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Primordialism and Otherness:
The 'Ethnic' Underpinning of 'Minority' in International Law

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1.   Introduction

Any study on 'minority' necessarily refers to the complexities involved in defining the term.[1] Francesco Capotorti, in his seminal report on minorities, asserts that '[t]he preparation of a definition [of the minority] capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it to date'; hence, there is no generally accepted definition of the term 'minority' despite numerous references to minorities in international legal instruments of all kinds.[2] Even a couple of decades after the Capotorti report, the Steering Committee on Human Rights to the Council of Minorities concluded in 1993 that no agreement on a definition of the minority was possible.[3] No general understanding could be achieved at the European level either so far as the definition of a 'national minority' was concerned. Thus, given the impossibility of formulating a definition of national minorities that could be approved by all the member States of the Council of Europe, the Framework Convention for the Protection of National Minorities adopts a pragmatic approach to deal with the issue.[4]

This chapter aims to grasp the role of ethnicity in relation to contemporary international law as expressed in its perception of 'minority'. I argue that the current liberal international law conceives of the minority as an ethnic notion, in that the minority as a concept is defined as the backward "other" with primordial characteristics.

As a notion, 'ethnicity' has historically informed the character of international law's engagement with the major events of each of its developmental phases, though the meaning and the degree of its salience in relation to those events often varied. In the nineteenth century German conservative romantic tradition ethnicity constitutes the core of the political organization of nation-states, and the ethnic "other" – the minority – is destined for exclusion or extermination in the process.[5] In the liberal tradition, on the

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[1] See, Kristin Henrard, *Devising an Adequate System of Minority Protection* (Martinus Nijhoff Publishers, 2000); Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991); Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities*, UN Doc E/CN4/Sub 2/384/Rev1 (1977) 34; Natan Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers, 2nd ed, 2003); John Packer, 'Problems in Defining minorities' in Deirdre Fottrell and Bill Bowring (eds), *Minority and Group Rights in the New Millennium* (Brill Academic Publishers, 1999); John Packer, 'On the Definition of Minorities' in J Packer & K Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Abo Akademi University Press, 1993).
[2] Capotorti Report, above n 1.
[3] See, Henrard, above n 1.
[4] Council of Europe, *Explanatory Report to the Framework Convention for the Protection of National Minorities* (1995) ETS No. 157 [12].
[5] Johann Gottfried von Herder, 'Reflections on the Philosophy of the History of Mankind (1791)' in O Dahbour and M R Ishay (eds), *The Nationalism Reader* (Humanities Press, 1995) 48–57; Herder, 'Ideas towards a Philosophy of the History of Mankind (1785)' in A Zimmern (ed), *Modern Political Doctrines* (Oxford University Press, 1939) 164–167; Johanne Gottlieb Fichte, 'An Outline of International and Cosmopolitan Law (1796–97)' in H S Reiss and P Brown (eds), *The Political Thought of the German*

other hand, ethnicity is cast as a primitive way of being as well as a peripheral issue, and hence, is set for gradual assimilation into the state-sponsored national "high culture," which is arguably the reflection of the liberal, universal spirit.[6] In this sense, as I will argue here, the notion of ethnicity not only constructs the minority as "the other", but also informs the ways in which the issue of minority should be dealt with in the political organization of nation-states against the backdrop of the claim of allegiance.

These philosophical traditions coexisted in Europe. Yet as one emerged dominant over the other, or as they mutually confronted each other, the relevance of ethnicity, and hence, the meaning of the 'self' and the 'other' changed accordingly. The ascendancy of the conservative tradition was witnessed in the nineteenth century and again during the Nazi rule, whereas liberalism gained dominance since the end of WWII and declared ultimate victory in the post-Cold War world order. The shifting primacy of these traditions has always been reflected in international law and also in the consequences of international legal engagement with ethnicity. In this dynamic process, liberal individualism now dominates the current international legal plane and the conservative notion of ethnicity is naturally conceived as primitive and backward, as we shall see. Nonetheless, ethnicity remains relevant for the pragmatic need of dealing with "primitive" phenomena such as ethnic minorities. It is in this context that this chapter aims to grasp the complex role of ethnicity as a category in the identity formation of minorities within the dominant liberal architecture of contemporary international law. Insofar as international law conceives of the minority as an ethnic notion, in that minority is tacitly defined as the backward "other" with primordial characteristics, this ethnicity-based definition is reflected in the difficulty in defining the minority within the liberal framework for the purpose of protection. This in turn engenders key questions: why this obsession to formulate some sort of "definition" of minority? And if one cannot actually define who it is that one is seeking to protect, why would one want to protect them? As this chapter argues, the answer to these questions goes beyond the mere need for substantive and procedural specificity required for effective protection of the groups in question.

Thus, underscoring the "ethnic" underpinning of the concept of minority appears relevant. Understanding the minority as a group with certain primordial characteristics not only constructs the distinct identity of the minority as well as the majority in a process of juxtaposition, but also informs the discourse on minority allegiance, especially when the political organization of the nation-state is perceived along the line of ethnicity, or post-ethnicity as a liberal response to this "primitive" notion. This ethnic perception of minority leaves international law with the paradoxical task of dealing with the "irrational" within an overarching liberal framework of "reason" and "rationality" – a problem which is often difficult to mitigate in an unambiguous way.

To substantiate this position, in the following sections, first I elaborate the meaning of primordialism in ethnicity in section 2 and then trace the notion of

Romantics (Basil Blackwell, 1955) 73–85; Fichte, 'Addresses to the German Nation – Thirteenth Address (1808)' in *The Political Thought of the German Romantics* 102–118; Ernest Renan, 'What Is a Nation? (1882)' in *Modern Political Doctrines* 186–205.

[6] Immanuel Kant, 'The Metaphysics of Morals (1797)' in H S Reiss (ed), H B Nisbet (trans), *Kant's Political Writings* (Cambridge University Press, 1970) 131–175; Kant, 'Perpetual Peace: A Philosophical Sketch (1795)' in *Kant: Political Writings* 93–130; John Stuart Mill, 'Considerations on Representative Government (1861)' in *Three Essays* (Oxford University Press, 1975) 380–388.

"otherness" in ethnicity through an etymological exposition in section 3. Against this background, in section 4, I explore how these ethnic notions inform the perception of the minority in contemporary international law.

2.   'Ethnicity' as a Primordial Tie

Primordialism, in its classic version, considers ethnicity as a given or natural phenomenon and understands ethnic groups in the biological sense and as closely related to race. The notion that ethnicity is a natural primordial tie is premised on the assumption that a group identity is an indispensable aspect of one's personal identity.[7] One proponent of this thought – sociologist Edward Shils – for example, takes the view that social life revolves mainly around various kinds of 'primary group' relationship. Thus, he claims that the attachment that one feels to another member of one's kinship group is not just a function of social interaction; instead, '[i]t is because a certain ineffable significance is attributed to the tie of blood'.[8] 'The need for connections or relationships of a primordial character', Shils continues, 'will be endemic in human existence as long as biological existence has a value to the individual organism.'[9]

Identifying the vulnerability of this biological understanding of primordialism to the charge that it only asserts the fundamental nature of ethnic sentiment without explaining why this is so, Pierre van den Berghe provides a socio-biological theory of primordialism. Drawing upon Darwinian thoughts, Pierre van den Berghe argues that all social organisms are biologically programmed to be nepotistic to others in proportion to their real or perceived degree of common ancestry as altruistic investment in unrelated organisms is biologically wasted and therefore could not evolve, and in this process they maximise their inclusive fitness. More than most other organisms, humans recognise and make fine gradations of kinship, and respond to them accordingly.[10] Nonetheless, with the widening of ethnic boundaries, van den Berghe continues, the bonds of kinship were correspondingly diluted, sometimes became fictive, and therefore, ethnicity became increasingly manipulated and perverted to other ends, including domination and exploitation.

> The urge, however, to continue to define a collectivity larger than the immediate circle of kinsmen on the basis of biological descent continues to be present even in the most industrialised mass societies of today. A wide variety of ethnic markers are used to define such collectivities of descent, but their choice is not capricious. Those markers will be stressed that are, in fact, objectively reliable predictors of common descent, given the environment in which the discriminating group finds itself.[11]

Thus, the use of these readily identifiable, unfalsifiable markers of probable common ancestry in forming a group arguably helps the dominant group to discriminate by significantly reducing the transaction costs for monitoring group-membership.

It would be worth noting here that even sharp biological differences in the form of race have socio-political underpinnings. Paul Gilroy, for example, suggests that such differences do not 'bear with them a unique or constant order of determinate effects

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[7] Milton J Esman, *An Introduction to Ethnic Conflict* (Polity Press, 2004) 55.

[8] Edward Shils, 'Primordial, Personal, Sacred, and Civil Ties' (1957) 8 *British Journal of Sociology* 142.

[9] Edward Shils, 'Colour, the Universal Intellectual Community, and the Afro-Asian Intellectual' in John Hope Franklin (ed), *Colour and Race* (Houghton Mifflin Co., 1968) 4.

[10] Pierre L Van den Berghe, *The Ethnic Phenomenon* (Elsevier, 1981) 11.

[11] Ibid.

which applies regardless of the conditions in which they have to exist'.[12] Without dismantling the relevance of biology as a factor in formation and reproduction of race, he asserts that race has to be socially and politically constructed by elaborate ideological work to secure and maintain the different forms of 'racialization'.[13] Gilroy refers to how the naming of races in Britain during 1980s had shifted from political definitions of 'black' based on the possibility of Afro-Asian unity towards more restricted alternative formulations which have confined that concept of blackness to people of African descent. This shift, he argues, 'had its origins in an understanding of "race" which stresses the obstacles to political accommodation erected between groups by culture and ethnicity'.[14] It is, thus, question-begging to conceive of ethnicity as merely a biological or natural phenomenon.

An understanding of primordialism that perceives 'ethnicity' as a *socially and historically constructed primordial tie* responds to this gap. For example, anthropologist Clifford Geertz terms the ascriptive features as 'assumed givens', as opposed to simple 'givens', for culture is inevitably involved in such matters of social existence. Although Geertz identifies immediate contiguity and kin connection as the icons of primordial attachment, he recognizes that such ascriptive givenness stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following particular social practices.[15] Thus, Geertz defines ethnicity as 'a primordial sentiment not because ethnicity is a natural, biologically based identity, but because ethnicity is a historically important cultural identity that, in certain parts of the world, has become particularly crucial or salient politically'.[16] For Geertz, in other words, ethnicity is only important so far as it contributes to, or forms a focus for, cultural identity. And it is in this sense that minority is defined as the ethnic other in the dichotomy of self and other, as we shall see soon.

Locating the issue of primordialism within the socio-historical context, Geertz takes the view that the people, especially of the new States, are simultaneously animated by two powerful motives: one is the demand that their identity be publicly acknowledged as having import, and the other is the demand for economic wellbeing. Although these demands are related, they stem from different sources and respond to different pressures.

> Multiethnic, usually multilinguistic, and sometimes multiracial, the populations of the new states tend to regard the immediate, concrete, and to them inherently meaningful sorting implicit in such "natural" diversity as the substantial content of their individuality. To subordinate these specific and familiar identifications in favour of a generalised commitment to an overarching and somewhat alien civil order is to risk a loss of definition as an autonomous person, either through absorption into a culturally undifferentiated mass or, what is even worse, through a domination by some other rival ethnic, racial, or linguistic community that is able to imbue that order with the temper of its own personality.[17]

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[12] Paul Gilroy, *There Ain't No Black in the Union Jack* (Unwin Hyman, 1987) 38.

[13] Ibid.

[14] Ibid 39.

[15] Clifford Geertz, 'The Integrative Revolution' in Clifford Geertz (ed), *Old Societies and New States* (Free Press, 1963) 108–13.

[16] Richard H. Thompson, *Theories of Ethnicity - a Critical Appraisal* (Greenwood Press, 1989) 53.

[17] Clifford Geertz, 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States' in Clifford Geertz (ed), *The Interpretation of Cultures* (Basic Books, 1973) 258–9.

Under such circumstances, primordial sentiments serve to define socio-political movements along ethnic lines.[18] Thus, Geertz conceives of ethnicity as a socially and historically constructed primordial tie, in that individual's inclusion in a particular ethnic group is not because of merely 'personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the very tie itself'.[19]

In a move to further refine the idea of primordialism, Steven Grosby contends that primordialism is not merely an emotion outside the fact that such emotions are aroused by the cognition of an object; in this case, it is the cognition of the property of kinship.[20] As a matter of fact, his assertion came as a response towards the argument of Jack Eller and Reed Coughlan that ethnicity is certainly an emotional issue, making it distinct from strictly material or instrumental issues, and since this emotion has a clear and analysable sociology, it is not primordial.[21] Grosby, in contrast, maintains that although primordialism asserts that human beings classify themselves and others in accordance with primordial criteria, it does not say that the referents of the criteria necessarily exist in the form in which those who refer to them believe. Primordialism, according to Grosby, informs us that human beings differentiate between the 'self' and the 'other' in accordance with such ascriptive criteria, and on the basis of such notions of 'us' and 'them', they form groups, memberships in which influence the conduct of their members.[22]

Primordial attachments, understood in this constructive sense, are an integral part of ethnic group formation. What makes an ethnic group distinct from other social groups is its formative criteria – the 'given' or 'assumed givens' or socio-historically constructed features. The belief that these features exist, though they do not or might not, claims loyalty and sacrifice from individuals towards the ethnic group. However, primordial attachments are not always fixed; the degree of the attachments is subject to context, time, and individual's orientations. In this sense, the importance of ethnicity is not a matter of its truth function, but of its social meaning. To put it in another way, it is the ontology rather than the epistemology of ethnicity that is of central importance. However, despite this gradual shift in the understanding of primordialism from biological to sociological, it is the orthodox biological fixity in primordialism that essentially occupies the construction of the minority identity in international law, as we shall see in section 4.

3.   'Ethnicity' as 'Otherness'
The term 'ethnicity' derives from the Greek word *ethnos*, and exists in modern French as *ethnie*, with the associated adjective *ethnique*. The adjective appears in modern English as 'ethnic', with a suffix added to give 'ethnicity'.[23] In ancient Greek, while *genos* was generally used by Greeks of Greeks themselves in a restricted kinship sense,

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[18] Thompson, above n 16, 62.

[19] Geertz, 'The Integrative Revolution', above n 15, 111.

[20] Steven Grosby, 'The Verdict of History: The Inexpungeable Tie of Primordiality – a Response to Eller and Coughlan' (1994) 17(2) *Ethnic and Racial Studies* 167.

[21] Jack Eller and Michael R Coughlan, 'The Poverty of Primordialism: The Demystification of Ethnic Attachment' (1993) 16(2) *Ethnic and Racial Studies* 187–92, 199–201.

[22] Grosby, above n 20, 168.

[23] Elizabeth Tonkin, Maryon McDonald and Malcolm Chapman, *History and Ethnicity* (Routledge, 1989) 11.

ethnos was the term for the 'others'. Homer uses it to describe large, undifferentiated groups of either animals or warriors.[24] Tonkin et al trace similar uses of *ethnos* in other Greek classics: Aeschylus uses *ethnos* to describe the Furies (*Eumenides* 366) and also the Persians (*Persai* 43, 56; also *Herodotus* 1.101); Sophocles uses it for wild animals (*Philoctetes* 1147; *Antigone* 344); Pindar employs the term to describe groups of like people, but 'again people whose location or conduct put them in some way outside the sphere of Greek social normality', e.g. the husband-killing women of Lemnos (*Pythian Odes* 4.448); Aristotle uses it for foreign or barbarous nations, as opposed to Hellenes (*Politics*, 1324.b.10); Romans, writing in Greek under the Empire, used the term to describe a province or the provinces in general – areas that were *not* Rome (*Appian Bella Civilia* 2.13; *Herodianus* 1.2.1; *Dion Chrysostom* 4.3.11).[25] Tonkin et al, thus, assert that

> [a]spects of naturality, of non-legitimate social organization, of disorganization, and of animality, are strong in *ethnos* … It is characteristic of this area of vocabulary, perhaps in all languages, that any term for 'people' in a general sense, has the potential for being taken up into a duality of 'us' and 'them', and from early use this has been the fate of *ethnos*.[26]

In later uses, in New Testament Greek, *ethnos* appears as a religious indicator to refer to non-Christian and non-Jewish. At this stage, the derived adjective *ethnikos* is very nearly synonymous with *barbaros* – those who spoke unintelligible languages, and wanted for civilization, who were beyond the bounds of meaning, order and decency.[27] For throughout the Middle Ages it was the Church Latin that dominated literacy in Europe, the term *gentile* – a grouping for religious 'otherness' – succeeded *ethnos*.[28]

The relevance of biological features in the depiction of the derogatory 'other' in relation to the superior 'self' gained impetus with the emergence of social Darwinism in the latter part of the nineteenth century. While the monogenic stream of social Darwinism advocated the gradual assimilation of the ethnic 'other' into the universal high culture, the polygenic stream relied on the difference of origins of various human groups to explain the evolutionary process. In this understanding of human origin, 'races' actually equated 'species'. For example, Le Bon argued that natural selection had formed different races of mankind that represented distinct species distinguished by physical characteristics and different mental traits and capabilities.[29] He distinguished human races in four groups on the basis of psychological classification – primitive races, inferior races, intermediate races, and superior races, and then concluded that the 'mental gap' which separates them is so obvious that confusion between these groups is absolutely impossible.[30] A similar argument was made by Austrian sociologist Gumplowicz,[31]

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[24] Ibid 12.

[25] Ibid.

[26] Ibid.

[27] Ibid 13.

[28] Ibid.

[29] Gustave Le Bon, *L'Homme er les societes: leurs origins et leur histoire*, 2 vols (Rothschild, 1881) 199–200, cited in Mike Hawkins, *Social Darwinism in European and American Thought, 1860-1945* (Cambridge University Press, 1997) 187.

[30] Gustave Le Bon, *Les Lois psychologiques de l'evolution des peoples*, (Felix Alcan, 6th ed, 1906) 26, cited in Raymond F Betts, *Assimilation and Association in French Colonial Theory 1890–1914* (Columbia University Press, 1961) 67.

[31] Ludwig Gumplowicz, *Outlines of Sociology*, tr F W More (Paine-Whitman, 1963) 161, 177, 217.

French scholar Lapouge,[32] German zoologist Haeckel,[33] among others. Thus, social Darwinism offered a "scientific" explanation for the backwardness of the ethnic "other".

This biological underpinning as well as the sense of backwardness in the notion of ethnicity can also be traced in the present day use of the term "ethnic".[34] As a matter of fact, Francesco Capotorti, in his oft-cited study on minorities, maintains that ethnicity came to replace the notion of race only after World War II, and it was at its third session in 1950 that the Sub-Commission on Prevention of Discrimination and Protection of Minorities, while considering a draft resolution on the definition of minorities, decided to replace the word 'racial' by the term 'ethnic' in all references to minority groups described by their ethnic origin.[35] In the context of article 27 of the International Covenant on Civil and Political Rights (ICCPR), Capotorti argues that 'the substitution of the term "ethnic minorities" for the term "racial minorities" and the omission of any reference to "national" minorities would seem to reflect a wish to use the broadest expression and to imply that racial and national minorities should therefore be regarded as included in the category of ethnic minorities.'[36]

Having thus explored the notion of primordial, hence primitive, "otherness" in the concept of ethnicity, in the following section I demonstrate how these ethnic notions inform the perception of the "minority" in contemporary international law.

4.   Ethnic 'Otherness' in the Perception of the 'Minority'

International law often encounters the difficulty of defining a minority within its liberal framework. This difficulty is inherent, in that the liberal effort to define the ethnic notion of minority represents an endeavour to define the indefinable, rationalizing the irrational. Formulating a general definition of a group, which is identified by the centrality of ethnic affiliation, essentially contradicts the liberal proposition that ethnicity has no real value and it is relevant, if at all, only for instrumental purposes. Yet, as the liberal instrumentalist intuition dictates, the minority, having its foundation in the conservative ethnic tradition, is a source of conflict;[37] hence, some form of definition of a

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[32] Georges Vacher de Lapouge, *Les Selections sociales* (Fontemoing, 1896) 1, 11, 5, 8, cited in Hawkins, above n 29, 192, 193. Lapouge argued that Europe was populated by three major racial groups: *Homo Europaeus* – tall, pale-skinned, blue-eyed and long-skulled, *Homo Alpinus*, smaller and darker complexioned than the Aryan, with black hair, brown eyes and brachycephalous heads, and the Mediterranean type, long-headed but possessing the darker skin and shorter stature of *Alpinus*.

[33] Ernest Heinrich Philipp Haeckel, *The History of Creation, or the Development of the Earth and Its Inhabitants by the Action of Natural Causes*, rev tr E Ray Lankester (King, 1876) 303–10.

[34] Tonkin, above n 23, 12.

[35] This change took place, as Capotorti notes, largely due to the efforts of some members to widen up the rubric of 'minority' from mere biological notion of race to more inclusive notion of ethnicity to include cultural as well as historical characteristics. It was also argued that racial groupings had a false premise, in that they were not 'based upon scientific facts and tended to become more indistinct as a result of evolutionary processes, intermarriage, and changes in ideas or beliefs'. See, Capotorti notes that the General Assembly Resolution 217 C (Ill) relating to the protection of minorities refers to 'racial' and 'national' minorities, not 'ethnic' minorities. See, Capotorti Report, above n 1, 34.

[36] Ibid 35.

[37] See, for example, Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995), 140–169. See also, Thomas Franck, 'Postmodern Tribalism and the Right to Secession' in C Brölmann, R Lefeber, & M Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, 1993) 3–27; Rosalyn Higgins, 'Postmodern Tribalism and the Right to Secession: Comments' in *Peoples and Minorities in International Law* 29–35.

minority is necessary to ascertain with whom to deal. As a result, a series of context-specific definitions of "minority" emerged, each with a note of definitional debate as well as the need for some sort of working definition.[38]

However, the need for defining a minority goes beyond the mere need for substantive and procedural specificity that is arguably required for effective protection of the groups in question. Rather, this need is related to a process in which some groups are attributed certain distinct primordial characteristics and, thereby, identified as the conservative "other" vis-à-vis liberal progressiveness; this conservative ethnic notion of the minority then reflects back on the distinctiveness of the majority, or *vice versa.* In almost all the definitions of the minority incorporated in various post-WWII international and regional human rights instruments, this phenomenon of identifying a minority as an ethnic "other" is evident.

Nevertheless, this understanding of the minority is not a new invention of the UN regime. In the *Greco-Bulgarian Community case*, the Permanent Court of International Justice defined a "community" – an equivalent of the minority – in purely ethnic terms.[39] Such reliance on ethnic attachments by a judicial body during the interwar period and especially, in dealing with the Eastern Europeans, was not unusual, in that the League period is claimed to be an era of minority protection. Although in the post-WWII regime of rights, liberal individualism in the form of human rights came to replace the notion of minority, the UN and European institutions, nonetheless, have had recourse to ethnicity to define a minority. This is a trend that underscores the ethnic phenomenon of the minority issue on the one hand, and as a result, highlights the "otherness" in the construction of the minority identity, on the other.

For example, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities formulated in 1950 guidelines for a definition of the minority, one of which conceives of minorities as those non-dominant groups in a given population that 'possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population'.[40] The Sub-Commission's definition of the minority appeared in 1954 accordingly.[41] Thus, the concept of primordiality and "otherness" in the Sub-Commission's understanding of the minority is translated into the subordinate position of the minority in a given society compared to the majority, while by wishing to preserve its distinctive primordial characters as the insignia of its identity, the minority simultaneously appears as a symbol of the nineteenth-century's conservative tradition of defining the "self" in ethnic terms, which makes it different from the liberal understanding of the "self" as a non-ethnic notion. In other words, this process of defining a minority can be seen as an ambiguous pronouncement: in one direction it speaks of the "otherness" of the minority understood in terms of its ethnic differentiation from the majority; the converse of its "otherness" being to affirm the ethnic homogeneity of the majority. In another direction it may speak to the liberal tradition by emphasizing the contrast between those who are committed to

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[38] See, for example, above n 1.

[39] *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Advisory opinion)* [1930] PCIJ (ser B) No 17, 33.

[40] UN Doc E/CN4/358. See, Henrard, above n 1, 20.

[41] UN Doc E/2573 (1954) 48–49. See, Lerner, above n 1, 9.

speak the language of ethnicity in their self-identification, and the majority who have dispensed with such a condition.

A similar approach to the minority was also adopted by the special rapporteurs on minorities in their seminal works. Considering different complexities involved in the term, the Capotorti Report of 1979 defines a minority, in the context of article 27 of the International Covenant on Civil and Political Rights (ICCPR), as

> a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[42]

Another special Rapporteur Deschenes, in a text transmitted to the Human Rights Commission in 1985, defines the minority as 'a group of citizens of a state, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a *sense of solidarity* with one another, motivated, if only implicitly, by a *collective will* to survive and whose aim is to achieve equality with the majority in fact and in law.'[43] With the exception that Deschenes specifically mentions achieving equality as an aim of the minority, two definitions appear identical in all other respects.

The mention of "a sense of solidarity" in these definitions demands particular attention. It is this sense of solidarity and collective will that makes a minority, as a group, different from a group of individuals formed for everyday purposes in rational terms. Here remains the fundamental contrast between the liberal and the conservative attitude towards the way in which identity of the "self" is perceived. And again, it is through this dichotomous, yet relational, process of perceiving the self and the other that allegiance towards the group, the community and the State is reconciled. Besides, in both the definitions, the minority is depicted as a group identified by primordial characteristics which are not only distinct from the rest of the population (or majority), but also meant to be preserved as distinct. The "minority" defined in this way is assigned a specific position in the "self" and "other" discourse.

The hierarchy of this relationship is, furthermore, informed by a sense of inferiority attached to the definition of a minority: the minority is a group that is inferior in number or size as well as power compared to the majority. Inferiority in both the categories of demography and power is crucial, for a small sized group can well be in the dominant position. Elites would be a pertinent example in this context. The reverse is also true; numerically larger groups can be in the subordinate position. The Bengalis in undivided Pakistan constituted a demographic majority, but certainly occupied a subordinate political status. Therefore, an image of the minority essentially captures a condition of inferiority in relation to both demography and power. Schermerhorn lucidly presents this notion in the following diagram:

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[42] For a detail discussion on the definition of 'minority' in the UN, see, Capotorti Report, above n 1, 5–15.

[43] UN Doc E/CN4/1987/WG5/WP1. See, Lerner, above n 1, 9.

Diagram: Inferiority of Minority in Power and Demography[44]

	Size	*Power*	
Dominant Group			
Group A	+	+	Majority Group
Group B	–	+	Elite
Subordinate Group			
Group C	+	–	Mass Subjects
Group D	–	–	Minority Group
[Group AD and BC = typical inter-group configuration]			

The ethnic underpinning of the concept of minority was also emphasized by the State parties while commenting on the provisional interpretation of the term "minority" provided by the special rapporteur Capotorti. The Finnish government held the view that any ethnic, religious or linguistic group *different* from the majority of a given society constituted a minority. This "difference" with the majority is ascertained by the contrast between their primordial characteristics that defines the minority in the first place. Likewise, the Greek government position on the minority issue was that the characteristic features of a minority group should be sufficiently distinctive to be clearly distinguishable from the majority. The Dutch government in the same vein maintained that the 'difference between a minority and the rest of the population should not only be sufficiently distinct but also sufficiently big, beyond gradual transitions and minor gradations'.[45] Clearly, efforts were made to draw a line between the 'other' with certain primordial characteristics and the "self".

In more recent international and European instruments, adopted following devastating ethnic conflicts in the aftermath of the fall of the Soviet empire, the "minority" is conceived in the same fashion. The text of the Declaration on Persons Belonging to Minorities (1992) and the document issued by the CSCE Meeting of Experts on National Minorities (1991) both perceive minorities as bearers of 'ethnic, cultural, linguistic and religious identity'.[46] Although the Steering Committee on Human Rights to the Council of Europe could not agree on a definition of the minority, the Committee in the end formulated a list of criteria to identify 'persons belonging to national minorities'; holding primordial features, distinctiveness of these features from the rest of the population, and the wish to preserve collectively these distinctive collective identity remain at the core of this list.[47] The Parliamentary Assembly of the Council of Europe defines the national minority as a group of persons in a State who, among others, display distinctive ethnic, cultural, religious or linguistic characteristics and are motivated by a concern to preserve together that which constitutes their common identity, including

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[44] Richard Schermerhorn, 'Ethnicity and Minority Groups' in Hutchinson and Smith (ed), *Ethnicity* (Oxford University Press, 1996) 17.
[45] See, Capotorti Report, above n 1, 7.
[46] See, Lerner, above n 1, 22.
[47] See, Henrard, above n 1, 27.

their culture, their traditions, their religion or their language.[48] Although there is no general definition of a national minority at the level of the OSCE, Henrard claims that 'there is a silent, practical consensus in the OSCE that the concept "minority" concerns a non-dominant, distinct, numerical minority within a state'.[49] Thus, in the mandate for the High Commissioner on National Minorities it is suggested that a national minority would typically fulfill two conditions: 'First of all, a minority is a group with linguistic, ethnic, or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity.'[50]

Taken together, what is common in all these definitions and understanding of the term "minority" is the image of a group in a subordinate position, which has at its core certain primordial features that the members of the group not only share but also intend to preserve as an insignia of their identity. This very desire of preserving these features makes minorities the symbol of the conservative passion. In this sense, the minority is not only the "other" of the majority within a given polity because of its distinctive ethnic features, but also the "other" of liberal universalism due to its tendency of portraying the self-image in ethnic terms. Therefore, instead of being understood as an isolated object with certain distinctive features, the minority needs to be perceived in relational terms – it is in this uneven relationship with the majority (in the realm of power and in terms of demographic composition) and liberalism (at the ideological level) that the "minority" is consistently defined and understood as "distinct" as well as primitive.

However, while it is generally accepted that the objectively recognizable fact of having ethnic, religious and linguistic characteristics differing from those of the rest of the population should be the starting point of every effort to formulate a definition of the minority,[51] John Packer's approach to the concept of a minority sheds lights on the contrast between the liberal and conservation traditions in that respect. Claiming that arguments to determine fixed features of minorities fail to take into account the capacity of human beings to shape and change themselves according to their aspirations and talents, he concludes that such arguments are fundamentally flawed.[52] Packer, therefore, defines a minority as 'a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule.'[53] This perception of the minority, within the paradigm of the human rights philosophy and law as a free association of individuals whose desires vary at different times and contexts, represents what is always at the centre of the liberal imaginary. Thus, in Packer's contractualist approach, the inherent positive value to be protected and promoted is not

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[48] Parliamentary Assembly of the Council of Europe, *On an additional protocol on the rights of national minorities to the European Convention on Human Rights (Recommendation 1201)* (1 February 1993) <http://assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA93/EREC120 1.HTM>. The Parliamentary Assembly gave in 1990 a first indication of its understanding of the meaning of 'national minority' in Recommendation 1134: '[S]eparate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of the state and have a certain religious, linguistic or other characteristics which distinguish them from the majority of the population.'
[49] Henrard, above n 1, 30.
[50] Conference for Security and Co-operation in Europe, *CSCE Helsinki Document 1992*: *Challenges of Change* (9–10 July 1993) < http://www.osce.org/documents/html/pdftohtml/4048_en.pdf.html > part 3.
[51] See, Henrard, above n 1, 31.
[52] Packer, 'Problems in Defining Minorities', above n 1, 247.
[53] Packer, 'On the Definition of Minorities', above n 1, 45.

culture *per se,* but rather the individual's desire as well as freedom to associate with the culture as a part of her identity which is valuable, and therefore, requires protection.[54] Within Packer's theoretical approach to a minority as an association, it is the 'free desires of individuals' that determine the nature of such association – classified as a positive association, which is formed by the voluntary choices of the constituent members and negative association, constructed by the majority or other external forces such as the State.[55] Although in one place Packer locates an individual in the context of her social life and surroundings as opposed to an 'American extreme of the isolated individual,' he, nevertheless, understands a minority group as 'individuals in community'.[56] Therefore, any claim of "collective rights" in the sense of rights to be enjoyed by entities themselves or the rights of "minority cultures" advocated by Kymlicka, for example, as opposed to the "cultural rights of minorities" are perceived by Packer as illiberal in nature as they appear to justify actions which could violate human rights.[57] In this way, the reduction of a minority group to individuals is justified as there is no question of protecting any particular culture.

Yet, this contrast between the liberal approach of Packer and the conservative approach adopted at different institutional levels[58] remains useful, in that it brings to the fore the idea that these instruments themselves are not explicitly liberal, although they are capable of that interpretation. There are two ways of seeing the differentiation – one which turns upon the essentially instrumental value of the references to ethnicity, the other which affirms, through the numerical inferiority of the minority, the distinctive ethnicity of the majority. The problem with Packer's position, of course, is that he fails to engage with what he, like many liberals, explicitly understands to be the problem – the link between ethnicity and violence – and assumes a position that tends to hide ethnicity by excluding it from the discourse, by not talking about it.[59] The problem with the alternative position (i.e. defining minority along the line of the conservative notion of ethnicity) that Packer is alert to is that, if there is this link between ethnicity and violence, then reinforcing it in regimes for minority protection may just end up affirming its value and importance.

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[54] Packer, 'Problems in Defining Minorities', above n 1, 247.

[55] See, ibid 254–260. Packer asserts that it is common that a negative association may experience such dynamics as to develop the attributes of a positive association, a phenomenon which Packer terms 'dynamic transformations'.

[56] Ibid 244.

[57] Ibid 242–243.

[58] Besides institutions, authors on the minority issue also took the same approach. For example, Fawcett in his book adopts a working definition of the minority as 'a group in a country which possesses and has common will – however conditioned – to preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious, or a combination of them, and which characterise it as a group. Further such a minority may be politically dominant or non-dominant.' See, James Fawcett, *The International Protection of Minorities* (Minority Rights Group, 1979) 4. Kristin Henrard's working definition of the minority is as follows: 'a "minority" is a group numerically smaller than the rest of the population of a state. The members of this non-dominant group have ethnic, religious or linguistic characteristics different from those of the rest of the population and show, even implicitly, a sense of mutual solidarity focused on the preservation of their culture, traditions, religion or language'. This working definition, Henrard admits, is a slightly adapted version of the Capotorti's definition. The most remarkable divergence with Capotorti's definition is the absence of any nationality requirement for the members of a minority. See, Henrard, above n 1, 48.

[59] Cf. Franck, above n 37, 140–169.

5.   Conclusion: What Does the Ethnic Notion of the Minority Mean to Minority 'Protection'?

The foregoing narrative of how the minority is perceived in international law highlights the internal (domestic) context of the engagement of ethnicity with the concept of minority in which minority is defined as a group with primordial characteristics, different from and subordinated to the majority or the rest of the population within a given polity. However, this ethnic depiction of the minority in international law has serious implications for the international law of minority *protection*. While the minority is essentially defined in ethnic terms, in the liberal architecture of international law, the "protection" of minorities largely relies on the manner in which the progressive liberal self-image of a nation is constructed vis-à-vis ethnic primitiveness.

Thus, with the emergence of liberalism as the dominant vocabulary of international law in the aftermath of the Second World War, minority protection came to mean going beyond ethnic primitiveness and ensuring certain rights for individuals belonging to minorities. Given that the concept of "minority" due to its ethnic underpinning is conceived as primitive when juxtaposed with normative individualism, it is no surprise that the minority 'protection' mechanism of the UN has been guided towards removing ethnicity from the concept of minority. This correlates with the underlying assumption that Western societies have sufficiently moved away from this primitiveness by embracing liberal democratic principles, which are to be exported to the rest of the world as a universal norm. Therefore, in post-WWII instruments such as the Universal Declaration of Human Rights and the International Covenant, as a general rule, the issue of "protection" was addressed through the "prevention of discrimination" within the framework of individual human rights. Under this new system, although forced assimilation of minorities into the majority culture was prohibited, voluntary assimilation of the members of the minorities was nothing short of desired.

Why? The protection of minorities in liberal sense can at the best be perceived as the protection of minorities from the very constitutive elements of their identity – ethnicity. Given that ethnicity not only turns the minority into the victim of oppression by the majority, but also undermines the individual rights of the minority group members, the liberal way of minority protection would thus logically mean the suppression of ethnicity through the individualist principles of equality and non-discrimination. In other words, the liberal version of minority protection appears as an emancipatory project: the liberal not only constructs minorities as a symbol of conservative traditions, but also protects them from the curse of ethnicity – the very constitutive element of minorities. Yet, in the real world, the continued existence of minorities keeps the underlying ethnic phenomenon alive, and thereby, poses constant challenge to this liberal imaginary. The liberal way of dealing with this pragmatic challenge reveals the hesitancy at and reconciliatory approach to the idea of actively promoting ethnic identities.

However, at the normative level, the very legitimacy of group "rights" has been questioned.[60] One popular form of liberal resistance towards group rights perceives the

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[60] See, for example, Brian Barry, *Culture and Equality* (Cambridge, 2001); Chandran Kukathas, 'Are There Any Cultural rights?' in J Stapleton (ed), *Group Rights – Perspective Since 1900* (Theommes Press, 1995) 258–98.

incorporation of collective rights as not only unnecessary but also incompatible with normative individualism. For example, within Packer's theoretical framework, which aims to define a minority as an association, it is the 'free desires of individuals' that determine the nature of such association. This can then be classified as a positive association, which is formed by the voluntary choices of the constituent members and contrasts negative association, constructed by the majority or other external forces such as the State.[61] Although in one place Packer locates an individual in the context of her social life and surroundings as opposed to an 'American extreme of the isolated individual,' he nevertheless understands a minority group as 'individuals in community'.[62] And therefore, any claim of '"collective rights" in the sense of rights to be enjoyed by entities themselves' or 'the rights of minority cultures' advocated by Will Kymlicka, for example, as opposed to 'cultural rights of minorities' are perceived by Packer as "illiberal" in nature as they appear to justify actions which could violate human rights.[63] In this way, the reduction of a minority group to individuals is justified as there is no question of protecting any particular culture. Another archetypical example of such a stance is Boreham's argument in this volume that the primacy accorded to collective rights has a frustrating effect for the protection of human rights; thus, it is difficult to reconcile the notion of 'an individual perception of identity inseparable from an entity external to the self, such as a strong religious belief,' with 'human rights as an inherent attribute to the individual'.[64]

Thus, although the eruption of violent ethnic conflicts in the aftermath of the Cold War has facilitated a fresh discourse on accommodating ethnic group phenomenon within the liberal framework, no concrete binding obligation for minority protection has been devolved on States so far. In this sense, the engagement of ethnicity with the concept of the minority engenders a paradoxical case: on the one hand, minority is defined as an ethnic notion, but on the other hand, the liberal notion of minority protection consistently endeavours to remove "ethnicity" from the concept of "minority" creating a complex legal puzzle in the discourse on identity formation.

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[61] See, Packer, 'Problems in Defining Minorities', above n 1, 254–60. Packer asserts that it is common that a negative association may experience such dynamics as to develop the attributes of a positive association, a phenomenon which Packer terms 'dynamic transformations'.
[62] Ibid 244.
[63] Ibid 242–3.
[64] Kevin Boreham, 'Allegiance and Identity and Rights: "the Indians are you" in Kim Rubenstein (ed), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2011) …