession of Quebec. A number of questions were put to the Court, including whether there was a right to self-determination under international law that would categorise Quebec's population as a 'people'; the Court, while tentatively observing that this notion might include a portion of the population of an existing State, declined to argue that the francophone community of Quebec, and/or other groups within Quebec, were as such a 'people' in the sense of international law.[57]

Negative response to the major secessionist movements of ethnic, religious or linguistic groups of the post-war era under the banner of self-determination indicates that those minority groups' demands for independent statehood are generally not acceptable.[58] Iraqi Kurds have been given military and humanitarian assistance, but the possibility of independence has been denied and avoided.[59] India changed its supporting policy in favour of Tamil separatists in Sri Lanka, having signed in 1987 a peace accord with the Sri Lankan government.[60] The support of the Tibetan struggle against China has not crossed a threshold of moral support.[61] Despite widespread condemnation of Russia's tactics in suppressing the rebellion in Chechnya, news that

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[55] Opinion No. 2, International Conference on the Former Yugoslavia Arbitration Commission, 1992, 31 ILM 1497, 1498-99.
[56] Reference re Secession of Quebec from Canada, 1998, 2 SCR 217, 133-39.
[57] *Ibid.*
[58] For a comprehensive review of this issue, see T.R. Gurr, *Minorities at Risk* (Washington, D.C: United States Institute of Peace Press, 1993), pp. 294-298; A. Heraclides, "Secessionist Minorities and External Involvement", *Int'l Org*, Vol., 44, 1990, pp. 341-346.
[59] Solving the Kurds, *Economist*, 31 October, 1992, at 17.
[60] S.W.R. de A. Samarasinghe, "The Dynamics of Separatism: the Case of Sri Lanka", *in Secessionist Movements in Comparative Perspective* (London: Pinter, 1990), R.R. Premdas, S.W.R. de A. Samarasinghe, A.B. Anderson (eds.), pp. 48-63.

States have recognised Chechnya as an independent State has not yet been heard.[62] While the North Atlantic Treaty Organisation (NATO)'s intervention to protect Kosovo's Albanians was waged against the Federal Republic of Yugoslavia (FRY) due to the 'gross' human rights violations perpetrated by the Yugoslav army, the international community has so far continued to uphold the territorial integrity of the FRY.[63]

While secession is the preferred option for decolonisation, self-determination beyond decolonisation may be satisfied by internally exercised self-determination through the guarantee of democratic process and the operation of democratic representative government to protect and guarantee the civil and political rights of all people 'within a State'. Nevertheless, it is still unclear who meets the definition of the term 'people' among the inhabitants in question.

3. 3. Ethnic or Racial Grouping and Sharing Common Historical, Political or Social Experiences

Dinstein identifies relevant elements for determining the term 'people' in the following way:

> "The objective element is that there has to exist an ethnic group linked by common history... It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such."[64]

Ethnic or racial grouping and sharing of common historical and political experiences should thus be understood broadly so that it can embrace diverse ethnic, religious or linguistic groups within the territory of a State. Though Brownlie's view is a bit lengthy, it deserves quoting. He observes that:

> "No doubt there has been continuing doubt over the definition of what is a "people" for the purpose of applying the principle of self-determination. Nonetheless, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed

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[61] W.G. Vause, "Tibet to Tienanmen: Chinese Human Rights and United States Foreign Policy", *Vand.L.Rev*, Vol., 42, 1989, pp. 1575-1597.

[62] G. Larson, "The Right of International Intervention in Civil Conflicts: Evolving International Law on State Sovereignty in Observance of Human Rights and Application to the Crisis in Chechnya", *Transnat'l L. & Contemp. Probs*, Vol., 11, 2001, pp. 252-274.

[63] UNSC Res. 1244, UN SCOR, 54th Sess., 4011 mtg., UN Doc. S/RES/1244 (1999), at 10-11.

[64] Y. Dinstein, "Collective Human Rights of Peoples and Minorities", *ICLQ*, Vol., 25, 1976, p. 104.

> scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long existing national identities would be negated on academic grounds as, for example, the United States."[65] (Emphasis in original.)

The Declaration on Friendly Relations also provides critical evidence in defining peoples in terms of ethnic or racial characteristics. Paragraph 7 of the Declaration refers to States complying with the right to self-determination and "thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[66] It suggests that the reference to "race, creed or colour" highlights that ethnicity is not a decisive element for determining the term people. More than anything else, it must be recognised that ethnic or racial grouping is a concept which seems to defy precise definition. Although it might be defined in terms of both objective and subjective criteria, fixing appropriate objective criteria is nearly impossible.

An independent State in the context of internal self-determination, then, is a political and cultural entity in which residents have created a nation by establishing a common solidarity under State sovereignty. By 'common solidarity' the writer means a progressively and loosely formulated state of mind and ethos of the inhabitants springing from common historical and social experiences living together in the same territory. Territorial boundaries form the nature and future identity of the people and it is quite natural that persons who have shared common historical, political and social experiences within a specific territorial space offer better foundations for co-operation than those who do not. The important point is that the common solidarity is broadly defined. It cannot be a unified or fixed sense of solidarity, as the people which various ethnic, religious or linguistic groups may constitute could not have a single fixed sense of common solidarity.

The definition of the term people with reference to internal self-determination can thus be described as follows: People, as the holders of the right to self-determination, are residing inhabitants in their State of residence. In order to be considered as members of a people, they must be connected to their State by reference to some nexus such as long and habitual residence and sharing broadly defined common

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[65] I.Brownlie, "The Rights of Peoples in Modern International Law", in *The Rights of Peoples, op.cit.*, p. 5.

[66] *The Declaration on Friendly Relations, op.cit.*, para., 7.

historical, political and social experiences with other residents as indications of common solidarity.[67]

4. Integration of Minorities and Peoples under Internal Self-Determination

The internal aspect of self-determination requires that all people 'within' their State of residence enjoy the right to vote and be elected in genuine periodic elections by universal equal suffrage based on true representation.[68] Further, they may constitute one or more ethnic, religious or linguistic minorities whose rights are likely to be abused at the discretion of government authorities. Herein lies the essence of the problem of the protection of existing ethnic, religious or linguistic minorities within a State, as history, warfare, and migrations have divided the world into cultural units that do not always correspond with the existing territorial unit. Minorities are groups within a State who see themselves as in some way separated from the rest of society. In principle, international legal standards of minority rights require that such persons be included in the 'common good' and never denied their human rights on the basis of distinctions such as race, religion, or language. States in which minorities reside have positive international obligations to protect their rights by way of implementing protective measures to that effect.[69]

The definition of a minority examined in Chapter 4, reflecting the recent international trend in the area of the protection of the rights of persons belonging to minorities, is a national or ethnic, religious and linguistic group numerically smaller than the rest of the population of a State, having lived over a significant period of time in their State of residence. The members of the group have ethnic, religious or linguistic features differing from the rest of the population and show a sense of mutual solidarity for the preservation of their unique culture, tradition or language. Persons, whether they are citizens or non-citizens in legal terms, may belong to several

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[67] See Article 8 (2) of the proposed convention in Chapter 8 below, pp. 266-268.

[68] *Beigbeder, International Monitoring of Plebiscites, Referenda and National Elections, op.cit.*, pp.151-212.

[69] The legal basis of States' obligations to protect minority rights may be evidenced in relevant provisions in the international instruments on the rights of minorities, as examined in Chapter 5 of this thesis. For instance, Article 27 of the ICCPR, 999 UNTS 171, 179; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA. Res. 135, UN, GAOR 3d Comm., 47th Sess., UN Doc.A/RES/47/135 (1992).

different ethnic, religious or linguistic minorities and they may be geographically scattered across several States, but they are part of only one people of their State of residence. Minorities may exclude their fellow citizens and neighbours, but the 'people' of a given territorial State must embrace every ethnic, religious or linguistic minority.

In a report written for the UN, Cristescu offered a limited definition of the term 'people' for self-determination:

> "(a). The term "people" denotes a social entity possessing a clear identity and its own characteristics;
> (b). It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
> (c). A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights."[70]

The problem of his definition is that it approached the concept of people so narrowly as to exclude minorities from membership of the category of people. Cristescu's exclusion of minorities from being members of a people depended on certain assumptions that are no longer acceptable. In other words, Cristescu's interpretation was an extension of earlier attempts within the UN to confine the right to self-determination to the peoples of the non-self-governing territories. Since secession of ethnic, religious or linguistic minority groups from the existing State is generally impermissible under present international law of self-determination, all references to self-determination in relation to independent States require respect for the rights of ethnic, religious or linguistic minorities residing therein. If the term people is understood in this way, and the right to self-determination is interpreted in a broader manner to include internal aspects, it is difficult not to integrate minorities into the membership of the people.

The respect of the right to self-determination and the protection of minority rights in international law are complementary in their scope of application. As Gilbert pointed out, "much time and energy has been wasted trying to justify the exclusion of minorities in the concept of the people under Article 1 of the ICCPR."[71] As to the relationship between self-determination and the international protection of minority rights in terms of the normative consideration, it may be correct to say that they

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[70] A. Cristescu, The right to self-determination, historical and current development on the basis of the United Nations instruments, UN Doc. E/CN.4/Sub.2/404/Rev.1, UN Sales No. E. 80.XIV.3 (1981), para. 279.

[71] *Gilbert, Autonomy and Minority Groups, op.cit.*, p. 339.

occupy their own separate space. But this does not mean that the two areas are mutually exclusive. On the contrary, the scope and dimension of each type of protection are different yet overlapping under present international law. Ermacora states as follows:

> "Unless the United Nations has not developed clear-cut ideas about the holder of the right to self-determination my opinion is that minorities also can be considered holders of the right to self-determination. Minorities must be considered as people. They must live also in a territory or they must have been living in a territory which is now occupied; they must have cultural or religious characteristics; they must be politically organized so that they can be represented . . . It does not depend on governments as to how they are describing an entity as a people; it depends on objective and subjective criteria of a group. It depends also on the self-consciousness of identity. I think, therefore, that national and racial, perhaps also religious, minorities could be considered peoples in the sense of an autonomous concept of the United Nations instruments. For them self-determination is inalienable."[72]

Ermacora concludes that minorities must be considered as people. As noted, this was also the finding of the Badinter Arbitration Commission's Opinion No. 2 of 1992. It is important to note that it applied Article 1 of the International Human Rights Covenants to the Serbian minorities, holding that they had a right to self-determination.[73] However, it has to be reiterated that the Commission declared that "the right of self-determination must not involve changes to existing frontiers."[74] The Commission equated the concept of minorities to that of peoples, but made clear that those minority groups were certainly not entitled to determine their political status through secession.[75] This means that individual members of ethnic, religious or linguistic minority groups in a State shall enjoy self-determination by virtue of their membership in the larger entity, the State, and participating in its political processes as part of the people. Thus the proposition by Higgins that members of distinct minorities in a State are part of the people in the context of self-determination is basically correct. She emphasises the rights of minorities 'within' their State of residence:

> "Peoples means the entire people of a State...The emphasis in all the relevant instruments in the State practice-on the importance of territorial integrity, means that 'peoples' is to be understood in the sense of *all* the peoples of a given territory. Of course, all members of distinct minority groups are part of the peoples of the territory. In that sense, they too, as individuals, are the holders of the right to self-determination."[76] (Emphasis in original.)

It is argued here that persons belonging to ethnic, religious or linguistic minorities

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[72] F. Ermacora, "The Protection of Minorities Before the United Nations", *RECUEIL DES COURS*, Vol. 182, 1983, p.327.
[73] *Badinter Commission Opinion No. 2, op.cit.*, at 1498.
[74] *Ibid.*
[75] *Ibid.*
[76] *Higgins, Problems and Process, op.cit.*, p. 124.

living in a State are integrated as constituents of the broad category of people in the context of the exercise of the right to internal self-determination.[77] Persons belonging to minorities are holders of minority rights recognised under present international law and at the same time, they are part of the people of their State of residence, because they have satisfied criteria for the determination of people by reference to the internal aspect of self-determination.

5. The Rights to Political Participation under Internal Self-Determination

Under internal self-determination, it is thus required generally that democratic representative governance be guaranteed for all peoples who have settled down and resided in their States of residence, in terms of the effects of internal self-determination upon the lives of such peoples.[78] The problem is, however, what the elements constituting democatic governance are in the context of internal self-determination.[79]

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[77] In the case of *Freedom and Democracy Party (OZDEP) v. Turkey* before the European Court of Human Rights (ECHR), the applicant party was dissolved for allegedly promoting terrorism and advocating the creation of a Kurdish State. The programme of the party made a number of references to the right of "our peoples" to self-determination, to "oppressed peoples", stating that it "will fully respect the Kurdish people's right to self-determination so that a democratic solution based on self-determination can be found". In finding a violation of Article 11, the Court read OZDEP's programme to reflect something like the right to internal self-determination, in line with the developments in international law. The Court stated that: "the passage in issue presents a political project whose aim is in essence the establishment- in accordance with democratic rules- of 'a social order encompassing the Turkish and Kurdish peoples'...It is true that in its programme OZDEP also refers to the right of self-determination of the 'national or religious minorities'; however, taken in context, these words do not encourage people to seek separation from Turkey but are intended instead to emphasise that the proposed political project must be underpinned by the freely given, democratically expressed, consent of the Kurds." *Freedom and Democracy Party (OZDEP) v. Turkey,* Application No. 23885/94, Judgment of 8 December 1999, para. 41.

[78] R.A. Miller, "Self-Determination in International Law and the Demise of Democracy?", *Colum. J. Transnat'l L,* Vol., 41, 2003, pp.601-648; General Recommendation XXI on the right to self-determination by the CERD has confirmed this in principle in the following terms: The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link to the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin." UN Doc. CERD/48/Misc.7/Rev.3, 1996, para. 4.

[79] The question of democracy in the context of internal self-determinaiton shows that self-determination must be appreciated in conjuction with other norms of international law, as Higgins implied before. This shows a much closer linkage between self-determination and human rights. For a general observation, see Lung-Chu Chen, "Self-Determination as a Human Right", in M. Reisman & B. Weston (eds.), *Toward World Order and Human Dignity* (New York: The Free Press, 1976), pp.198-261; *McCorquodale, Self-Determination: A Human Rights Approach, op.cit.,* pp. 870-878.

The rights to political participation are recognised in Article 25 of the ICCPR: citizens have the right to (a) "take part in the conduct of public affairs, directly or through freely chosen representatives", and (b) "vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[80] In its General Comment on Article 25, the HRC explained the relationship between the right to self-determination and the rights to political participation:

> "By virtue of the rights covered by Article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right to individuals to participate in those processes which constitute the conduct of public affairs."[81]

Article 25 is concerned with the right of individual political participation in a system of collective decision-making. According to the HRC, it "lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant."[82] In a number of reports to the HRC, States parties to the ICCPR associate the right of peoples to self-determination with a right to democratic government. For instance, the report submitted by India provides: "The internal aspects of self-determination, it is suggested, include the right of people to choose their own form of government and the right to democracy."[83] In its Concluding Observations on Congo, the HRC expressed its concern that the Congolese people had been unable, owing to the postponement of general elections, "to exercise their right to self-determination."[84] The Committee called on Congo to organise general elections as soon as possible in order to enable its citizens to exercise their rights under Articles 1 and 25.[85] The right of peoples to self-determination creates an obligation for the 150-plus States parties to the ICCPR both to introduce and maintain democratic forms of government.

Article 21 of the Universal Declaration of Human Rights (Universal Declaration) emphasises the overriding importance of the "will of the people".[86] A government that is not based on the consent of the governed is not democratic in nature. In addition, the

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[80] Article 25 of the ICCPR.
[81] HRC General Comment No. 25, CCPR/C/21/Rev. 1/Add. 7, 1996, para. 2.
[82] *Ibid.*, para. 1.
[83] Third Periodic Report (India), UN Doc. CCPR/C/76/Add. 6,1996, para. 32.
[84] HRC, Concluding Observation on the Second Periodic Report of the Congo, UN Doc. CCPR/C/79/Add. 118, 2000, para. 20.
[85] *Ibid.*
[86] Article 21 (3) of Universal Declaration of Human Rights.

government of a State must be substantially representative of all distinct ethnic, religious or linguistic groups living in it. This is a logical interpretation of the phrase "everyone has the right to take part in the government" in Article 21 of the Universal Declaration.[87]

In order not to lose the essence of democratic representation in a State, it is assumed that a government must guarantee the substantial and effective representation of all residents, not a mere nominal representation. Representation should thus be materialised in active participation such that representation and participation are experienced as part of a continuum.[88] Article 21 of the Universal Declaration did, in fact, contemplate a solution to the question of representation by providing that everyone has the right to take part in government. It seems that the provision denotes an active and substantive participation beyond the initial consent usually expressed through free elections. Even if some inhabitants within the State have voted in a government, every segment of the population within it must not be deemed, *a fortiori*, to be participating, because, to be legitimate and democratic, the emerging government must be representative of all ethnic, religious or linguistic groups within the territory of the State.

Lijphart's account of the so-called 'consociational democracy', which is intended to address the ethnic tensions that have driven the separatist and secessionist movements of the last decade under the banner of self-determination, may be said to have succinctly described the essence of internal self-determination with respect to democratic representation. He writes that:

> "In ethnically and communally divided countries - that is, in most of the countries of the world - the breadth of representation is also important for the viability of democracy... The most important requirement of democracy is that citizens have the opportunity to participate, directly or indirectly, in decision-making. This meaning of democracy is violated if significant minorities are excluded from the decision-making process for extended periods of time. Under such circumstances, narrow majority rule is totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony."[89]

Therefore, it is argued that the participation of persons belonging to minorities in the democratic process of their State of residence is basically required under internal

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[87] See W. O. Kodjoe, "The United Nations and the Protection of Individual and Group Rights", *Int'l Soc. Sci. J*, Vol., 47, 1995, pp.315-317 (stating that self-determination is a right for every person).

[88] P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism", in *Modern Law of Self-Determination, op.cit.*, p.116.

[89] A. Lijphart, "Back to Democratic Basics: Who Really Practices Majority Rule?" in A. Hadenius (ed.), *Democracy's Victory and Crisis* (Cambridge: Cambridge University Press, 1997), p. 144.

self-determination, without which it is virtually impossible for them to achieve and realise their rights in the State. For instance, Paragraph 30 of the Copenhagen Document emphases that the "questions relating to national minorities can only be satisfactorily resolved in a democratic political framework [which] guarantees ... political pluralism."[90]

An electoral politics based upon simple majoritarian rule could not be said to secure fully effective participation of minority groups in public affairs. This argument is supported by the requirement in the Declaration on Friendly Relations that participation of ethnic, religious or linguistic minority groups in a democratic political process is a necessary constituent of 'representative government'. The right to self-determination, as described by the Declaration, requires that peoples should enjoy representative government that governs 'without distinction as to race, creed or colour' in a State that conducts itself in accordance with the principle of equal rights and self-determination of peoples.[91] Hannum argues as follows:

> "A more persuasive interpretation, consistent with the concerns of most United Nations members when the declaration was adopted in 1970, is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that group's race, creed, or color (such as South Africa or Southern Rhodesia under the Smith regime). "[92]

It is important to note that participation in the electoral system in the sense of formal participation, which can vary depending upon the constitutional structure of a State, will not necessarily guarantee that minorities are 'represented'. The Declaration on Friendly Relations provides authority for the proposition that the establishment and operation of a system of democratic elections to a legislature is a necessary first step, not a completely sufficient one, for the right to internal self-determination to be fulfilled. In order for the whole people to be represented in government without "distinction as to race, creed or colour", it must be assumed that persons belonging to minorities have access to the political process in their State of residence, thus achieving *de facto* parity with the dominant majority population who, by the fact of

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[90] Paragraph 30 of the Copenhagen Document.

[91] According to Kirgis, a strong showing of *opinio juris* may overcome a weak basis of State practice to establish a customary international rule. He presents the self-determination provisions in the Declaration on Friendly Relations as being included in this category, meaning that the Declaration on Friendly Relations reflect an *opinio juris*. See, F. L. Kirgis, "Appraisal of the ICJ's Decision: Nicaragua v. United States (Merits)", *AJIL*, Vol., 81, 1987, pp. 146-151.

[92] *Hannum, Rethinking self-determination, op.cit.*, p. 17.

numerical domination, control various matters affecting minorities.[93] Thornberry's following argument may be understood in this context:

> "It is possible to read self-determination as mandating neither secession nor the artificial homogeneity of States but as a potential synthesis of respect and mutual concern between whole societies and their component groups..."[94]

It must be emphasised that the rights recognised in Article 25 of the ICCPR are to be enjoyed without any of the distinctions mentioned in Article 2 of the ICCPR and without unreasonable restriction.[95] The distinctions in Article 2 of the ICCPR concern "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[96] Moreover, the rights to political participation, including the right to stand as a candidate, are also to be enjoyed without discrimination, *inter alia* on the ground of language. The question arises as to whether State parties of the ICCPR may exclude candidates from the electoral process where they are not proficient in the official or working language(s)of the State. In *Ignatane v. Latvia*, the author, a Latvian citizen of Russian origin, was prevented from standing as a candidate in a local election, following a decision that she did not have the required proficiency in the Latvian language.[97] The HRC held that this constituted a violation of Article 25, taken in conjunction with Article 2 of the ICCPR.[98] The imposition of mandatory language requirements on candidates for elective office precludes the possibility of the electorate voting for persons from linguistic minorities nor proficient in the official or working language(s) of the State. At the same time, it can be argued that mandatory language requirements are not incompatible with the primary object and purpose of Article 25(b) of the ICCPR: the expression of the will of the people in free and fair elections.[99]

Kirgis's approach on self-determination in its possibility of secession by a minority group in a State illustrates that a people of a State have a legal right to representative government, the existence of which does deny the possible right to

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[93] It needs to be remembered that Paragraph 31 of the Copenhagen provides that: "The Participating State will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities *'full equality with other citizens'* in the exercise and enjoyment of human rights and fundamental freedoms." (Emphasis added.)

[94] P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism", in *Modern Law of Self-Determination*, *op.cit*, p. 138.

[95] Article 25 of the ICCPR.

[96] Article 2 (1) of the ICCPR.

[97] *Ignatane v. Latvia*, Communication No. 884/1999, UN Doc. CCPR/C/72/D/884/1999, 31 July 2001, para. 7.3.

[98] *Ibid.* para. 7.5

[99] HRC General Comment No. 25 ('Article 25'), *op.cit.*, para. 21.

secession.[100] He bases this on the penultimate paragraph of the Declaration on Friendly Relations bringing a right to secession for minorities from their State of residence. He argues that territorial integrity and political unity could not be impaired by self-determination where the State was "conducting itself in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind."[101] On this basis, however, he maintains that if any State is not providing 'internal self-determination' through non-discriminatory representative government for all its peoples, then excluded ethnic, religious or linguistic groups within their State of residence could secede.[102] A 1995 Report of the UN Secretary General dealing with minority protection states as follows:

> "As a general rule, a solution to minority protection had to be found within the framework of existing States. Legitimate claims by individuals and groups should normally be accommodated within the State constitutional system by creating adequate political arrangements, structure and procedures. Thus, the staring point of a model world order was that there was no generally recognized right of secession, that State borders were not to be altered except with the consent of the parties concerned, and that weight should not be put on external self-determination. Instead, the focus must be on the creation and pragmatic development of flexible forms of internal self-determination which gave all social groups- majorities and minorities, ethnic and other groups- a fair chance of political autonomy and other form of self-realization."[103]

The Supreme Court of Canada in the *Quebec Secession Case* by implication also accepted, obiter, that where "a people is blocked from the meaningful exercise of its right to self-determination internally," it could secede.[104]

In sum, the 'consent of the governed' and 'true representative' quality of the government are necessary components to guarantee the right to internal self-determination. Given that internal self-determination requires true representative government without distinction of race, creed or colour, it may be argued that when a State precludes effective participation of members of ethnic or linguistic minority groups, it denies its people their right to internal self-determination.

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[100] F. L. Kirgis, "The Degrees of Self-Determination in the United Nations Era", *AJIL,* Vol., 88, 1994, p.305.

[101] *Ibid.*, pp. 305-306.

[102] *Ibid.*

[103] Report Secretary General, Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, 14 June 1995, UN Doc.E/CN.4/Sub.2/1995/33, 14.

[104] Reference re Secession of Quebec from Canada, 1998, 2 SCR 217, 133-39. The case of Kosovo is exceptional in that human rights violations perpetrated by the Yugoslav army during its programme of ethnic cleansing were so gross that after the North Atlantic Treaty Organization (NATO)'s intervention,

6. Participation Rights of Persons belonging to Minorities

The UN HRC concluded in its General Comment on Article 27 of the ICCPR that the rights of persons belonging to minorities "may require ...measures to ensure the effective participation of members of minority communities to ensure the effective participation of members of minority communities in decisions which affect them."[105] The Optional Protocol to the ICCPR provides a procedure under which persons belonging to minorities can claim that their rights to enjoy their own culture, to profess and practise their own religion, to use their own language have been violated. In its opinions concerning on Article 27 of the ICCPR, the formulation hardens to "measures must be taken" to ensure the effective participation of members of minority communities in decisions which affect them.[106]

The HRC pays particular attention to the extent to which a minority group has been involved in relevant decision-making processes, and the extent to which its interests and perspectives have been taken into account. In *Mahuika v. New Zealand*, members of the Maori people of New Zealand complained that the Government's action threatened their way of life and the culture of their tribes, in violation of Article 27 of the ICCPR.[107] In 1992, the Government of New Zealand had agreed to pay NZ$150 million to the Maori for the purchase of Sealords, the largest fishing company in Australia and New Zealand, in final settlement of all claims by Maori in respect of commercial fishing.[108] The settlement was enacted in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The HRC accepted that the Act, and its mechanisms, limited the right of the authors to enjoy their own culture, which included the use and control of fisheries, as an essential element of their culture.[109] The question was whether the measures amounted to a denial of minority rights.[110] The opinion noted that, in its case law under the Optional Protocol, "the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the

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it was subsequently decided that only international protectorate status would suffice. See UN SC Res. 1244, UN Doc. S/RES/1244 1999, at 10-11.

[105] HRC General Comment No. 23 (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5, 1994, para. 7.

[106] *Länsman et al. v. Finland* (No.1), Communication No. 511/1992/, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994, para. 9.5. (Emphasis added.)

[107] *Mahuika et al. v. New Zealand, op.cit.*, para. 6.2.

[108] *Ibid.*, para. 1.12.

[109] *Ibid.*, para. 9.3.

members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures."[111] Maori communities and national Maori organisations were consulted on the proposals for the settlement of claims by Maori in respect of commercial fishing. Their responses did affect the design of the final agreement, which was only enacted following evidence of substantial Maori support.[112] Special attention was paid to the cultural significance of fishing for the Maori. The HRC concluded that, while it was a matter of concern that the settlement and its process had contributed to divisions among Maori, the State party had "by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the relevant measures were compatible with Article 27 of the ICCPR."[113] The Committee noted that "the State party continues to be bound by Article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention...In order to comply with Article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group."[114]

The opinion of the HRC demonstrates the need for States parties to ensure that the interests and preferences of persons belonging to minorities are effectively 'represented' in a relevant decision-making process. The right of effective political or public participation for minorities is parasitic to broadly defined minority rights, which have not only cultural aspects, but also political or public aspects. A State's positive measures in favour of the effective participation in the political or public process by persons belonging to minorities, rather than being non-discriminatory by refraining from negative intervention by the government to the life of minority groups, is thus required to ensure political or public participation 'without distinction of race, creed or colour'.[115]

The importance of political or public participation for persons belonging to minorities is also reflected in the FCNM. Article 15 of the FCNM provides that: "The

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[110] *Ibid.*, para. 9.4.
[111] *Ibid.*, para. 9.5.
[112] *Ibid.*, para. 9.6.
[113] *Ibid.*, para. 9.8.
[114] *Ibid.*, para. 9.9.
[115] Prime evidence may be found in Article 5 of the FCNM, Article 2 of the UN Declaration on Minority Rights, and Paragraph 5 of the Copenhagen Document.

Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic and public affairs, in particular those affecting them."[116] Public participation requires the inclusion of persons from ethnic, linguistic or religious minorities in relevant decision-making processes, in particular where issues affecting the national minority are under consideration. In a number of Opinions, the Advisory Committee on the FCNM has affirmed the importance of establishing formal bodies as one mechanism by which the rights of political or public participation for national minorities may be given effect.[117]

Participation is not confined to the political sphere, but also implicates wide areas of public and social life. In education processes, for instance, it would not be in accordance with the FCNM to allow decisions on educational curricula that affected minority interests to go ahead without appropriate minority participation.[118] Article 15 of the FCNM does not specify precise modalities of minority participation. However, the explanatory report offers suggestions that States parties to the FCNM could promote the participation of persons belonging to minorities through, among other measures, the following: consultation...when parties are contemplating legislation or administrative measures likely to affect them directly;[119] involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly; undertaking studies, in conjunction with these persons, to access the possible impact on them of projected development activities; effective participation...in...decision-making processes and elected bodies of both at national and local levels; and decentralised or local forms of government.[120]

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[116] Article 15 of the FCNM. In relation to Article 15 of the FCNM concerning the right of political participation, Weller observes that while the provision is expressed in general terms, lacking details on the necessary measures, the obligation is a "provision of hard law-and it is an obligation of result." M. Weller, "Conclusion", in M. Weller, ed., *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), p. 635.

[117] See following: "in a number of countries in Europe, special representative bodies in the form of Councils of National Minorities have been successfully established to further the dialogue and to ensure the effective participation of persons belonging to national minorities." Opinion on Albania, ACFC/INF/OPI (2003)004, para. 69; "bodies established by the Government to deal with minority issues...are important from the perspective of the implementation of Article 15 of the FCNM." Opinion on Romania, ACFC/INF/OPI (2002)001, para. 65). "That official bodies should be consulted on all issues specifically affecting minorities." Opinion on Romania, ACFC/INF/OPI (2002)001, para. 66.

[118] Opinion on Albania, *op.cit.*, para. 75.

[119] However, it is important to note that consultation may not necessarily amount to the 'effective participation' referred to in Article 15 of the FCNM. Opinions on Cyprus, ACFC/INF/OPI (2002) 004, para. 41.

[120] Explanatory Report on the FCNM, para. 80.

In the Copenhagen Document, the participating States of the OSCE in Europe recognised that the "questions relating to national minorities can only be satisfactorily resolved in a democratic political framework."[121] They agreed to respect the right of persons belonging to minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.[122] The participating States committed themselves to protect the ethnic, linguistic and religious identity of national minorities on their territory and to create conditions for the promotion of that identity, and agreed to take the necessary measures to that effect "after due consultation, including contacts with the organizations or associations of such minorities, in accordance with the decision-making procedures of each State."[123]

In terms of the effectiveness of minority rights, it should be emphasised that the link between effective participation and other types of minority rights is obvious and critically important. If minority groups are effectively 'represented' in public life and cultural, social and economic affairs, discriminatory standards and practices may be more readily excluded. If, on the other hand, persons belonging to minorities are systematically discriminated against, they manifestly cannot participate fully in a given society. Similarly, effective participation ensures that persons belonging to minorities can participate in public decisions that generate space for the maintenance and promotion of minority identities and interests.[124] At the same time, persons belonging to minorities that are enabled fully to develop their identity with other minority members will be better able to contribute to the functioning of a given society, and to seek effective 'representation' within it.[125]

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[121] Paragraph 30 of the Copenhagen Document.

[122] Paragraph 35 of the Copenhagen Document.

[123] Paragraph 33 of the Copenhagen Document. An important contribution to the elaboration of OSCE commitments, in respect of national minorities and political participation, was provided with the adoption of the "Lund Recommendation on Effective Participation of National Minorities in Public Life". Recommendation 1 provides that "in order to promote participation, governments often need to establish specific arrangements for national minorities to have an effective voice at the level of central government." This may require special representation for representatives of minorities, for example, through a reserved number of seats in parliament; mechanisms to ensure that minority interests are considered within relevant government departments; and special measures for minority participation in the civil service. See also Article 8 (3) of the proposed convention in Chapter 8 below, pp. 266-268.

[124] See Article 9 of the proposed convention in Chapter 8 below, pp. 268-270.

[125] Some States have made provisions which make it possible to take account of the existence of minorities on their territory for electoral purposes. Thus, in Croatia, if the members of an ethnic or national minority comprise more than 8% of the population, they can be represented proportionally in the national Parliament and in the Government, as well as in the superior courts. A number of seats in the national Parliament are also reserved for those minorities which do not reach this threshold. Similarly, in Denmark, legislation makes provision for two to be given to representative for the Faroe

7. The Justification of Minority Protection under Internal Self-Determination: Baltic Implications

If a people of a State is to be defined as above, the question of how to determine citizenship of those people within their State of residence becomes a critical matter. This is evident, because the exercise of self-determination with regard to its political aspect, such as participating in national elections is made by means of citizenship at the domestic legal level. The presence of the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia, who had resided in the territories of what are now Estonia and Latvia before independence in 1991 and even participated in the Estonian and Latvian independence movements from the former Soviet Union, illustrates the importance of citizenship in the context of self-determination. Examination of citizenship with reference to the Russian stateless persons or non-citizens in Estonia and Latvia within their States of residence brings one face to face with a reality permeated by a multitude of contradictions in the application of self-determination to the people within 'a State'. The fall of the former Soviet Union led to the birth of States founded on ethnic-nationalist oriented claims under the banner of

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Islands and two to representatives from Greenland. In the German Lander, the parties of the Danish and Sorban minorities are exempted from the rule according to which a political party must obtain more than 5% of the national vote in order to be represented in Parliament. Romania also makes special provision for associations of citizens belonging to national minorities, seats in the lower house being reserved for them on certain conditions. In Switzerland, linguistic criteria have had a certain influence on the mode of election of the principal confederal organs. This is also applicable to certain bilingual Cantons. In Belgium, special measures have been taken both in the constitution and by law to ensure the effective participation of minorities in political life. Such participation is provided for at all levels of government- executive, legislative and judicial. In addition, this protection is not valid only for the federal government: the Flemish minority resident in the federated entity of the Region of Brussels also benefits from mechanisms quite similar to those used at federal level to protect the Francophone minority. In Switzerland, the mode of election to the principal confederal organs is influenced by the will to represent the various linguistic regions equitably. In Italy, in the province of Bolzano, in the Trentino-Alto-Adige, the membership of the provincial and local government executive bodies is corrected to ensure an adequate representation of the different linguistic communities, including the Ladin communities. Some States have created bodies for the management of problems relating to minorities. These bodies are generally confined to a consultative power. Thus, in Romania, there is the Council for National Minorities. Austria has a system of "Councils for ethnic groups" for each group. In Finland, separate communities have been set up for Sami affairs and Roma affairs. Under the constitution, Sami representatives have a right to be heard on matters concerning this minority. In Norway, a consultative Sami Parliament is established. In Hungary, there is a national body for the self-management of minorities. In Cyprus, the Armenian, the Maronite and the Latin religious minorities each elect a representative to the Chamber of Representatives. In the Netherlands, a national consultation Council in which all ethnic minority groups are represented discusses all major initiatives and can make recommendations with regard to them. In Slovakia, an advisory board for minority issues can be consulted by the executive. See generally, European Commission for Democracy Through Law, "The Protection of Minorities", Collected Texts No.9, 1994, pp. 74-75; See also "Overview of forms of participation of national minorities in decision-making processes in seventeen countries", prepared by

national unity such as Estonia and Latvia in the Baltic region. The problem of restrictive citizenship laws by the newly independent States of Estonia and Latvia through which mass statelessness was created, clearly illustrates the difficulty of the protection of ethnic, religious or linguistic groups with reference to citizenship.

It is necessary to repeat that international concern over citizenship laws in Estonia and Latvia arose precisely because of those laws' potential to 'disenfranchise' substantial portions of the ethnic, religious or linguistic minority population. It can be argued that the restrictive citizenship measures by 'a State' targeting resident ethnic, religious or linguistic minorities are contrary to internal self-determination, as certain crucial aspects of the processes by which a State determines its political future is a question of internal self-determination for all people. This means that a State may not manipulate the political participation of the people for political purposes of the State. Large populations who have settled and resided in a territorial State cannot be blocked from the political process without justified reasons for excluding them as members of the people in the context of internal self-determination.[126] It may be possible to argue that the cases of Estonia and Latvia have been that the States have tried to exclude ethnic, linguistic Russians from the political process by making it difficult for them to become Estonian and Latvian citizens by means of restrictive citizenship laws.[127]

Minority groups can be effectively excluded from meaningful participation in the political process in their States of residence by government authorities. Indeed, when the Badinter Commission was asked to render an opinion as to whether Serbian populations in Croatia and Bosnia were entitled to self-determination, it answered almost solely by reference to "the - now peremptory - norms of international law [that] require States to ensure respect for the rights of minorities."[128] It also affirmed that " the republics ought to grant to the members of these minorities and ethnic groups the totality of human rights and fundamental freedoms recognized by international law, including, as the case may be, the right to choose their nationality."[129]

The practical effect of internal self-determination on the protection of minority groups within their State of residence, therefore, lies in the structural change of the

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the Minorities Unit of the Council of Europe Directorate of Human Rights, February 1998.

[126] It is to be noted that internal self-determination takes into account the fact that struggles for autonomy by ethnic, religious or linguistic minority groups often find their roots in the failure of national political institutions to address the interests of those groups. *Fox, Self-determination in the post-Cold War era, op.cit,* p. 752.

[127] See Article 9 (2) of the proposed convention in Chapter 8 below, pp. 268-270.

[128] *Badinter Commission Opinion No. 2, op.cit.*, at 1498.

protection of the groups from preventing the secessionist claims to guarantees of civil and political rights within the State. As observed above, it needs to be emphasised that all inhabitants who can be integrated as constituents of the category of people in their State of residence have the right to take part in governing their country as holders of the right to self-determination in the context of internal self-determination, since the deliberation and judgment of the people is the only legitimate basis of governmental authority. The peoples' voice may only be expressed through universal and equal suffrage in periodic and genuine elections.[130] A manifest and continued abuse of governmental power, to the detriment of any section of the population of a State, implicitly recognises the victim group as a separate nation for seeking secession under the right to self-determination.[131]

In the *Gillot v. France* case,[132] the HRC ruled that for the inhabitants in the territorial entity in the context of self-determination to participate in local referendums, they must be genuinely connected to the territory in question. The applicants in *Gillot v. France* were French nationals, resident in New Caledonia, who claimed to be victims of violation by France of Articles 2 (1), 12 (1), 25 and 26 of the ICCPR. They

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[129] *Ibid.*

[130] Internal self-determination is based on democratic practice, for which an election system is required and operated. United Nations organs have consistently singled out free and fair elections as essential to this transformative process: See, e.g., SC Res. 968, UN SCOR, 49th Sess., UN Doc. S/RES/968 (1994) (international assistance to resolve the conflict in Tajikistan "must be linked to the process of national reconciliation, including inter alia free and fair elections"); SC Res. 957, UN SCOR, 49th Sess., UN Doc. S/RES/957 (1994) (calling on parties to the Mozambique conflict to base reconciliation "on a system of multi-party democracy and the observance of democratic principles which will ensure lasting peace and political stability"); SC Res. 919, UN SCOR, 49th Sess., UN Doc. S/RES/919 (1994) (welcoming South Africa's "first all-race multiparty election and the establishment of a united, democratic, non-racial government"); GA Res. 149, UN GAOR 3d Comm., 48th Sess., at 1, UN Doc. A/RES/48/149 (1993) (reconciliation process in El Salvador requires support for the "democratization process under way"); GA Res. 150, UN GAOR 3d Comm., 48th Sess., at 3, UN Doc. A/RES/48/150 (1993) (urging Myanmar to "allow all citizens to participate freely in the political process ... and to accelerate the process of transition to democracy, in particular through the transfer of power to the democratically elected representatives"); GA Res. 151, UN GAOR 3d Comm., 48th Sess., UN Doc. A/RES/48/151 (1993) (condemning events in Haiti "which abruptly and violently interrupted the democratic process in that country"); GA Res. 152, UN GAOR 3d Comm., 48th Sess., at 3, UN Doc. A/RES/48/152 (1993) (urging comprehensive political solution to Afghan crisis based, inter alia, "on the free exercise of the right to self-determination by the people, including free and genuine elections"); Assistance to Georgia in the Field of Human Rights, Hum. Rts. Comm'n. Res. 1993/85, UN ESCOR, 49th Sess., Supp. No. 3, at 252, UN Doc. E/1993/23 (1993) (encouraging Georgia to continue the "process of democratization, including elections"); Support for the Restoration of Democracy in Peru, Hum. Rts. Comm'n. Res. 1992/12, in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Fourth Session, UN Doc. E/CN.4/1993/2, at 46 (1992) (praising Peru's decision "to choose a democratic constituent congress by means of an election to be accompanied by every guarantee of the free expression of the popular will").

[131] The Aaland Islands Question, Report Presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21/68/106 (1921).

[132] *Gillot v. France*, CCPR/C/75/D/932/2000.

did not fulfil the requirement to vote in the referendum on the approval of the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia over the next 20 years. New Caledonia is a former colony of France and an overseas territory under the 1946 French Constitution. The Accord also recognises New Caledonian citizenship and provides that "New Caledonian citizens" are to take a decision, within a 15 to 20 year time frame, on accession to independence or autonomy. The HRC had to determine whether the restrictions imposed on the electorate for the purpose of the local referendums of 8 November 1998 and in 2014 or thereafter constituted a violation of Article 25 and Article 26 of the ICCPR. The Committee said that:

> "The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article I. It thereafter considers that the criteria established are reasonable to the extent that they are applied to strictly and solely to ballots held in the framework of self-determination process... Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1, the Committee considers that, in the present case, it would not unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties with the territory."[133]

Although this case was applied here to the traditional context of decolonisation, the fact that the HRC noted the genuine territorial connection between the inhabitants to the territorial entity in exercising self-determination in the form of a referendum implies that political participation of the inhabitants who have been connected to the territory in question must be guaranteed in the context of self-determination.

Internal self-determination indicates that the 'self' be regarded as co-existent with the territory of the existing State, with the 'people' consisting of all inhabitants historically and residentially connected to the territory in question. Under such reasoning, except in rare situations, such as the case of the extreme suppression of purposefully targeted ethnic, religious or linguistic groups within a State, there would be no independent right for ethnic, religious or linguistic minority groups to secede because one cannot secede from oneself in the context of the 'internal self'. Denied the possibility of sub-dividing, the people's political, economic, social, and cultural rights are to be achieved within the existing State through democratic political participation, good governance, and effective legislation protecting the rights of persons belonging to minorities based on the principle of substantive equality as

[133] *Ibid.*, para. 13. 16.

observed in Chapter 6.

When confined to the citizens of a State as the membership of the people, self-determination offers no effective protection to non-citizens and stateless persons. Where, as in Estonia and Latvia, such persons form a significant and distinct portion of the permanent population, such a denial is at odds with self-determination as an inclusive right that encompasses a right of democratic political participation. If only citizens can enjoy the right to full access to political participation, a very unreasonable situation cannot be avoided in such countries as Estonia and Latvia. This means in Estonia and Latvia that nearly 60 percent of persons belonging to ethnic, linguistic minority groups (some 20 percent of the total population in Estonia and 23.3 percent in Latvia) are deprived of effective political participation at the national level,[134] despite the historical fact that they had resided therein and some of them even participated in the independence movement along with titular Estonians and Latvians from the former Soviet Union in 1991. The opinions of the UN Committee on Elimination of Racial Discrimination (CERD) on Estonia noted the fragile status of non-citizens in stating that "according to article 48 of the Estonian Constitution, only citizens can be members of political parties."[135]

The situation in Latvia is similar. A number of laws and secondary legislation reserve certain rights and opportunities to citizens only, such as the right to participate in national elections and to form political parties. Other laws restrict non-citizens' property rights, the right to work in a number of professions, both in the State and the private sector, and the right to receive social and other benefits.[136] The CERD report on Latvia held the views that "the Committee concerns... about reports that there are still unjustified differences of treatment between citizens and non-citizens, mostly a number of minorities, in the enjoyment of the rights provided for in article 5 (e) of the

[134] Both in Estonia and Latvia, the ethnic, linguistic Russian minorities tend to be underrepresented in State institutions. In 2001, in Estonia, the Russian minorities made up only nine percent of all judges and six percent of officers within the Ministry of Internal Affairs whereas there were no Russian minorities working as officials in the Ministries of Justice or Education. In Latvia, statistical research of minority representation in State ministries revealed that minorities are employed by 65 percent less than their ratio among the citizenry. Minorities are also insufficiently and unevenly represented in municipal councils and administration and are underrepresented in the judiciary. *Monitoring the EU Accession Process: Minority Protection* (Budapest: Open Society Institute, 2002), pp. 350-351; Legal Information Centre For Human Rights, Estonia, "differences in the legal status" at www.licht.ee/eng/researchers.anlysis/diff1.htm, Report note 123.

[135] Concluding observations of the CERD, A/57/18, 2001, paras.344-366, para. 359.

[136] For the full list of differences between the rights of citizens and non-citizens, see LICHR Report, http://www.riga.lv/minelres/count/non_cit-rights_1. htm.

Convention."[137]

Even if persons belonging to the ethnic, linguistic Russian population are Latvian citizens by way of naturalisation, their political participation was restricted until recently. Minority representatives seeking election in national as well as municipal elections were required by law to demonstrate the highest level of fluency in the Latvian language to register as candidates. As noted, the HRC ruled that the Latvian municipal election law provision requiring candidates to obtain a Latvian language proficiency certificate from the State Language Board contravenes the ICCPR.[138]

Governments, elected by the majority, are likely to reflect the interests of the majority. This may be true, or at the very least perceived to be true, both in the formulation of policy and in its application, for example in the apportioning of school funding or the provision of government spending to different regions. It is clear, however, that in all aspects of government decision-making (including education and language policy) minorities are entitled to be consulted as to developments in policy, especially where the decision will have direct or indirect impact on the interests of minority groups.[139] In responding to Estonia's report, the Advisory Committee on the FCNM especially emphasised the need to include minorities in the consultation process as follows:

> "As regards the allocation of this support, the Advisory Committee considers it important that representatives of national minorities are involved in the decision-making process and that the needs of all minorities including the numerically small ones, are completely addressed."[140]

Estonia and Latvia were able to realise their right to self-determination by achieving independence from the former Soviet Union in 1991. Now, as independent sovereign States, however, Estonia and Latvia should respect the right to self-determination in relation to the protection of the ethnic, linguistic Russians. In particular, the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia who had resided in the territory of what are now Estonia and Latvia before independence in 1991 fit exactly into the category of members of 'people' and that of 'minority' for international law. It is debatable whether ethnic, linguistic Russians in Estonia and Latvia meet the criteria for external self-determination in the sense of secession, which applies to relations with other States. In a most persuasive remark,

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[137] CERD/C/304/ADD.79, 2001, para.14

[138] *A. Ignatane v. Latvia*, HRC Communication No. 884/1999, 25 July 2001.

[139] See Article 5 of the proposed convention in Chapter 8 below, pp. 260-262.

[140] Advisory Committee Opinion on Estonia, ACFC/INF/OP/I (2002) 005, para. 28.

MaCorquodale argues that:

> "It appears that only a government of a State which allows all its peoples to decide freely their political status and economic, social and cultural development has an interest of territorial integrity which can possibly limit the exercise of a right of self-determination. So territorial integrity, as a limitation on the exercise of the right of self-determination, can apply only to those (minority of) States in which the government represents the whole population in accordance with the exercise of internal self-determination."[141]

In other words, even if it would be difficult for the Russian populations in Estonia and Latvia to defend their rights on the basis of external self-determination, they should still have the right to internal self-determination, which concerns the right of people 'within' their State of residence to participate in the political, economic, and social process as members of the people.[142] Put differently, it can be argued that if a State limits the boundary of the body of citizenship by enacting restrictive citizenship laws on the basis of ethnic, or linguistic distinctions or preferences, with the result being that some particular ethnic or linguistic minority residents are actually 'excluded' from the members of the category of a people of the State and thereby cannot participate in the political process effectively, this can be contrary to internal self-determination under international law.

8. Conclusions

(1). Self-determination will be effectuated through the formation of an independent statehood in its external aspect. However, as soon as a self-determining regime attains independent statehood, internal self-determination primarily operates as a governing and organising principle of the State. A people within 'a State', as holders of the right to self-determination under international law should have the right to choose their form of government, and their economic, social, and cultural systems, based on their entitlement to democratic representative government.

(2). International law generally does not recognise, outside of colonial contexts, an affirmative right on the part of people to exercise their self-determination right by seceding from the existing State. As the right to self-determination has evolved from

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[141] *MaCorquodale, Self-Determination: A Human Rights Approach, op.cit.*, p. 880.

[142] The Estonian scholar of international law Müllerson correctly observes as follows: "It would not be correct, to say, as it is sometimes asserted, that there is no right of self-determination for minorities. It would be more accurate to say that they can exercise the right of self-determination together with the

the context of decolonisation to its internal aspect since the post-colonial and the Cold War eras, it is observed that the right to internal self-determination is applicable to the protection of persons belonging to ethnic, religious or linguistic groups with respect to their political participation in their State of residence.

(3). The concept of people as holders of the right to self-determination includes 'all inhabitants' residing in 'a territorial State', who have been connected to that State with reference to historical and habitual residence and the sharing of broadly defined common political and social experiences as indication of common solidarity. It embraces ethnic, religious or linguistic minorities as members of a people for the right to self-determination in a State. Moreover, as the internal aspect of the right to self-determination guarantees a people's right to freely determine their political status and pursue their economic, social and cultural development in a 'democratic way' in their State of residence, it can be argued that citizenship is given to the members of that people without discrimination, because the holding of citizenship is essential for those inhabitants to participate politically in their State of residence.

(4). Democracy has a direct relationship with the right to internal self-determination. Internal self-determination guarantees the political participation of persons belonging to ethnic, religious or linguistic minority groups in their State of residence without discrimination.

(5). Minority rights are not the rights which are only confined to the cultural aspect of minority phenomena. They also include the rights of political or public participation of persons belonging to minority groups in their State of residence. The grounds for support of the rights of political or public participation of persons belonging to minorities may be confirmed in the UN Human Rights Covenants, the UN HRC minority rights jurisprudence as well as Article 15 of the FCNM.

(6). The case of the ethnic, linguistic Russian stateless persons or non-citizens in Estonia and Latvia presents the possibility of the application of the right to internal self-determination for their status as 'members of protected minority group'. There seems to be no reason to deny that the ethnic, linguistic Russian residents in Estonia and Latvia who had resided in the territories of what are now Estonia and Latvia before independence in 1991 are to be integrated as constituents of the peoples for the purpose of the right to internal self-determination. In this context, the Estonian and

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rest of the population of a given state, as a part of this population." R. Müllerson, *International Law, Rights and Politics* (London: Routledge, 1994), p. 73.

Latvian citizenship measures since independence in 1991 are problematic, because it is evident that Estonia and Latvia have limited the boundary of the body of citizenship by enacting restrictive citizenship laws on the basis of ethnic and linguistic distinctions or preferences, with the result being that some particular ethnic or linguistic residents (the ethnic, linguistic Russians) have actually been 'excluded' from the members of the category of peoples for the States.

(7). The issue of the protection of minority rights under international law is not separate from the right to self-determination. Rather, they are mutually connected and the effective realisation of minority rights could be made possible and more secure with the legal and normative basis of the right to self-determination.

Chapter VIII

Conclusion and Recommendations

1. Continuity and Change in the Discussion on the Protection of Minority Rights in International Law

In international law, there is no such thing as an officially accepted definition of a minority. According to the traditional definition of a minority, citizenship is the distinctive feature of a minority under international law. The issue of whether minority rights by definition apply only to citizens is a fundamental question for the effective protection of minority rights under international law. If citizenship is the requirement for receiving minority status, it follows that minority rights are citizens' rights. Already at the beginning of the United Nations discussions on the protection of persons belonging to minorities, shortly after World War II, whether legal protection should be offered only to citizens was a serious topic. As Eide pointed out, some Western members of the UN Sub-commission on Prevention of Discrimination, such as Belgium, France, and the United Kingdom, wanted to limit minority rights to only those citizens of the country concerned.[1] Reflecting this position, the oft-cited Capotorti definition of a minority for the purpose of international law requires the holding of citizenship of the State of residence in order to receive minority status and enjoy minority rights.

However, as examined in this thesis, this traditional, narrow approach to the concepts of minority and minority rights is being challenged by recent developments in international law of minority protection. As observed, according to the United Nations Human Rights Committee (HRC), it is necessary that minorities, and the persons belonging to them, "exist", while it is not relevant to determine the degree of permanence that the term "exist" connotes.[2] Given this approach, it is in no way surprising that the HRC does not distinguish between migrants and persons belonging

[1] A. Eide, "Citizenship and Minority Rights of Non-citizens", working paper for the 5th session of the Sub-Commission's Working Group on Minorities, 2000, p. 3

[2] General Comment No. 23, CCPR/21/Rev.1/Add.5, General Comment No. 23 (50), 26 April 1994, para. 5.2.

to minorities.[3] From the perspective of the protection to be offered, the simple fact of being on a State's territory is enough.

The discussion about the legal and normative bases for the protection of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities with reference to their citizenship status is thus significant for the purpose of reinforcing the pillars for the effective protection of minority rights under international law. The situation of the stateless or non-citizen ethnic, linguistic Russians in Estonia and Latvia has illustrated the necessity for the effective protection of persons belonging to minority groups under international law. Most resided in the territories of what are now Estonia and Latvia since before these countries regained independence from the former USSR in 1991. They became 'instant aliens' as soon as Estonia and Latvia enacted citizenship laws under which only citizens of pre-war Estonia and Latvia (and their descendants) would be granted automatic citizenship. This was in contrast to Lithuania, where the demographic effects of Sovietisation were less pronounced than in Latvia and Estonia, and where Lithuanians constituted about 80 percent of the population. Lithuania adopted a zero option approach that in effect gave automatic citizenship to all who were resident in 1991. Of course, the Estonian and Latvian citizenship laws have undergone significant changes over the past few years. However, basically it cannot be denied that the citizenship policy measures of Estonia and Latvia have resulted in the denial of the historic and habitual residence of the ethnic, linguistic Russian populations in the Baltic region during the period of the former USSR, thereby threatening the stabilised lives and the maintenance of identity for the ethnic, linguistic Russians in Estonia and Latvia.

The international legal and normative bases for the justification of the effective protection of the rights of the ethnic, linguistic Russians in Estonia and Latvia as persons belonging to minorities can be found in minorities-specific standards with the focus on the protection of cultural identity for minorities, general human rights standards with an emphasis on substantive equality, and the right to internal self-determination. The linkage of these legal and normative bases to the justification of the protection of the rights of the ethnic, linguistic Russians in question leads to the strong suggestion that Estonia and Latvia should protect their interests in an effective manner at the domestic legal level, by taking into account their concrete needs and

[3] *Ibid.*, paras. 5, 2 and 7.

problems, including the matter of citizenship.

The discussion about the protection of the Russian minorities in Estonia and Latvia is significant in that it has shown that the concepts of minority rights and minority protection should be understood broadly. Minority rights are interconnected with general human rights and the right to internal self-determination. The effective realisation of minority rights can be better secured with the legal and normative bases of general human rights and internal self-determination, beyond minorities-specific standards. For too long, the contents of minority rights have been understood as having been confined only to the maintenance of cultural identity for persons belonging to minority groups, and this negative perception of minority rights seems to have been based on the assumption that minority rights are essentially 'citizens' rights'. This narrow approach to the concept of minority rights has undoubtedly been related to States' concerns that giving broad meaning to minority rights would contribute to secessionist movements of minority groups, thereby bringing about social disorder and threatening State sovereignty. However, the scope of minority rights has been expanding in present international law, being confined not only to cultural aspects, but also open to political aspects of minority phenomena in a State, as is confirmed by the significance of the implication of Article 15 of the Framework Convention on the Protection of National Minorities (FCNM), with respect to participation rights of persons belonging to minority groups in their States of residence.

In the case of Estonia, only citizens are entitled to minority rights at the domestic legal level. The Estonian position is in line with the traditional view of the definition of a minority under which only citizens are entitled to minority rights. In Latvia, holding citizenship is not required to receive minority status in formal terms. However, given that there exist many non-citizens and stateless persons belonging to the ethnic, linguistic Russian groups as a result of Latvia's restrictive citizenship law and that there is no specific, detailed minority protection law at the domestic legal level, the situation is not wholly different from the case of Estonia. As examined in Chapter 5, although whether Article 27 of the ICCPR has become the part of customary international law or not is not certain at present, it can be interpreted that the protection of minority rights in the sense of the protection of identity for minorities requires States concerned to protect and promote the cultural identity of persons belonging to minority groups in their State of residence through the implementation of protective measures at the domestic legal level under minorities-specific standards.

Furthermore, Estonia and Latvia's obligations to protect minority rights of the ethnic, linguistic Russians, irrespective of whether they hold the citizenship of Estonia and Latvia, are reinforced by the bases of the substantive equality principle and internal self-determination. There is no doubt that the restrictive citizenship laws of Estonia and Latvia have had serious negative consequences on the rights and interests of the ethnic, linguistic Russians in terms of maintaining and promoting their identity, because persons within a population sharing the same ethnic and linguistic characteristics may have a different legal status, based on citizenship, which threatens the preservation and promotion of their identity. Estonia and Latvia, as parties of the ICCPR, the ICERD and the FCNM, are required to implement concrete protective measures for the protection and promotion of the rights of the ethnic, linguistic Russians as members of minority groups. In implementing such State protective measures for minority protection, it seems clear that citizenship issue for the ethnic, linguistic non-citizen and stateless persons should be considered in a positive way to protect their right to identity effectively, as citizenship and the maintenance and promotion of identity are inherently and actually related to each other in effectuating broadly defined minority rights at the domestic legal level in a State.[4]

If this is the case, the question arises as to whether persons belonging to minorities have the right to citizenship as such under international law. As observed in Chapter 3, it appears difficult to state that Estonia and Latvia have obligations to grant automatic citizenship to the ethnic, linguistic Russian non-citizens and stateless persons at least from the present state of international law, given that a State's discretion to regulate citizenship is generally recognised and the legal status of the right to nationality as a 'positive human right' has remained unclear. However, this does not mean that a State may treat persons belonging to minorities arbitrarily in the form of citizenship under present international law. The discussion about the legal and normative bases for the protection of the ethnic, linguistic Russians with reference to their citizenship status suggests that a State's power to regulate citizenship can be 'constrained' by its obligations to protect minority rights in an effective way under international law. The present writer does not intend to suggest that a State must grant citizenship to 'anyone'. Rather, it would be more correct to say that a State's power to regulate citizenship can be constrained 'to the extent' that it is obliged to protect minority rights effectively at

[4] See Article 7 of the proposed convention in this chapter, pp. 263-266.

the domestic legal level under international law. From this perspective, though Estonia and Latvia have no direct obligations to grant automatic citizenship to the Russian non-citizens and stateless persons in question under present international law, it would be recommended that Estonia and Latvia abolish the language requirements of the naturalisation process or simplify the process 'as a way' of protecting the ethnic, linguistic Russian non-citizens and stateless persons as persons belonging to minority groups.[5] In the case of Estonia, the present writer also pleads for the renouncing of the citizenship criterion as a requirement for membership of a national minority.

The minority situation can be very different from State to State, reflecting the unique social and cultural backgrounds of each State, such as the composition of the minority and majority population. However, as there is no guarantee that the criterion for receiving citizenship is in harmony with full and effective protection of the rights of persons belonging to existing ethnic, religious or linguistic minority groups as a 'protected minority' at the domestic legal level, a State's discretion to regulate citizenship is open to abuse.[6] To that extent, the proposition that a State's power to regulate citizenship can be 'constrained' by its obligations to protect broadly defined minority rights would be critical for the purposes of effective international minority protection.[7]

For instance, citizenship has been used consistently throughout South Asia as a political instrument for targeting ethnic, religious or linguistic minority groups. It has posed a long-term pervasive threat to the fundamental human rights of millions of people who for more than fifty years have been without effective protection from its abuse. The wilful denial of citizenship to large groups of minorities in Bhutan,

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[5] It is generally admitted that a language test is a common requirement for naturalisation in many European countries. However, it is also true that some States, including Belgium, Finland, Greece, Ireland, Italy, Russia, Spain, Sweden, do not have a language requirement for naturalisation. See, R. Hansen, "A European Citizenship or a Europe of Citizens", *Journal of Ethnic and Migration Studies*, Vol., 24, 1998, pp. 751-768.

[6] A number of examples can be provided of persons belonging to minorities who were allegedly denied citizenship and therefore also the enjoyment of certain fundamental rights. These include: the Kurdish minority in the Syrian Arab Republic who were denied citizenship and thus faced widespread discrimination; the Turkish minority in Greece who were arbitrarily deprived of Greek citizenship; the Korean minority in Japan who were denied re-entry permits, thus curtailing their right to travel and to livelihood; the Lahu, Lisu and Ahaka tribal communities in Thailand, who did not have Thai citizenship, and therefore no identity cards, travel documents or right to vote; the Banjara Gypsies of Rajasthan, India, who had settled down but who were denied citizenship; and the pygmy and Mbororo minorities in Cameroon, whose citizenship rights were curtailed. Cited in Paragraph 39, Prevention of Discrimination against and the Protection of Minorities, Report of the Working Group on Minorities on its fifth session, E/CN.4/Sub.2/1999/21.

[7] See Article 10 of the proposed convention in this chapter, pp.270-271; Article 9 of the proposed convention in this chapter, pp. 268-270.

Bangladesh, Myanmar, Sri Lanka and India has left its indelible mark on the region.[8] Following the process of decolonisation and the subsequent creation of newly independent States in South Asia, governments began to change their citizenship laws and introduce severe restrictions to retaining, acquiring or re-acquiring citizenship, creating millions of stateless persons. In post-colonial Bhutan, Pakistan, Myanmar and Sri Lanka, the trend has been for the State to seek control by using a strong central government to determine citizenship based on the pursuit of a national ideology aimed at excluding segments of society who refuse to submit to the nationalist line.

Nearly 100,000 ethnic Nepalese from Bhutan, many of whom lived in Bhutan for generations, were stripped of their citizenship and pushed out of Bhutan by its government following the implementation of 'Bhutanisation'. Following the 1977 revision of the 1958 Nationality Law, the monarchy imposed the 1985 Citizenship Act. In addition to the inclusion of a language requirement and a strong understanding of Bhutanese history, culture and tradition, the updated Act required anyone who had only one Bhutanese parent and born after 1958 to apply for naturalisation. By 1992, an estimated 100,000 Lhotshampas had left Bhutan.[9]

The indigenous Sinhalese-controlled government of Sri Lanka enacted citizenship legislation aimed at deliberately disenfranchising the ethnic Indian Estate Tamils. The Estate Tamil migrants represented British colonialism and were never welcomed by many Sri Lankan Sinhalese, the predominant ethnic group. Shortly after independence, the newly independent State of Sri Lanka enacted the 1948 Ceylon Citizenship Act, which required that the applicant's father or both the applicant and the applicant's grandfather had to be born in Sri Lanka. This ruled out many of the Tamil minority group who had been living and working in Sri Lanka for generations.[10] In Sri Lanka as in Bhutan, the denial of citizenship to a minority group was used as an instrument to assist the State in its pursuit of a monolithic nationalisation aimed at protecting or creating a national identity.[11]

Similar to the Estate Tamils in Sri Lanka, the Bihari of Bangladesh have been

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[8] J.W. Heffernan, "Being Recognized as Citizens: A Human Security Dilemma in South and Southeast Asia", Report on the Commission on Human Security, 2002, pp. 3-18.

[9] *Ibid*, pp. 3-5; See, generally, N. Mishra & S.K. Singh, *Status of Minorities in South Asia* (Delhi: Authorspress, 2002), Chapter 3.

[10] P. Sahadeven, *India and the Overseas Indians: The Case of Sri Lanka* (Kalinga Publications: New Dehli, 1995), Chapter 4.

[11] However, the Sri Lankan parliament implemented a naturalising remedy for statelessness in 2003 when it passed a law granting citizenship to over 168,000 stateless Tamils. BBC Worldwide Monitoring, 7, October 2003.

denied citizenship of Bangladesh and have suffered many years of statelessness. The Urdu-speaking Bihari Muslims fled India during India's 1947 independence and became a linguistic minority among the Bengali-speaking majority in former East Pakistan. The newly independent of Pakistan, led by the Urdu-speaking ethnic Punjabis who dominated West Pakistan, took a centrist approach, reducing local government influence as well as limiting the power of those who were not Urdu-speaking ethnic Punjabis including the Bengali-speaking majority in East Pakistan. When the Bengali majority of East Pakistan seceded from Pakistan to create an independent Bangladesh in 1972, the Bihari minority were initially granted full citizenship rights and equal treatment under Bangladeshi law. This was subsequently ignored by the new government, which claimed that the Biharis were Pakistanis, not Bangladeshis. With their homes destroyed and property confiscated, most Biharis were forced to live in camps and await repatriation to Pakistan where they had never lived, but claimed citizenship. Thirty years later, over 200,000 remain in camps in Bangladesh, effectively stateless as a consequence of neither Pakistan nor Bangladesh recognising them as citizens.[12]

The case of the Rohingya in Myanmar is a blatant example of a State's long term policy of citizenship denial and deprivation. Following independence from the British in 1948, the Rohingya Muslims of Myanmar, who were predominantly concentrated in the northern part of Rakhine State, claimed a separate ethnic identity and were recognised by the newly independent government. In 1950, Rohingyas had representation in parliament and held high-level government posts. After the 1962 military take-over, however, the Rohingyas were systematically denied their civil, political, economic and social human rights, culminating in the Citizenship Act of 1982. The 1982 Act was clearly designed to exclude the over one million Rohingyas from citizenship.[13] The Act set two criteria for defining "full citizens": they should either belong to one of the 50-plus national races, or be able to prove that they were born in Myanmar, and in addition, that their parents have resided in the country before 4 January 1948. The Rohingyas were denied citizenship as they were considered by

[12] United Nations High Commissioner for Refugees (UNHCR), *The State of the World's Refugees: Fifty Years of Humanitarian Action* (2000), at 189; Bangladesh, Country Report, Country Information & Policy Unit, Immigration & Nationality Directorate, Home Office, United Kingdom, 2004.

[13] Zama Coursen-Neff, Living in Limbo: Burmese Rohingyas in Malaysia (2000), available at www.hrw.org/reports/2000/malaysia.

the authorities unable to meet the requirements of any of these categories.[14]

Historically speaking, the question of the protection of persons belonging to minorities in relation to the citizenship of their State of residence is not a new issue, as observed in Chapter 4 of this thesis on the protection of minority groups during the period of the League of Nations.[15] However, one should not forget the progressive development of international law of minority protection in terms of the efforts to set general standards for the protection of minority rights since the establishment of the United Nations and the end of the Cold War, and its positive impact on the effectuation of minority rights at the international and regional levels.[16] Although the outcomes generated by the minority question throughout history have been markedly different depending on legal and political settings, the important point is that the question of minority protection has been one of the most delicate and sensitive issues on the international agenda. Writing in 1950, Lauterpacht stated that the protection of minorities was a fundamental element of human rights involving the preservation of peace between and within nations.[17] Indeed, the international protection of minority rights may be a representative area which indicates the state of the development of international law, because it presents a crossing point between the two fundamental norms of international law: the respect of State sovereignty and the protection of human rights. The reason for the progressive and gradual development of international standards of minority rights, even though minority issues have been unending and crucial issues in international relations, may be found in this inherent tension between two fundamental norms of international law.

After 1945, the issue of the protection of minority rights was constrained by the strict leash of Cold-War dynamics, and remained somewhat obscured or unresolved, though never fading away. Rather, the post-Cold War upsurge of minority problems in numerous countries, coupled with social tension and even violence, has prompted the international community to tackle the issue of minorities more constructively than in the past, thereby placing renewed emphasis on the principle that such issues are a

[14] Myanmar, The Rohingya Minority: Fundamental Rights Denied, Amnesty International, AI Index ASA 16/005/2004

[15] See Chapter 4 above, *the Polish Nationality Case*, pp. 100-105.

[16] In this regard, it is important to note that three international institutions were set up during the 1990s to address minority situations: The Office of the High Commissioner on National Minorities (HCNM), set up under the CSCE (now OSCE); the UN Working Group on Minorities (UNWG), set up under the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1995, and the Advisory Committee on the Framework Convention (ACFC) set up by the Council of Europe.

[17] H. Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950), p. 352.

matter of legitimate international concern and do not constitute exclusively an internal affair of the respective State.[18] 'Continuity' and 'change' may thus be appropriate words to describe the nature of minority issues in international law.

Despite the importance of certain gains in the international protection of minority rights, much remains to be done. For this reason, the present writer thinks that it would be worthwhile to think about adopting a new convention on the protection of persons belonging to minorities at the universal level. Minority protection can be accomplished through bilateral treaties between the States concerned, and minority protection can be finalised by way of domestic legislature. Nevertheless, the adoption of a new convention on the protection of minority rights would be valuable, as it could provide consolidated international standards for the protection of minority rights, which might have a positive impact on the States concerned. More specifically, the adoption of a new convention would be necessary for at least two reasons. First, the contents of minority rights and the corresponding States' obligations to uphold minority rights need to be elaborated. It is true that many provisions regarding minority rights under present standards are vague, and the extent and degree of the corresponding States' obligations are insufficient. Moreover, the FCNM applies only to Europe[19] and the 1992 UN Declaration on Minority rights is not a legally binding document, at least in formal terms. Secondly, the power of the supervisory machinery to ensure the implementation of States' obligations to protect minority rights needs to be strengthened in view of strong criticism made of the weakness of the control mechanism for the FCNM. Bearing this in mind, the present writer now proposes a mini-sample draft of the international convention on the protection of the rights of persons belonging to minorities as a recommendation.

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[18] It should be reiterated that the Badinter Arbitration Commission which was established in 1991 by the European Union in the wake of the break-up of Yugoslavia, explicitly recognised that the protection of the rights of minorities, particularly with regard to the right to identity of minorities is part of the "peremptory norms of general international law". Badinter Arbitration Commission, Opinion No. 2, 20 November 1991, 31 ILM 1497.

[19] Asia has not produced a regional organisation comparable to the Council of Europe, the European Union, the Organisation of American Sates or the African Union. Moreover, there is no regional convention on the protection of minority rights in the Asian region. Due to the diversities of cultural and linguistic backgrounds and to the pluralism in the legal systems, it is very difficult for the Asian countries to draft successfully a convention. Since many Asian countries are confronted with major

2. Proposed International Convention on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities and its Commentary

Preamble

The States signatory hereto of the Convention on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities, considering that the upheavals of world history have shown that the protection of ethnic, religious or linguistic minority groups is essential to stability, democratic security and peace in the world; considering that a pluralist and genuinely democratic society should not only respect the ethnic, religious or linguistic identity of each person belonging to minority groups and minority groups as such, but also create appropriate conditions enabling them to express, preserve and develop this identity; considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society; considering that the realisation of a tolerant and prosperous world community does not depend solely on co-operation between States but also requires trans frontier co-operation between local and regional authorities without prejudice to the constitution and territorial integrity of each State; having regard to the human rights principles contained in the United Nations Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Convention on the Rights of the Child, the Framework Convention on the Protection of National Minorities as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations; being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure in States, the effective protection of national, ethnic, religious or linguistic minorities and of the rights and freedoms of persons belonging to such minorities, within the rule of law; respecting the territorial integrity and national sovereignty of States; being determined to implement the principles set out in

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problems that have human rights dimensions and most of these cases are directly involved with minority rights, it is highly desirable to have regional co-operation to face these problems.

this Convention through national legislation and appropriate governmental policies; and recognising the need to ensure even more effective implementation of international protection of the rights of persons belonging to minorities, have agreed as follows:

<Notes>

1. The purpose of this Convention is to promote more effective implementation of the rights of persons belonging to minorities and more generally to contribute to the realisation of the principles of the Charter of the United Nations and of the human rights instruments adopted at the universal or regional level. This Convention is particularly inspired by Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Declaration on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities, and the European Framework Convention on the Protection of National Minorities (FCNM). The Convention is based on the principle that the protection and promotion of minority rights contribute to the political and social stability of the States in which minorities live and contribute to the strengthening of friendship and co-operation among States.

2. The Convention builds on and adds to the rights contained in the International Bill of Human Rights and minority rights related instruments by strengthening and clarifying those rights which make it possible for persons belonging to minorities to preserve and develop their group identity. The human rights set out in the International Bill of Human Rights must at all times be respected in the process, including the principle of non-discrimination between individuals. The States are obliged to respect and ensure to every person within their territory and subject to their jurisdiction, without discrimination on any ground, including race, ethnicity, religion or national origin, the rights contained in the instruments to which those States are parties.

3.It is in light of these purposes and principles that the articles of the Convention must be interpreted.

Part 1. General provisions

Article 1

The protection of the rights and interests of national, ethnic, religious or linguistic minorities and persons belonging to those minorities forms an integral part of the international protection of human rights, and States parties are obliged to protect and

promote the rights of persons belonging to such minorities at the domestic legal level.

<Notes>

4. The purpose of Article 1 is to specify clearly that the protection of persons belonging to national, ethnic, religious or linguistic minorities is an integral part of human rights and does not fall within the reserved domain of States. It is necessary to realise that minority protection may not undermine but strengthens territorial integrity and State sovereignty and is designed to promote a democratic political system. It should be noted that the Badinter Commission of the International Conference on the Former Yugoslavia stated that the protection of minority rights with particular reference to identity constitutes the peremptory norm of international law. This should not be understood as being only declarative in nature without substance. The protection of minority rights should be realised by States parties through the implementation of 'concrete protective measures' at the domestic legal level.

Article 2

States parties should co-operate on questions relating to the protection of persons belonging to minorities, *inter alia,* by exchanging information and experiences, in order to promote mutual understanding and confidence.

<Notes>

5. Situations involving minorities often have international conflicts and repercussions. Tensions between States have arisen in the past and in some cases continue in the present over the treatment of minorities, particularly in relations between the home State of a given minority and other States where persons belonging to the same ethnic, religious or linguistic group reside. Article 2 encourages States parties to co-operate in order to find constructive solutions to situations involving minorities. It is expected that States parties should engage in constructive co-operation to facilitate, on a reciprocal basis, the protection of minority groups and their identities.

6. One approach, much used in Central and Eastern Europe, is for States to conclude bilateral treaties or other arrangements concerning good neighbourly relations, based on the principles of international human rights law, combining commitments of strict non-intervention with provisions for co-operation in promoting conditions for the maintenance of group identities and cross-border contacts by persons belonging to minorities. In this context, it is important to note that provisions on minorities contained in such treaties and other bilateral arrangements should be based on universal and regional instruments relating to equality, non-discrimination and

minority rights. Such treaties should include provisions for the settlement of disputes regarding their implementation for the effectuation of minority rights.

Article 3

The exercise of the rights set forth in the present Convention shall not prejudice the enjoyment by all persons of universally recognised human rights and fundamental freedoms.

<Notes>

7. The rights of specific categories of persons belonging to minorities are supplementary to the universally recognised rights of every person. This Convention is intended to strengthen the implementation of human rights in regard to persons belonging to minorities, not to weaken for anyone the enjoyment of universal human rights. Consequently, the exercise of rights under the Convention must not negatively affect the enjoyment of human rights for persons who do not belong to a minority, nor for persons who do belong to a minority.

8. Minority rights and human rights are not identical notions. The concept of human rights is different in that the rights of all individuals are placed under international protection, whereas minority rights can be described as special rights recognised to the exclusive benefit of persons belonging to minorities. However, human rights and minority rights are complementary and the legal basis for the protection of minority rights can be made more solid with the normative basis of human rights.

Article 4

1. A minority is a group numerically smaller than the rest of the population whose members have lived for a significant period of time in their State of residence. The members of the group have ethnic, religious or linguistic features differing from the rest of the population and show a sense of mutual solidarity for the preservation of their unique culture, tradition or language.

2. Any group coming within the terms of this definition shall be treated as an ethnic, religious or linguistic minority.

3. Holding citizenship of the State of residence is not a mandatory requirement for receiving minority status as the holder of minority rights recognised in the present Convention.

4. Persons belonging to ethnic, religious or linguistic minority groups may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present Convention individually as well as in community with others.

5. Every person belonging to an ethnic, religious or linguistic minority should have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice nor from the exercise of the rights which are connected to that choice.

<Notes>

9. This Convention contains the official definition of a minority. The definitional question of the concept of a minority as the holder of minority rights goes to the heart of the issue of the international 'legal protection' of minority rights. If international law is the 'legal basis' for the protection of the rights of persons belonging to minorities, identification of persons belonging to such groups is essential. Without identification of what constitutes the concept of a minority, the international legal protection of minority rights may lack effectiveness. Bearing this in mind, the Convention introduces the definition of a minority. The definition of a minority under this Convention is primarily concerned with the historical and factual aspects of persons belonging to minorities in their State of residence with the subjective belief of members of minority groups to maintain and promote their own identity in their States of residence.

10. The beneficiaries of the rights under Article 27 of the ICCPR, which have inspired this Convention, are persons belonging to "ethnic, religious or linguistic minorities". This Convention has added the term "national minorities". However, that addition does not extend the overall scope of application beyond the groups already covered by Article 27 of the ICCPR. There is hardly any national minority, however defined, that is not also an ethnic or linguistic minority. Regional European instruments on minority rights such as the FCNM and the instruments and documents of the Council of Europe and the Organisation for Security and Co-operation in Europe (OSCE) use only the concept "national minorities" and do not refer to "ethnic, religious or linguistic minorities". When applying those instruments it is important to define "national minority", but the same problem does not arise for this Convention. Even if a group is held not to constitute a national minority, it can still be an ethnic, religious or linguistic minority and therefore be covered by this Convention.

11. Citizenship as such should not be a distinguishing criterion which excludes some persons or groups from enjoying minority rights under the Convention. This is also the view expressed by the Human Rights Committee (HRC) in paragraphs 5.1 and 5.2 of

its General Comment No. 23 (fiftieth session, 1994).[20] Persons who are not (yet) citizens of the country in which they reside can form part of or belong to a minority in that country and are recognised as the right holder for minority rights. That this Convention clearly express no relevance of citizenship for the determination of a minority is significant, as it can be conducive to the prevention of States' possible limitation of the personal scope of minority protection by means of citizenship status at the domestic legal level.

12. While the rights are consistently set out as rights of individuals, minority rights by their nature have a collective aspect. The duties of States parties concerning minority protection are in part formulated as duties towards minorities as groups. States cannot fully implement minority rights without ensuring adequate conditions for the existence and identity of the group as a whole. The main point here is that persons can exercise their rights both individually and collectively, the most important aspect being the collective exercise of their rights, be it through associations, cultural manifestations or educational institutions, or in any other way.

13. While Article 3 of the Convention provides that persons belonging to minorities shall not be subjected to discrimination for exercising, individually or collectively, their minority rights, Article 4 (5) makes it clear that they shall also not be disadvantaged in any way for choosing not to belong to the minority concerned. This provision is directed both towards the States concerned and the agencies of the minority groups. States parties cannot impose a particular ethnic identity on a given person through the use of negative sanctions against those who do not want to be part of that group; nor can persons belonging to minorities be subject to any disadvantage as persons who on objective criteria may be held to form part of their group but who subjectively do not want to belong to it. States Parties would have a duty to prohibit the taking of measures by minorities to impose their particular rules on any person who did not want to be part of the minority concerned, and therefore did not want to exercise her or his rights.

Article 5

1. Persons belonging to national, ethnic, religious and linguistic minority groups (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language,

[20] HRC General Comment No. 23, UN Doc.HRI\GEN\1\REV.1\ at 35 (1994), paras. 5.1-5.2.

freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and political life in their State of residence.

3. Persons belonging to minorities have the right to participate effectively in decisions at a national and regional level concerning the minority to which they belong or the regions in which they live, in accordance with relevant national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

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14. Article 27 of the ICCPR has almost the same language, but the Convention is more explicit in requiring positive action. Article 27 of the Covenant requires that persons belonging to minorities "shall not be denied the right to ...," and the FCNM also uses the expression "shall". However, the Convention uses the positive expression "have the right to ..." Article 27 of the ICCPR has been interpreted by the Human Rights Committee as requiring more than mere passive non-interference. The Convention makes it clear that these rights require 'concrete positive action', including protective measures and encouragement of conditions for the promotion of their identity and active measures by the State. The words "freely and without interference or any form of discrimination", at the end of Article 5.1, show that it is not enough for a State to abstain from interference or discrimination. It must also ensure that individuals and organisations of the larger society do not interfere or discriminate.

15. The right to participate in all aspects of the life of the larger national society is essential, both in order for persons belonging to minorities to promote their interests and values and to create an integrated but pluralist society based on tolerance and dialogue. By their participation in all forms of public life in their country, they are able both to shape their own destinies and to contribute to political and social change in the larger society.

16. It is critically important to note that the words "public life" should be interpreted in the broad sense, though much is covered already by the preceding words "cultural, religious, social and economic." Included in "public life" are, among other rights, rights relating to election and to being elected, the holding of public office, and other political and administrative domains.

17. Participation can be ensured in many ways, including the use of minority associations, membership in other associations, and through their free contacts both

inside the State and across borders. While Article 5.4 deals generally with the right to participation in all aspects of the public life of a society, Article 5.3 deals specifically with the right of persons belonging to minorities to effective participation "in decisions ... concerning the minority to which they belong or the regions in which they live." As such decisions have a great impact on persons belonging to minorities, the emphasis on effective participation here is of particular importance. Representatives of persons belonging to minorities should be involved already from the initial stages of decision-making. Minorities should be involved at the local, national and international levels in the formulation, adoption, implementation and monitoring of standards and policies affecting them. Persons belonging to minorities are entitled, in the same way as other members of society, to set up any association they may want, including educational or religious institutions, but their right to association is not limited to concerns related to their cultural, linguistic or religious identity.

Article 6

1. Any person belonging to minority groups has the right to enjoy the same right to enjoy the same rights as any other citizen, without distinction and on an equal footing.

2. States parties should take concrete measures to ensure that persons belonging to minorities in their States of residence may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

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18. In accordance with Article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Article 2 of the Universal Declaration provides that everyone is entitled to all the rights set out in that declaration without distinction of any kind such as race, language, religion or national origin. The question has been raised as to whether special measures in favour of national or ethnic or linguistic minorities constitute a distinction in the enjoyment of human rights. The same question could be put with even greater emphasis with respect to the definition of racial discrimination contained in Article 1.1 of the ICERD, which reads: "The term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the

political, economic, social, cultural or any other field of public life." While States are generally obliged under international law to ensure that all members of society may exercise their human rights, States must give particular attention to the human rights situation of persons belonging to minorities because of the special problems they confront. They are often in a vulnerable position and have, in the past, often been subjected to discrimination. In order to ensure substantive equality in fact, it may under some circumstances be necessary for the State to take affirmative action, as provided for in Article 2.2 of the ICERD, which is applicable to ethnic as well as racial minorities, provided these measures do not disproportionately affect the rights of others.

19. It should be noted that substantive equality is fundamentally different from formal equality, because the former goes beyond consistent treatment. Substantive equality can be secured by way of guaranteeing 'equality of opportunity' and 'equality of results'. It is important to note that mere domestic legislation securing formal equality for minority groups is not sufficient for the effective protection of minority rights. National, ethnic, religious or linguistic groups must be guaranteed *de facto* equality.

Article 7

1. States parties should create the conditions necessary for the effective participation of persons belonging to minorities in cultural, social and economic life and in public affairs.

2. States parties should take appropriate measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to maintain and develop their culture, language, religion, traditions and customs.

3. States parties should take appropriate measures so that persons belonging to minorities may have adequate opportunities to learn the mother tongue of their minority or to have instruction in their mother tongue.

4. States parties should take concrete measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

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20. It is necessary to interpret "promotion of the identity of minorities" in a very broad way covering a variety of areas, which requires special measures by States concerned to facilitate the maintenance, reproduction and further development of their identity.

Cultures have multi-dimensional meanings and have their own dynamics; minorities should be given the opportunity and institutional framework to develop their own culture in the context of an ongoing process in their States of residence. That process should be an interaction between the persons belonging to the minority themselves, between the minority and the State, and between the minority and the wider national society. The measures required to achieve this purpose must be implemented in an effective manner at the domestic legal level.

21. Article 7 of the Convention calls for more than mere tolerance of the manifestation of different cultures within a State. The words "cultural, social and economic life and in public affairs" should be understood in the broad sense. The protection and promotion of the cultural identity of ethnic, religious or linguistic groups in a State is not an isolated phenomenon and should be realised in conjunction with the guarantee of various other civil, political and social rights for persons belonging to minorities. The creation of favourable conditions requires active measures by States concerned, which are to cover diverse areas not only cultural, but also civil and political for the benefits of persons belonging to minorities. The participation of persons belonging to minorities in cultural, social and economic life and in public affairs can be achieved only if their interests are taken into account in the planning and implementation of national policies and programmes. The nature of those measures depends on the situation of the minority concerned, but should be guided by the purpose set forth in Article 6 of the Convention on the basis of the 'substantive equality principle'. Planning of educational policy, citizenship policy, and various welfare policies are among the many aspects of State measures in which the interests of minorities should be taken into account by means of concrete domestic legislature. The interests of minorities should be given "due regard", which means that they should be given reasonable weight compared with other legitimate interests that the Government has to take into consideration. It is to be noted that the citizenship status of persons belonging to minorities can affect the question of the maintenance of identity for persons belonging to ethnic, linguistic minorities. It is difficult to deny the fact that 'citizenship' is a critical condition for gaining full membership in a nation-State unit in today's international community. As citizenship is a basic legal element in realising one's human rights at the domestic legal level, it is readily conceivable that citizenship can affect directly or indirectly the question of maintenance and promotion of identity of minority groups within the framework of State in which minorities reside. Although

admittedly the concrete situation would differ from State to State, States parties should take into account the citizenship matter in terms of concretising minority protection policies, having realised that citizenship can be directly or indirectly related to the maintenance and promotion of minority identity.

22. Language is among the most important elements of group identity. States should encourage the promotion of the linguistic identity of the minority concerned. Various measures are required for persons belonging to minorities to learn their mother tongue (which is a basic minimum) or to have instruction in their mother tongue (which goes some steps further). The steps required in these regards depend on a number of variable factors. Of significance will be the size of the group and the nature of its settlement. In cases where the language of the minority is a territorial language traditionally spoken and used by many in a region of the country, States should to the maximum of their available resources ensure that linguistic identity can be preserved. Where there is a large linguistic minority within the country, it is strongly recommended that the language of the minority be made an official language of the regions in which linguistic minorities reside. In regard to non-territorial languages spoken traditionally by a minority within a country, but which are not associated with a particular region of that country, a uniform solution is more difficult to find. Where the persons belonging to the minority live dispersed, with only a few persons in each particular place, their children need to learn the language of the surrounding environment more fully at an earlier stage. Nevertheless, they should always also have an opportunity to learn their mother tongue. In this regard, persons belonging to minorities have a right, like others, to establish their private institutions where the minority language is the main language of instruction. However, the State is entitled to require that the State language also be taught. One question to be addressed is whether States concerned are obliged to provide subsidies for such teaching. It would be a requirement that the State ensure the existence of and fund some institutions which can enable the teaching of that minority language.

23. In societies where different national, ethnic, religious or linguistic groups coexist, the culture, history and traditions of minority groups have often been neglected and the majorities are frequently ignorant of those traditions and cultures. Where there has been conflict, the minority groups' culture, history and traditions have often been subject to distorted representations, resulting in low self-esteem within the groups and negative stereotypes towards members of the group on the part of the wider

community. Racial hatred, xenophobia and intolerance sometimes take root. To avoid such circumstances, States' policy intervention is required for promoting the both multicultural and intercultural education.

Part 2. Democratic Governance and the Rights of Political Participation for Persons belonging to Minorities

Article 8

1. All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

2. A government representing the whole people belonging to the territory without distinction as to race, creed or colour can be considered to be complying with the right to self-determination.

3. Peoples have a right to democratic governance which shall consist of:

(1). a political system based on the free will of the peoples expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be by secret vote or by equivalent free-voting procedures.

(2). a political system based on constitutional guarantees and an institutional framework for the realisation of fundamental human rights.

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24. States enjoying full sovereignty and independence, and possessed of a government effectively representing the whole of their population, shall be considered to be conducting themselves in conformity with the principles of equal rights and self-determination of peoples as regards that population. Nothing in the foregoing paragraphs shall be construed as authorising any action which would impair, totally or in part, the territorial integrity, or political unity, of such States. The meaning of this is plain. Once an independent State has been established and recognised, its constituent peoples must express their aspirations through the national political system, and not through the creation of new States. That holds true unless the national political system becomes so exclusive and non-democratic that it no longer can be said to "represent the whole of the population." At that point, and if all reasonable international legal and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in exercising their right to self-determination to the extent of

creating a new State for their safety and security. The rights of persons belonging to minorities differ from the rights of peoples to self-determination. The rights of persons belonging to minorities are basically individual rights with a collective aspect. The rights of peoples, on the other hand, are collective rights. However, this does not rule out that persons belonging to minority group may in some contexts legitimately make claims based on minority rights and, in another context, when acting as a group, can make claims based on the right of self-determination. It is important to note that the right to self-determination as a 'group right' does not and would not, necessarily imply their automatic priority over individual rights. Individual human rights can limit the exercise of group rights. However, individual human rights also can often contribute to defining and enriching the actual content of group rights. There is a definite link between the right of persons belonging to minorities to effective political participation and the right of peoples to self-determination. If participation is denied to a minority and its members, this might in some cases give rise to a legitimate claim to self-determination in its external sense. If the group claims a right to self-determination and challenges the territorial integrity of the State, it would have to claim to be a people, and that claim would have to be based on common Article 1 of the ICCPR and would therefore fall outside this Convention. Self-determination is a continuing dynamic right, in the sense that it can be re-awakened if, at any moment, 'representative democracy' fails and no alternative exists for the defence of fundamental rights. Self-determination has consequently taken on a new meaning in the post-colonial and Cold War eras. Ordinarily, it is the right of the members of a people as a whole of an existing, independent State to share power democratically.[21] However, the State may sometimes abuse this right of its people so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences.

25. The Supreme Court of Canada in the *Quebec Secession Case* stated that: "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances a right of secession may arise...A number of commentators

[21] J. Park, "Integration of Peoples and Minorities: An Approach to the Conceptual Problem of Peoples and Minorities with Reference to Self-Determination under International Law", *International Journal on Minority and Group Rights*, Vol., 13, 2006, pp. 69-93.

have further asserted that the right to self-determination may ground a right to a unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."[22] 'Internal' self-determination is thus a part of self-determination. Internal self-determination concerns the right of a people 'within' a State to choose their political status, the extent of their political participation and the form of their government. Democracy has a direct relationship with the right to internal self-determination. Internal self-determination guarantees the political participation of persons belonging to ethnic, religious or linguistic minorities in their State of residence without discrimination. The respect of the right to self-determination and the protection of minority rights are complementary in their scope of application. The effective realisation of minority rights in a State can be consolidated and made more secure with the legal and normative basis of the right to internal self-determination.

26. Representative government through free, fair and periodic elections is the hallmark of contemporary democracy. The fundamental objective is, in the words of Article 21(3) of the Universal Declaration of Human Rights, that a "the will of the people shall be the basis of the authority of government." This basic standard is articulated in universal and European treaties, namely Article 25 of the ICCPR and Article 3 of Protocol I additional to the European Convention on Human Rights. For OSCE participating States, paragraphs 5 and 6 of the Copenhagen Document specify that, "among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings," "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government." The essence of democratic representation in a State assumes that a government must guarantee the substantial and effective representation of all residents including persons belonging to national, ethnic, religious or linguistic minorities, not a just nominal representation.

Article 9

1. States parties should take effective legislative, administrative, judicial, or other measures to protect the right of persons belonging to minorities to participate in public

[22] Reference re Secession of Quebec from Canada, 1998, 2 SCR 217, 122-134.

and political affairs in their States of residence without discrimination.

2. Public institutions should not be based on ethnic or religious criteria. Governments at local, regional and national levels should recognise the role of multiple identities in contributing to open and democratic society.

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27. While States have considerable power in choosing the specific manner with which to comply with these obligations, they must do so without discrimination of persons belonging to minorities and should aim for as much representativeness as possible. Insofar as no electoral system is neutral from the perspective of varying views and interests, States should adopt the system which would result in the most representative government in their specific situation. This is especially important for persons belonging to ethnic, linguistic minorities who might otherwise not have adequate representation in their States of residence. The electoral system should facilitate minority representation and influence. The protection of participation rights of persons belonging to minorities should be concretised by means of domestic legislature.

28. Effective participation for minorities requires providing channels for consultation between and among minorities and Governments. It can serve as a means of dispute resolution and sustain diversity as a condition for the dynamic stability of a society. The number of persons belonging to minorities is by definition too small for them to determine the outcome of decisions in majoritarian democracy. They must as a minimum have the right to have their opinions heard and fully taken into account before decisions which concern them are adopted. A wide range of constitutional and political measures should be used to provide access for minorities to decision-making.

29. States parties should also establish advisory or consultative bodies involving minorities within appropriate institutional frameworks. Such bodies or round tables should be attributed political weight and effectively consulted on issues affecting the minority population.

30. There should be equal access to public sector employment across the various ethnic, linguistic and religious communities.

31. Citizenship is a critical condition for full and effective participation of persons belonging to minorities in their States of residence, given that it is a basic legal element for exercising the right to political participation. The State may fashion the restrictions on immigration as it sees fit and allow the entry of people wishing to settle in the State on the basis of a connection between the applicant and the population of

the State that has its origin in the past, or on the basis of other criteria established by the State. Although a State has broad discretion to regulate citizenship matters, barriers to the acquisition of citizenship for members of minorities, which are linked to ethnic or linguistic distinctions and preferences, and other unreasonable restrictions can be contrary to the equality principle as a general norm of international law. States parties in this Convention should pay special attention to the requirements of naturalisation under citizenship laws in terms of whether they are in harmony of minority protection. Once the State has given a person an opportunity to immigrate and he or she has exercised that right and subsequently lived in the State for a substantial period of time, the State must allow him or her to become a full member of society, a citizen of the State. Diverse forms of political participation by resident non-citizens belonging to minority groups should also be developed, including participating in local elections after a certain period of residence. Inclusion of elected non-citizen observers in municipal, regional and national legislative and decision-making organs is also encouraged.

Part 3. The Protection of Persons belonging to Minorities in the case of State Succession

Article 10

1. In matters of nationality in the case of State succession, each State party concerned should respect the human right to citizenship, the principle of dominant and effective links and the protection of persons belonging to national, ethnic, religious or linguistic minorities in regulating citizenship

2. In deciding on the granting or the retention of nationality in the case of State succession, each State party concerned should grant the right of option to persons belonging to national, ethnic, religious or linguistic minorities.

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32. These provisions are aimed at avoiding potentially damaging uncertainty as to the nationality of persons affected by State succession as well as at respecting the right to nationality as a positive human right for members of ethnic, religious or linguistic minority groups.

33. The right of option is understood as the right of persons affected by territorial changes to choose between either the nationality of successor State and that of the

predecessor State or between the nationalities of several successor States. The right of option must be granted not to all persons who pass from one sovereignty to another but only to those who have genuine links with a predecessor or successor State. This solution is based on the principle that persons may not be deprived of their nationality against their will. As far as the right of option is concerned, the term 'genuine links' implies substantial, dominant and effective links between the persons concerned and the State, which will serve the protection of stabilised lives of persons belonging to ethnic, religious or linguistic minority groups affected by a change of territory.

Part 4. Control Machinery

Article 11

1. To ensure the observance of the undertakings by the States parties in the present Convention, there shall be set up a Minority Protection Committee (hereinafter referred to as "the Committee").
2. The Committee shall consist of a number of members equal to that of the States parties.
3. The members shall serve in their individual capacity.

Article 12

1. The members of the Committee shall be elected by the United Nations Human Rights Commission by an absolute majority of votes, from a list of names presented by the Secretariat of the United Nations.
2. Each national delegation of the States parties shall put forward three candidates on the list.
3. The members of the Committee shall be elected for a period of five years. They may be re-elected.
4. The Committee shall draw up its own Rules of Procedure.

Article 13

1. The States parties shall submit to the Committee, through the Secretary General of the United Nations, reports on the measures that they have adopted to give effect to their undertakings under this Convention, within one year of entry into force of the Convention. The States parties shall submit supplementary reports at two-yearly intervals concerning any new measure adopted, as well as any other report requested by the Committee.

2. By a majority of two-thirds of the members of the Committee, the Committee may make any necessary recommendations to a State party.

Article 14

1. Provided that a State party has, by a declaration addressed to the Secretary General of the United Nations, recognised the competence of the Committee to receive petitions, it may receive such petitions from any State party which considers that another State party does not respect the provisions of this Convention

2. Provided that a State party has, by a declaration addressed to the Secretary General of the United Nations, recognised the competence of the Committee to receive individual petitions, it may receive such petitions from any person, group of individuals or any international non-governmental organisation representative of minorities, claiming to be the victim of a violation by this State party of the rights set forth in this Convention.

Article 15

1. The Committee may only deal with the matter referred to it under Article 14 (2) after all domestic remedies have been exhausted.

2. The Committee shall declare inadmissible petitions submitted under Article 14 (2) which are anonymous; have already been submitted to another international body; are incompatible with the provisions of this Convention, manifestly ill-founded or represent an abuse of the right of petitions.

Article 16

1. The Committee shall undertake an examination of the petition and, if need be, an investigation.

2. In the event of the Committee accepting a petition referred to it, it endeavours to reach a friendly settlement of the matter on the basis of respect of this Convention. If it succeeds, it shall draw up a report which shall contain a statement of the facts and of the solution reached to be sent to the State or States concerned.

Article 17

1. If no friendly settlement has been reached, the Committee shall draw up a report as to whether the facts found disclose a breach by the State concerned of its obligations under this Convention and make such proposals as it thinks are necessary.

2. The report shall be transmitted to the General Assembly of the United Nations, to the State or States concerned and to the Secretary General of the United Nations.

3. The Committee may take up any follow-up action it thinks fit in order to ensure

respect of the Convention.

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34. As to the State compliance system, the Framework Convention on the Protection of minorities (FCNM) has been criticised for its weakness. Within the framework provided by the FCNM, the role of the Advisory Committee is, in dialogue with the States parties and in partnership with the Committee of Ministers, to develop a narrower and clearer understanding of the content of the legal obligations in the FCNM, and to highlight areas where the operation of the treaty regime might be improved. It is not the function of the Advisory Committee to act as a mediator in disputes between majority and minority communities. This is the function of the OSCE High Commissioner on National Minorities. The provisions provided in the Part 4 Control Machinery of this Convention have been influenced by this problem, because even though the FCNM is the first legally binding instrument on minority rights, its supervisory mechanism leaves much to be desired. The proposed Convention has established the Minorities Protection Committee, an independent committee with sufficient resources to enable it to carry out its duties, which should go beyond being purely an advisory committee. Further, the proceedings of the Minorities Protection Committee should be public, transparent and seek the co-operation of non-governmental partners concerned with minority rights. Finally, the Committee, while seeking a dialogue with State parties, should focus on monitoring legal obligations and speaking out on violations of international law of minority protection.

35. A quasi-judicial control mechanism is adopted in this Convention. It may be useful to note that establishing State reports, optional State petitions and optional individual petitions appears to operate as a half-way course between a flexible model and the stringency of the judicial control model. In the case of individual petitions, the review includes complaints from allegedly directly affected groups of individuals and NGO representatives of minorities as well. The idea of using a quasi-judicial model adopted in this Convention is inspired by the positive influence of the United Nations Human Rights Committee (HRC) under the First Optional Protocol to the ICCPR upon minority rights jurisprudence.

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