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THE IMPACT OF INTERNATIONAL NON-DISCRIMINATION NORMS IN COMBINATION WITH GENERAL HUMAN RIGHTS FOR THE PROTECTION OF NATIONAL MINORITIES :

SEVERAL UNITED NATIONS HUMAN RIGHTS CONVENTIONS

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I. Introduction[1]

The central question addressed in this (and the three other papers), is whether the prohibition of discrimination provides sufficient protection for persons belonging to minorities. The question is actually whether the prohibition of discrimination in combination with general human rights is sufficient, or whether one needs additionally minority (specific) rights. This question can be framed in terms of the pillars or basic principles of minority protection, more specifically whether, in addition to the first pillar (of individual human rights), there is a need for the second pillar (with special rights for minorities). The idea that an adequate system of minority protection (in view of substantive equality and identity considerations) would be constructed on these two pillars can actually be traced back to an opinion of the Permanent Court of International Justice,[2] operative during the League of Nations. Nevertheless, it needs to be acknowledged that this position is not universally accepted. There are indeed still academics and states that argue that an effective protection of the first pillar (general human rights) would suffice (hence, discarding the need for the second pillar with 'special' minority rights).[3]

When reviewing the practice of the member states of the Council of Europe, it is obvious that there are great divergences in approach reflecting, *inter alia,* different degrees of sensitivity towards the minority phenomenon. States tend to be concerned not only that the acceptance of potentially far reaching positive obligations towards minorities in their territory will create a heavy financial burden, but also (and maybe primarily) that the acknowledgement of minorities and granting of special minority rights will counter nation building and lead to stronger divisions within the overall population, possibly even threatening territorial integrity.[4] In this regard, in an attempt to address some of the concerns about minority rights, it should be emphasized (again) that minority rights are not situated outside the human rights framework but are considered to be part and parcel of it.

While numerous contributions have already been written about this question in previous years,[5] it is not superfluous to investigate this again since the norms concerned contain concepts and expressions, the exact scope of which is determined through interpretation. The latter is however not (necessarily) static, as is often emphasized by the European Court of Human Rights (ECtHR).[6] In this respect, the argument can be made that if certain jurisprudential developments in relation to the first pillar in favour of substantive equality and the right to identity can be identified (get stronger and consolidate), this might have an impact on the relative importance of the two pillars in relation to the construction of an adequate system of minority protection.

The UN Treaties are not discussed one by one but in an integrated theme-based manner. While the International Covenant on Civil and Political Rights (CCPR) and the International Convention against all forms of Racial Discrimination (CERD) receive most attention, regularly references to the

[1] This report should be read together with the report on 'The impact of the case-law of the European Court of Human Rights in the field of non-discrimination on the protection of national minorities' (DH-MIN(2006)020), as it addresses the same central question and follows a similar structure. While it seems useful to repeat the central question here, the parts on the definition of the 'minority' concept as well as the general section on equality and non-discrimination will not be repeated. Similarly, the theoretical considerations in relation to the various sub-issues addressed, as well as parallels in the supervisory practice of the Advisory Committee on the Framework Convention for the Protection of National Minorities are only taken up in the report on the ECHR. However, reference will be made here to parallels in the supervisory practice of the ACFC which are 'unique' to a particular UN Convention (and thus not yet highlighted in relation to the ECHR).

[2] PCIJ, Advisory Opinion regarding Minority Schools in Albania, 6 April 1935, *PCIJ Reports, Seires A/B No. 64*, 1935, 17.

[3] *Inter alia* C.C. O'Brien, 'What Rights Should Minorities Have?', in B. Whitaker (ed.), *Minorities: A Question of Human Rights?* (Oxford: Pergamon, 1984), 21; J. Raïkka (ed.), *Do we Need Minority Rights? Conceptual Issues* (The Hague: Martinus Nijhoff, 1996); N.S. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', (1995) *H.R.Q.*, 64.

[4] See *inter alia* M.N. Shaw, 'The Definition of Minorities in International Law', in Y. Dinstein and M. Tabory (eds.), *The Protection of Minorities and Human Rights* (Dordrecht: Martinus Nijhoff, 1992) 30-31.

[5] See inter alia the references in the footnotes supra and infra.

[6] The interpretation of case law is furthermore not always identical either, as is exemplified by the differences between the papers of Hoffmann and myself.

International Covenant on Civil and Political Rights (CESCR) and the International Convention on the Rights of the Child (CRC) are taken up as well.

This report consists of three sections addressing consecutively conceptual issues, substantive issues and enforcement. The conceptual issues are focused on evaluating the implications of non-discrimination for minority protection and address in addition to the reach of the prohibition of discrimination, also its relationship to substantive equality, and hence the connection with both temporary and more enduring special measures. The section on substantive issues actually assesses to what extent the other dimension of the first pillar, namely general human rights, contribute to minority protection. Finally, in relation to enforcement, the supervisory mechanisms are outlined and burden of proof issues discussed.

II. Non-discrimination and national minorities: CCPR, CESCR, CERD and CRC[7]

The following analysis provides an integrated assessment on a thematic basis. Due to their richer practice in relation to the principle of equality, most attention goes to the CERD/C and the HRC. It was already indicated that the quasi-jurisprudence of the UN treaty bodies is overall less technical and refined then the jurisprudence of the ECtHR.

A. Conceptual issues

1) Recognition of national minorities

In view of the fact that this review is concentrated on the supervisory practice in relation to non-minority specific provisions, it is not surprising that the treaty bodies have not ventured into the politically sensitive domain of formulating a (working) definition of the concept minority.[8]

As in the case of the ECtHR, it is of course possible (maybe even increasingly likely) that the minority dimension will come into play in relation to the enjoyment of a human right (e.g. the freedom of religion or the freedom of association), in which case the treaty bodies might feel the need to pronounce on this matter. Even though the Human Rights Committee has a recent view in which it sanctioned (in terms of Article 22 of the CCPR) 'unreasonable' conditions imposed on the registration of a religious minority association, the Committee did not address the definitional question at all.[9] Since the CERD is focused on eradicating (racial) discrimination, it is not surprising that the Committee is also critical about the distinction made in a state between national and linguistic minorities, the determining criteria and the reason for the differences in status.[10] The CERD/C is however careful not take a clear position on the underlying definitional question.

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[7] There are at least two reasons why the Convention on the Elimination of All Forms of Discrimination against Women is relevant when studying the importance of equality and the prohibition of discrimination for minorities. First of all, the prohibition of gender discrimination tends to be one of the grounds, if not the ground about which most case law has been developed. In other words, the development of various clarifications and 'technical refinements' in regard to the equality principle have emerged in this case law. Secondly, and particularly relevant from a minority protection perspective, one can ask oneself the question whether and to what extent the prohibition of gender discrimination (as expounded in CEDAW) implies limits on the enjoyment of one's own religion and culture (from the sides of the male members of the relevant community). This relates again to the extent to which the prohibition of gender discrimination obliges states to interfere in the relationships between private parties.
While CEDAW is taken up in the chapter I wrote for the book on Jurisprudence of relevance for Minority Protection (ECMI, 2006), a study of CEDAW would be beyond the confines of this report.

[8] The HRC has provided several clarifications in relation to the concept 'minority' in its General Comment on Article 27 CCPR (paragraph 5), but this article is not included in this review. Besides, the Committee has so far not taken up this definition (explicitly) in relation to other provisions of the CCPR. In view of the holistic approach taken by supervisory bodies generally it is unlikely that a different definition would be used in relation to other articles. What is generally highlighted is the fact that the HRC explicitly denies the need for a nationality or a 'lasting ties' requirement.

[9] HRC, Malakhovsky and Pikul v Belarus, 26 July 2005, para 7.6-7.7.

[10] CERD/C, Concluding Observations: Albania, 2003, para. 14.

2) Non-discrimination

a) Non-discrimination: reach

i. Accessory or not

There are important differences between the non-discrimination clauses of the UN human rights treaties. The CCPR contains three non-discrimination provisions, the two broadest ones being Article 2 and Article 26. Both these provisions have open enumerations of prohibited grounds, but where Article 2 is accessory, Article 26 is autonomous.

While the definition in Article 1 of the CERD seems somehow more restricted in scope than Article 26 because it 'only' protects the equal enjoyment of 'human rights' (and not other rights, without the qualification of 'human right'), the categories of rights enumerated in Article 5 are very broad (and open ended).

Both the CESCR and the CRC have only an accessory prohibition of discrimination in their Article 2.

ii. Grounds

At the United Nations level there are in addition to general human rights conventions (CCPR and CESCR) also issue specific conventions that focus on the prohibition of discrimination on a single ground, namely race (CERD) and gender (CEDAW).

While there are differences between the grounds that are explicitly enumerated in the open models, the following are usually present and are of special relevance to minorities: race, and religion or belief. Others, that are equally relevant but do not feature in the majority of conventions are language (CCPR and CESCR, CRC). While ethnic origin or ethnicity and colour are also not consistently present, they are largely understood as being encompassed by the concept 'race' (see *infra*). One might argue that it does not really matter, because open models are open and have a catch all expression, like 'or other status' which would cover the ones that are not mentioned. However, it seems that the grounds that are enumerated are more strongly protected (heightened scrutiny), at least by several of the treaty bodies.[11]

In regard to the prohibited ground of discrimination '**race',** it should be highlighted that the text of the CERD includes under racial discrimination, discrimination on the basis of race, colour, descent, and national or ethnic origin. This is understood as confirming that 'race' is interpreted as encompassing 'colour, descent and national or ethnic origin'. Furthermore, indirect discrimination can be important to break open the closed system of grounds. More specifically differentiations on the basis of language, religion and nationality could, in certain circumstances, be qualified as indirect discrimination on the basis of race. The CERD/C has definitely addressed the issue of language use and language regulation in its concluding observations to periodic state reports, implicitly qualifying the underlying differentiations on the basis of language as indirect forms of racial discrimination. It is known that 'race' and 'religion' intersect and overlap,[12] giving rise to several borderline cases, especially since the 9/11 terrorist attacks on the United States of America and the rise of Islamophobia.[13] Similarly, it is widely understood that there is a considerable overlap between

[11] W. VandenHole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005), 183 (in relation to the HRC). However, this analysis clearly does not apply to the European Court of Human Rights as that has attached heightened scrutiny to grounds that are not explicitly enumerated, like sexual orientation, while no heightened scrutiny has been adopted in relation to several of the enumerated grounds. The underlying reason why grounds are explicitly enumerated is that they concern criteria which are clearly of no relevance to merit or social value, while some of them are innate.

[12] M. Bell, 'Setting Standards in the Fight against Racism: a Comparison of the EU and the Council of Europe', in J. Niessen & I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Dordrecht, 2004), 219.

[13] P. Thornberry, 'Confronting Racial Discrimination: A CERD Perspective', 5 *Human Rights Law Review* 2005, 259.

minority ethnic communities and foreigners or non-nationals.[14] In this regard, it should be highlighted that the provision in the CERD which indicates that it would not be applicable to differentiations on the basis of nationality (Article 1, paragraph 2) has been narrowed down by the CERD/C in its General Recommendation No. 25, exactly in view of the possible qualification of such differentiation as indirect racial discrimination.[15] It is to be hoped that a similar development will take place in relation to Article 3, paragraph 2 of the European Union's Racial Equality Directive.

iii. Direct and Indirect Discrimination

The references to 'effect' in addition to 'intent' in the definition of discrimination used in the CERD (as in CEDAW) have consistently been understood as meaning that also indirect discrimination is prohibited. However, even though the General Comment No. 18 on non-discrimination of the HRC explicitly refers back to the definition in the CERD, [16] it was only relatively recently that the HRC seemed to embrace 'indirect discrimination' properly.

b) Non- discrimination: Review criteria

At the global level, the HRC is the only UN treaty body that has developed a certain theoretical model in relation to the prohibition of discrimination. While the HRC does not use the terms 'legitimate aim' and 'proportionality', it does investigate whether the distinction is objective and reasonable, the latter implying proportionality considerations.[17] In its General Comment No. 18[18] and in its quasi case law the Committee emphasizes that the prohibition against discrimination does not make all differences of treatment discriminatory since a 'differentiation based on reasonable and objective criteria does not amount to a prohibited discrimination'.[19] The General Comment explicitly adds that the aim of the differentiation is to achieve a purpose which is legitimate under the covenant (which is actually also subsumed under the requirement of 'reasonable and objective criteria' for a differentiation).[20]

Levels of scrutiny?

While the HRC is not keen on the use of the doctrine of the margin of appreciation, its supervisory practice has revealed that different levels of scrutiny are adopted.[21] It has been pointed out in this respect that the 'HRC probably views certain grounds of distinction as inherently more suspect and deserving of greater scrutiny than other grounds'.[22] It can be argued that all the enumerated grounds and some others like nationality, sexuality, age or disability receive a higher level of scrutiny, while differentiations on the basis of 'other status' almost never are considered to be a prohibited discrimination by the HRC.[23] Especially the grounds of race and gender seem to be considered 'suspect' classifications by the HRC.[24]

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[14] *Inter alia* Bell, Setting Standards…, 218-219.
[15] CERD/C, General Recommendation No. 25, para 2. See also VandenHole, UN Human Rights Treaty Bodies…, 91.
[16] Joseph, Schultz and Castan, Cases, Materials and Commentary…, 694.
[17] HRC, Lahcen BM Oulajin and Mohammed Kaiss v the Netherlands, Communication 406/1990 and 426/1990, 23 October 1992, para 7.4; HRC, Sister Immaculate Joseph and 80 teaching sisters of the Holy Cross of the Roder of Saint Francisco in Menzinger v Sri Lanka, Communication 1249/2004, 21 October 2005, para 7.4.
[18] HRC, General Comment No. 18, para 13.
[19] R. Hanski & M. Scheinin, *Leading Cases of the Human Rights Committee* (Abo, 2003), 326.
[20] A study of the practice of the HRC (both in terms of quasi jurisprudence and concluding observations in relation to periodic reporting) reveals that while initially the requirements of legitimate aim and proportionality were not explicit, they do feature in more recent 'views' and concluding observations: VandenHole, UN Human Rights Treaty Bodies…, 54-55.
[21] Joseph, Schultz and Castan, Cases, Materials and Commentary…, 693.
[22] J. Bair, *The International Covenant on Civil and Political Rights and its (first) optional protocol* (Berlin) 117; Joseph, Schultz and Castan, Cases, Materials and Commentary…, 693; vandenHole, UN Human Rights Treaty Bodies…, 113.
[23] *Inter alia* HRC, Gueye v France (Communication No. 196/85); HRC, Foin v France (Communication 666/1995); HRC, Miaille v France (Communication No. 689/1996).
[24] Vanden Hole, UN Human Rights Treaty Bodies…, 113.

The HRC does not often use language which clearly indicates that the justification test is done with heightened scrutiny. However, in *Muller and Engelhard v Namibia*[25] the Committee underlines (in a case concerning differentiation on the basis of gender), that:

> 'A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26. A different treatment based on *one of the specific grounds enumerated in Article 26*, clause 2 of the Covenant, however, places a *heavy burden* on the State party to explain the reason for the differentiation'.

In most cases, the Committee is not explicit in that way. Nevertheless, the views make abundantly clear that the Committee considers differentiation on certain grounds hardly ever acceptable.[26]
In the specific conventions such as the CERD and the CEDAW, it is unlikely that different levels of scrutiny will be detected. However, the mere fact of having a convention dedicated to a specific ground (broadly interpreted), as well as the numerous General Recommendations that have been elaborated to provide more detailed guidelines in certain areas of life, arguably also provides an indication of the higher level of scrutiny, (in regard to differentiation on these grounds).

3) Non-discrimination and substantive equality

The following statement of the CESCR./C may not be formulated in terms of affirmative action or indirect discrimination but arguably does imply an acknowledgement of the fact that a mere formal equality approach is not sufficient in terms of minority protection. In its Concluding Observations on France in 2001, the Committee pointed out:

> "While the French tradition emphasizes the unity of the State and the equality of all French citizens, and while there is a commitment on the part of the State party to respect and protect equal rights for all, the Committee is of the opinion that the fact that all individuals are guaranteed equal rights in the State party and that they are all equal before the law does not mean that minorities do not have the right to exist and to be protected as such in the State Party."[27]

At the same time, this statement also hints at the existence of positive state obligations in relation to equality (benefiting persons belonging to minorities).

a) Non-discrimination and substantive equality: indirect discrimination

In line with the 'inviting' wording of the definition of discrimination in CERD, CERD/C took from the beginning a very positive stance in regard to 'indirect discrimination'.[28]

The supervisory practice of the CERD/C regularly makes statements in this regard which are of specific relevance for minorities. [29] In its concluding observations regarding Denmark for example, it stated that 'the reported prohibition of the use of the mother tongue in some of these establishments may, though aimed at facilitating integration, lead to indirect discrimination against minorities'.[30]

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[25] HRC, Muller and Engelhard v Namibia (Communication No. 919/00), para 6.7.
[26] See in relation to religion HRC, Waldman v Canada (Communication No. 694/96), para 10.5 and 10.6 and in relation to gender HRC, Broeks v Netherlands (Communication No. 172/84).
[27] CESCR/C, Concluding Observations: France, 2001, para. 15.
[28] The CERD/C acknowledges explicitly in its General Recommendation No. 14 on the definition of the concept 'racial discrimination', referring back to Article 1 CERD: 'In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin' (CERD/C, General Recommendation No. 14, para 2). This clearly amounts to an acknowledgement that the inclusion of 'effect' in addition to 'purpose' in the definition in Article 1 is meant to refer to the phenomenon of 'indirect discrimination'
[29] Idem, 42.
[30] CERD/C/60/CO/5, para 12.

For a long time, the supervisory practice of the HRC lacked consistency in regard to the acceptance of the idea of 'indirect discrimination'. [31] This is peculiar in view of the fact that its General Comment No. 18 on non-discrimination takes over the definition of discrimination as it is found in the CERD and the CEDAW, including the reference to 'purpose or effect'. A good example of the HRC's inconsistent approach to the concept of indirect discrimination can be detected when contrasting the two cases of special relevance for linguistic minorities which are more fully discussed infra: *Ballantyne et al v Canada* and *Diergaardt v Namibia.*

In the *Ballantyne* decision, the HRC totally disregarded the fact that the prohibition of outdoor advertising in languages other than French would have a disproportionate impact on English traders in the province of Quebec, which is predominantly French. The Committee focused on the fact that the rule would apply equally to both French and English speaking traders.[32] This concerns a general rule which is apparently neutral, but which has a disproportional impact on English companies because they arguably want to reach the English speaking clientele more then the French companies. The HRC seems at this stage (still) unsympathetic to ideas concerning indirect discrimination.

However, in the *Diergaardt* decision, the HRC found a violation of Article 26 of the CCPR because the prohibition to civil servants to use Afrikaans in communications over the phone or in writing would have a deleterious impact on Afrikaans speakers.[33] If the HRC would have followed the *Ballantyne* line of reasoning in relation to (indirect) discrimination, it would have argued that this instruction would equally affect persons which are not Afrikaners (but who are able to speak Afrikaans) and hence is not discriminatory.

The HRC seems to have fully acknowledged the phenomenon of (and the prohibition of) indirect discrimination only relatively recently,[34] more particularly in the *Althammer v Austria*[35] and the *Derksen v the Netherlands*[36] decisions. While the Committee starts by remarking that a certain measure is apparently neutral and does not have any intent to discriminate, it goes on to conclude that this measure nevertheless results in discrimination because of its exclusive or disproportionate adverse effects on a certain category of persons (without justification).

b) Non-discrimination and substantive equality: obligation to differentiate

The Human Rights Committee has not developed the second dimension of the prohibition of discrimination as such, but has identified positive state obligations to adopt special measures (and thus differential treatment). The HRC has several times recommended to states to take positive measures especially with regard to minorities (and women).[37] This can actually be translated in terms of the second dimension of the prohibition of discrimination, in the sense that a failure to take measures 'to elevate such groups to a level of equality with other members of society could be regarded as the perpetuation of systematic discrimination and thus states would not be complying with their obligation to ensure equal and effective protection against discrimination as required by Article 26'.[38]

To some extent, this obligation to adopt differential measures is closely related to more general obligations to secure equal treatment to all, as well as to an obligation to adopt affirmative action

[31] Scott Davidson, 'Equality and Non-discrimination', in Conte, Davidson and Burchill (eds.), *Defining Civil and Political Rights* (Ashgate, 2004), 167; Joseph, Schultz and Castan, Cases, Materials and Commentary …, 696.
[32] HRC, Ballantyne et al v Canada, para 11.5.
[33] HRC, Diergaardt v Namibia, para 10.10.
[34] Since 2002 the CESC/C has also explicitly referred to covert forms of discrimination, while its General Comment No. 16 (2005) includes in paragraph 13 an explicit definition of indirect discrimination, in line with the more general understanding of this concept: 'indirect discrimination occurs when a law, policy or program does not appear to be discriminatory on its face, but has a discriminatory effect when implemented'.
[35] HRC, Althammer v Austria (Communication No. 998/2001), para 10.2.
[36] HRC, Derksen v the Netherlands (Communication No. 976/2001), para 9.3.
[37] VandenHole, UN Human Rights Treaty Bodies…, 219
[38] S. Davidson, 'Equality and Non-discrimination', in A. Conte, S. Davidson & R. Burchill (eds.), *Defining civil and political rights: the jurisprudence of the UN Human Rights Committee* (Alderschot: Ashgate, 2004), 178.

measures. It is indeed not that easy to neatly distinguish between these different themes. Consequently, it can be argued that the other treaty bodies implicitly also acknowledge this so-called second dimension of the prohibition of discrimination, considering their argumentation in terms of positive obligations of states and affirmative action.

c) Non-discrimination and substantive equality: positive obligations in relation to equality

The supervisory practice of the CESCR/C clearly embraces substantive equality considerations when it indicates that the state obligations to facilitate (the prohibition of discrimination) would require them to adopt measures to ensure equal opportunities. More specifically, the Committee has highlighted the obligation to ensure equal opportunities for minorities, including Roma, in several fields but especially in relation to employment, housing, health and education.[39] Similarly, the Committee underlines the need to "undertake the necessary measures to combat patterns of *de jure* and *de facto* discrimination against all minority groups" in its concluding observations in respect of Japan.[40] It is hence not surprising that it welcomed for example the affirmative action measures that Israel has adopted with respect to various disadvantaged minority groups.[41] At the same time, this reveals again the inter-connectedness of the various themes discussed here.

Possibly, because of the explicit openings in the text of the CERD in relation to affirmative action, the CERD/C mainly identifies an obligation to adopt differential treatment in terms of an obligation to adopt affirmative action, and thus inherently temporary measures.[42] This has led to the criticism that the CERD does not contain a safeguard against assimilationist policies because it would not provide for structural, institutional measures in addition to the temporary affirmative action ones.[43] Nevertheless, the CERD/C has also urged states to adopt more enduring 'special' measures for minorities, even explicitly in order to protect their own identity:

> 'Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture… Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups … where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups'.[44]

This has been taken up and further refined in General Recommendation No. 30 on Discrimination against non-citizens, where the CERD/C underlined that contracting States should ensure the preservation of the culture and the cultural identity of these racial groups (of non-citizens).[45] It is furthermore remarkable that several of the CERD/C's General Recommendations focus on specific types of minority groups, more specifically indigenous peoples, the Roma and descent-based groups.

These Recommendations all underscore (in various degrees of affirmativeness) the multiple positive obligations of states in respect of the protection and promotion of the right to identity of these groups, including the adoption of special measures in this regard. The CERD/C even explicitly calls on states to ensure that these communities can exercise their rights to practice and revitalize their culture and to preserve and to practice their language, that they have adequate levels of political participation (including representation in the police, enforcement agencies), and sometimes also that mother tongue

[39] VandenHole, UN Human Rights Treaty Bodies…, 234
[40] CESCR/C, Concluding Observations: Japan, 2001, para. 40. The Committee similarly expresses the need to work towards equality of opportunities in its concluding observations on the UK (2001, para. 31) and on Brazil (2003, para. 44).
[41] CESCR/C, Concluding Observations: Israel, 2003, para. 5.
[42] H.B. Schöpp-Schilling, 'Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of all forms of discrimination against women', in I. Boerefijn et al (ed.), *Temporary Special Measures* (Antwerp, 2003), 28.
[43] K. Boyle and A. Baldaccini, 'A Critical Evaluation of Human Rights Approaches to Cases of Racism', in S. Fredman (ed.), *Discrimintion and Human Rights: The Case of Racism* (Oxford, 2001), 158.
[44] CERD, General Recommendation No. 21: The Right to Self-Determination (1996), para 5. See also CERD/C, Concluding Observations: Ecuador, 2003, para. 11. See also CERD/C Concluding Observations: Russian Federation 2003, para. 27.
[45] CERD, General Recommendation No. 30, para 37.

education, bi-lingual and/or multicultural education (implying adapted textbooks and the like) are guaranteed.[46]

Since the practice of the CRC/C also emphasizes the obligation to adopt special measures for persons belonging to minority groups in order to guarantee the enjoyment of their fundamental rights,[47] the practice of this treaty body confirms the substantive equality approach of the UN treaty bodies.

One particular positive obligation which merits special attention in this respect, is the one in relation to the fight against discrimination by private actors. The text of the CERD already contains clear stipulations about the existence of such a positive obligation, more specifically in Article 2(1)(d). This provision indeed imposes an obligation on states to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, race discrimination by any persons, groups or organization.[48] This obligation would be reinforced by the provisions in *inter alia* articles 4 and 5 (pertaining to employment and housing). Nevertheless, it does not seem to be all that clear-cut (and far reaching).[49]

In regard to the HRC position it has been noticed that despite the HRC's acceptance of the principle of positive state obligations in this respect, 'compared to the attention the CERD/C has paid to discrimination by private actors in its concluding observations, the HRC seems to be much more hesitant in systematically addressing states' obligations to protect against discrimination by third parties'.[50]

The CESCR/C clearly acknowledges that states would have a duty to protect against discrimination by private actors, particularly in relation to race (and gender).[51] Similarly, it has indicated the need to take legislative measures, *inter alia*, for the protection of Roma[52] and to penalize certain forms of racial discrimination.[53] There are no further indications though that would clarify how far this positive obligation would reach.

d) Non-discrimination and substantive equality: affirmative action

The text of the CERD already shows a rather positive attitude towards affirmative action measures, conceived as inherently temporary measures. It does not only allow states to adopt such measures (Articles 1 and 4), it even contains an obligation in certain circumstances to do so (Articles 2 and 1). At the same time, this text reveals that the prohibition of discrimination constitutes the limit of acceptable affirmative action measures.[54] The goal or legitimate aim should be the 'acceleration of *de facto* equality', while the proportionality considerations are further specified in the requirements that measures should be temporary (they should not lead to the maintenance of separate standards and temporary special measures should be discontinued when objectives of equality of opportunity have been achieved).

[46] CERD/C, General Recommendation No. 23 on Indigenous Peoples, paras. 4(a) (e); General Recommendation No. 27 on Discrimination against Roma, paras. 15,18,26,28-9,41; General Recommendation No. 29 on Descent, paras. 6,24,27-8,36,48.
[47] CRC/C, Concluding Observation: Bangladesh, 2003, para. 79; Concluding Observations: Israel, 2002, para. 55.
[48] Fredman, Introduction…, 192-3; Thornberry, Confronting Racial Discrimination …, 251.
[49] See also the concluding observations of CRC/C in which it has taken the position that states have an obligation to outlaw racial discrimination by private persons in education and employment.[49] While this doctrine is not as elaborated as in terms of CERD, it is unlikely that this would imply a strict obligation of result.
[50] VandenHole, UN Human Rights Treaty Bodies …, 217.
[51] Inter alia CESCR/C, Concluding Observations: Croatia (UN Doc. E/C.12/1/Add.73), para 9.
[52] CESCR/C, Concluding Observations: China (UN Doc. E/C.12/1/Add.58), para 30.
[53] Inter alia CESCR/C, Concluding Observations: Belgium (UN Doc. E/C.12/1/Add.54), para 21.
[54] Thornberry, Confronting Racial Discrimination…, 256.

While there is no explicit provision in the CCPR, the HRC clearly accepts the legitimacy of affirmative action, since it even points to an obligation to adopt such measures in certain circumstances.[55] The General Comment No. 18, paragraph 10 stipulates that:

> 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant'.[56]

The HRC in *Jacobs v Belgium*[57] also clearly indicates that the Committee is rather open to affirmative action measures. It highlights that the goal of affirmative action is substantive equality and hence is not an exception to the equality principle.[58] This view furthermore confirms that the HRC sees affirmative action and non-discrimination as intrinsically related in the sense that the latter constitutes the limits for justifiable affirmative action. According to the HRC, in order to assess whether or not the affirmative action measures are objectively and reasonably justifiable (and proportional) are the establishment of an under-representation of women in the public service, the fact that the preference for women only applies to 30 percent of the entire category of positions (non justices to the High Council of Justice), and the fact that the respective qualifications of candidates were not irrelevant.[59] These factors all seem related to the proportionality principle underlying the need for an objective and reasonable justification.

The practice of the HRC furthermore clarifies that affirmative action measures need to be temporary, in the sense that they would only be acceptable (read: proportionate), as long as they are necessary to correct discrimination in fact.[60] However, it is less self-evident that the HRC seems rather permissive in relation to one of the most sensitive affirmative action measures, more specifically the use of quota. This is not only visible in some of its views, but also in its Concluding Observations.[61]

The supervisory practice of the CESCR/C reveals that the Committee not only allows affirmative action measures in so far as they abide by the principle of non-discrimination,[62] but in certain circumstances even considers them obligatory. The Committee has for example indicated that 'temporary special measures may sometime be needed in order to bring disadvantaged or marginalized groups of persons to the same substantive level as others'.[63] This approach hints at more general positive obligations to adopt special measures in order to achieve substantive equality, which is confirmed in the General Comment on Discrimination against Roma.

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[55] Schultz et al highlight that: 'The HRC has confirmed that affirmative action is certainly permissible under the Covenant, and may have indicated that, in certain circumstances, it is mandatory for States to take such action.' (Joseph, Schultz and Castan, Cases, Materials and Commentary …,738).

[56] In this respect, reference should also be made to General Comments No. 4 and No. 28 on Article 3 since these indicate (in respectively paragraph 2 and 3) that the principle of non-discrimination in all three articles of the CCPR 'requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights'.

[57] HRC, Jacobs v Belgium (Communication 943/2000, 7 July 2004).

[58] HRC, Jacobs v Belgium, para 9.3 : 'states may take measures in order to ensure that the law guarantees to women the rights (contained in Article 25 CCPR) on equal terms with men'.

[59] HRC, Jacobs v Belgium, para 9.4 – 9.5

[60] See also the statement in HRC's General Comment No. 23 on Article 27 CCPR where it underscores that the obligation to take positive measures to protect the identity of a minority (in Article 27) is limited by the prohibition of non-discrimination, in the sense that the special measures a state would adopt in terms of Article 27 would have to comply with the proportionality principle, in addition to pursuing a legitimate goal.

[61] HRC, Jacobs v Belgium, para 13.11. See also its Concluding Observations on India (1998), in which the HRC explicitly accepted the use of quota for improving the representation of women and people belonging to the scheduled casts.

[62] CESCR/C, General Comment No. 5 on 'Temporary special measures', para 32.

[63] CESCR/C, General Comment No. 16, para 15.

B. Substantive issues[64]

1) Culture: own way of life

In view of the fact that both the CCPR and the CRC have a (virtually identical) provision on the right for persons belonging to minorities to enjoy their own culture (which has been interpreted as including their own traditional way of life), it is understandable that no explicit references to these themes can be found in terms of the other fundamental rights enshrined.

Notwithstanding the fact that the CERD is not the minority specific instrument, it is widely acknowledged that the Convention is of special relevance and importance to minorities.[65] This explains that the CERD/C often takes the minority dimension on board in its supervisory practice.[66] It remains, however, striking that several assessments in terms of general human rights obligations under the treaty are made in terms of the right to identity, even though this does not feature as such in the CERD**.** The Committee actually urges states (in its Concluding Observations) to have special attention for a certain minority group in the country, and requests it to ensure that the group concerned can 'exercise their rights to their own culture, the use of their own language, and the preservation and development of their own identity'.[67] This language is undeniably very close to that of Article 27 of the CCPR.

Also, the CESCR/C seems to be attentive towards the protection of the right to identity in relation to minorities. This is exemplified by its call on Syria to ensure that the Kurds would be able to live in accordance with their own culture.[68]

2) Participatory Rights[69]

Another confirmation of the special attention to minorities displayed by the CERD/C is the increasing importance that is attached to adequate political participation for minority groups. The Committee expressed for example its concern about the under representation of ethnic minorities in the police, army and other public services in Fiji.[70] This arguably implies that the state should strive to obtain a more proportional representation of these minority groups in public administration (in general). This understanding is confirmed, *inter alia,* in the Concluding Observations on Slovenia where the Committee went as far as stating that the state should take further measures to ensure that all minority groups are represented in parliament (at least).[71] Similarly, the Committee expressed its approval of

[64] For a focus on the extent to which minority concerns are mainstreamed in terms of human rights conventions, see also K. Henrard, 'An Ever Increasing Synergy towards a stronger level of minority protection between minority specific and non specific instruments', *European Yearbook of Minority Issues*, 2003/4, vol. 3, 15-41. See also the book edited by K. Henrard & R. Dunbar on Synergies in Minority Protection (CUP, 2006).

[65] Thornberry, International law and the rights of minorities…, 263.

[66] In line with the terminology used in the EU, one could coin this practice 'mainstreaming' of minority considerations.

[67] CERD/C, Concluding Observations: Morocco, 2003, para. 14. See also CERD/C, Concluding Observations: Tunesia, 2003, para. 8. States are furthermore urged to grant the right to members of ethnic or linguistic groups "to engage in activities which are particularly relevant to the preservation of the **identity** of such persons or groups: CERD/C, General Recommendation No. 21 on the Right to Self Determination, para. 5.

[68] CESCR/C, Concluding Observations: Syria, 2001, para. 45. It should also be noted that in its general comment No. 13 on the right to education the Committee states that maintaining separate educational institutions for linguistic and religious groups is not in violation of the prohibition of discrimination (para. 33). The Committee expressly refers to the UNESCO Convention against Discrimination in Education which makes this explicit in Article 2(2). Once again, there seems to be a synergy as regards formulations/interpretations of fundamental rights that are favorable to minorities.

[69] For a more elaborate discussion of participatory rights for minorities, see inter alia K. Henrard, '"Participation", "Representation", and "Autonomy" in the Lund Recommendations and its Reflections in the Supervision of the FCNM and Several Human Rights Conventions', *I.J.G.M.R.* 2005, 133-168; A. Verstichel,
'Elaborating a Catalogue of Best Practices of Effective Participation of National Minorities: Review of the Opinion of the Advisory Committee under Article 15 of the Framework Convention for the Protection of National Minorities', *European Yearbook of Minority Issues* (2002/3), 165-195.

[70] CERD/C, Concluding Observations, Fiji, 2003, para. 18. See also the report by the International Service on Human Rights (website) regarding the 2002 session of CERD/C on Jamaica.

[71] CERD/C, Concluding Observations: Slovenia, 2003, para. 9.

the efforts made by Ghana to include all ethnic groups in the decision-making processes affecting them.[72] The General Recommendations pertaining to the right to self-determination does not only exhibit explicit attention to the right to identity, the Committee also points out a state obligation to ensure that persons belonging to ethnic groups can play their part in the government of the country.

Interestingly, several strands of jurisprudence of the HRC in terms of general human rights law (excluding Article 27 of the CCPR) are adopting more minority conscious stances, also hinting at a mainstreaming of minority protection concerns, definitely concerning participatory rights. The most striking example so far is *Ignatane v Latvia*[73], which is very similar to *Podkolzina v Latvia*, decided by the ECtHR. Also the HRC concluded to a disproportional interference with the right to political participation (Article 25 of the CCPR) because of the arbitrary re-examination of the linguistic competence of *Ignatane* resulting in her being struck of the electoral list. This view seems to indicate, as the ECtHR judgment, that states do not have unlimited discretion in the way in which they impose linguistic requirements for certain functions. This approach is bound to strengthen the possibilities for linguistic minorities to participate more fully in the political life of the state in which they find themselves.

The practice of the CRC/C also seems to reveal a special awareness for the importance of an adequate political participation of minorities, since it denounces in its concluding observations the under representation of minority groups in the public service.[74]

This special attention for minority participatory rights is furthermore fully in line with the increased attention worldwide,[75] as is also noticeable in the Lund Recommendations on the Effective Participation of National Minorities in Public Life, developed under the auspices of the OSCE High Commissioner on National Minorities.

3) Use of the Minority Language in Public

The special interest for minority issues by the CERD/C is also visible in relation to linguistic rights and regulations on language use. The Committee, in several Concluding Observations, has indicated its wish to receive more information on the languages spoken in a country, on the legal status of certain minority languages and especially their use in education, employment and public administration.[76] The Committee has for example urged states to maintain the possibility for the various ethnic groups to use their mother tongue in private and in public.[77] According to the CERD/C, a prohibition to use the mother tongue in some public establishments 'though aimed at facilitating integration, may lead to indirect discrimination on the basis of race' against minorities.[78] Also in its views under the complaints procedure, it is obvious that the CERD is of the opinion that language requirements for employment could amount to racial discrimination, to the extent that there would not be a reasonable and objective justification for these requirements.[79] This already hints at positive state obligations (of a legislative nature) in relation to minority linguistic rights, which also straddle the private sphere.[80]

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[72] CERD/C, Concluding Observations: Ghana, 2003, para. 21.
[73] HRC, Ignatane v Latvia (communications No. 884/1999), 25 July 2001.
[74] CRC/C, Concluding Observations: Estonia, 2003, para. 23.
[75] Reference can be made not only to Article 15 Framework Convention and Paragraph 35 of the Copenhagen document but also to several reports to the UN Working Group on Minorities, including F. de Varennes, *Towards Effective Political Participation and Representation of Minorities* (Working Paper for the UN Working Group of Minorities, UN Doc. E/CN.4/Sub.2/AC.5/1998/WP.4, May 1998); as well as the Lund Recommendations on the Effective Participation of National Minorities in Public Life, September 1999 (see *infra*).
[76] CERD/C, Concluding Observations: Fiji, 2003, para. 27, Ghana, 2003, para. 20. See also the website of the International Service for Human Rights, review on the 2002 Session of CERD/C regarding the evaluation of Moldova in 2002.
[77] UN Doc.CERD/C/304/Add.38, para 15 ("the former Yugoslav Republic of Macedonia").
[78] UN Doc. CERD/C/60/CO/5, para. 12.
[79] CERD, Emir Sefic v Denmark, (communication 032/2003), para 7.2.
[80] CERD/C, Concluding Observations: Kazachstan (UN Doc.CERD/C/65/CO/3), para 12.

The CCPR is one of the few international conventions which explicitly includes 'language' as a prohibited ground of discrimination. Two particularly relevant cases in this regard, in which the HRC demonstrates a sensitivity for linguistic needs and concerns of a minority[81] are *Diergaardt v Namibia* and *Ballantyne et al v Canada*.

In *Ballantyne*[82], the signage law in the province Quebec, prohibiting public commercials in English, did not amount to discrimination on the basis of language because it would affect the French and the English companies equally. The HRC seems at this stage (still) unsympathetic to ideas concerning indirect discrimination. Nevertheless, the Committee takes the linguistic minority position of the French-speaking in Canada into account in its assessment whether or not Article 19 and the freedom of expression is violated by this strict ban on advertising in English in the province of Quebec. The HRC accepted that the 'rights of others' was the legitimate aim of the restriction, and concerned *in casu* the rights of the French minority in Canada to use its own language. However, according to the Committee the restriction was disproportionate because 'it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English… A state may choose one or more official languages, but it may not exclude outside the spheres of public life, the freedom to express oneself in a language of one's choice'.[83]

In *Diergaardt*[84]*,* the HRC qualified the instruction of the Namibian government to public servants not to communicate in Afrikaans either orally or in writing, (even when they would be able to do so) as being targeted towards Afrikaners, and thus in violation of the prohibition of discrimination.[85] The *Ballantyne* and *Diergaardt* decisions furthermore show that, depending on the interpretation and balancing by the supervisory organ, certain typical minority concerns can be protected in terms of general human rights, and thus without the need to turn to special minority rights.

In this respect, it is interesting to remark the way in which the Advisory Committee has highlighted the problematic nature of limitations on the use of a minority language for public advertisements under Article 11 of the Framework Convention in its Opinion on Azerbaijan. The Advisory Committee pointed out that when a national law envisages the use of a minority language for advertisements only in 'necessary cases', everything depends on how this concept 'necessary' is being interpreted.[86] This underscores again the importance of the interpretation to gauge the actual effects and protection levels of certain norms.

A certain special sensitivity towards linguistic minorities is also visible in the practice of the CESCR/C and the CRC/C. In its Concluding Observations, the former repeated its concerns about the lack of possibilities for minorities to use their language in dealings with public authorities,[87] while the latter criticizes (for example) the difficulties experienced by members of linguistic minorities to have children's names registered in their native language.[88]

[81] Regarding the complaint that the expropriation of their lands after Namibia's independence the HRC decided that this did not involve Article 27 rights because the relationship between the author's way of life and the land was not such that a distinctive culture was at stake (para. 10.6). The Committee in any event did not rule that the Afrikaners are not a minority in terms of Article 27.
[82] HRC, Ballantyne, Davidson and McIntyre (Communication No. 359/1989), 13 March 1993.
[83] HRC, Ballantyne et al, para 11.4.
[84] HRC, Diergaardt et al v Namibia (Communication No. 760/1996), 25 July 2000.
[85] A critical remark that seems nevertheless in order here is that the HRC fails to take into account that English is now the only official language of Namibia and that Afrikaans is at the same level as the (other) indigenous languages. The instruction can thus be understood as having as its goal to eradicate a lingering and now unjustified advantage for Afrikaans speakers in comparison to the speakers of indigenous languages. See also A. E. Morawa, *Minority Languages and Public Administration: A Comment on Issues Raised in Diergaardt et al v Namibia* (ECMI Working Paper 16*,* October 2002).
[86] AC, Opinion on Azerbaijan (II), ACFC/INF/OP/I(2004) 001, para 59.
[87] CESCR/C, Concluding Observations: Guatemala, 2003. para. 27; Concluding Observations: Estonia, 2002, para. 57; Concluding Observations: Bolivia, 2001, para. 24.
[88] CRC/C, Concluding Observations: Lebanon, 2002, para. 40.

4) Education: Linguistic and broader curriculum issues

In terms of Article 5 of the CERD's state obligation to eliminate racial discrimination in the enjoyment of human rights, several of the pronouncements of the Committee in its Concluding Observations concern the right to education (Article 5(e)(v)), and more specifically the language of instruction. Once again, a clear minority sensitivity can be noticed in the assessments made. This is manifested, *inter alia*, in the positive evaluation of having a bilingual education system,[89] and especially in the call for guaranteeing (certain forms of) mother tongue education outside the areas where minorities are territorially concentrated.[90] Equally interesting is the demand for the necessary accompanying measures to make these arrangements practically feasible, more specifically an increase of the personnel qualified to give either bilingual education or education in a certain minority language.[91]

The HRC's views in *Waldman v Canada* demonstrate (once again) that certain specific minority concerns, like funding for minority schools, can be met through the application of general human rights, and *in casu* the prohibition of discrimination. According to the HRC, there was no reasonable and objective justification for the practice of the province of Ontario to only fund Roman Catholic private schools, while not financing other religious minority schools. Hence, this practice amounted to a violation of Article 26, which prohibits discrimination on the ground of religion. The critical assessment of the state's justification of the differential treatment reveals in itself a certain minority consciousness.

The CESCR/C formulates strong recommendations with respect to the provision of mother tongue education to linguistic minorities.[92] According to the Committee, this should be introduced in the official curricula of public schools enrolling a significant number of pupils belonging to linguistic minorities.[93] The Committee furthermore looks into broader curriculum issues, when it advocates intercultural education[94] or the importance to receive education that is culturally appropriate, and 'adaptable' to the needs of students in view of their diverse cultural settings.[95] Arguably, these references and their attention for the accommodation of cultural diversity also exhibit special minority protection considerations.

Similar minority specific concerns are shown and taken up by the CRC/C.[96] The Committee underlines for example the importance of mother tongue education,[97] if necessary via the development of bilingual education.[98] It furthermore underlines the importance of an inclusive curriculum, which would include the study of minority cultures and history.[99]

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[89] CERD/C, Concluding Observations: Ecuador, 2003, para. 6.
[90] CERD/C, Concluding Observations: Albania, 2003, para. 16; Iran 2003, para. 13
[91] CERD/C, Concluding Observations: Ecuador, 2003, para. 14.
[92] CESCR/C, Concluding Observations: Guatemala, 2003, para. 27; Concluding Observations: Estonia, 2002, para. 57; Concluding Observations: Sweden, 2002, para. 38; Concluding Observations: Syria, 2001, para. 45.
[93] CESCR/C, Concluding Observations: Japan, 2001, para. 60.
[94] CESCR/C, Concluding Observations: Guatemala, 2003, para. 45. See also Concluding Observations: Croatia, 2001, para. 19, with a call to adapt the textbooks accordingly.
[95] CESCR/C, General Comment No. 13 on the Right to Education (art. 13), E/C.12/1999/10, para. 6.
[96] Inter alia CRC/C, Concluding Observations: Estonia, 2003, para. 23.
[97] CRC/C, Concluding Observations: Georgia, 2003, para. 71; Concluding Observations: Eritrea, 2003, para. 51; Concluding Observations: Estonia, 2003, paras. 43, 52; Concluding Observations: Ukraine, 2002, paras. 60-61.
[98] CRC/C, Concluding Observations: New Zealand, 2003, para. 43; Concluding Observations: Latvia, 2001, para. 51.
[99] CRC/C, Concluding Observations: Romania, 2003, para. 65; Concluding Observations: Canada, 2003, para. 45; Concluding Observations: Czech Republic, 2003, paras. 54, 68; Concluding Observations : Estonia, 2003, para. 53.

C. Enforcement

1) Enforcement Mechanism

As was obvious throughout the preceding text, and more particularly the references to 'concluding observations', all UN Treaties under review provide for the review mechanism of periodic reporting.[100] This is actually the only available enforcement mechanism for the CESCR and the CRC. Both the CERD and the CCPR also have an interstate complaints procedure that is obligatory for all ratifying states[101] and an optional individual complaints procedure.[102] In view of the fact that states do not tend to file inter-state complaints, the usefulness of a complaints procedure depends on individual complaints. The fact that individual complaints would only be optional seems to constrain the potential of having a complaints procedure.

2) Burden of Proof

Burden of proof issues are actually only relevant in relation to a complaints procedure, and thus only for the CERD and the CCPR. While the requirements as to the proof of alleged discriminations are obviously essential to determine the effectiveness of the protection against discrimination, this matter is not explicitly dealt with in either convention. Neither the standard of proof nor the distribution of this burden of proof have been developed properly in the quasi case law of the supervisory bodies. In the CERD/C's practice, there are no indications to be found in relation to the standard of proof, let alone the distribution of the burden of proof. While the HRC seems to require that there be 'sufficient evidence' to substantiate a communication, (again) there are no further guidelines to be distilled as to what this would imply.[103]

[100] Article 9 CERD, Article 40 CCPR, Article 16 CESCR, Article 44 CRC.
[101] Article 11-13 CERD; Article 41 CCPR.
[102] Article 14 CERD; first Optional Protocol to CCPR.
[103] Joseph, Schultz and Castan, Cases, Materials and Commentary …, 22.

III. Conclusion

The main point in this report was to investigate to what extent a development in the jurisprudence of the first pillar, consisting of the prohibition of discrimination and general human rights, towards a protection of substantive equality and the right to identity of persons belonging to minorities, influences the additional need for the second pillar or special minority rights. The Conventions focused upon in terms of the first pillar are the UN Treaties, mentioned in this report, and the ECHR (DH-MIN(2006)020).

The UN Treaties analysed in this report, mainly concern the CERD and the CCPR but also the CESCR and the CRC. In terms of the human rights treaties of the United Nations, the increasing attention for minority considerations in terms of non-minority specific provisions can only be welcomed. The degree to which special minority concerns are mainstreamed in the interpretation of the non-minority specific human rights is striking. This practice actually constitutes outstanding proof of the thesis (also explicitly confirmed by the Framework Convention's inclusion of general human rights), that an interpretation of the prohibition of discrimination and (other) general human rights in line with substantive equality and identity considerations can already realize, to a significant extent, an adequate minority protection.

It may seem unlikely that the interpretation of norms, that are in themselves not catering for (the special needs of) minorities, will ever address and span the entire spectrum of minority concerns, especially since the latter is arguably not even achieved by the current minority rights standards.[104] Nevertheless, considerable parallels have been identified.[105]

It would in any event not be correct to deduce from this that the FCNM would not have an added value.[106]It is not only symbolically important to have instruments with minority specific rights, it is arguably better to have explicit standards on matters than to have to rely *entirely* on interpretation by supervisory bodies.

Finally, a parallel can be drawn between minority specific standards, like those in the FCNM, and CEDAW and CRC. The latter are easily accepted as being specifications of general human rights, highlighting themes of special relevance to the groups concerned, the special vulnerability of which merits some special attention. Notwithstanding the mainstreaming of gender and children issues in other general human rights conventions, there is no call to get rid of CEDAW or CRC, to the contrary.

In conclusion, it can still be maintained that the human rights (quasi) jurisprudence, which has developed over the past two decades, does not negate the validity of the two-pillar conception in relation to minority protection, and more specifically the need of special minority rights in addition to the prohibition of discrimination in combination with general human rights. The recognition of positive state obligations in relation to minorities is and will remain the essential cement to construct an adequate system of minority protection,[107] the interrelated building blocks of which are the right to identity of minorities, integration without forced assimilation and the principle of substantive equality.[108]

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[104] Consider the special attention by academics and minority NGOs concerning questions of development and economic participation, and the on-going controversies surrounding group rights and the right to self-determination for minorities. See also the analysis in T. Malloy, *National Minority Rights in Europe* (New York: OUP, 2005), more particularly chapters 3 and 7.

[105] For a more detailed analysis of this, see the references in footnote 64.

[106] See also the report prepared for DH-MIN by R. Hofmann.

[107] *Inter alia* M. Weller, 'Conclusion: the Contribution of the European Convention for the Protection of National Minorities to the Development of Minority Rights', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (New York: OUP, 2005), 620-623.

[108] *Inter alia* T. Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights', in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Leiden-Boston: Martinus Nijhoff, 2005), 175; Henrard, Devising an Adequate System of Minority Protection …, 11-13; R.M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: TMC Asser, 2005), 15; Pentassuglia, Minorities in International law …, 90-93; Weller, Conclusion …, 616.