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Introduction

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Introduction

'Synergy' is a word which conveys a range of meanings, and the particular ways in which it is understood for the purposes of this collection will be explored in this introduction. In our view, the notion of 'synergy' is particularly relevant to the protection of minorities in international law, owing to the diversity of relevant instruments and international institutions, and we shall therefore precede our discussion of the notion of 'synergy' with a broad summary of the most important developments in relation to minority protection, both at a global and at a regional level. We shall conclude with a consideration of the limits of the synergies explored in this collection, and with a speculation, informed by the contributions to this collection, on the future prospects for synergies in minority protection.

1 Broad developments in relation to minority protection at global and regional level

The broad history of the development of protection for minorities in international law is generally well known. So, too, are the limitations of the various mechanisms for minority protection which have existed at each stage in this development. Prior to the First World War, such protection as existed in international law was generally *ad hoc*, based primarily on bilateral treaties in response to particular conflicts or potential conflicts involving kin-groups or co-religionists. It was also usually limited in scope, and included only limitations on discrimination, a right to respect for freedom of religion, and, in some cases, a limited right to freedom of expression – or at least a freedom to use a minority language without restriction in private life. Finally, such protection generally had only rudimentary and largely ineffective mechanisms for monitoring and

enforcing compliance.[1] After the First World War, there was a broader recognition of the role that ethnic and religious tensions played in the outbreak of the war. Also, in spite of the post-war effort – which resulted from this recognition – to redraw the political map of central and eastern Europe to coincide more effectively with ethnic and religious realities, there was also a realisation that the continued and unavoidable presence of minorities in several of the newly-created, recreated or reconfigured states raised the potential for further instability. As a result, a more ambitious, multilateral system of minority protection was created under the auspices of the League of Nations. The regime for the protection of minorities which was established under the League of Nations witnessed important developments in the articulation of standards of minority protection: in addition to the inclusion of individual general human rights of particular importance to members of minorities, such as the right to life, liberty and freedom of religion, and a richer understanding of non-discrimination and equality rights, the various instruments which formed part of the system also included important guarantees relating to the use of minority languages in the education system and before the courts, for example. The League of Nations regime also created mechanisms for supervision by the Council of the League of Nations and by the Permanent Court of International Justice, although these proved to be of only limited effectiveness. However, the regime was still limited in scope – it applied only in respect of a limited number of states in eastern and central Europe, Turkey and Iraq, and only in respect of certain groups – and this may have limited its effectiveness by compromising its legitimacy. The regime did not survive the cataclysms of the Second World War.[2]

In the aftermath of the Second World War, there was a reluctance to recreate a League-style regime of minority protection, in part due to the chequered track-record of that earlier regime and to the exploitation of minority issues by Nazi Germany which justified its expansionism under

[1] See, e.g., Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), ch. 2, pp. 25–37; Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, (New York: United Nations, 1991), 'Introduction', pp. 1–4; and Eduardo Ruiz Vieytez, *The History of Legal Protection of Minorities in Europe (XVIIth–XXth Centuries)* (Derby: University of Derby, 1999), chs. I and II, pp. 11–26, among others.

[2] Again, see, e.g., Thornberry, *International Law and the Rights of Minorities*, chs. 3 and 4, pp. 38–54; Capotorti, *Rights of Persons*, ch. 2, pp. 16–26; and Ruiz Vieytez, *Legal Protection of Minorities in Europe*, ch. III, pp. 26–34.

the veil of 'protecting' kin-groups in other states. Instead, the articulation of universal human rights, supplemented by particular prohibitions on genocide and racial discrimination, was thought to be the best means to guarantee peace and stability and the protection of all human beings, including members of minorities. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') of 1948, evaluated in this collection by William Schabas, and the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, discussed here by Ivan Garvalov, have obvious, and special relevance for members of minorities, since members of minorities tend to be targets of the sorts of acts these instruments seek to prevent. Similarly, major international human rights instruments such as the Council of Europe's European Convention on Human Rights ('ECHR') of 1950, considered in this collection by Kristin Henrard, and the United Nations 1966 International Covenant on Civil and Political Rights ('ICCPR'), discussed by Martin Scheinin, and International Covenant on Economic, Social and Cultural Rights ('ICESCR'), treated here by María Amor Martín Estébanez, contain a number of provisions which have particular importance for minorities, but which are not specifically directed at minorities.

The genocidal atrocities committed in Rwanda and the inter-communal tensions and violence in many other states, such as Sri Lanka, have shown that the question of minority protection is not simply a European one, and this is particularly evident in the contributions of Tim Murithi, who explores relevant developments under the African Charter on Human and Peoples' Rights ('African Charter'), Erik Friberg, who analyses developments in the Asia-Pacific region, and Li-Ann Thio, who examines the work of the United Nations Working Group on Minorities of the Sub-commission on the Promotion and Protection of Human Rights.[3] While the

[3] It should be noted that at the fifth session of the new United Nations Human Rights Council, the Council decided to replace the Sub-Commission on the Promotion and Protection of Human Rights with a new Human Rights Council Advisory Committee, having a reduced mandate. The Council decided at its sixth session (10–28 September and 10–14 December 2007) to establish a forum on minority issues which will effectively replace the Working Group on Minorities and which will provide a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities, which shall provide thematic contributions and expertise to the work of the independent expert on minority issues. See Human Rights Council, Report of the Human Rights Council on its Sixth Session, A/HRC/6/22, 14 April 2008, pp. 34–37.

Working Group on Minorities will, as of September 2007, effectively be replaced by a new Forum on minority issues, created by the Human Rights Council, the experience of the Working Group, as described by Thio, is very important and can, it is hoped, be carried forward in the Forum. While the African Charter is of a slightly later date (1986), the peoples' rights clearly have potential in terms of minority protection, which has been confirmed by the practice of the African Commission on Human and Peoples' Rights.

In spite of the general reluctance to address the question of minorities which prevailed during this period, as Thio points out in her contribution to this book, the United Nations Human Rights Commission did, from a fairly early point in its history, pay attention to minority issues. As Fons Coomans notes in his chapter, UNESCO also addressed minorities issues in the context of its work. Furthermore, both the ICCPR and the United Nations Convention on the Rights of the Child ('CRC') of 1989, discussed here by Jaap Doek, contain a provision which is specifically directed at minorities. Friberg, however, highlights the particular and continuing inability in the Asian region to arrive at regional standards, not only in respect of the protection of minorities but in terms of human rights more generally, due in part to the strong reluctance of the relevant states to submit to a multinational monitoring system. So, while the question of minority protection might be a global one, it is definitely not approached in the same way or to the same extent in different regions. Nevertheless, it remains important and appropriate to attempt to identify synergies, wherever possible.

Another feature of the post-Second World War instruments was the development of methods of treaty monitoring and implementation. In addition to the creation of state reporting mechanisms, quasi-judicial mechanisms emerged, which allowed for both inter-state and individual complaints to be adjudicated by treaty bodies.[4] Indeed, there has been growing recognition of the importance of supervisory mechanisms for the full and effective protection and enjoyment of human rights, and the question of the powers and working practices of supervisory mechanisms in ensuring the effective protection of rights is itself a theme which emerges across the contributions to this volume.

In spite of the relevance of these various post-war instruments to persons belonging to minorities, the outbreak of ethnic and religious violence

[4] See, e.g., Capotorti, *Rights of Persons*, ch. 2, pp. 26–41; and Ruiz Vieytez, *Legal Protection of Minorities in Europe*, ch. IV, pp. 34–46.

following the collapse of Communism and the break-up of multi-ethnic states such as the former Republic of Yugoslavia and the former Soviet Union arguably revealed the inadequacy of the post-war approach in dealing with minorities issues, and the 1990s therefore witnessed a new period of standard-setting and institutional development relative to the protection of minorities. Of particular relevance here is the work of the Conference on Security and Co-operation in Europe ('CSCE', now the Organization for Security and Co-operation in Europe, the 'OSCE'), which is explored in this volume by Arie Bloed and Rianne Letschert. The establishment of the Office of the High Commissioner on National Minorities ('HCNM') as an instrument of conflict prevention should be highlighted, as well as the development of important, though non-legally binding, instruments such as the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. While the establishment of the HCNM acknowledged the importance of a conflict prevention strand in a comprehensive approach to minority protection, it should be noted that, under the auspices of the HCNM, several sets of thematic recommendations were formulated by experts, all of which concern topics of special relevance for minorities and which have provided further guidance to states on the content of existing minority protection norms.

The Council of Europe ('COE') has also played a crucial role in the emergence of a stronger edifice of minority protection, notably through the creation of the first (and still the only) international treaty specifically and exclusively directed at minorities, the 1995 Framework Convention for the Protection of National Minorities ('FCNM'), explored in this collection by Asbjørn Eide. As Bruno de Witte and Enikő Horváth note, the enlargement of the European Union ('EU') to include parts of central and eastern Europe, in which ethnic and religious tensions have been serious, has also caused the EU to address the issue of minority protection. However, no minority-specific standards, let alone an explicit internal minority policy, have yet been developed by the EU, although there are undoubtedly possibilities, based on existing competences, to address, at least indirectly, minority concerns. While de Witte and Horváth remain sceptical about the extent to which this is possible, one could argue that a certain level of 'mainstreaming' of minority issues in the EU could be achieved, if the political will existed.

The establishment in 1995 of the UN Working Group on Minorities has added yet another strategy to enhance minority protection, as is

underscored by Thio, namely one of providing a discussion forum in which problems concerning minorities could be addressed in the presence of government representatives.[5]

It is important to recognise, however, that the renewed interest in minority protection was not solely inspired by the re-emergence of ethnic and religious violence in the former Communist bloc. From at least the 1980s, concerns have grown about the impact of globalisation on cultural and, in particular, linguistic diversity. The realisation that many linguistic minorities were in danger of disappearing has also led to standard-setting of relevance to many minorities, such as the COE's European Charter for Regional or Minority Languages (the 'Languages Charter') of 1992, explored in Robert Dunbar's contribution, and in the context of UNESCO, discussed here by Fons Coomans.

These contemporary developments, layered as they are on top of the important human rights standards which emerged after the Second World War, have resulted in a complex and multi-faceted regime, but one which must be said to fall short of an integrated and coherent 'system' of minority protection in international law. Owing to the work of the COE and the OSCE, in particular, standard-setting is more advanced in Europe, but even in the European context, the legal blanket can be likened to a patchwork quilt, comprising a great variety of component parts, but not always producing a harmonious whole. This variety extends from the nature of the legal commitments themselves – legally binding treaty obligations to soft law – to the precision of those standards – from detailed rights to vague objectives – to the type of monitoring mechanisms – from quasi-judicial to advisory. Ian Brownlie has warned of the dangers posed by the 'fragmentation of law' in the discussion of peoples' rights and in standard-setting as well,[6] and the kaleidoscopic nature of contemporary standards of minority protection may give rise to similar concerns, such as jurisdictional overlap, inconsistencies between standards themselves and inconsistencies in the supervision of standards resulting from differing approaches of different treaty bodies and different international institutions. In this collection, however, while not disregarding the possibility of the emergence of such dangers, we have asked contributors to identify

[5] As noted earlier, the working group has been replaced by a Forum on minority issues.
[6] Ian Brownlie, 'Rights of Peoples in International Law', in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon, 1998), pp. 15–16.

and assess the emergence of synergies of various kinds within this complex set of rules and institutions.

It should be highlighted that there has certainly been an increasing attention to, and mainstreaming of, minorities issues at the UN, especially in the last few years. In line with the developing practice of the relevant UN treaty bodies, the Commission on Human Rights has encouraged these bodies to take the situation of minorities into account in their monitoring activities.[7] Similarly, the Commission requested the High Commissioner on Human Rights to continue its efforts to improve coordination and cooperation among UN agencies and programmes concerning minority protection.[8] The High Commissioner effectively organised an interagency meeting in late February 2004 with a view to encouraging closer cooperation with other parts of the UN system and to better integrating minority issues in the work of these activities and programmes. However, the follow-up interagency meeting to examine ways of integrating minority issues and rights into UN programmes has not yet taken place.[9]

Arguably, this identified need to increase mainstreaming of minority issues in the UN has led to the establishment of the Independent Expert on Minority Issues (UNIEMI), who is specifically mandated to 'cooperate closely, while avoiding duplication, with existing relevant UN bodies, mandates, mechanisms as well as regional organizations', while 'taking into account the views of non-governmental organisations on matters pertaining to his or her mandate'.[10] The reference to cooperation with regional organisations – concern with regional developments is also visible in the activities of UN Working Group on Minorities[11] – is important, as it is bound to enhance possible synergies not only within the UN system but also between the UN and the respective regional systems. In the latter respect, reference can be made to the first meeting between UNIEMI and the HCNM in The Hague on 8 and 9 March 2007, during which a possible cross-fertilisation in working methods and approaches was investigated.

[7] UN Commission on Human Rights, Specific Groups and Individuals, E/CN.4/2005/L.62, para. 10.
[8] *Ibid.*, para 11.
[9] Report of the High Commissioner on the rights of persons belonging to national or ethnic, religious and linguistic minorities, E/CN.4/200/81, paras. 40–41.
[10] Commission on Human Rights, Resolution 2005/79.
[11] See, *inter alia*, Report of the High Commissioner, para. 43; Sub-Commission on the Protection and Promotion of Human Rights, A/HRC/Sub.1/58/L.2, para. 5.

Despite the potential pivotal importance of the UNIEMI, no separate chapter on this special procedure is included in this volume, because of the fact that it is still too early to deduce much from the actual practice of this new body, which has been in place for less than two years. Nevertheless, the current UNIEMI, Gay McDougall, has provided a succinct but useful introduction to its work, which follows Li-Ann Thio's contribution. It also seems appropriate to make some reference to the UNIEMI here. It should in any event be highlighted that the UNIEMI participated as an observer in the activities of the UN Working Group on Minorities, which in turn provided conceptual support to the Expert.[12] Obviously, the mandates of these two UN mechanisms were greatly complementary and both provided ample avenues for the development of synergies, and this is why we have chosen to add McDougall's comments after Thio's contribution. As noted, the Working Group will effectively be replaced by a Forum on minority issues, but it is hoped that the work of the Forum will be greatly influenced by that of the Working Group, and the Forum is to support the UNIEMI who, in turn, shall guide the work of the Forum and prepare its annual meetings.

While UNIEMI has no monitoring function, and therefore has no mandate to consider individual complaints, it works closely not only with the UN Working Group (fostering dialogue between governments and minority groups),[13] but also with the UN treaty bodies, and especially CERD/C, in relation to reporting guidelines for states and initiatives in the field of genocide prevention.[14] The UNIEMI is also clearly set to play an important role in regard to conflict prevention and effective early warning,[15] and to enhance mainstreaming of minority protection in all UN activities.

2 Synergies

The notion of 'synergies' in minority protection was first explored by one of the editors in an article which appeared in 2005.[16] There are several

[12] Report of the Independent Expert on Minority Issues, E/CN.4/2006/74, para. 15.
[13] *Ibid.*, para. 49. [14] *Ibid.*, para. 50. [15] *Ibid.*, para. 71.
[16] Kristin Henrard, 'Ever-increasing synergy towards a stronger level of minority protection between minority-specific and non-minority-specific instruments', 3 *European Yearbook of Minority Issues 2003/4* 15–41.

different types of possible synergies, of which the following three are of particular relevance:

1. express cross-referencing;
2. substantive convergences; and
3. emergence of similar working methods.

2.1 Express cross-referencing

By express cross-referencing, we mean the explicit and specific referencing of the standards of one or more instruments or the output of one or more monitoring bodies or organisations in the standard-setting of another organisation or the work of another monitoring body. Examples of this include the recognition in the preamble to the Framework Convention of the work of other bodies and of other instruments, and in particular that of the OSCE and its Copenhagen Document, or the explicit referencing of a range of instruments in the development of the various recommendations of the OSCE HCNM. Another interesting example of this is the references to the FCNM in the interpretation of the European Court of Human Rights of ECHR standards in some situations involving members of minorities. It is also common knowledge that the EU, and more particularly the Commission in its accession monitoring, refers to minority rights standards developed in the OSCE and the Council of Europe.[17] Though such references are still relatively rare, they are significant developments.

A large body of information is contained in the monitoring output of treaty bodies and other relevant international organisations, and another aspect of the sort of synergy described here is the use of such material by other treaty bodies or organisations. It has been noted, for example, that in its consideration of a state report under the FCNM, the Advisory Committee, the treaty monitoring body under the FCNM, considers reports of other monitoring bodies such as the UN Human Rights

[17] See, *inter alia*, Gabriel von Toggenburg, 'A remaining share or a new part? The Union's role vis-à-vis minorities after the Enlargement Decade', *EUI Working Papers* 2006/15, 22–5, who also identifies institutional cooperation between the HCNM and the European Commission and potential for enhanced institutional cooperation with the Council of Europe. See, also, Rainer Hofmann and Erik Friberg, 'The enlarged EU and the Council of Europe: transfer of standards and the quest for future cooperation in minority protection', in Gabriel von Toggenburg (ed.), *Minority Protection and the Enlarged EU: The Way Forward* (Budapest: LGI Books, 2004), pp. 125–47.

Committee, the Committee under the ICERD, ECRI, the Committee of Experts under the European Charter, and of international organisations such as the OSCE, as well as reports from international non-governmental organisations ('NGOs') such as Minority Rights Group, the International Helsinki Federation, and other organisations representing national minorities in a state.[18] Many of the contributors to this volume highlight a number of examples of such synergies.

2.2 Substantive convergences

Another synergy which is less explicit but which undoubtedly underlies such synergies is the emergence in the work of monitoring bodies and international organisations of common understandings of particular issues, common approaches towards how particular themes are addressed, similarities in how particular issues are resolved, and similarities in the recognition of particular themes and in how such themes are dealt with, all of which might be described as substantive synergies. Examples of such synergies have been commented upon by a number of contributors to this collection. While they are not altogether obvious or striking at first sight, and by no means present or equally strong in all the respective mechanisms and instruments explored in this collection, when considering the collection as a whole, they come into sharper focus.

One example is the close cross-fertilisation that appears to be taking place in the approaches of certain treaty monitoring bodies and international organisations, particularly those dealing with minority-specific standards or instruments. While this is, to a certain extent, to be expected, it is still noteworthy, given that there are still differences between these standards and instruments. For example, the OSCE HCNM has remarked that the various recommendations and guidelines on minority issues that have been produced under the auspices of his office 'have already been largely integrated with the Opinions of the Advisory Committee of the [FCNM]'.[19] Another very important development is what could be

[18] See Rainer Hofmann, 'Introduction', in Marc Weller (ed.), *The Rights of Minorities in Europe: A Commentary on the Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), pp. 8–9.

[19] See Rolf Ekéus, 'The role of the Framework Convention in promoting stability and democratic security in Europe', in *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe, 2004), p. 27.