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# RELIGIOUS RIGHTS OF MINORITIES: DEVELOPMENT AND COMPARISON OF EUROPEAN AND AFRICAN FRAMEWORKS

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# RELIGIOUS RIGHTS OF MINORITIES: DEVELOPMENT AND COMPARISON OF EUROPEAN AND AFRICAN FRAMEWORKS

*Abstract – The definition and protection of minority rights have been a problematic and neglected topic for many centuries. It is only during the past 25 years that minority rights have formally been acknowledged by the international community. Regional ethnic conflict has been rife due to the negligible focus that minority rights received. This dissertation will give an overview of the modern development of minority rights as well as the lack of a universally accepted definition of minorities. The regional frameworks of Europe and Africa with specific reference to the religious rights of minorities will be discussed whereafter the two different approaches to protection will be compared. In Europe an individual approach is followed when minority rights are violated contrary to the collective manner which minority groups in Africa favour.*

## 1. INTRODUCTION

Minorities and their fundamental right to a distinct and separate culture, religion and language within the borders of a sovereign state, have been a problematic and often neglected topic in the international arena for many centuries. The aim of this research is to scrutinise the modern international development of minority rights and to compare the subsequent regional protection of religious rights of minorities in both Europe and Africa.

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Africa experiences the same challenge as Europe in that various minority groups are settled within the borders of its respective countries. Balancing and protecting the rights of a minority group within and alongside the bigger population is an extremely challenging task. It is even more demanding if religion is a possible trigger for violence due to the mere existence of a minority group and their lifestyle. Slimane observes that it has been widely recognised that there is a direct link between conflicts and the violation of minority rights.[1]

Europe has been at the forefront of recognising and formulating minority rights in numerous regional treaties over the past two decades. As the European Court for

[1] Slimane "Recognizing Minorities in Africa" 2003 *Minority Rights Group International* 1 4-5

Human Rights (ECtHR) plays an active role in the protection of human rights, it is bound to address violations of the rights and specifically the religious rights of minorities. With the procurement of minority rights for the traditional Roma and Gypsies in Europe and the recent influx and migration of Africans and refugees from the Middle East, the importance of minority rights and the implementation thereof in Europe cannot be underestimated.

In Africa with its diverse populations, cultures and religions, existing within its sovereign states, and the ethnic violence tormenting the region, the legal fraternity has largely ignored the significance of and necessity for minority rights. The African Court of Human Rights has to date not played a meaningful role in the protection of human rights with the African Commission only addressing a handful of complaints relating to peoples' rights including both indigenous communities and minorities. The reason for this lack of consideration is mainly due to ignorance amongst the general public of their basic human rights and the various legal processes available to protect these rights.

An overview of minority rights in general, with specific reference to the challenge of defining minorities and their rights will be discussed followed by a concise analysis of the international development of minority rights. The development and current regional framework for the protection and enforcement of European minority rights in general and case law of the ECtHR with specific focus on the religious rights of minorities will be examined.

The position in Africa relating to minority rights and the protection thereof by the African Charter and the African Commission will then be considered whereafter a comparison of the two regions will follow. The comparison will focus on the distinction between the various regulating frameworks and the manner in which protection of minority rights are sought. In Europe, individuals belonging to minority groups seek legal relief when their individual rights are violated whereas minority groups in Africa pursue legal action when their rights as a group are violated.

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## 2. ANALYSIS OF THE CONTEMPORARY DEFINITION OF MINORITIES

Minorities and their rights fall within the ambit of human rights. Human rights do not only extend to individuals, but may also be understood in terms of the need to protect the dignity of a group and a group's physical integrity as well as its civil, cultural, economic, political and social engagement.[2] Each individual is part of one or many groups and an individual's identity, history, and engagement is affected by belonging to groups and by the communities within which they live. The protection of a group of individuals against oppression based on the fact that they belong to a group or have a group identity is to be found in group rights or "collective rights".[3]

The distinction between individual and collective rights is important, as the survey of case law suggests that minorities in Europe tend to approach the court as individuals belonging to a distinct minority group whose individual human rights have been violated, whereas Africans approach the African Commission as a group or "a people" when their rights have been violated. Most Africans that approached the African Commission were indigenous minority groups whose existence was threatened as a group rather than a violation of an individual human right. This distinction will be discussed in more detail when the case law of the two continents is compared.

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The concept "minority rights" is a complex topic because no internationally agreed upon definition as to which groups constitute minorities exists.[4] One of the reasons that a universally accepted definition is absent in international law is the fact that until recently, minority rights were mostly ignored and overlooked in international conflict situations. It appears that the international community has been pre-occupied with the establishment of an international criminal court and the prosecution of international crimes but seemingly failed to investigate the reasons for these atrocities. Inadequate protection of minority rights was a major

[2] McCorquodale "Rights of Peoples and Minorities" in Moeckli (ed) *International Human Rights Law* (2010) 365 - 366

[3] Moeckli (n2) 366

[4] Smith *Textbook on International Human Rights* 2nd edition 322

contributing factor to modern international conflict as is evident in the genocide in Rwanda, Burundi and the Balkans.

The diversity of the situations in which minorities live also contributes to the difficulty in formulating a universally acceptable definition. Some minorities live together in well-defined areas, separated from the dominant part of the population while others are scattered throughout the country or across borders such as the Kurds in Turkey, Iraq and other parts of the Middle East.[5] Some minority groups have a strong sense of collective identity and a recorded history while others retain only a fragmented notion of their common heritage.[6]

In addition the discernment between "old" and "new" minorities does not simplify the debate as to what constitutes a minority. The so-called "old minorities" refer to communities whose members have a distinct language, culture or religion compared to the rest of the population.[7] They became minorities as a consequence of the re-drawing of international borders and their settlement area changing from the sovereignty of one country to another or they did not achieve for various reasons, statehood of their own and instead form part of a larger country or several countries.

Groups stemming from migration - the "new minorities" - refer to groups formed by individuals and families who have left their original homeland and emigrated to another country generally for economic and sometimes also for political reasons. Thus, they consist of migrants, refugees and their descendants who are living, on a more than merely transitional basis, in another country than that of their origin.[8] This is especially true for the current situation in Europe were many migrants have recently settled.

One of the first references to minorities after World War II is found in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (1966) that provides:

[5] www.irinnews.org accessed on 30 October 2015
[6] United Nations High Commissioner Human Rights (UNHCHR): Minority Rights - International standards and guidance for implementation (2012) 2
[7] Medda-Windischer "Integration of new and old minorities in Europe: different or similar policies and indicators?" 2014 *INTEGRIM Online Papers* 1 3
[8] Medda-Windischer (n7) 3

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> 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.[9]

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:

> A group numerically inferior to the rest of the population of a State in a non-dominant position, whose members – being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.[10]

Jules Deschênes, again at the request of the United Nations Sub-Commission, proposed a refinement of this definition in 1985.[11] However Capotorti's definition is widely accepted as being authoritive on this issue.

The definition makes it clear that a minority group should be in a non-dominant position. A minority group will usually be identified by numerical factors, but in other situations, as during the apartheid regime in South Africa, the black population (despite their majority in numbers) was in a non-dominant position.[12] The apartheid legislation at the time enabled white South Africans, although the minority population, to govern the country.[13]

It may even be that a group that constitutes a majority in a state as a whole may be in a non-dominant position within a particular region of the state in question.[14] Minorities may also be undermined, not so much by their weakness in numbers,

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[9] Moeckli (n2) 383
[10] UNHCHR Minority Rights (n6) 2
[11] Slimane (n1) 2
[12] Rehman *International Human Rights Law – A Practical approach* (2003) 299
[13] In *Post-Apartheid* Justice Sachs made the following comment: "There is no clear majority population in South Africa against which minorities should be protected. Linguistically and culturally speaking there are only minorities in our country. The problem is to balance out their various interest rather than to protect any group against another." Henrad *Minority Protection in Post-Apartheid South Africa – Human Rights, Minority Rights and Self-Determination* (2002) 39
[14] UNHCHR Minority Rights (n6) 3

but by their exclusion from power.[15] This is true of the Hutu in Rwanda and the Oromo in Ethiopia.

The issue of non-dominance of particular groups may be complicated by the ways in which political parties exploit ethnic or religious differences for political ends. In practice some numerically smaller groups, through alliances with other groups, may exert political dominance, as is the current position in Nigeria where historically dominant minorities such as the Efik or the Ijaw find themselves now marginalized politically. Political changes may lead to a minority group losing its access to power and become non-dominant once again.[16]

When a minority group is identified, both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (such as the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group, ie self-identification) should be taken into account.[17]

However, De Varennes points out that the definition of minorities given by Capotorti is an objective numerical status based upon ties with a language, religion or ethnic group. A complicated formula involving dominance, and a need to show a sense of solidarity and length of residency in a state therefore becomes obsolete.[18] Fortman goes so far as to state that "A group numerically inferior to the rest of the population of a state" is not only arithmetic nonsense, but also neglects the primary background of the minority problem: abuse of dominant positions that are based on exclusive collective identities.[19]

As will be discussed later contemporary minority concerns in Africa still differ markedly from classic European societies. Dessalegn states that in the African scenario, it would be a simple fallacy to apply Capitorti's distinctive features of

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[15] Rehman (n12) 298

[16] Slimane (n1) 2

[17] UNHCHR Minority Rights (n6) 3

[18] De Varennes *Language, Minorities and Human Rights* (1996) 144 - 145

[19] Fortman "Minority Rights: A Major Misconception?" 2011 *Human Rights Quarterly* 255 276-277



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minorities to categorise a certain population as such. The question of dominance is far from clear in several African states, as political dominance tends to (but does not necessarily) coincide with economic, social and/or cultural dominance. Furthermore, while several political parties are formed along ethnic lines, there are constant shifts in alliances and thus political power.[20]

Minority rights aim to ensure the right of the minorities to preserve and enjoy their own culture while also having the right to participate on an equal footing in the political, economic and social life of the society at large. Gilbert[21] observes that standards of non-discrimination and equality are crucial and they constitute only the first pillar of the protection of minorities. The second pillar of protection goes a step further by providing minorities with the right to practise their own religion, develop their own culture, and use their own language. The aim is to ensure that minorities have the right to enjoy their own identity, in other words the right to be treated equally while remaining different. The right to remain different constitutes the quintessence of minority rights.

According to De Schutter, there are three ways to protect minority rights through the use of human rights instruments.[22] Firstly: minorities – whether they are ethnic, linguistic, religious or cultural – can be protected through the general prohibition of non-discrimination. Secondly: minorities can be protected through provision for other human rights, such as freedom of religion, freedom of association or the right to respect for private life. Thirdly and finally: the right of minorities "to enjoy their own culture, to profess and practise their own religion or to use their own language" can be protected as such, under Article 27 of the ICCPR: although this provision refers to the "person belonging to minorities" as the holder of the right, it nevertheless begins with the recognition that such rights matter because of the existence of minorities under the state's jurisdiction.

[20] Dessalegn "The normative framework of the African Human Rights Regime on the Rights of Minorities" 2014 *Mizan La Review* 455 466

[21] Gilbert "Constitutionalism ethnicity and minority rights in Africa; A legal appraisal form the Great lakes region" 2013 *I.CON* 414 416

[22] De Schutter *International Human Rights Law – Cases, Materials, Commentary (*2010) 703

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The latter form of protection may be called "direct" since it refers explicitly to the rights of minorities, rather than "indirectly" allowing for members of minority groups to exercise their individual rights collectively. These two approaches may be used either exclusively or in combination with each other.

To a certain extent De Schutter echoes Gilbert's sentiment as the protection of minority rights rests upon two fundamentals, namely a universal standard of non-discrimination and equity, as well as explicit reference to minorities and protection of their rights to be contained in legal instruments.

## 3. OVERVIEW OF INTERNATIONAL DEVELOPMENT OF MINORITY PROTECTION

Historically, minority rights predate human rights. They were an early modern phenomenon guaranteeing religious freedom in Europe in the sixteenth, seventeenth and eighteenth centuries. In the nineteenth century, minority rights continued to be applied as freedom of religion rights in the Millet system of the Ottoman Empire, while in continental Europe they evolved in national minority protection rights after the Congress of Vienna (1815).[23] Throughout this time, minority rights were primarily a domestic affair guaranteed through bilateral treaties if necessary. After World War I, minority rights entered the international sphere and were enshrined in the Minority Treaty system under the League of Nations. With the emergence of the human rights regime of the United Nations, minority rights became subsumed under human rights during the Cold War and only reappeared as independent topic on the international agenda after the events of 1989 in Europe.[24]

Religion has been the primary cause of minority persecution since the beginning of Western civilization. From the Jews and Christians in the Roman Empire to the

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[23] Malloy "Minority Rights Overview" in Forsyth (ed) *Encyclopaedia of Human Rights Volume 3* (2009) 512
[24] Forsyth (n23) 512

Armenians and Jews in the twentieth century Turkey and Germany, religious beliefs have often led to ethnic cleansing and genocide.[25]

The international recognition of minority rights in the United Nations regime was initially very limited and the only reference to minorities is found in Article 27 of the ICCPR.

Although Article 27 refers to the rights of minorities in those states in which they exist, its applicability is not subject to official recognition of a minority by a state. States that have ratified the ICCPR are obliged to ensure that all individuals under their jurisdiction enjoy their rights: this may require specific action to correct inequalities to which minorities are subjected.[26]

The Human Rights Committee's General Comment No 23 (1994) on the rights of minorities provides an authoritative interpretation of Article 27. The Committee stated that:

> This article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights, which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.[27]

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The interpretation of its scope of application by the Human Rights Committee has had the effect of ensuring recognition of the existence of diverse groups within a state and of the fact that decisions regarding such recognition are not the responsibility of the state alone. States need to take positive measures, as it may be "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group".[28] Macklem interprets the text to suggest that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the broader society in which it is situated.[29]

[25] Forsyth (n23) 513
[26] UNHCHR Minority Rights (n6) 16
[27] UNHCHR Minority Rights (n6) 16
[28] UNCHCR Minority Rights (n6) 16
[29] Macklem "Minority Rights in International Law" 2008 *I.CON* 531 535

However, according to McCorquodale the group rights approach recognises that the collective qualities that the minority possesses, distinguishes them from the majority and so requires them to be protected as a group.[30] These two contrasting views are reflected in the different manner in which Europeans and Africans of minority groups approach the courts.

The United Nations Minorities Declaration of 1992 is a landmark in the international recognition of minorities and their rights and is the first treaty that is designated to the protection of minorities (in its entirety). This is the main international reference document for minority rights and confirms the rights of minorities to enjoy their own culture and profess and practise their own religion and to use their own language in private and public and orders states to adopt appropriate legislative and other measures to achieve those ends. Unfortunately it is not prescriptive as to the means to be adopted to protect these rights.[31] Although this document is non-binding, its impact has been significant in guiding the development of the new minority rights discourse. It was also instrumental in the reading of existing documents and addresses both individual and collective rights.[32]

To give effect to the United Nations Minorities Declaration, the United Nations Independent Expert ("the Independent Expert") on minority issues was established in 2005. This office aims to *inter alia* promote the implementation of the United Nations Minorities Declaration and to engage in consultation and dialogue with governments regarding minority issues in their countries. Since its establishment, the Independent Expert has visited countries such as the Dominican Republic, Ethiopia, France, Greece, Hungary and Rwanda.

Additional protection of minority rights can also be found in the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article 7(1) of

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[30] Moeckli (n2) 386
[31] Hill " Freedom of belief for minorities in states with a dominant religion: Anomaly and pragmatism" 2014 *African Human Rights Law Journal* 266 273
[32] Jabareen "Redefining minority rights: Successes and shortcomings of the UN Declaration on the Rights of Indigenous People" 2012 *JILP* 119 134-135

the Rome Statute of the International Court (1998) and Article 2(2) of The International Covenant on Economical, Social and Cultural Rights (1966).

The Human Rights Council established the Forum on Minority Issues in 2007 to provide a stand for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities. The Forum adds *inter alia* thematic contributions and expertise to the work of the Independent Expert on Minority Issues.[33]

From the above it is evident that the United Nations has at least set a platform to raise international awareness of the entitlement and protection of minority rights. However what is required of states to secure the protection of minority rights is still to be determined and, even more importantly, the enforcement that should follow, if states violate these rights is not clear.

## 4. EUROPEAN PROTECTION OF MINORITY RIGHTS

### 4.1 Overview

In the aftermath of World War II, the prevailing view in Western Europe was that strict formal minority rights were counter-productive, both for minorities and for the maintenance of international security because they tend to promote the division within states along ethnic, linguistic, or religious lines and even secessionism.[34] The Council of Europe and the European Convention of Human Rights (ECHR), the respective main European body and instrument for the promotion and protection of human rights, were originally founded on the alternative individual rights approach which accepts the existing borders of states and attempts to accommodate minority rights within a national framework of equal, non-discriminatory, individual rights, neutral as far as ethnic, religious, linguistic, cultural, and other identifying criteria are concerned.[35]

[33] UNHCHR Minority Rights (n6) 22
[34] Greer *The European Convention of Human Rights Achievements, Problems and Prospects* (2006) 31
[35] Greer (n34) 31

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This explains why no provisions are found in the ECHR directly pertaining to minorities. However with the inter-ethnic violence that affected Eastern Europe (especially the Balkans) in the 1990's, a renewed interest in minority rights was sparked.[36] Over the past three decades Europe has experienced a surge of immigration and with it, a wave of discrimination based on language, religion and ethnicity. Discrimination has occurred in particular against Muslims immigrating to states committed to secularism such as France according to Baillie.[37]

Although no mention is made of minorities in the ECHR, the first legally binding provision relating to religion is found in Article 9 of the ECHR. According to Medda-Windischer this right includes freedom to change one's religion or belief, and freedom, either alone or in community with others, and in public or private, to manifest one's religion or belief in worship, teaching, practise and observance[38]. Referral to Article 9 is important, as a number of matters have been adjudicated before the ECtHR based on a violation of this right.

Of interest is that human rights law has to date not defined religion other than to ensure that the concept of belief is included in the definition. It appears that individual states and individual claimants must define such boundaries of religious rights.[39] The fact that the right to practise religion is not unconditional allows restrictions and regulation thereof. The ECtHR has on more than one occasion stressed the fact that in a democratic society in which several religions coexist in one and the same population, it may be necessary to curb this freedom in an attempt to reconcile the interest of the various groups and to ensure respect for everyone's beliefs.[40]

Cognisance should also be taken of Europe's own attitude towards religion as this influences views of and conduct towards minorities and their religious practices such as wearing religious attire. In the past, Europe tended to be much more

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[36] Greer (n34) 31
[37] Baillie "Protection of Religious Minorities in Europe: The Council of Europe's Successes and Failures" 2007 *American University International Law Review* 617 622-623
[38] Medda-Windischer "The Contribution of the European Court of Human Rights to Contemporary Religious-Related Dilemmas" 2012 *European Yearbook of Minority Issues* 453 455
[39] Medda-Windischer (n38) 456
[40] Medda-Windischer (n38) 457

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inclined towards Christianity and Catholicism but has now become increasingly secular in its beliefs and state orientation. This will be referred to when case law before the ECtHR is discussed.

## 4.2 Council of Europe

### 4.2.1 European Charter for Regional and Minority Languages

The first attempt to formalise minority rights in Europe was the European Charter for Regional and Minority Languages in 1989 that was adopted in 1992. The aim of the Charter is to protect and promote regional or minority languages in Europe and to respect the right of individuals to use a regional or minority language in private and public life.[41] According to De Witte[42] the Charter is a flexible instrument, requiring the contracting states to undertake only those obligations that they are positively willing to undertake (as state parties are not only free to indicate the "regional and minority languages" to which they wish to make the Charter provisions applicable but also have the discretion in selecting from among the many other substantive provisions of the Charter), with the expectation that a process of emulation among states will develop.

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However once states have decided to undertake commitments for the promotion of a given language in a given field, they are closely monitored by a Committee of Experts for their compliance with those commitments by way of reports and recommendations.[43] De Witte is of the opinion that the dynamic approach adopted by this committee is remarkable in that the committee has established a dialogue with the governments concerned, visits the countries and speaks to representatives of minority groups and do not hesitate to make statements as to whether the states have adequately complied with their recommendations.[44]

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[41] Shelton et al *Regional Protection of Human Rights* (2013) 17

[42] De Witte "European Minority Rights" in Foblets *Cultural Diversity and the Law – State Responses from around the World* (2010) 725

[43] Foblets (n42) 726

[44] Foblets (n42) 724

### 4.2.2 The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities ("Framework Convention") that followed in 1995 and came into force in 1998 is much more comprehensive than the above agreement and is seen as the most important international instrument to date on minority protection.[45] The title of the Framework Convention indicates its pragmatic and non-constraining nature – a consequence of the political controversy surrounding the issue.

The Framework Convention is the first legally binding multilateral instrument devoted to the protection of minorities although it fails to define "national minority". The absence of such a definition is further aggravated by the "margin of appreciation" as state parties are given the discretion to qualify the minorities who can benefit from the Framework Convention.[46] Baillie observes that the Framework Convention's impact is greatly diminished by a weak enforcement mechanism comprised of state authored compliance reports and non-binding recommendations from the Framework Convention's monitoring body, the Advisory Committee, and the Committee of Ministers.[47]

The Framework Convention has been ratified by 39 European countries thereby setting a common European standard, which lays down a "floor of rights" to be respected by all. Furthermore, concrete international legal obligations are contained therein. The Framework Convention has gained authority and efficacy thanks to the dynamic monitoring practise of its advisory committee and the willingness of at least some states to "play the game".[48]

De Witte argues that it would be tempting to consider that, in defining the term "European minority rights" one needs to go no further than the Framework Convention. However it does not offer a comprehensive picture of the European minority rights regime for two major reasons.[49]

[45] Hidayat & Zubair "Development of Minorities' Rights and Critical Analysis of Contemporary Comparative International Human Rights Law for their Protection" *International Research Journal of Social Sciences* 2013 53 55
[46] Hidayat & Zubair (n45) 55
[47] Baillie (n37) 621
[48] Foblets (n42) 718
[49] Foblets (n42) 718

One reason is that the Framework Convention is only part of the overall picture; other "European" legal instruments which have emerged in the context of both the same Council of Europe and in that of the European Union (that will be discussed later on), offer more indirect but complementary protection to certain minority rights. Therefore, when examining the existence of a European minority rights regime, one needs to deal with these various layers of protection.[50]

Another reason is that the words "European", "minority" and "rights" are rather problematic as used by the Framework Convention. First, to consider the Framework Convention as the embodiment of *European* minority rights standards is a bit of an overstatement as not all of the European countries have signed this agreement.

However there is a small number of countries that deliberately refrain from ratifying it based on "conscientious objections", such as Belgium, France, Greece and Turkey.[51] They refuse because they either do not recognise the existence of minorities as a matter of constitutional principle (France) or because they consider that the recognition of minorities should be restricted to what is imposed by existing international treaties by which they are bound (Turkey). As De Witte argues, the longer the list of the countries that do ratify the Convention becomes the less plausible these views become.[52]

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Secondly, the use of the term *minority* in the Framework Convention conceals a great diversity of views among European countries on what constitutes a minority (as highlighted in chapter 2). Three groups are distinguished in this regard: a large group of countries, situated mainly in central Europe, where the concept of minority is reserved for "old" minorities that have lasting ties with a particular territory. These ties may sometimes be with a different nation to the one in which they live (hence the term *national* minority that was used for the Framework Convention, although its scope of application is in fact wider that just those national minorities); a smaller group of countries, mainly in North-Western

[50] Foblets (n42) 718
[51] Foblets (n42) 718
[52] Foblets (n42) 718

Europe, in which the concept of minority is used both in legal and everyday language to encompass not only territorially-based groups but also immigrant communities (that are often called, for example in the United Kingdom, "ethnic minorities"); and finally a very small number of countries, including France and Turkey, in which the term minority is considered to be inherently suspicious and incompatible with the constitutional identity of the country.[53]

Thirdly, to use the term r*ights* in reference to the Framework Convention may seem exaggerated. Although the language of rights is frequently used in the articles of the Convention, its provisions do not seem easily capable of direct effect in the national legal orders of the state parties; that is they do not formulate rights that individuals could easily invoke in national courts. Furthermore, their international supervision mechanisms do not lead to binding judicial or quasi-judicial decisions (the ECtHR is not given competence to apply these conventions). However many of the Framework Convention provisions are sufficiently clearly framed so as to be turned by individual members of a minority into a claim for concrete benefits addressed to state authorities – in this sense, according to De Witte they can indeed be called "rights".[54]

Within the context of promoting tolerance and mutual respect, the Framework Convention provides for the protection of a number of minority rights such as the manifestation of religion, access to media, freedom to use minority languages, and education in – and the promotion of – minority culture, language, religion and history.[55] While it is not enforceable by any judicial process, states are nevertheless required under the supervision of the Committee of Ministers assisted by an advisory committee, to submit periodic reports to the Secretary General of the Council of Europe. In addition the principles contained in the Framework Convention require state parties to adopt national laws and policies to give them effect.[56]

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[53] Foblets (n42) 719
[54] Foblets (n42) 720
[55] Greer (n34) 32
[56] Shelton (n41) 18

### 4.2.3 European Commission against Racism and Intolerance

The European Commission against Racism and Intolerance (ECRI) is a monitoring body created by the Council of Europe to combat racism, xenophobia, anti-semitism and intolerance. Its mandate covers all forms of discrimination and prejudice against persons or groups of persons based on race, colour, language, religion, nationality, or national or ethnic origin. The Commission conducts country-by-country monitoring, makes general policy recommendations and promotes awareness.[57]

The Commissioner for Human Rights is an independent institution within the Council of Europe, created in 1999 and mandated to promote awareness of and respect for human rights in all the Council of Europe States.[58] The Commissioner's monitoring of minorities in countries has often built on the work of the Advisory Committee of the Framework Convention for the Protection of National Minorities and the committee of experts of the European Charter for Regional or Minority Languages, which are described above. However, the Commissioner also assesses the position of minorities in countries that have not yet adhered to these instruments. The Commissioner has evaluated member States' approaches regarding the inclusion or exclusion of minorities falling under the protection of international instruments.[59]

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## 4.3 Organisation for Security and Cooperation in Europe

In addition to work done by the Council of Europe, significant contributions in the field of minority rights are made by another inter-governmental organisation, the Organisation for Security and Cooperation in Europe (OSCE).[60] As its name suggests, the OSCE is an organisation concerned with regional security specifically conflict prevention, crisis management and post conflict

[57] United Nations High Commissioner Human Rights (UNHCHR) – Promoting and Protecting Minority Rights – A Guide for Advocates (2012) 116
[58] UNHCHR A Guide for Advocates (n57) 117
[59] UNHCHR A Guide for Advocates (n57) 118
[60] Rehman (n12) 322

rehabilitation.[61] The OSCE established the High Commissioner of National Minorities (HCNM) in 1992.

The mandate of the HCNM is to "provide early warning" and as deemed appropriate, "early action" at the earliest possible stage with regard to tensions involving national minority issues which have developed beyond an early warning stage, but judged by the High Commissioner to have the potential to develop into a conflict within the OSCE area thus affecting peace, stability or respect between participating States, requiring the attention of and action by the Council (of Ministers of Foreign Affairs) or the CSE (Committee of Senior Officials).[62]

### 4.4 European Community / Union

With the potential extension of the European Community to the east, the plight of minority groups has attained a higher profile.[63] The Treaty on European Union states unequivocally that the rights of persons belonging to minorities are among the values upon which the European Union (EU) is founded and which it is explicitly committed to promote inside the EU and in its relations with the wider world.

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The EU has put in place a legal framework to fight discrimination, racism and xenophobia and contributes financially to programs that support activities aimed at combating these injustices.[64] The EU raises minority issues in its political dialogues with countries and cooperates actively at United Nations forums to promote and protect the rights of persons belonging to minority groups.

The member states are required under EU anti-discrimination law to enact national legislation which prohibits discrimination on grounds of race or ethnic origin in areas including employment, education, social protection and access to and supply of goods and services. Protection against discrimination applies to every person living in the EU, not only EU citizens. Moreover, member States are obliged to

[61] Macklem (n29) 543
[62] Shelton (n41) 51
[63] Smith (n4) 336
[64] UNHCHR A Guide for Advocates (n57) 133

designate or set up an independent body to help persons who have been discriminated against based on their racial or ethnic origin to receive advice and support to pursue their complaints.[65]

The Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law was adopted in 2008. Requiring domestic adoption of appropriate laws it aims to ensure that racist and xenophobic offences are sanctioned in all EU member States by effective, proportionate and dissuasive criminal penalties. Punishable offences include intentional public incitement to violence or hatred against a group of persons or a member of such a group, defined by reference to race, colour, religion, descent, national or ethnic origin.[66]

Similar to the United Nations, Europe can be commended for developing an impressive awareness program and legal framework for protection of minority rights. This has been of the utmost importance, as the recent influx of migrants to Europe will in all probability exert extra strain on already complicated historical relationships. The distinction between “old” and “new” minorities may also become irrelevant. However the bodies referred to in paragraphs 4.2 – 4.3 lack enforcement measures and or compliance mechanisms and therefore their existence may not realize the potential for which they were developed.

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### 4.5 Case law of the European Court for Human Rights

The ECHR established the ECtHR as a supplement to domestic legal remedies. The ECtHR ensures that member states observe their responsibilities under the ECHR and its jurisdiction is limited to matters foreseen by the ECHR. Signing and ratifying the ECHR has become a *de facto* requirement for joining the Council of Europe.[67] The ECtHR’s jurisprudence has expanded along with Europe’s population and the Court has taken a more active role in protecting the rights outlined in the ECHR. Baillie argues that the degree of the ECtHR’s success in protecting the rights of religious minorities is however questionable. He supports

[65] UNHCHR A Guide for Advocates (n57) 134
[66] UNHCHR A Guide for Advocates (n57) 134
[67] Baillie (n37) 624-625

this argument by referring *inter alia* to the *Leyla Sahin* matter that will be discussed later on.[68]

As stated earlier, Europe has to a large extent become secular in its approach to religion. Matters such as *Refah Partisi (The Welfare Party of Turkey) and Others v Turkey*, (the *Refah* case)[69] adjudicated before the ECtHR confirm this. The court found that the concept of secularism is pivotal as guarantor of democratic values, equality of citizens before the law and gender equality and that to defend those values and principles, restrictions can be placed on freedom to manifest one's religion in Turkey.[70] Although this case does not directly deal with minorities as such, the principle of secularism laid down here constitutes the basis for adjudicating violations of religious rights of minorities.

### 4.5.1 Secularism and wearing religious symbols in educational environments

The principle of secularism was enforced in the *Leyla Sahin v Turkey* case.[71] This case relates to the prohibition of female students wearing the Islamic headscarf and covering their hair and throat while attending classes and examinations at Istanbul University. The prohibition was found not to violate Article 9 of the ECHR. The applicant was a nursing student at the time of the claim and was refused admission to classes following a circular issued by the Higher Education Council stating it was a disciplinary and criminal offence for students to wear Islamic headscarves in higher education establishments. The Turkish government submitted that the ban was aimed at guaranteeing the principle of secularism laid down in the Constitution as well as guaranteeing the peaceful co-existence of different religions and beliefs in the same community or establishment.

The judges stressed that interference such as above are based on two principles, namely secularism and equality that reinforced and complemented each other. They also noted that the notion of secularism appeared to be consistent with the values underpinning the ECHR and accepted that upholding the principle might be

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[68] Baillie (n37) 626
[69] *Refah Partisi (The Welfare Party of Turkey) and Others v Turkey* 1998 ECtHR Appl. Nos. 22723/93,22734/93, 22725/93
[70] Medda-Windischer (n38) 462
[71] *Leyla Sahin v Turkey* ECtHR {GC} 41566/98

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regarded as necessary for the protection of the democratic system in Turkey. The court also stressed that Article 9 does not always guarantee the right to behave in a manner governed by a religious belief and does not confer on people who do so the right to disregard rules that have been proven to be justified.

Turkey's secular approach was again considered by the court in the *Kurtulmus* matter[72] where the applicant, an associate professor at the University of Istanbul was subjected to a disciplinary investigation following an allegation that she had failed to comply with the dress code for public servants. The applicant submitted that the ban on her wearing a headscarf when teaching had violated her rights guaranteed by Article 9 of the Convention.[73]

The court noted that because public servants act as representatives of the state when they perform their duties the rules require their appearance to be neutral to preserve the principle of secularism that is undoubtedly one of the fundamental principles of the Turkish State. Moreover, the court observed that when the issue concerning the relationship between state and religions is at stake something on which opinion in a democratic society may reasonably differ, the role of the national decision-making body must be given special importance.[74]

In the context of this case concerning tertiary education, the court took into account the margin of appreciation that has to be left to the states in determining the obligations of teachers in the state education system depending on the level of education concerned (primary, secondary or higher) and concluded that that ban on wearing a headscarf as a university professor was justified in principle and proportionate to the aim pursued. According to the court this aspect of the complaint was manifestly ill founded and was thus dismissed.[75] In this regard the court concluded that states have an obligation to refrain from imposing beliefs in places which persons are dependent on or in places in which they are particularly vulnerable such as in primary education.

[72] *Kurtumulus v Turkey* ECtHR Appl. no. 65500/01

[73] Medda-Windischer (n38) 466

[74] Medda-Windischer (n38) 466

[75] Medda-Windischer (n38) 466

Secularism was also central in the case of *Dogru v France*[76] where the court examined the reforms introduced by France relating to the place of Islam in that society. The applicant who was an eleven-year-old Muslim girl at the time, started wearing a headscarf in the second term of secondary school. When she went to physical education and sport classes she was asked to remove it by her teacher who explained that wearing a headscarf was incompatible with physical education classes. The applicant repeatedly refused to remove it. As a result she was expelled for failing to participate actively in physical education classes.

France contended that their conception of secularism respects the principles of the ECHR, permitting the peaceful co-existence of people belonging to different faiths while maintaining the neutrality of the public arena. The court reiterated that pluralism and democracy are based on a spirit of compromise that entails various concessions on the part of individuals to reconcile the interest of the various groups and promote the ideas of a democratic society. The court underlined the principle that the ban was imposed to protect secularist state schools and that, although wearing religious signs at school was not inherently incompatible with the principle of secularism, it was up to the national authorities to decide whether the applicant had exceeded the relevant limits.[77]

### 4.5.2 Confessional neutrality in public education

The issue of vulnerability in certain places, such as in primary education was once again raised in the *Lautsi*[78] matter where the court scrutinised the practice of the Italian public schools to display a crucifix in each classroom. The applicant's children (aged 11 and 13) attended one of the schools and lodged an objection. The question for the court was whether, while imposing the display of crucifixes in classrooms, Italy was able to ensure that education and teaching knowledge was passed on in an objective, critical and pluralist way and that parents' religious and philosophical convictions were respected.

The Italian authorities justified the obligation to display the crucifix by referring to the positive moral message of the Christian faith (which transcended secular

[76] *Dogru v France* ECtHR, Appl. No.27058/05
[77] Medda-Windischer (n38) 464-465
[78] *Lautsi & Others v Italy* ECtHR, Appl. No. 30814/06

constitutional values), to the role of religion in Italian history and to the deep roots of religion in the country's tradition. They attributed to the crucifix a neutral and secular meaning with reference to Italian history and traditions that were closely linked to Christianity. They submitted that the crucifix was a religious symbol but one which could also present other values.

Although the symbol of the crucifix can have a number of meanings, the religious meaning was predominant. The Grand Chamber of the ECtHR found that the display of this symbol did not influence pupils as it is an essentially passive symbol, as opposed to active teaching on religion or participation in religious activities. The court further ruled that the decision whether or not to allow the presence of crucifixes in public classrooms falls within the state's margin of appreciation and that, although the regulation confers on Italy's majority religion preponderant visibility, this does not amount to indoctrination in the school environment.[79]

The main principle the court reiterated in this regard is that states, in their efforts to reconcile the functions they assume with reference to education and teaching, enjoy a broad margin of appreciation limited by the principles of pluralism and objectivity and the prohibition of indoctrination.[80]

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This broad margin of appreciation however creates the impression that the court is less inclined to accommodate Muslims when they approach the court and may in essence defy the principle of secularism and neutrality towards religion.

**4.5.3 Religious attire in public spaces**

In one of the most recent and controversial cases, the ECtHR in *S.A.S. v France*[81] had to determine if the banning of the burqa in France was contrary to the ECHR. The applicant, S.A.S, was a practising Muslim living in France who elected to wear religious clothing that conceals her face, such as a burqa or a niqab. In April 2011, a law prohibiting the concealment of a person's face in public entered into force in France. The applicant claimed that the law prohibited her from wearing

[79] Medda-Windischer (n38) 468
[80] Medda-Windischer (n38) 468
[81] *S.A.S. v. France* ECtHR, [GC], no. 43835/11

religious attire of her choosing and *inter alia* violated her rights under Articles 8 (private life) and 9 (freedom of religion) of the ECHR separately and in conjunction with Article 14 (freedom from discrimination).

According to the International Justice Resource Center[82], the Grand Chamber's analysis focused principally on the compatibility of the French law with Article 8 (respect for private life) and Article 9 (freedom of religion) of the ECHR. Because the Court found that the law constituted an "interference" with or "limitation" on the exercising of both of these rights, it then had to determine whether the interference was "prescribed by law," pursues a legitimate aim, and is "necessary in a democratic society."

The Grand Chamber found that the ban pursues a legitimate aim as it addresses issues of public safety that may arise from the concealment of faces in public. With regard to the need of living together in a democratic society the Grand Chamber primarily focused on Article 9 (freedom of religion). The Grand Chamber noted that in a democratic society with diverse religious beliefs, "it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[83]

Once again the court accepted that the State is "in principle better placed than an international court to evaluate local needs and conditions"[84] and therefore is typically granted a wide margin of appreciation to determine the extent to which a limitation on freedom of religion is necessary in a democratic society.

Judges Nussberger and Jaderblom issued a joint dissent arguing that the French law violated the applicant's rights under Articles 8 and 9 of the Convention. The dissent called into question both the purported legitimate aim of the law and its proportionality. The dissenting judges contended that the majority decision "sacrifices concrete individual rights guaranteed by the ECHR to abstract principles." Some academics, such as Dr Stephanie Berry from the University of

[82] International Justice Resource Center www.ijrcenter.org posted 11 July 2014 accessed on 30 September 2015
[83] *S.A.S v France* (n81) paragraph 126
[84] www.ijrcenter.org (n82)

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Sussex,[85] also argued that the ECtHR failed to uphold the principles of the ECHR by applying an assimilationist approach as the decision targeted Muslims due to a lack of neutrality, in comparison to other cases such as the *Lautsi* matter. French law is based on secularism and therefore religion neutral. However the burqa ban was specific to Islamic dress.

### 4.5.4 Public Safety and Order

Both the ECtHR and the Human Rights Committee have examined restrictions on religious attire in the context of public safety. The court has declared inadmissible two applications concerning French laws that required the temporary removal of religious headgear or facial coverings for the purpose of identification and security measures. In the case of *Phull v. France*, the applicant was asked to remove his turban for an airport security screening. The Court held that the arrangements for airport security "fell within the respondent State's margin of appreciation, particularly as the measure was only resorted to occasionally."[86] Similarly, in the case of *El Morsli v. France*, the applicant was refused entry to the French consulate when she refused to remove her veil in front of a man for an identity check. The Court found no violation of the Convention and reiterated that security checks are essential to public safety.[87]

As with the matters relating to public education the court favours the national authorities' margin of appreciation to determine if limitations to freedom of religion are necessitated. The principle of secularism is deemed to be less important than the margin of appreciation if cognisance is taken of the rulings on Islamic attire in public places. Even the court's rulings in the *Phull* and *El Morsli* matters create the impression that secularism is taking a backseat.

## 4.6 Conclusion

According to Durham the ECtHR has emerged as the most effective transnational human rights enforcement mechanism on earth. It not only serves more than 800 million citizens, but its decisions also have persuasive authority throughout the

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[85] Veloy A Minorities in Focus *Europe: Minorities are protected, but by whom* posted on 25 September 2014 and accessed on 30 September 2015
[86] *Phull v. France* ECtHR, (dec.), no. 35753/03, (n67)
[87] E*l Morsli v. France* ECtHR (dec.) 15585/06

world and is actually being implemented by governments.[88] The jurisprudence of the ECtHR on religious issues has emerged against the background of (and has contributed to) the shifting in attitude towards religion-state relations that have been influenced in turn by the growing awareness of Islam in Europe.

The ECtHR is positioned to play a critical role in finding consolidation between Islamic principles and traditional values and the interests of Europe. But the record of the Court has thus far been mixed. Considering the decisions by the ECtHR the impression is created that the court is less willing to protect Muslim rights than the rights of individuals and groups from other religious traditions.

However Professor Martinez-Torrón points out that the ECtHR's reasoning is consistent when addressing issues related to Muslim or non-Muslim. This is no small feat if one considers that the ECtHR has up to 2012 adjudicated more than 400 cases relating to religion of which a substantial percentage addressed Muslim beliefs and practices.[89] Only two exceptions to equal treatment are noted and these relate to Turkey (a greater margin of appreciation) and France (reducing visibility of Islam in public spaces). This is in line with De Witte's argument in paragraph 4.2.2 relating to the Framework Convention that certain countries such as France and Turkey regard the term minority with inherent suspicion and incompatible with the constitutional identity of the country.

Medda-Windischer argues that the most important principle that the ECtHR formulated with regard to the protection of minority rights is the duty of the state to maintain a climate of tolerance and respect for the rights of others. At the same time the duty to ensure tolerance and respect is to be read together with the duty to remain impartial.[90] However if one compares the decisions of the cross (*Lautsi)* and burqa (*S.A.S. v France)* it appears that these duties have been neglected in the burqa matter.

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[88] Durham et al *Islam, Europe and Emerging Legal Issues* (2012) 2
[89] Durham (n88) 6-7
[90] Medda-Windischer (n38) 492

# 5. AFRICA

## 5.1 Overview

The concept of minority rights remains largely undeveloped on the continent. Traditionally most African countries view the rights of minorities with political scepticism and juridical ambiguity.[91] Many African states are of the view that the minority "problem" is essentially European and are reluctant to admit that Africa is not immune to ethnic concerns.[92] Consequently various minorities and indigenous peoples living in Africa suffer as a result of the lack of attention paid to their rights and concerns by the states in which they exercise their citizenship.

In Africa there are many more "peoples" described as minority groups or ethnic groups than there are states. In Nigeria and Cameroon alone there are more than 250 different ethnic groups within state borders. Zambia[93] has 70 ethno-linguistic groups, none of which constitutes a majority.[94] Therefore the use of "minorities" as elaborated on at international level to refer to marginalised ethnic, linguistic and religious groups of Africa is problematic as it cannot fully reflect the complexity of multi-ethnic states in Africa. That may be the reason why the use of the word "people" is rather favoured. In addition the distinction between minority groups and indigenous peoples is even more blurred in the African context.

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At the end of colonialism many of these independent African states, in an attempt to achieve nation building, disavowed cultural diversity as divisive and unity was postulated in a way that assumed a mythical nation state amidst multi-ethnic states. The challenge was to forge disparate ethnic groups into a nation-state with which individuals would identify when the colonial map was drawn up with no regard to the boundaries between different ethnic groups.[95]

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[91] Gilbert "Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region" 2013 *I.Con* 414 415

[92] Slimane (n1) 1

[93] Zambia with its slogan "One Zambia, One Nation" seems to be successfully integrating various ethnic groups based on policies implemented by its government since 1964 - www.tolerance.org accessed on 19 October 2015

[94] Hidayat & Zubair (n45) 56

[95] Slimane (n1) 1

According to Slimane the challenge to secure the rights of minorities in Africa can be overcome if ethnic diversity is accommodated, the richness of ethnic groups' values are promoted, political, economical and social exclusion is combatted and the rights of all ethnic groups in developmental matters are respected in relation to their fundamental rights as articulated in international law.[96]

Only a handful of African countries have acknowledged the need to protect the rights of minorities and only three have done so in their constitution, namely Cameroon, The Democratic Republic of Congo and Uganda.[97] Burundi with its history of ethnic conflicts and violence has adopted a new constitution in 2005 that includes the explicit recognition of ethnicity and minority rights. The preamble of the constitution affirms the will to move away from ethnic tensions by declaring the unshakeable determination to put an end to the cause of ethnic violence, genocide and exclusion. The preamble established that "the protection and the inclusion of ethnic, cultural and religious minority groups in the system of good governance" is an essential element to reach this goal.[98]

This is in stark contradiction to the Constitution of Rwanda adopted in 2003, which shares the same history as Burundi regarding ethnic conflicts and violence and rejects any mention of ethnicity and promotes national unity. The constitution expressly prohibits any form of association between ethnicity and political parties. The rationale behind the ban is that a reference to ethnicity might create division and run contrary to the on-going national policy of unity and reconciliation.[99] The Constitution of Rwanda follows on the genocide of 1994 that led to the massacre of almost one million Tutsis and moderate Hutus within a period of 100 days.

South Africa's Constitution contains no direct reference to minorities. However section 31[100] states that "persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise, their religion and use their language; and to form, join

[96] Slimane (n1) 1
[97] Gilbert (n91) 415
[98] Gilbert (n91) 422-423
[99] Gilbert (n91) 418
[100] Constitution of South Africa, 1996

and maintain cultural, religious and linguistic associations and other organs of civil society".[101]

It could be argued that to some extent, all recent ethnic violence in Africa has largely been driven by either the repression of minorities or the rebellion by minorities against oppression.[102] Such frictions have adversely affected Africa's economic development, human rights protection and good governance records. Protection of minorities should be ensured not only by domestic mechanisms of accommodating ethnic diversity, but also through the African human rights regime. This regime under its African Bill of Rights embodies numerous innovative provisions, which can lend support to the various tribulations of minorities in Africa, though not for all types of minorities.[103]

## 5.2 The African Charter

As Alston and Steiner state the African human rights system is the newest, least developed and effective, however the most distinctive and controversial of the regional human right regimes in existence.[104] The African Charter on Human and Peoples' Rights forms the basis of the African Union. Although the Charter does not make specific reference to minorities, its protection of "peoples'" rights has been interpreted by the African Commission on Human and Peoples' Rights (the Charter's primary overseeing body) as affording protection to minorities. It should also be noted that there is no minority-specific institution within the African human rights system but once again the African Commission has adopted a very broad approach to minority issues.[105]

Both individual and peoples' rights are subject to the general provisions found in Articles 1,2 and 26 of the Charter. Article 1 provides that member states of the

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[101] Justice Sachs in a minority decision in *Doctors for Life International v The Speaker of the National Assembly and 11 others* 2006 6 SA 416 (CC) par 126 observes that "minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy".
[102] Gilbert (n91) 417
[103] Dessalegn (n20) 469
[104] Dessalegn (n20) 461
[105] UNHCHR A Guide for Advocates (n57) 90

AU shall recognize the rights, duties and freedoms contained in the Charter and will enact domestic legislation to give effect thereto whereas Article 26 places the onus on member states to ensure the independence of the courts and to establish and improve national institutions to promote and protect the rights and freedoms set out in the Charter. Article 2 guarantees individual rights set out in the Charter without distinctions such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, or any other.

Individual rights are set out in various articles of the Charter, with Article 8 specifically dealing with the freedom to practise the religion of one's choice. The African Commission has applied this provision to protect the Christian minority in the Sudan noting that the State violated the authors' right to practise religion because non-Muslim people did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest and expulsion.[106]

In addition the African Charter contains a series of group rights attributed to "peoples". However it does not clearly define either the subject or beneficiary of the rights and the nature or the content of the rights. The African Charter has, however guaranteed a number of collective rights and it is the only international human rights instrument that provides fortification for peoples' rights.[107] A survey of the African Commission's jurisprudence indicates that the Commission considers "peoples" to refer to identifiable ethnic communities and it has not thus far distinguished between minorities and indigenous peoples in any of the cases that address peoples' rights.[108]

Article 19 of the African Charter provides that: *"*All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of one people by another." This is further endorsed by the reporting guidelines for Article 19 that require states to give information on the

[106] UNHCHR –A Guide for Advocates (n49) 91; *Communications 48/90, 50/91, 52/91 and 89/93 Amnesty International; Comité Loosli Bachelard; Lawyers Committee for Human Rights; Association of Member of the Episcopal Conference of East Africa v Sudan*
[107] Dessalegn (n20) 464
[108] UNHCHR –A Guide for Advocates (n57) 92

"constitutional and statutory framework which seek to protect the different sections of national community" and refer to "precautions taken to prevent any tendencies of some people dominating another as feared by the article".

During the examination of the state report of Ghana in 1993, and in relation to Article 19, the ambassador of Ghana interpreted the concept "domination" as the domination of one ethnic group by another and not simply as the domination of one state over another.[109]

The African Commission was approached by certain sections of the Mauritanian population alleging violation of Article 19 in that black Mauritanians were being murdered, expelled from their lands, inhumanely treated and tortured in custody and had their goods confiscated and villages destroyed.[110] The African Commission stated that "At the heart of the abuses is the question of the domination of one section of the population by another", thus affirming that the "peoples" referred to in the African Charter include different groups within a state.

Self-determination is set out in Article 20 of the African Charter. However the African Commission's definition of "people" in a 2009 decision concerning a claim by Southern Cameroonians for self-determination applies. The African Commission found that besides the individual rights afforded to the Southern Cameroonians, they have a distinct identity that attracts certain collective rights. They could be referred to as a "people' because they manifest numerous characteristics and affinities which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to decide to recognize such existence, but not to deny it.[111]

[109] Slimane (n1) 3
[110] Dersso "The African Human Rights system and the issue of minorities in Africa" *African Journal of International and Comparative Law* 2012 42 52-53
[111] UNHCHR - A Guide for Advocates (n57) 93

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### 5.3 The African Commission

The African Commission on Human and Peoples' Rights ("African Commission") is the monitoring body for the African Charter. The broad mandate of the African Commission is *inter alia* the promotion of human rights through studies, research, the organisation of seminars and dissemination of information, interpreting the provisions of the African Charter and ensuring the protection of human and peoples' rights as laid down in the African Charter.

The protective and supervisory role of the African Commission is important as it gives an interpretation of the term "people" and provides clear guidelines for the protection of peoples' rights. The jurisprudence of the African Commission on peoples' rights demonstrates that sub-state groups within a certain state could be considered as "a people" within the meaning of the African Charter.[112] In the following matters, which came before the African Commission, this interpretation was confirmed.

In *Katangese Peoples' v Zaire* [113] the African Commission by implication recognised the various inhabitants of the Katanga province in Zaire as "people", although it rejected their quest for self-determination. According to Solomon the term "people" can thus be construed to mean a section of the population of a state.[114]

In the case of *Serac & Another v Nigeria*[115] the Commission applied the term "people" to refer to a distinct community. The complaint concerned the consequences of environmental degradation in Ogoniland (in the Niger Delta) caused by Shell Corporation in collusion with the Nigerian government. It held that the Nigerian government and Shell are accountable for violations of civil and political, socio-economic as well as the collective rights of the Ogoni people, a

[112] Dessalegn (n20) 467
[113] *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995)
[114] Dessalegn (n20) 468
[115] *Social and Economic Rights Action Center (Serac) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)

distinct ethnic group living in Ogoniland. The Commission also stated that collective rights are essential elements of human rights in Africa.

The African Commission articulated the nature and types of obligations that the African Charter's guaranteed rights impose and pointed out that all rights "generate at least four levels of duties namely the duty to protect, promote and fulfil" and that they entail a combination of negative and positive duties. Dersso observes that these duties have important consequences in relation to minorities.[116] It requires states to adopt institutional and policy measures that recognise the equality of, and promote and enhance tolerance and peaceful coexistence among members of different ethno-cultural groups. Most importantly these duties recognise the need to take targeted measures to address the survival needs of minorities.

According to Dessalegn[117] the jurisprudential exercise by the African Commission of expounding the understanding of the term "people" has gone to the extent of recognizing distinct communities within a certain state to qualify as "people" within the meaning of the African Charter. However, the African Commission did not go to the extent of delimiting the rights of these affected communities, and it thus remains ambiguous whether such recognition of "people" extends to the existing diverse types of minorities in Africa.

The development of the definition of indigenous peoples' human rights in Africa made huge progress with the decision by the African Commission in 2009 in the *Endorois* matter.[118] As stated earlier, the African Commission has not really drawn a distinction between indigenous communities and minorities to date, hence the discussion below. It is necessary to briefly give a definition of what constitutes "indigenous" as it differs from the definition of "minority". The African Commission's interpretation in the *Endorois* matter is noteworthy in that it states " as far as 'indigenous peoples' are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition

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[116] Dersso (n110) 59
[117] Dessalegn (n20) 468
[118] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003

captures the diversity of indigenous cultures, histories and current circumstances". However the important criteria to take into consideration are the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[119]

This case involved the Endorois indigenous community who had lived in the Lake Bogoria area in Kenya for centuries. They followed a pastoral way of life, with Lake Bogoria being central to their religious and traditional practices. In 1973 the land was re-gazetted and in 1978, a game reserve was created around Lake Bogoria. This led to the *de facto* expulsion of the community from its land as several game lodges, roads and a hotel were then built on the Endorois' ancestral territory. This meant the loss of access to valuable grazing lands, water and significant cultural and religious sites. After exhausting all the possible remedies at national level, the community turned to the African Commission.[120]

The African Commission decided that the Endorois were an indigenous community, with sufficient "distinctiveness" to be considered a "people". They were therefore entitled to benefit from the provisions of the African Charter that protected collective rights. The Commission further decided that the Endorois' spiritual beliefs and ceremonial practices constituted a "religion" under the terms of the Charter, and stated that religion was often linked to land, cultural beliefs and practices, and that freedom to worship and engage in ceremonial practices was central to the right of freedom of religion. Though the restriction of the rights was permissible, it had to be established by law, and could not be applied in a manner that would completely nullify the right. Any restriction therefore had to be proportionate to the specific need on which it was based and be reasonable in the circumstances.[121] The Commission noted that the Endorois religious practices centred around Lake Bogoria, and considered that the restriction imposed on the

[119] Gilbert (n21) 252
[120] Gilbert (n21) 248
[121] Gilbert (n21) 256

Endorois' freedom to practise their religion was not necessitated by any significant public security interest or other legitimate justification.

The African Commission was also not convinced that removal of the Endorois from their ancestral lands on grounds of economic development or ecological protection was a lawful action, as it considered that the use of the land for religious practices would not "detract from the goal of conservation or development for economic reasons". The Commission therefore decided that the forcible eviction of the Endorois from the lands sacred to the practice of their religion was an interference with their right to freedom of religion. As a consequence, it was virtually impossible for them to maintain their religious practices[122] and therefore Kenya was found guilty of violating the Endorios' rights under Article 8 of the African Charter.

What is evident from the Orgoni and Endorios decisions is that the African Commission, although not referring to minorities, adjudicated violations of a collective right relating to a "people" in a non-dominant position, one of the crucial elements of the contemporary definition of minorities.

### 5.4 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (AfCHPR) was created by a protocol of the AU in 1998 and came into force during 2004. It started functioning in 2006. However this court's continuation was transformed when the AU adopted another protocol in 2008 to create a single African Court of Justice and Human Rights, to replace the present African Court on Human and Peoples' Rights and the Court of Justice of the African Union. At present the AfCHPR is still functioning.[123]

The matter of the *Ogiek Community of the Mau Forest v Kenya*[124] (where judgment is outstanding) is the first to deal with peoples' rights under the African

[122] Gilbert (n21) 256
[123] www.african-court.org accessed on 22 September 2015
[124] *African Commission on Human and Peoples' Rights v Republic of Ken*ya 006/2012

Charter. The African Commission filed an application on behalf of the Ogiek of the Mau Forest, an indigenous community in the Republic of Kenya. The Ogiek alleged that they have lived since time immemorial in the Mau Forest in Kenya's Rift Valley, and that they have been routinely subjected to arbitrary forced evictions from their ancestral land in the Mau Forest without consultation or compensation and that this has had a detrimental impact on the Ogiek's pursuit of their traditional lifestyle, religious and cultural life, access to natural resources on their land and, more generally, access to education, health services and justice; all of which are safeguarded under the African Charter.[125]

The public hearing in the above matter was concluded in December 2014 but the date for judgment is yet to be decided. In March 2013 the court issued provisional measures ordering the Kenyan Government to stop land transactions in the Mau Forest and refrain from taking any actions, which would harm the case until it has reached a decision.

From the above discussion it is evident that the African Commission and not the AfCHPR has been at the forefront in defining, expanding and interpreting "peoples' rights" that may assist minority groups to approach the African Commission for assistance when these rights are violated.

At a colloquium conducted by the South African Law Society during October 2015, in Kempton Park, South Africa, the need to raise public awareness about the existence, functions and accessibility of the AfCHPR is to be discussed and debated. Hopefully these kinds of seminars will be extended to other African countries in an attempt to, at the very least, raise awareness of the existence of the court amongst attorneys and legal practitioners.

The recent trend in northern Nigeria to implement the Shari'ah law as the penal code, thereby becoming an increasingly theocratic state could be a feasible application to be referred to the AfCHPR. This trend has serious implications for Christian-Muslim interaction and the minority status of Christians as the Muslims

[125] www.au-banjul@africa-union.org accessed on 22 September 2015

and Christians share the same public space and institutions in those states that have introduced Shari'ah penal codes. Members of the religious minority group, i.e. Christians living in northern Nigeria, are exposed to a system that curtails their enjoyment of their fundamental human rights.[126]

This has become evident in the public school system where all children (Muslim and Christian) are expected to appear in the prescribed Islamic dress without regard to the religious sensitivities of religious minorities. While Christian schools are obligated to employ Islamic teachers to give Islamic instruction, Muslim schools are not correspondingly required to employ teachers to teach Christian religious studies.[127] The non-compliance of this directive that stipulates the employment of Islamic teachers to teach Islamic studies has in fact led to the closure of some of the Christian schools.

The media has also been hijacked by Islam, as it is extremely difficult to feature Christian programmes on state controlled radio and television.

Discrimination against Christian communities is also experienced in the distribution and allocation of land for the construction of their churches and schools. Some churches were demolished based on the excuse of non-compliance with town planning instructions. Even more concerning is that sale of public land to Christian groups are now dependent upon their future projects on the lands which may not be anything that contradicts the principles of Islam.[128] Unfortunately when Christian minorities or individuals raise objections to this, they are faced with one or other form of injustice, either by way of suspension from public office, or worse still, targeted by attacks by the now infamous Boko Haram and Jama'atu Ansarul Muslimina Fi Biladis-Sudan (JAMBS). This has led to many Christians disguising the way they dress when appearing in public places as well as altering their places of worship, preferring small gatherings at unconventional places rather than larger churches.[129]

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126 Bolaji "Shari'ah as group rights and the plight of religious minority groups in Nigeria" 2013 *International Journal on World Peace* 31 47
127Bolaji (n126) 47
128 Bolaji (n126) 48
129 Bolaji (n126) 48

Clearly the above is violating Christians' fundamental human rights but in the face of Boko Haram's current reign of terror and the stronghold that it has over the government of Nigeria, Christians' fear of further persecution will most probably discourage them from approaching domestic courts for the necessary legal assistance. In addition, the regional framework discussed here is still in its infancy stage and unable to render the necessary legal respite.

## 5.5 Conclusion

African states have to a large extent been slow to recognise the different distinct identities comprising minorities, as they fear that it posed a threat to national unity and would therefore undermine the objective of nation building. However, as is clear from the ethnic hatred manifested in Rwanda, Burundi and the Democratic Republic of the Congo, it is widely recognised that a direct link exists between conflicts and the violation and/or repression of minority rights.

The Organization of African Unity's Assembly of Heads of State and Government in 1994 have noted this when it adopted the Declaration on a Code of Conduct for Inter-African Relations. The statement reads as follows:

> "Peace, justice, stability and democracy call for the protection of the ethnic, cultural, linguistic and religious identity of all our people including national minorities and the creation of conditions conducive to the promotion of this identity."[130]

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In 2000 the Secretary General of the AU acknowledged that the absence of a culture of tolerance also contributes to the creation of division between different ethnic groups and leads to internal conflicts.[131]

Thus Africa will fail to achieve the objective of ensuring stability and lasting peace on the continent if the respective states fail to integrate minority rights into their political, social, cultural and developmental agenda with the aim to ensure

[130] Slimane (n1) 5
[131] Slimane (n1) 5

the safeguarding of their uniqueness and balancing the interests of the diverse ethnic groups.

The African system of human rights has not been traditionally seen as part of the "strong" regional systems of human rights. Until recently this was also true for the Inter-American system. However strong jurisprudence from the Inter-American Commission gave birth to what is now regarded as an effective regional monitoring system of compliance.[132] Hopefully the African regime can attain the same results.

## 6. COMPARISON

The regional framework created by Europe to protect the rights of minorities has been exemplary. Various treaties have been entered into and regulating bodies have been established with the specific aim to either prevent violation of minority rights or to promote the protection thereof. This is evident from the various forums discussed in chapter four. However none of these have specific enforcement or compliance mechanisms and European minorities are to rely on individual states' adherence to the umbrella regulations imposed by the European Council. Henrad argues that further developments on minority specific rights are required, and that these should be much more explicit on issues of religion and religious identity.[133]

Africa is unfortunately lacking the same zest to create and raise awareness of minority protection. As such no regional treaty or regulating body dealing specifically with minority protection exists. The concept of "minorities" does not even appear in the African Charter and one has to deduce by interpreting case law before the African Commission that the term "people" used in the African Charter is to be applied to minorities.

[132] Gilbert (n21) 270

[133] Henrad "Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion" 2009 *European Yearbook of Minority Issues* 5 44

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The effective and commonly accepted manner that European minorities may and indeed actively pursue to obtain legal relief when their rights are violated, is based on the principles set out in the ECHR that allow individuals *per se* to approach the ECtHR. As discussed above the court has been approached on a number of occasions to determine if minority rights have been violated.

Regrettably from the brief discussion of European case law, it is evident that there appears to be a bias against Muslims when they have approached the court. Although Europe is largely secular and therefore neutral to religion, Muslim minorities had to accept adverse decisions relating to their religion. The margin of appreciation that national authorities have to determine whether the exercise of religious rights of minorities should be restricted in the democracy of the state has the tendency to erode the effective protection of minority rights. The increasing workload of the ECtHR suggests that religious rights of minorities will remain controversial and even more so with an increased population of diverse beliefs.

In contrast to Europe where individuals approach the court when their rights are violated, African minority groups approach the African Commission as a group and claim violation of collective rights. Macklem's reasoning as to the fact that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the broader society in which it is situated is in contrast with the position in Africa.

The African Commission has been the only institution that has dealt with encroachments of minority rights and it is only a handful of matters that was referred to it. The only matter involving religion relates to the Endorois decision. Although the African Charter has laid the foundation for the enforcement of human and peoples' rights on the continent, the implementation of its mechanisms to protect human rights and specifically minority rights remains problematic. The fact that only three countries[134] have made direct reference to minorities in their constitutions confirms this view.

[134] Gilbert (n91) 415

Having regard to the different levels of protection enjoyed by minorities in Europe and Africa and the contrasting manner in which legal relief is pursued when their rights are violated, it is important that both regional frameworks adopt effective and similar mechanisms for due enforcement and recognition of minority rights. This may be a deterrent for religious-based conflict and violence in these two regions and could enhance stable relationships within states.

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