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Chair of International Law

**PROTECTION OF MINORITIES IN INTERNATIONAL LAW:
THE CASE OF ROHINGYAS IN MYANMAR**

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I. DEFINITION OF MINORITIES UNDER INTERNATIONAL LAW

Violations of human rights has always been a topic extremely important especially if those human rights, which are violated, are those of fragments of populations which are in a difficult position or are ostracized from the rest of society. This is, because, above all the duties of a state, the contribution of a state to its population's happiness defines the character of the state itself¹. Past and recent national and international crisis, encompassing gross violations of human rights towards minorities, has rendered the protection of those people particularly significant. Felix Ermacora states that today only 9 percent of the states in the world are technically homogenous, and among all the 191 existing sovereign states, more than 175 appear multiethnic in their composition². During these last years, states are increasingly getting conscience of this fact, and, also at the international level, they are trying to devise possible guarantees for the protection of minorities and their rights, in order to avoid ethnic crisis capable of destabilizing the internal situation. However, the most cumbersome obstacles to an effective protection of minority rights, are: primarily, the absence of a widely recognized definition of "minority" accepted at the international level by all international actors; secondly, by the reluctance of the states to work for a working definition. In legal situations, definitions are important to understand which kind of rights and duties a subject earns. Despite the famous sentence of the former OSCE High Commissioner on National Minorities, Max van der Stoep "I would dare to say I know a minority when I see one", meaning that the recognition of a minority is a matter of fact and not of words, it is for the absence of a clear definition that it is difficult to monitor states and entities in the protection of minority rights. Often, states are the first in avoiding taking a clear stance on definition of minority, fearing that granting separate rights can stem a sentiment of secession in the portion of the population interested. For these reasons, the topic of minority rights is still today a controversial theme. Recent happenings, in several parts of the world, recall our attention to the importance and the urgency of an effective protection of minorities and their rights. This document wants to analyze in depth the topic. In the first section, there is a detailed overview on the different definitions proposed at international level, their advantages and weaknesses, furthermore there is also an analysis of the problems that today working definitions can pose to the protection of minority rights. In the second section, it is present an evaluation of the present protection's tools for minorities' rights and the most influential Courts' decisions, in order to fully evaluate the degree of protection that international, but also national and regional, instruments grant. The third and final section focuses on the present alarming situation in Myanmar, more precisely, in the region of Rakhine, where the

¹ H.J. LASKI, *A Grammar of Politics*, London, 1925, I ed.

² F. ERMACORA, *The Protection of Minorities Before the United Nations*, in *Recueil Des Cours De L'Academie De Droit International*, vol. 182, pp. 251-366, Hague, 1983.

rights of a Muslim minority, the Rohingyas, are brutally violated. The section goes through the history of this people in the north of Myanmar, the several violations of human rights the government of Myanmar has carried out and continues to carry out against them, and in the end, the possible solutions and remedies to end the crisis in the region, and to develop a deep conscience about the value of minority rights.

1.1 International attempts for defining minorities

Minority protection traces back to the reforms for the protection of religious groups in the 17th century. If we do a step further in history, a very similar notion can be found in the three important congresses of the 19th century, respectively: Vienna (1814-1815), Paris (1865) and Berlin (1878). However, we must recognize that the first systematical attempt to assure minority protection is after World War I, more precisely during the Versailles Treaty (1919-1920).

1.1.1 Minority Treaties – Treaty of the Allies with Poland

Under the League of Nations system, formalized under the auspices of the Treaty of Versailles, the protection of minorities was attained through minority treaties among the Eastern European states and the Balkan states. One of leading importance is the treaty of the Allies with Poland, named Polish Minority Treaty or Little Versailles Treaty, since it was signed on the same day of the real Versailles Treaty. After the end of the war, new territories merged in the new state of Poland, and along with these territories also people belonging to different culture, languages, religion and ethnicity became Polish citizens. For this reason, Poland was obliged by the Allies to respect these minorities present in that time in the territory of the state. Although no clear definition is present in the treaty, it is possible to see some characteristics that will be the basis for the today definitions of minority. In Article 2 of the treaty it is stated that: "total and complete protection of life and freedom of all people regardless of their birth, nationality, language, race or religion" should be granted³. From the words of this article, it is evident that minorities are peoples distinct because of objective characteristics such as: birth, nationality, language, race or religion. Furthermore, in Article 7 it is also affirmed that: "difference of religion, creed, or confession shall not prejudice any Polish national in matters relating to the enjoyment of civil or political rights, as for instance the admission to Public employment, functions and honors, or the exercise of professions and industries"⁴. The wording of the article is unambiguous, people who will enjoy the rights described in the treaty must be citizens of the Polish state. So, it is possible to say that, although the idea of providing a definition was not conceived by

³ Minority Treaty between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland, Versailles, 28 June 1919.

⁴ *Ibid.*

the writers of the treaty, in an indirect way what is considered a minority is clear by the words of the treaty itself.

1.1.2 PCIJ on minorities cases: Advisory Opinion of 31/7/1930 on Greece and Bulgaria respecting reciprocal emigration and Advisory Opinion of 6/04/1935 on Minority Schools in Albania

Under the League of Nations system, the League had the mandate to enforce the minorities' treaties, in the light of the fact that the obligations concerned in the treaties are part of fundamental laws of the state, therefore, under the monitoring process of the League of Nations Council⁵. In addition, it was established a system of solving minorities' questions, only in 10 states, through the possibility that individuals belonging to minorities could petition for a breach of one of the rights inserted in the abovementioned treaties. The advisory opinion delivered by the Permanent Court of International Justice (hereafter PCIJ)⁶ on the case on *Greece and Bulgaria* about the respect of their reciprocal emigration is interesting, because the Court decided to insert a possible definition for the notion of minority. Although this definition is referred only to the States of Greece and Bulgaria concerned by the case, it is extremely noteworthy for its universal character, indeed it helped in the international path toward a modern definition. According to the Court, a minority is "(...) is a group of persons living in a given country or locality, having a race, religion, language and traditions, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view of preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another"⁷. In this definition it is possible to find again the same characteristics already highlighted in the articles of the Polish Minority Treaty, so: distinctiveness in race, religion, language and traditions. Although the different wording, the meaning of the expressions chosen by the PCIJ resound in the words of the Little Versailles Treaty. Differently, the Court did not specify if these people must be also citizens of the state in which they reside, therefore in the wording of this definition also immigrants or workers can be included. In addition to this difference, the Court expressed also that a minority should also be granted the right to preserve its traditions, culture or any other distinctive

⁵ Codification report, C. 24. M. 18. 1929, by the League of Nations, of February 1929, on Protection of Linguistic, Racial and Religious Minorities by the League of Nations - Resolutions and Extracts from the Minutes of the Council, Resolutions and Reports adopted by the Assembly relating to the Procedure to be followed in Questions concerning the Protection of Minorities.

⁶ The Permanent Court of International Justice was the predecessor of the International Court of Justice, and its creation was provided by the Covenant of the League of Nations. It was the first international tribunal with general jurisdiction. Its work ended in 1946.

⁷ Advisory Opinion n. 24 of the Permanent Court of International Justice, 8th March 1932, Fourth Session, *Greece and Bulgaria respecting reciprocal emigration*.

traits it has, in a sense of solidarity. This new aspect is extraordinary, because it means that the existence of a group is necessary for the definition of minority, since only when in a group people can secure and preserve their traits similar among each other and different from other people. In the same way, the Court based its decision on the same definition, in order to deliver its Advisory Opinion on *Minority Schools in Albania*, concerning the Albanian Government denying the possibility for the Greek minority to have minority school where the language used was the Greek⁸.

1.1.3 UN ICCPR art. 27: First international attempt of a comprehensive definition of “minority”

The system under the League of Nations was weak and collapsed very soon. After World War II, the world and the international entities put the discourse of minority protection aside, instead focusing on the importance of the protection of all human rights. However, gross violations of human rights are often perpetrated against minorities inside a state. After few years, the necessity to properly readdress minority rights returned onto the scene. A special sub-commission of the Commission of Human Rights of the United Nations (hereinafter UN), specifically the Sub-Commission on the Prevention of Discrimination and Protection of Minorities⁹, tried to shed light on the necessity of a definition of minority and the consequent protection. The definition chosen to start the works of the Sub-Commission was “the term minority shall include only those non-dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population”¹⁰. This attempt of description of the term minority included several elements of the previous definitions, but also some hints for the following attempts, made by the Sub-Commission itself. This specific wording considered that minorities must be made up of a sufficient number of persons, in order to develop a feeling of preservation, necessary for the protection of the group itself. However, several members of the Sub-Commission highlighted through dissenting opinions the possibility that states can argue that some groups do not have this feeling of preservation, in order to avoid giving them the protection they need¹¹. Furthermore, it was stressed that underlining too much the differences between the

⁸ Advisory Opinion n. 26 of the Permanent Court of International Justice, of 6th April 1935, Thirty Fourth Session, *Minority Schools in Albania*.

⁹ The United Nations Sub-Commission on the Promotion and Protection of Human Rights was the main subsidiary body of the former Commission on Human Rights, established in 1947. It was originally named the 'Sub Commission on Prevention of Discrimination and Protection of Minorities', until 1999. Its main functions are in the field of human rights issues, it can also make recommendations concerning the prevention of discrimination related to human rights and fundamental freedoms. It was then replaced by the Advisory Committee.

¹⁰ Report E/CN.4/703 (VI) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1954, para. 26 on Rights of persons belonging to ethnic, religious and linguistic minorities.

¹¹ Report E/CN.4/705 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1954, paras. 424-25, on Report of the 10th session of the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities for the writing of the ICCPR.

minority and the dominant group can create problems for states with regard to the policies of assimilation¹². When the Sub-Commission became in charge of drafting the International Covenants on Human Rights, various draft propositions were discussed to insert a provision regarding minorities. These attempts were realized in the presence of Article 27 in the International Covenant on Civil and Political Rights. The Article states that: “(...) in those states in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”. Although the Article does not propose a real description of the term minority, the wording chosen recalls several elements of the past definitions: the presence of a group of people, the feeling of preservation and solidarity expressed in the words “in community” and “to enjoy”. However, as asked by the delegate of Chile, at the beginning of the article the sentence “in those states in which ethnic, religious and linguistic minorities exist” was inserted, and through these words the article seemed to state that immigrants or other groups present in the territory of the states could not ask for minority rights protection. Nevertheless, in the General Comment on Article 27, adopted by the Committee, it was specified that the persons belonging to national minorities need not to be nationals or permanent residents of the state concerned¹³.

1.1.4 F. Capotorti's definition of 1977 as Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities

One of the most illustrious attempt to define minorities and minority rights was made by the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities¹⁴. Basing his study on Article 27 of the ICCPR, he proposed that 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, traditions, religion or language”¹⁵. According to the work of Capotorti, minority groups must meet some specific criteria:

- Numerical inferiority;

¹² *Ibid.*

¹³ General Comment, CCPR/C/21/Rev.1/Add.5, by the UN Human Rights Committee, 8th April 1994, on General Comment no. 23 on Article 27.

¹⁴ The figure of the Special Rapporteur conducts fact-finding missions to countries to investigate allegations of human rights violations. Furthermore, they regularly assess and verify complaints from alleged victims of human rights violations. They usually serve for three years, but their mandate can be extended for another three years.

¹⁵ Final Report by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/384/Rev.1, by UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1979, para. 568, on Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities.

- Socio-political non-dominance;
- Nationality or citizenship status;
- Distinguishing ethnic, religious or linguistic characteristics;
- A sense of solidarity – directed towards preserving culture, traditions, religion or language.

It is necessary to analyze in depth all of these characteristics. Concerning numerical inferiority, it is presupposed that a minority is numerically inferior, and, in order to be determined, it must be referred to the rest of the population, and where there is no clear dominant group, it must be referred to the aggregate of all the groups present in the state. Capotorti did not specify how many persons should be in the group for it to be considered a minority, but now it is well defined that there must be a sufficient number for the state to recognize the presence of a minority. Of course, this sufficiency is based on objective characteristics, and not on the discretion of the state, otherwise it could generate discrimination.

However, the number is not the only characteristic important for defining a minority. Instead, more often, the political and the social conditions are more important in shaping the presence of minorities in a state. Minority situation is based on the degree of political participation and social inclusion rather than on numbers of a specific group¹⁶. Focusing too much on numerical factors misleads from more important factors, and it generalizes the fact that a group which is inferior in number is also in a non-dominant position. This assumption is false, as evidence in South Africa showed. A group numerically inferior was in charge of the most important institutions, and it retained in its hands the power to decide for an entire country. Therefore, it could be helpful looking at the definition of minority given by Professor Palley, who said that a minority is “any racial, tribal, linguistic, religious, caste or nationality groups within a nation state and which is not in control of the political machinery of the state”¹⁷.

Capotorti strictly maintained in the words of his definition that the persons belonging to minorities must also be citizens of the state. However, in an article published in 1985 rethought about this requirement¹⁸, and in the same sense also the Committee on Human Rights in its General comment no. 23 on Article 27, as said before, repeated that the protection of minorities rights designed in the

¹⁶ B. UDDIN KHAN, M. MAHBUBUR RAHMAN, *Protection of Minorities: Regimes, Norms and Issues in South Asia*, p. 4, Cambridge, 2012.

¹⁷ C. PALLEY, *Constitutional Law and Minorities*, in *Minority Rights Group* p. 3, London, 1978.

¹⁸ F. CAPOTORTI, *Minorities*, in *Encyclopedia of Public International Law*, Vol. 8, p. 385, Amsterdam, 1985.

Article 27 of the ICCPR is not only for nationals or citizens of the state in question. Nevertheless, there is still confusion on who is really and fully entitled to these rights.

Furthermore, Capotorti relied on different characteristics, in order to define if a group of people is a minority. Indeed, minority is considered as such only if it differs from the rest of society on one or more of these fields: ethnicity, religion, language. While religion and language are enough clear in their meaning, the term ethnicity is difficult to define. In 1950, the UN Sub-Commission replaced the term “racial” with “ethnic”, because of poor scientific basis of racial categorization¹⁹. The term “ethnic” is more inclusive and refers more generally to the field of culture, as the grammatical structure of the Article 27 of ICCPR seemed to provide.

The last of the characteristics enumerated in the definition given by Capotorti is the sense of solidarity expressed as preserving culture, traditions, religion or language, and defined as a subjective criterion. Capotorti stated that this characteristic is implied in the fact that the group maintained over time its distinctive features, however, according to him, it is restricted only to those minorities defined as minorities by will, and not to minorities by force, so those persons who would like to assimilate to the rest of society, but are barred.

In this regard, the definition provided by Deschenes in 1985 to the Sub-Commission is in a certain sense capable of covering also minorities by force. Based on the words of Article 27 of the ICCPR, also Deschenes defined a 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”²⁰. However, this definition was not approved by the Sub-Commission, because it raised several criticisms.

1.1.5 European conception of national minority

The term national minority seems to be a purely European term. It appears for the first time in an international treaty in the European Convention of Human Rights²¹ (hereinafter ECHR), although there was no definition at all. And still now, a clear definition is not present, and the term remains

¹⁹ Memorandum by the Secretary General, E/CN.4/Sub.2/85, by the UN Commission of Human Rights, 1949, on Definition and Classification of Minorities.

²⁰ *Ibid.*

²¹ International Convention on Human Rights and Freedoms, drafted in 1950 by the Council of Europe, entered into force in 1953. All Council of Europe member states are party to the Convention. The Convention established the European Court of Human Rights. Judgments that find violations are binding on the State Parties, which have the duty to execute them in their territories.

contested. The reason why this term is used mainly in Europe is because of historical motivations; the broader definition of “national minorities” pictures them as historic minorities derived from the territorial divisions mainly due to the two world conflicts²². The European character of this notion is given also by the fact that the only documents and entities which tried to find a definition of national minority are European in nature. The first attempt was made by the Parliamentary Assembly (hereinafter PA) of the Council of Europe in 1990, in the Recommendation 1134 the PA defines national minorities as: “separate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of that state and have certain religious, linguistic, cultural or other characteristics which distinguish them from the majority of the population”²³. This definition poses emphasis on the separateness element, such that the group in question must be visibly separate from the rest of society with regard to some characteristics. It also highlights the temporal elements, which means that the group must have historical links with the region of state in question. For this reason, it is said that that definition proposed in the Recommendation 1134 looks at groups with historical presence in Europe.

In 1991, the Commission for Democracy Through Law²⁴ (hereinafter Venice commission) proposed another definition of national minority, hoping to reach a consensus, in order to develop a more effective ground of protection of national minorities also under the ECHR. The formulation stated: “a minority consists of a group of persons which is smaller in number than the rest of the population of the State, whose members, who are not national of the State, have ethnical, religious or linguistic features different from those of the rest of population, and are guided by the will to safeguard their culture, traditions, religion and language”²⁵. In this case the temporal element present in the previous definition is absent, and in the same sense it is explicitly stated that the persons belonging to national minorities are not nationals of the state.

Following these two attempts, in 1993 the PA issued another recommendation, Recommendation 1201, in which a new definition of national minority was present. “[The] expression “national minority” refers to a group of persons in state who:

- a. Reside on the territory of that state and are citizens thereof;

²² G. GULIYEVA, *Defining the Indefinable: A Definition of Minority in EU Law*, in *Eur. Y.B. Minority Issues*, 189, Bolzano, 2010.

²³ Recommendation n. 1134, by European Parliamentary Assembly, 42nd Sess., 1st October 1990, pt. 2 para 6, on the Rights of Minorities.

²⁴ The Venice Commission is an advisory body of the Council of Europe, focused on constitutional matters. It was created in 1990. Its primary task is to assist and advise individual countries on legal issues, for the well -functioning of democratic institutions and the protection of human rights. Its opinions are not binding.

²⁵ Opinion, CDL (1991)007, by the Commission for Democracy through Law (Venice Commission), 8th February 1991, *Proposition pour une Convention européenne pour la Protection des Minorités*.

- b. Maintain longstanding, firm and lasting ties with the state;
- c. Display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. Are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of the state;
- e. Are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language”²⁶.

It is evident the absence of the separateness element, however it adds new details, indeed it suggests that the minority must be “sufficiently representative” in respect of the population of the state; furthermore, it stresses the fact that the group must have a common will to preserve their identity.

In the same year, at the meeting of Head of States and Governments of the member States of the Council of Europe in Vienna, it was stated in the “Vienna Declaration” that national minorities have been created by the “upheavals of history”²⁷, referring to the two World Wars, underlining the fact that national minorities were created by members of one nationality that was placed within the borders of a country dominated by a different nationality, thus making the first nationality a minority within the new country²⁸. This notion suggests that whenever there is a kin-state/kin-minority relationship, the kin-minority is defined as a national minority.

In the same way, Kymlicka characterizes national minorities as groups resulting from the incorporation of territories into larger states²⁹. In his words, national minorities are “groups who formed functioning societies on their historical homelands prior to being incorporated into a larger state”³⁰.

1.2 Difficulties in implementation of previous definitions

As a matter of fact, all the past attempts to define in general terms what is a minority, had brought conceptual and terminological confusion, impeding the elaboration and implementation of an effective system of law and protection. In most of the cases, the international community had defined rights and procedures without having duly determined a definitive definition of minority. This behavior had not clarified either the subjects or the beneficiaries of the rights, or the specific content of the rights. Of course, this practice can lead to unjust appeals to these rights, causing possible social

²⁶ Recommendation n. 1201, by European Parliamentary Assembly, 44th Sess., 1st February 1993, Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights.

²⁷ Vienna Declaration, Appendix II, Oct. 9, 1993.

²⁸ J.R. VALENTINE. *Toward a definition of a National Minority*, in *Denver Journal of International Law and Policy*, 445, Denver, 2004.

²⁹ *Supra* note 22.

³⁰ W. KYMLICKA. *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, p. 54, Oxford, 2001.

conflicts, because of lack of clarity. The same lack of clarity brings fear and uncertainty for the interested parties, especially for states, who worry that minority rights can endanger their position and their sovereignty. Several doubts, problems, and difficulties have arisen since the creation of minority protection documents had been established. Some of them are going to be discussed in this section.

1.2.1 *Individual or Collective rights?*

The minority rights discourse brought to the lights a difference between the individual conception of rights and the collective conception of rights. The first supports rights attributed only to individuals, while the second group supports rights attributed to the entities *per se*, as collectivities. More generally, referring to human rights, it is looking at the individual dimension. They are a more modern definition of rights, that aim at protecting individuals against the modern state³¹. The second category, the one which looks at a more traditional view, protecting some distinctive features common to a particular community, are usually defined collective rights³². The question, if minority rights are to be considered collective rights, is highly controversial. For this reason, the notion of collective rights must be even more in-depth examined. Indeed, this expression can be viewed in two different aspects. The first one conceives the holder of the rights as a group, because, otherwise, the rights would lose their sense, if applied to a single individual. For example, the right to self-determination³³. The second aspect conceives rights attributable to individuals, in order to advantage the entire group, which the individuals are part of³⁴. This last approach was used in the wording of the most important tool for the protection of minorities: Article 27 of ICCPR. This article does not refer to minorities as entities *per se*, while it expressly refers to “(...) persons belonging to (...) minorities”. Indeed, the rights prescribed by the article are individual in nature, but they need to be exercised in collectivity with the group in question, in order to give advantages, they were thought for. From this reading of Article 27, it seems that minorities are entitled only to individual rights, and the collective character is limited to their application in community with the other members of the group. Capotorti provides some reasons to support this view. According to him, the protection of minorities is based on two norms: one providing to all individuals the right of non-discrimination; the other preserving the distinctive identity of the individual, in common with the group. The interpretation of minority rights as purely collective would undermine the individual side of these rights³⁵. The second reason, which Capotorti

³¹ A. P. VIJAPUR, *International Protection of Minority Rights*, in *International Studies* vol. 43, Is. 4, New Delhi, 2006.

³² *Ibid.*

³³ F. CAPOTORTI, *Are minorities entitled to collective international rights?*, in Y. DINSTEIN, M. TABORY. (eds.) *The protection of Minorities and Human Rights*, p. 505, Dordrech, 1992.

³⁴ *Ibid.*

³⁵ F. CAPOTORTI, *Are minorities entitled to collective international rights?*, cit. p. 508-510.

brought, is that any of the individuals belonging to a minority must be free to choose to benefit from the protection of this special rights³⁶. And finally, he cited a political reason, for which that the recognition of collective rights could be interpreted as if a minority group has also the right to represent their interests within the State, preventing the State its main task, which it is to say to represent the interest of all the population, and in most of the cases, this is against the legal order of the State in question³⁷.

1.2.2 *The right to Self-determination*

The right to self-determination is provided in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁸.

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of its own means of subsistence”³⁹.

But, the international community wonder to whom this right is bestowed. Following only the words of the article it is obvious to say people, but also the notion of people is confusing, and it overlaps with other notions in international law, such as: indigenous people and minorities. Part of the confusion is also because there are two school of thought examining the notion of self-determination. The classical view of self-determination considers nations to be groups of individuals who rationally decide to join to form a new society, then self-determination is seen as a procedure of establishing institutions of governments⁴⁰. The romantic school of thought instead sees self-determination as a secession, based on the Grotius notion of *jus resistendi ac secessionis*. Nation is an authentic community, with an authentic idea of nationhood. The nation can fight oppression through funding

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ ICESCR is a multilateral treaty adopted by the General Assembly in 1966. Its State Parties work toward granting economic, social, and cultural rights to non-self-governing territories and individuals. The ICESCR is part of the International Bill of Human Rights. The UN Committee on Economic, Social and Cultural Rights has the duty to monitor the application of the principle envisaged by the protocol.

³⁹ Resolution 21/2200, by UN General Assembly, 16th December 1966, on International Covenant for Civil and Political Rights and International Covenant for Economic, Social and Cultural Rights.

⁴⁰ J. CASTELLINO, J. GILBER, *Self-determination, Indigenous People and Minorities*, in *Macquarie Law Journal*, Vol. 3, Macquarie, 2000.

new institutions of government expressing their own community identity⁴¹. In modern era, the second school of thought had gained more and more weight, especially after the tool of self-determination was used to achieve decolonization. However, it was stated in more than one occasion by the international community that the right to self-determination is not closed only in the space of decolonization. For this reason, many scholars have asserted that this right can also be linked to other types of groups in international law, other than people. This reasoning is quite logical, since the dimension of peoplehood are somewhat unclear, and in many cases overlap and coincide with the notions of indigenous people and minorities. However, from existing human rights documents which assert minority rights, it is ruled out the possibility for minorities to ask for the right of self-determination, among them, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities insists in Article 8 paragraph 4 that nothing in the rights proclaimed by the declaration itself can interfere with States' territorial integrity⁴². Indeed, the predominance of international instruments for minority protection highlight the necessity to achieve political participation, assimilation and totally avoiding secessionist models. Nevertheless, some documents suggest that minorities have rights to a certain kind of self-determination, such as internal self-determination. As Antonio Cassese pointed out, the internal context of self-determination refers to the right to participate in the democratic process, and to exercise some form of autonomous development within the state boundaries⁴³. But, it must be always reminded that the right to self-determination covers the ideal of protecting oppressed peoples living under external oppression. And, as Wright intended about the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States⁴⁴ (hereinafter 1970 Declaration), the right to self-determination can be a tool for readdressing the disequilibrium among majorities and minorities within a society, thus a remedial right for minorities⁴⁵. And the same message seems to be given by the Vienna Declaration of 1993:

“[The right to self-determination] shall not be constructed as authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or

⁴¹ *Ibid.*

⁴² Resolution 47/135, by the UN General Assembly, 18th December 1992 on Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

⁴³ A. CASSESE, *Self-determination of Peoples: A Legal Appraisal*, Cambridge, 1995.

⁴⁴ With resolution 1966 (XVIII) of 16 December 1963, General Assembly decided to establish a Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. In 1970, the Special Committee delivered to the General Assembly a Draft Declaration, adopted by the Assembly in the same session, in which there were recognized the paramount importance of seven principles of international law concerning friendly relations and co-operation among States and resolved to undertake a study of those principles with a view to their progressive development and codification.

⁴⁵ J. WRIGHT, *Minority Groups, Autonomy, and Self-Determination*, in *Oxford Journal of Legal Studies* Vol. 19, Is. 4, Oxford, 1999.

political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind”⁴⁶.

1.2.3 “New” Minorities

In the European application of the rights of minorities, much of the debate is about the difference between “old” and “new” minorities. Since in Europe the term minority is often associated to historical communities, present in the territory of a state, the presence of new groups and communities has posed the question if these new groups have the same rights of minorities under European protection tools. More generally, these “new” minorities consist of migrants, asylum seekers, refugees and their descendants. Most of the time they are not recognized as minorities in the conventional sense, since the generally accepted definition of national minority in Europe relies on “(...) Maintain longstanding, firm and lasting ties with the state”⁴⁷. Therefore, it seems that who belongs to the so called “new” minorities should be protected under the general protection of individual human rights. In addition, due to the fact that someone leaves his/her own country to go somewhere else, it should be obvious that he/she wants to assimilate to the culture and the way of life of the place where the person goes. But this reasoning is not so apparent, since individuals do not easily want to give up their identity, and especially within the of European integration, which encourages migration, protection of identities is given a higher importance, indeed long-term migrants may become “old” minorities, and in the same time individuals of “old” minorities in one country, can decide to go in another country and become “new” minority in that state. Furthermore, although the existence of international instruments for the protection of these categories does not cut out the possibility of being protected on different grounds, such as minority rights. In conclusion, recalling the most important protection tools for minority rights, Article 27 of ICCPR confers rights to persons belonging to minorities that “exist” in a state, so the temporal element is not relevant for defining the existence of a minority, which instead is based on objective and distinctive characteristics.

II. PROTECTION OF HUMAN RIGHTS

As already said, the ability of a State is understood through the degree of protection of the rights of its citizens and every person residing in its territory. Human rights are important, and human

⁴⁶ World Conference on Human Rights document, A/CONF.157/23, by the UN General Assembly, 25th June 1993, on Vienna Declaration and Programme of Action.

⁴⁷ *Supra* note 26.

collectivity emphasize their importance with the time passing by. Many historical events had demonstrated this theory, and some of them are very near in time in our memory. For these reasons, the international community has worked hard during the past decades to define and improve the protection of the most important human rights. However, during this time, a needier category has emerged which need further attention: minority. As said in the previous section, minorities are sections of the population that live in a situation of non-dominance or of discrimination, thus they need special protection added to the simple human rights granted to individuals in general. Several documents have tried to describe these rights and implement a system of protection for minorities.

2.1 International Documents and Conventions

Most of them are international in nature. This means that the international community have cared about this topic, although most of the documents are not binding. This limit is due to the fact that the international community still relies on the principle of state sovereignty, therefore, states have the last word on decisions affecting their nationals and their territories. However, states have surrendered some of their sovereignty believing that it is in their own interest promoting human rights, thus these documents have still great importance.

2.1.1 Universal Declaration of Human Rights 1948

After the end of World War II, the international community was in need for a certain catalogue of human rights for all the individuals, with no exception. Although this declaration was framed in an individual rights approach, and no mention is made about minorities, some of its articles are of outstanding importance. Article 1 of the Universal Declaration proclaims that “All human beings are born free and equal in dignity and rights”⁴⁸. According to article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”⁴⁹. This last article is referred to as the non-discrimination article, and the principle expressed is of extreme centrality in the issue about minorities. Since the international community does not recognize the possibility of secession for what concerns minorities, the same international community has often highlighted the necessity of participation, equality in law and in facts for those people belonging to any kind of minority. Thus,

⁴⁸Resolution 3/217 A, by the UN General Assembly, 10th December 1948, on Universal Declaration of Human Rights.

⁴⁹ *Ibid.*

non-discrimination is necessary for protecting minorities, but not sufficient in itself to deal with the question, as Thornberry argued. However, it is a starting point for a general protection, and it has a leading role in the jurisprudence for the protection of minority rights. In the Universal declaration, the same principle it is restated in Article 7: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”⁵⁰.

2.1.2 International Covenant on Civil and Political Rights

With the drafting of the Covenant, the topic of minority rights re-entered in the international agenda, and although it was hard finding a formulation which the most parties agree with, the ICCPR is the first international instrument legally binding for contracting states, which contains an article about minority rights, specifically Article 27.

“In those states in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”⁵¹.

In the Article, three different kind of minorities were specified, in order to guarantee specific rights protection to each of them according to their peculiarities. This Article is very different from Article 2 of the UNDHR, since it precisely prescribes substantive rights to persons belonging to minorities.

Articles contained in the Covenant were framed by the (now defunct) Sub-Commission for the Prevention of discrimination and Protection of Minorities, which had the mandate to:

- a) Undertaking studies and to make recommendations to the Commission concerning the human rights and the protection of racial, national, religious and linguistic minorities⁵²;
- b) Other functions as determined by the Council or Commission⁵³.

Other provisions concern minorities, although not in the collective character of minority rights, but in the individual character, since the ICCPR, as the past documents were built around the individual rights approach. Article 25 deals with the participation in public life.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 39.

⁵² J. CASTELLINO, *The Protection of Minorities and Indigenous People in International Law: A Comparative Temporal Analysis*, in *International Journal on Minority and Group Rights* vol. 17, p. 393, Leiden/Boston 2010.

⁵³ *Ibid.*

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country”⁵⁴.

Article 18 guarantees the freedom to profess a religion, right to worship and right to live in accordance with that religion.

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”⁵⁵.

More specifically, in paragraph 2, the scholars identified the equivalent of the right of conscientious objection, so the possibility to refuse the military service for religious reasons. In paragraph 3, the covenant specifies that this article is not absolute in nature, and in specific cases the contracting state can limit it. Paragraph 4, instead, grants the possibility of having different education according to faith the persons belong to. Although this Article does not refer to minorities, in General Comment

⁵⁴ *Supra* note 39.

⁵⁵ *Ibid.*

22 to Article 18 the Committee on Human Rights firmly linked Article 18 to the protection of religious minorities.

“Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, *or represent religious minorities that may be the subject of hostility on the part of a predominant religious community*”⁵⁶.

Article 20 paragraph 2, states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”⁵⁷, and so provides safeguards against acts of violence and persecution against persons belonging to religious minorities.

Although these articles did not impose on states positive actions to improve the protection of minority rights, they are influential steps forward. And this is proved by the First Optional Protocol to the ICCPR that gives the right to individual to submit petition or communications for violations of their individual and collective rights.

2.1.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Although this covenant was not specifically conceived for addressing in particular the topic of minorities, many articles can be referred to their protection. Article 13 is perhaps the most important and addresses the right of education in several aspects.

“1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

⁵⁶ General Comment, CCPR/C/21/Rev.1/Add.4, para. 2, by the UN Human Rights Committee, 30th July 1993, General Comment No. 22.

⁵⁷ *Ibid.*

- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State”⁵⁸.

For the importance attached to this article, it is worth to analyze in depth its meaning. In the first paragraph it is recognized the necessity to respect human rights and the principle of tolerance among all countries and “racial, ethnic or religious groups”. In paragraph 2, this article goes a step further in the protection and uses an extensive method since established a set of obligations that states must met, in order to effectively protect the right of education of individuals. In paragraphs 3 and 4, the Article recognizes the freedom to choose for their own children the methods of education in accordance with their beliefs and convictions.

In Article 14 of the Covenant it was added the duty for states to introduce a compulsory primary school system, that respects the rights and freedoms cited above, where it does not exist, so it stresses

⁵⁸ *Supra* note 39.

even more the necessity and the value of education. In addition, Article 15 requires equal participation in cultural life for everyone.

As seen above, the Covenant urges the positive action by states, in more than one time. And to control the application of the articles contained, it was decided that states must deliver periodic reports. For this reason, the Committee on Economic, Social and Cultural Rights developed a monitoring mechanism and produced also guidelines, in order to facilitate the work of the States. In particular, the Committee asked whether “children belonging to linguistic, racial, religious or other minorities and children of indigenous people”⁵⁹ enjoy the rights under Articles 13 and 14 of the Covenant. In the same way, concerning Article 15, the Committee requests information on “promotion of cultural identities as a factor of mutual appreciation among individuals, groups, nations and religions as well as promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities of indigenous peoples”⁶⁰.

2.1.4 International Convention for the Elimination of All Forms of Racial Discrimination (CERD)

This convention, adopted by the General Assembly in 1965, committed to eliminating any form of racial discrimination and promoting a deep understanding among peoples, as stated in Article 2. Article 1, instead, states a definition of what is intended for racial discrimination: “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effects of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”⁶¹. This definition is important for the aim of this document, because it touches not only race in its strict sense, but also ethnic and national features that can be causes of discrimination of a group against another one, a situation very similar to a situation of non-dominance of a minority.

Article 4 requires contracting parties to take positive actions, in order to prohibit any forms of dissemination of ideas based on racial superiority or hatred. In the same way, incitement to racial discrimination and acts of violence is forbidden.

In the light of this commitment to improving positive actions by the states themselves, this convention created for the first time a way to monitor and review states’ actions for what concerns human rights. The convention establishes three procedures: first, in Article 9 paragraph 1, periodic reports by States

⁵⁹ *Supra* note 31.

⁶⁰ *Ibid.*

⁶¹ Resolution 20/2106, by the UN General Assembly, 21th December 1965, Convention on the Elimination of All Forms of Racial Discrimination.

Parties to the convention body; second, in Article 11, possibility for State Parties to denounce irregular practices by other state Parties; third, in Article 14 paragraph 1, individuals or groups of persons can make complaints⁶². This monitoring mechanism produced a limited jurisprudence on the interpretation and implementation of the Convention.

2.1.5 Universal Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992

In the United Nation Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, the UN recognizes that the role of minority rights plays an important part in the promotion of equality, peace and security, most of now days conflict indeed have been caused by internal and civil conflicts that then brought to interstate and international conflicts.

Article 1(1) of the Declaration provides that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”⁶³. To achieve these ends, they shall, according to article 1(2), “adopt appropriate legislative and other measures”.

Articles 2 and 3 provide for the specific rights of minorities groups and their ambits of action, while article 4 deals with special measures and articles 5, 6 and 7 provide the national policies and programmes, as well as cooperation and assistance among states, to achieve the equality of rights for minority groups.

Article 8 is special in its nature, since its scope is the protection of minority rights, but it is also in the interest of states, including their “sovereign equality, territorial integrity and political independence”⁶⁴, restating again the impossibility for minorities to aspire to self-determination. As said before, also in this case, in the Declaration there is no mention of possible sanctions in case of violation. Hence, it is clearly visible the character of non-binding document of the declaration.

2.1.6 Other Secondary UN instruments

⁶² After a recognition of the competence of the Committee by the State parties, individuals can petition to national body, who has the duty to examine the allegation and to attest that all national tools have been used. After that, the State party should inform the Secretary general and the petition is officially deposited before the Committee. The Secretary General shall notify to all State Parties. In case the petitioner has not received satisfaction from the national body, the petitioner can petition directly to the Committee in six months.

⁶³ Resolution 47/135, by the UN General Assembly, 18th December 1992, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

⁶⁴ *Ibid.*

In the aftermath of the second World War, and after the atrocious events happened in that time, in the 1948 it was approved the Convention of Prevention and Punishment of Genocide⁶⁵ that provides protection to all persons and groups living within a state, as defined by national, ethnic, racial and religious criteria. In Article 2 paragraph 1 the convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”, so, although the term minority was not used, it is easy to turn this definition to protect also minorities.

In other documents of the United Nations, there is a mention of minority rights, as in Article 30 of the Convention on the Rights of the Child of 1989: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language”⁶⁶.

In addition, also the UNESCO Convention against Discrimination in Education and the UNESCO Declaration on Race and Racial Prejudice deal with minority rights.

2.2 Regional Documents and Conventions

Special attention should be reserved to regional documents that aim at protecting rights of minorities in specific areas. Much of the regional jurisprudence refers to the work made in the European area. For this reason, it is mandatory to analyze some of the documents that regulate minority rights application in Europe. Especially because of the long history of discourse about minorities in the European territories. Since very long ago, minorities, of every kind, and their rights were considered as a crucial topic, since states understood that solving minorities problems can solve territorial conflicts, especially in territories at the borders among different countries. For these reasons, Europe has always had in mind the minority issue, although, as demonstrated by these documents, difficulties in agreeing to a unique definition and system of protection have prevented a coherent and operative defense.

2.2.1 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

This convention is the first international treaty that uses the formulation “national minority”. This instrument protects minorities and their rights through the principle of non-discrimination cited in

⁶⁵ The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948. It defines genocide in legal terms and impose to its State Parties to prevent and punish the crime of genocide.

⁶⁶ Resolution 44/25, by the UN General Assembly, 20th November 1989, Convention on the Rights of the Child.

Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”⁶⁷. In addition to the important ground of non-discrimination, there are other articles of the convention that touches minorities and their rights.

Article 6 deals with the right to fair trial and in paragraph 3 states that everyone charged with a criminal offence has the right: “(...) to have the free assistance of an interpreter if he cannot understand or speak the language used in the court”⁶⁸. In the same way minority rights are recognized through Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association). As showed by these instruments of protection, the general human rights security cannot be completely achieved without taking into account protection of minority rights, and *vice versa*, since minority rights have little importance in absence of a general human rights protection framework.

Additional significance must be shed on Article 2 of the Additional Protocol to the Convention No. 1 which obliges contracting States to assure education of minorities in their territories according to their needs and wishes. Article 3 of Additional Protocol No. 3 prohibits any type of ethnical cleansing, deportation or transfer of any citizens belonging to a national minority.

2.2.2 European Charter for Regional or Minority Languages

Adopted in 1992 by the Committee of Ministers of the Council of Europe, it does not consist of direct individual or collective rights, but it lists a series of potential claims in the area of regional or minority languages, a field very controversial in Europe since World War I. This instrument defines regional or minority languages as non-official languages traditionally used in a country by nationals of that country, who form a group numerically smaller than the rest of the country’s population⁶⁹. The objective is to preserve not only human rights, equality and dignity of a specific community using a specific language, but also to preserve cultural peculiarities that are a value for all mankind⁷⁰. It is evident that the document aims at protecting languages and not linguistic minorities as such, but it is also obvious that this kind of protection has consequences for communities using minority languages.

⁶⁷ European Convention for Human Rights and Fundamental Freedoms of 1950.

⁶⁸ *Ibid.*

⁶⁹ A. PETRICUSIC, *The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations*, in *Croatian International Relations Review*, vol. 11, No 38/39, Zagreb 2005.

⁷⁰ D. SHIMULA, *Rights of Persons Belonging to National Minorities in International Law*, in *Polish Y.B. International Law* 95, Warsaw, 2006.

A distinction is made between territorial and non-territorial languages. This was made in order to exclude migrants and “uncomfortable” minorities later arrived in the European territories. However, the line between migrant and person belonging to a minority is very thin, as previously discussed.

For what concerns the degree of protection set out by the document, the European Charter defines only the “minimal European standard”, so there is the possibility for states to implement higher levels of protection, while the reduction under the standard set by the Charter is prohibited.

2.2.3 Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe

After the fall of the Communist governments in Central and East Asia, the Parliamentary Assembly of the Council of Europe⁷¹ recognizes the urgency to address in appropriate way the “grave minority problems (...) [which] have been ignored and neglected for many years by authoritarian rule”⁷². And in 1993 the same Parliamentary Assembly issued Recommendation 1201 which requests the Council of Europe to adopt an additional protocol on the rights of national minorities to the European Convention on Human Rights. This special Protocol should have had the aim at enabling persons belonging to national minorities to appeal to the European Court of Human Rights, which ensures the respect of the rights contained in the ECHR. Since the Parliamentary Assembly cannot deliver binding decisions, it was up to the members states of the Council of Europe to ratify the recommendation to make this instrument binding.

The Recommendations introduced new aspects of the protection of the rights of minorities, but at the same time it maintained general protections:

- a) Protection for national minorities, at national and international level (Preamble 3)⁷³;
- b) Belonging to a national minority is a fact of personal choice (Article 2)⁷⁴;
- c) Attempts of forced assimilation are prohibited (Article 3)⁷⁵;
- d) Deliberate changes to the demographic composition in a region in which a national minority exists are prohibited (Article 5)⁷⁶;
- e) Self-organization of national minorities shall include also political parties (Article 6)⁷⁷;

⁷¹ The Parliamentary Assembly of the Council of Europe is the parliamentary body of the Council of Europe. The Assembly is made up of 324 parliamentarians from the national parliaments of the State Parties of the Council of Europe. The Assembly meets in Strasbourg and it is one of the main bodies of the Council of Europe.

⁷² *Supra* note 23.

⁷³ *Supra* note 26.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

- f) Right to use name/surname in the original language for official reasons (Article 7 para. 2)⁷⁸;
- g) Relationship between individuals of a national minority in one region and individuals of the same ethnic identity in another state should not be prohibited (Article 10)⁷⁹;
- h) Minorities have rights to some form of territorial and institutional autonomy (Article 11)⁸⁰;
- i) Introduction of some form of “positive discrimination”, in other words the act of giving advantage to those groups in society that are often treated unfairly (Article 12 para. 2)⁸¹;
- j) Introduction of some form of “reserve protection”, so the protection of fragments of population belonging to the ethnic majority of the people in one state, that reside in a region where the minority of the same state is present in higher number (Article 13)⁸².

The Recommendations tried to arrive to a more specific protection of the rights of national minorities. Some of the rights in the document looked at the daily life of persons differing from the rest of the population for ethnic, religious or linguistic reasons. However, although the work was remarkable, members states did not ratify an additional protocol to the ECHR.

2.2.4 *Framework Convention for the Protection of National Minorities*

During the Vienna Meeting of Heads of State and Government of the Council of Europe⁸³ in 1993, the main point on the agenda was addressing the protection of national minorities, and in the same meeting it was decided to work on a Framework Convention on National Minorities. The meeting created an Ad Hoc Committee for the Protection of National Minorities, and this body was responsible for the drafting of the Framework Convention for the Protection of National Minorities. This instrument was adopted by the Committee of Ministers on November the 10th 1994 and came into force in 1998. It is open also for states that are not members of the Council of Europe. The Framework Convention represents a new milestone in the protection of national minorities in Europe.

In the Preamble the Convention states that “the protection of national minorities is essential to stability, democratic security, peace in this continent” and it stresses the co-operation of all member states, and also of all states willing to adhere to this Convention.

In Article 1 and Article 3(2) it is possible to find again the dichotomy among individual rights approach and collective rights approach. The Convention seems to solve the problem in a way similar

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ The Council of Europe has held three summits of Heads of State and Government of all its member states. The first took place in Vienna in 1993. The second was held in Strasbourg in 1997, and the third Summit was held in Warsaw in May 2005.

to Article 27 of the ICCPR, so defining that the rights of the convention protect individuals belonging to national minorities, but these individuals have the rights to enjoy in community those rights with the other members of their group. As stated, “[Article 3(2)] recognizes the possibility of joint exercise of [the rights and freedoms guaranteed under the Convention], which is distinct from the notion of collective rights”⁸⁴. Although the Convention protects individuals, it is referred only to a specific group, which are national minorities, therefore, the Convention introduced a new step in the recognition of rights, that is the prior recognition of a national minority.

In Article 3(1) the Convention grants to each individual recognized as member of a national minority the free choice of being part of such group or not. This Article does not grant the possibility to members of minorities to recognize a national minority, but only to decide to be part of it. In the same way, states “do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the Framework Convention”⁸⁵. However, the Article does not clarify objective criteria to define a national minority, in this sense, Explanatory Report to Article 3(1) refers to a person’s self-identity to understand the affinity to the definition of persons belonging to national minority⁸⁶.

Other elements that can be found in the Convention are:

- a) Article 4 introduced the idea of positive discrimination. The Parties are obliged to adopt positive measures to achieve “full and effective equality between persons belonging to a national minority and those belonging to the majority”⁸⁷.
- b) Article 11(1) ensures to persons belonging to a national minority the possibility to use their name/surnames in their original language for official purposes.
- c) Article 16 prohibits measures altering the proportion of the population in areas where persons belonging to national minority resides.

As seen in the examples of some articles of the Convention, the work of Recommendation 1201 was used in this new document, in order to develop a more specific, realistic protection mechanism for national minority rights. However, the provisions of the Framework are not self-executing, and state parties must adopt them through national legislation. The implementation of this Convention is

⁸⁴ Explanatory Report to the Framework Convention for the Protection of National Minorities of Council of Europe, para. 1, 1995.

⁸⁵ *Supra* note 23.

⁸⁶ *Ibid.*

⁸⁷ Framework Convention on the Protection of National Minorities, adopted in 1994, entered into force in 1998.

monitored by the Committee of Ministers of the Council of Europe, assisted by an advisory group of experts.

2.2.5 *Organization for Security and Co-operation in Europe (OSCE)*

The Organization for Security and Co-operation in Europe (OSCE) has the goal to defend human and minority rights, and to build democratic institutions in the territories of the Member States. The question of minority rights protection was in the agenda on the OSCE since its beginning, and in the Helsinki Final Act of 1975 the Conference on the Security and Cooperation in Europe (CSCE), affirms that every State “on whose territory national minority exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere”⁸⁸.

Years later, during the meeting of the “Copenhagen Declaration” of the Conference on the Human Dimension, the states represented in the CSCE declared to “respect the rights of persons belonging to national minorities”⁸⁹ and for the first time it was provided “that the possibility to positive measures, intended to restore real and effective equality with the majority, may be taken with respect to minorities without these measures being considered as discrimination against the majority”⁹⁰.

In 1999, the OSCE adopted the Lund Recommendations on the Effective Participation of National Minorities in Public Life to encourage states to adopt positive measures to reduce tensions related to national minorities.

Through the Helsinki Final Act, the CSCE created the body of the High Commissioner on National Minorities (HCNM), who must be appointed by the Council of Ministers and must act independently with respect to all parties involved. This body has two missions: to control and reduce tensions in potential ethnic conflicts, and to inform the OSCE countries whenever these tensions are about to escalate to worrying levels.

2.3 Most relevant Court’s Decisions

For the importance attached to the interpretation of rights, especially in conflict situation such as when minorities rights are involved, it is worth analyzing some of the most famous judicial cases about minority rights and see how Courts have expressed themselves.

⁸⁸ Helsinki Final Act, Principle VII of the Declaration on Principles Guiding Relations between Participating States, 1975.

⁸⁹ Document of The Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 1990.

⁹⁰F. BENOIT-ROHMER, *The minority question in Europe: towards a coherent system of protection for national minorities*, (ed.) Council of Europe, Strasbourg, 1996.

2.3.1 *Lovelace vs. Canada 1977*

The first important case concerning minority rights was the one regarding Ms. Sandra Lovelace. She was a Maliseet Indian, living in Canada. After she got married with a non-Indian, according to the Canadian Indian Act of 1970, she lost her status of Indian. After she divorced from his husband, she wanted to go back living in the Indian reserve, but it was impeded, because of the loss of her status. According to the same Act, there was no loss of status for Indian men marrying non-Indian women. Ms. Lovelace alleged that the Canadian Indian Act violates: Article 2 paragraphs 1 and 4 of the ICCPR concerning protection of the family and equality of the spouses; Article 26 of the ICCPR about equality before the law and non-discrimination and finally Article 27 of the ICCPR regarding protection of minorities.

The Human Rights Committee concluded that Canada violated Article 27 of the ICCPR, because restricted Ms. Lovelace's rights to reside in a reserve, without reasonable motivations⁹¹. In the 1983, Canada informed the Committee that the Canadian Indian Act was amended following the decision of the Committee.

2.3.2 *Bernard Ominayak and the Lubicon Lake Band vs. Canada 1984*

Chief Bernard Ominayak of the Lubicon Lake Band⁹² brought a communication under Art. 2 of the Optional Protocol to ICCPR against Canada, a state Party to the protocol. He alleged a denial of the "right to self-determination" of the Band, including the right to "freely dispose of their natural wealth and resources" (Art. 1 ICCPR). Canada answered that Lubicon Lake Band cannot be considered a people, so they are not entitled to the right of self-determination. Individual Band members' right to hunt, trap and fish in traditional lands is recognized under the Indian Act and Treaty 8 of 1899. These activities are essential to maintain the subsistence economy distinguishing the Band's distinctive culture, spirituality and language. Oil and gas development in traditional lands threatened the environmental and economic base of the Band. The complaint was brought to the Human Rights Committee after the Supreme Court of Canada refused to hear an appeal from a decision of the Alberta Court of Appeal.

The Committee found that it cannot pronounce upon the existence of a 'people' under Art. 1⁹³. The claim instead engaged the rights of persons under Art. 27: "to engage in economic and social activities which are a part of a culture of the community to which they belong"⁹⁴. Therefore, Canada was found

⁹¹ Human Rights Committee Communication No. 24/1977, 14th August 1979, *Lovelace vs. Canada*.

⁹² Indian community, often referred as Cree First Nation in Alberta, Canada.

⁹³ Human Rights Committee Communication No. 167/1984, 26th March 1990, *Lubicon Lake Band vs. Canada*.

⁹⁴ *Ibid.*

in violation of Art. 27 of ICCPR⁹⁵. The Committee invited the parties to find a way to reconcile interests through negotiation⁹⁶.

2.3.3 *Kitok vs. Sweden 1988*

Ivan Kitok was a member of the Sami Swedish nationality who sued Sweden because he was denied traditional Sami rights because of loss of membership in a Sami village.

Kitok lost his status as Sami because of the "Reindeer Husbandry Act" of the Swedish government. This law stipulated that every Sami, who pursues another profession for three years or more, loses his right to breed reindeer, unless the Sami community explicitly recognizes it and resumes it as a family member.

Although Kitok had continued to maintain ties with Sami community, in the three years in which he pursued another profession, he lost the status of Sami and thus the full right to breed reindeer.

The Committee was concerned about the Swedish legislation, because Sami membership was dependent on other than objective criteria. Swedish government argued that the law aims at protecting the indigenous minority of the Sami against the interests of individual members by limiting the number of reindeer breeders. In those circumstances, the Committee does not see any violation of article 27 of the Pact⁹⁷.

2.3.4 *Sidiropoulos vs. Greece 1998*

The applicant, together with other Greek nationals, affirmed to be of Macedonian ethnic origin, decided to create a cultural association called "Home of Macedonian Civilisation". However, once asked for the recognition under Greek law of this association, the Court refused the application. The Court of Appeal and the Court of Cassation maintained the same reasoning.

The Court's approach was considered as leading in the jurisprudence about the Convention on the Protection of National Minority. The court recognized as legitimate the aims of the cultural association that Mr. Sidiropoulos wanted to create. Furthermore, the Court declared that Greek democracy had to tolerate and support associations of this kind according to the principles of international law⁹⁸.

2.3.5 *Chapman vs. United Kingdom 2001*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Human Rights Committee Communication No. 197/1985 of 27th July 1988, *Kitok vs. Sweden*.

⁹⁸ European Court of Human Rights Judgment 57/841/1047 of 10th July 1998, *Sidiropoulos and others vs. Greece*.

Sally Chapman purchased a piece of land in 1985 with the intention of living on it in a caravan. She was refused permission to live on the land by the District Council and was given 15 months to go away. She claimed her rights under the European Convention on Human Rights had been violated, including Article 8 (right to respect for private and family life) and Article 14 (violation of prohibition of discrimination). The European Roma Rights Centre intervened as a third party in the written procedure before the European Court of Human Rights. The organization referred to international standards regarding the special needs of minorities and other information concerning the position of Roma. The Court accepted that there has been an interference, not a violation, with the enjoyment of a home, as well as with private and family life. The Court held that Article 8 implied positive state obligations to facilitate the Gypsy way of life⁹⁹. However, in the present case, it applied the exception of Article 8 (2) that the interference was “necessary in a democratic society”, since the land inhabited by the Gypsy family was the subject to environmental protection¹⁰⁰.

2.4 The “Responsibility to Protect” doctrine and its results

During the 90’s, states, international organizations, international law scholars attempted to revise and standardize an approach to what has been called “humanitarian intervention”, henceforth, military and non-military action aimed at preventing or ending gross human rights violations.

The Doctrine of Responsibility to Protect (R2P) possibly is another potential protecting tool for guaranteeing human rights. Its principles were adopted in several occasions during the past years, and they have been created in response to what happened in Srebrenica and other similar disastrous events. Although, in many times they have not showed the wished results, this new concept of the international law revolutionized the field of relations among international entities and moreover, it added a new horizon for the protection of human rights.

2.4.1 The evolution of the notion

Responsibility to Protect doctrine was offered for the first time by the International Commission on Intervention and State Sovereignty (ICISS)¹⁰¹. The aim of offering a new concept was to solve the legal and policy dilemmas linked to the notion of “humanitarian intervention”, based on the new reading of Article 39 of the UN Charter, according to which threat to peace can also derive by situation of humanitarian emergency, often linked to mass violence against population by a state

⁹⁹ European Court of Human Rights, Judgment 43 of 18th January 2001, *Chapman vs. United Kingdom*.

¹⁰⁰ *Ibid.*

¹⁰¹ The Commission was founded under the auspices and authority of the Canadian Government and consisted of members from the General Assembly. The purpose of the Commission was to arrive to an answer to the debate raised by Kofi Annan, between those who value the norm of humanitarian intervention above state sovereignty and *vice versa*.

covered by the impunity of the principle of sovereignty. Under Chapter VII of the Charter, Article 41 and Article 42 give to the Security Council the power to adopt non-military measures and military measure, respectively. The indulgent use of veto in the Security Council, and the frozen decisions of the body regarding important humanitarian issues, led the international community to the formulation of the new concept of R2P. Since the beginning, the ICISS tried to divide the two concepts, and the difference is that humanitarian intervention looks at “possible justification for intervention outside the UN framework, concentrated on developing the exception to the rule”¹⁰², while R2P “seeks to elaborate a new rule that itself justifies and may require international intervention”¹⁰³, as Ramesh Thakur wrote. So, humanitarian intervention would have discarded the rule contained in Article 2 paragraph 7 of the UN Charter, which codifies the principle of sovereignty of the states and non-interference in domestic jurisdiction by the international organization of the United Nations. R2P, instead, wanted to impose itself as a new rule authorizing in a lawful manner the possibility in specific cases of collective intervention, admitted by the UN Charter. To reach this objective the ICISS had to deal with the principle of sovereignty and the solution offered was to re-characterize the principle in a way that sovereignty is conceived as responsibility, rather than control. The Commission affirmed that states are sovereign in the sense that they are responsible for the protection of their citizens, and this responsibility is a prerequisite for sovereignty. A failure to accomplish this responsibility led the international community to be able to act, in order to facilitate this protection, through prevention, protection or post conflict help.

“When a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect”¹⁰⁴.

The concepts closed in this quote are also known as the three pillars. The first pillar is the responsibility of the sovereign powers towards their own people, the second is the responsibility to the international community to enforce this responsibility, and the third the permission to use coercive measures, including military intervention, in order to meet this responsibility.

Always the Commission distinguished three different aspects of R2P: responsibility to prevent, to react and to rebuild. R2P in its preventing notion tried to strengthen sovereignty, by helping states to meet their protection responsibilities and to exercise these responsibilities, to build their capacity to

¹⁰² R. THAKUR, *Humanitarian Intervention*, in S. DAWS and T. WEISS (eds.) *The Oxford Handbook on the United Nations*, Oxford, 2006.

¹⁰³ *Ibid.*

¹⁰⁴ Report by the International Commission on Intervention and State Sovereignty, December 2001, Report on The Responsibility to Protect.

protect before conflicts break out, with the aim to reach the goal of good governance whose elements are: rule of law, competent and independent judiciary, human rights, independent press, political tolerance and dialogue.

Responsibility to react instead bases its concept on when states fail to accomplish their responsibilities, and in consequence of this, the international community has the duty to protect. The residual responsibility of the broader community intervenes only in presence of these situations:

- “when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect”¹⁰⁵;
- “when a particular state (...) is itself the actual perpetrator of crimes and atrocities”¹⁰⁶;
- “where people living outside a particular state are directly threatened by actions taking place there”¹⁰⁷.

The commission made it clear that the Security Council was the first body to decide on a matter relating the possibility of military collective action. However, it did not exclude the possibility for non-authorized action by regional or national entities. More precisely, in the Outcome Document of the 2005 World Summit¹⁰⁸, Paragraph 139 of the Outcome Document states that:

“The international community, through the united Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations, as appropriate, should peaceful means be inadequate and national authorities are manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law”¹⁰⁹.

However, also in this document, it is not stated that Security Council is the only one with the power to authorize collective action through the use of force.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ The 2005 World Summit was summit meeting following the United Nations' 2000 Millennium Summit, which led to the Millennium Declaration of the Millennium Development Goals. The contents touched during the summit led to a document, agreed to by the delegations present and then brought before the General Assembly for adoption as a resolution.

¹⁰⁹ Resolution 60/1 E, by the UN General Assembly, 24th October 2005, Outcome Document of the 2005 World Summit.

Unlike these previous documents, the High-Level Panel on Threats, Challenges and Change Report¹¹⁰ attached to the Security Council not only the authority, but also the responsibility to decide and authorize collective action through the use of force. The Report did not take into account possible actions by regional or other organizations in absence of the Security Council. The Panel had the aim to create a unique channel for collective action through the executive body of the UN.

Finally, responsibility to rebuild, concentrates on the post-conflict engagement of the broader community to rebuild and prevent future causes of harm. For this purpose, the Outcome Document created the Peacebuilding Commission, in order to help countries to pass from war and conflict to lasting peace¹¹¹.

2.4.2 Remedies to Inaction

From the documents that tried to provide the notion of R2P, few interrogatives come up. First of all, whether the R2P is an obligation to the international community to act to stop abuses, or if it just permits the intervention. The violations under which the R2P is triggered seem to be part of that group of *jus cogens* violations, that provide universal jurisdiction to act, but often they are considered to be less hateful, and therefore, as suggested by Thomas Weiss, they produce only a moral obligation to act, not a legal or political one¹¹².

The question of obligation brings to another interrogative about the R2P, if the notion becomes widely accepted as obligation, what are the effects of inaction? According to the interpretation of Bellamy and Reike of the first two pillars: “states have a legal duty to take peaceful measures to prevent genocide wherever they have relevant influence and information and an obligation to use peaceful means to ensure compliance with the laws of the war”¹¹³. However, the obligation was never clearly expressed by the Outcome Document, as Rosenberg suggested¹¹⁴. And if R2P were an obligatory norm, the document would have suggested legal sanctions in case of inaction. However, problems arise in imaging how to set “objective criteria for the establishment of manifest failure and the requirement of collective action”¹¹⁵. Furthermore, if it is problematic to define clearly when action is

¹¹⁰ Resolution 59/565, by the UN General Assembly, 2nd December 2004, Note by Secretary General on High-Level Panel on Threats, Challenges and Change Report - The United Nations' High-level Panel on Threats, Challenges and Change was created in 2003 to analyze threats and challenges to international peace and security, and to recommend action based on this analysis.

¹¹¹ Resolution 60/180, by the UN General Assembly, 30th December 2005, Peace Building Commission.

¹¹² T.J. FARER, D. ARCHIBUGI, C. BROWN, N.C. CRAWFORD, T. WEISS, N. WHEELER, *Roundtable: Humanitarian Intervention After 9/11*, in *International Relations Vol. 19, No. 2*, p. 211-250, Aberystwyth, 2005.

¹¹³ A. BELLAMY, R. REIKE, *The Responsibility to Protect and International Law*, in A. BELLAMY, S.E. DAVIS, L. GLANVILLE (eds.) *The Responsibility to Protect and International Law*, Leiden, 2010.

¹¹⁴ S.P. ROSENBERG, *Responsibility to Protect: A Framework for Prevention*, in A. BELLAMY, S.E. DAVIS, L. GLANVILLE (eds.) *The Responsibility to Protect and International Law*, Leiden 2010.

¹¹⁵ *Supra* cit. 97.

required by states, and therefore, when the grounds for punishment of inaction are operating, it is even more controversial, imaging how to punish non-compliance of international organizations or political bodies.

The uncertainty about the connotation of obligation and the consequences of non-compliance raise a broader question: whether, or not, R2P is hard norm of international law or instead a “soft law”, or even just a political principle.

2.4.3 *Emerging Norm or Principle of Soft Law?*

The High-Level Panel Report classified R2P as an emerging norm. Some of the features, indeed, are well established in the principles of international law, however, other are really innovative, and for this reason, according to some legal scholars is premature to speak of a norm.

In analyzing the aspect of the notion that are already present in international law, it can be seen that the conception of sovereignty as responsibility was already conceived by Hugo Grotius, stating that states have to think to the benefit of the subjects of rights and duties, therefore human beings¹¹⁶. Following his reasoning, it is also stated that it is allowed to go to war because a state is maltreating its subjects¹¹⁷. The same thought was subsequently expressed also by the philosopher John Locke that explained how the relationship among state and subjects is based on trust¹¹⁸. Additionally, in international law was already understood that sovereignty provides duties also at international level, and that the state cannot act in its territory, regardless of the effects, as stated in the case *Island of Palmas* by the arbitrator Max Huber¹¹⁹. And finally, with the adoption of the UN Charter, the link between sovereignty and power was definitely discarded, thanks to the focus of the Charter to human rights. This was accompanied by the recognition by the International Court of Justice (ICJ)¹²⁰ of the *erga omnes* obligations, that oblige the states towards the international community as a whole¹²¹.

In the same way, the parameters for the action which work for the notion of R2P, are already accepted by the international community. The three-partition in responsibility to prevent, to protect and to rebuild, were in the vision of the UN peacekeeping action of 1990s, and they are also present in the famous “Agenda for Peace”¹²² of the Secretary-General Boutros Boutros-Ghali, in which the

¹¹⁶ H. LAUTERPACHT, *The Grotian Tradition in International Law*, in *British Year Book of International Law*, 1, 27, London, 1946.

¹¹⁷ *Ibid.*

¹¹⁸ J. LOCKE, *The Second Treatise of Government*, chap. XIII, para. 49, London, 1690.

¹¹⁹ Arbitral award by Permanent Court of Arbitration, of 4th April 1928, case n. 829, *Island of Palmas* case.

¹²⁰ ICJ is the principal judicial organ of the United Nations. It settles legal disputes between member states and gives advisory opinions to UN organs and agencies. Its members are elected by the General Assembly and Security Council for a term of nine year. Its headquarter is in the Hague, Netherlands.

¹²¹ Judgement by the International Court of Justice, of 24th July 1964, *Barcelona Traction* case.

¹²² Resolution 47/277, by the UN General Assembly, 17th June 1992, *An Agenda for Peace*.

international community must focus, not only on the mere action, but also on the aspects that anticipate and comes after the action, in order to stabilize a long-lasting peace.

However, the innovative aspects for the notion of R2P create doubts about the legitimacy to be considered a norm of international law. The thing that is the most original, is that, not only the notion links responsibility to protection, but also it links responsibility to a sense of positive action by the states. Although the International Law Commission (ILC)¹²³, Draft Articles on State Responsibility provide for some limited duties to act for states in case of extreme gravity, this obligation is limited to particular category of violations (“gross or systematic failures by the responsible State”). Furthermore, the Commission envisaged two consequences:

- “To cooperate to bring [the serious breach] to an end through lawful means”¹²⁴;
- “Negative obligation of states not to recognize as lawful a situation created by a serious breach and not to render aid or assistance in maintaining that situation”¹²⁵.

From the reading of these Article, it could seem that the notion of R2P is not so different from the already established norm of cooperation under Article 41(1), however, the Outcome Document of the 2005 World Summit does not provide limitation for the action, instead it extends the idea of responsibility to all forms of “genocide, war crimes, ethnic cleansing and crimes against humanity”¹²⁶. In this sense, the Outcome Document marks a progressive development in international law, already conceived by the ILC that acknowledged that the creation of positive duty to cooperation under Article 41(1) “may reflect the progressive development of international law”¹²⁷, therefore leaving space for R2P to step in.

2.4.4 Results

Many would say that R2P have failed, because of the nowadays situation in Syria, where the Security Council action is frozen by the veto usage of the five permanent members and the indecisive behave of the Council itself. However, many other missions had great results, like in Darfur, or those in Libya, Ivory Coast, South Sudan and Yemen, as stated in the 2012 speech of the previous UN Secretary General Ban Ki Moon, in a meeting in New York focused on R2P.

¹²³ It was established by the United Nations General Assembly in 1948 for the promotion of the progressive development of international law and its codification. It holds an annual session at the United Nations Office at Geneva.

¹²⁴ Resolution 56/10, by the UN General Assembly, 2001, Report of the International Law Commission on its Fifty Third Session.

¹²⁵ *Ibid.*

¹²⁶ *Supra* note 93.

¹²⁷ *Supra* note 106.

Furthermore, the concept of R2P has been inserted in many international Documents, mainly UN documents; according to the Security Council, the notion is present in more than 50 resolutions and presidential statements, the same has been state by the Human Rights Council for what concerns its work. Also, at regional level it is important the contribution to the functioning of the notion of R2P the creation of focal points, which are necessary to establish a solid base for the development of local architecture for implementing the principle of R2P, and therefore prevent, protect and rebuild form abuses.

What continues to block the effective implementation of the principle are the blockages at global political level, therefore, it is needed a higher number of way to seize initiative of R2P. Although already exist some forms to bypass the main decisional organ, the Security Council, their legitimacy can be questioned, or in alternative are not timesaving as hoped. Among these mostly non-coercive methods, under Article 12 of the UN Charter, the General Assembly can investigate if a tension or conflict can endanger the maintenance of international peace. The Human Rights Council can establish fact-finding missions or appoint a special rapporteur, in order to investigate on the situation, and in many cases also to provide advises and deliver messages on key decisions for the states in question and its relationship with the international community as a whole, in order to end the conflict.

III. ROHINGYA'S CRISIS

Rohingyas are the population of the Rakhine or Arakan state, respectively the name in Burmese language or Arab language. This population is ethnically and culturally different from the Burmese majority. They speak Bengali, they are Muslims similarly to Bangladeshi populations. They are therefore an ethnic, religious, cultural and linguistic minority living within the borders of Myanmar. This differentiation led to growing degree of persecution. The Muslims Rohingya crisis is not new, but the events have rapidly escalated in recent waves of violence that can be traced back to a specific episode happened in 2012, when a Buddhist woman was raped and killed by a group of Muslims. This tragic event caused a massive attack on ten Muslims men who are beaten to death by a group of Buddhist men¹²⁸. However, this is only the one of the last episodes of violence that happened in Myanmar, and the roots of all of this are not difficult to detect.

3.1 Rohingya: A History of Violence (1784 – 2016)

The regime of violence in Myanmar is not new and according to Galtung, structural and cultural violence cause direct violence, and in the other way around, direct violence reinforces structural and

¹²⁸ B. DRISS, *Rohingya Minority in Myanmar between the Religious Persecution and the Reality of constitutional Protection*, in *Brawijaya Law Journal Vol. 3 Is. 2*, Jakarta, 2016.

cultural violence¹²⁹. Structural violence is evident in a state and society structures which are repressive, aggressive, exploitative and alienating. Cultural violence is full of patriotic and heroic thought and language of hate against the other, while direct violence is physical, verbal and visible in behavior¹³⁰. What happened to Rohingya group can be definitely recognized in all of the three categories, and it must be traced back to long ago in history.

3.1.1 *Origins of marginalization*

Islam was introduced in the region of today Myanmar thanks to the first wave of Arab merchants, and there is evidence of settling of Arabs in the region of Arakan during the 9th century¹³¹. In 1430, it was founded the first Islamic state in Arakan, lasting till the end of the 18th century. During this period Arabs were dominating the trade and the techniques of agriculture, they developed a flourishing society, which put the roots for the importance and the richness of the region in the colonization period. However, from 1784, the Burmese invasion changed drastically the destiny of Arabs in Myanmar and of the people living in the region of Arakan, since the Buddhists started persecuting Muslims fearing the spread of Islam in the region¹³². In 1824, Britain colonized the Myanmar and annexed it to the Government of British Colonial India¹³³. In 1937, Britain made Arakan an independent colony, named after the British government of Burma¹³⁴. Muslims in these regions strongly resisted to British occupation, willing to protect their independence, their culture and their religion from new waves of repression. For this reason, Britain feared the power of the Islamic tradition in the region, and the British government began a campaign to get rid of the influence of the Muslim and provided the Buddhists with arms and support to arise enmity among them. The British governments also enacted several policies and actions against Muslims, such as: expelling Muslims from their jobs and giving to Buddhists the place, confiscating their properties and distributing to the Buddhists, closing Islamic institutions and schools¹³⁵. In this way the British authorities managed to create a discriminating and repressing structure towards Muslims. These acts of structural violence were then followed by the first episodes of direct violence in 1938 and 1942, with hundred thousand of victims of Muslims from the Rohingya people. And to direct violence was attached also cultural

¹²⁹ J. GALTUNG, *Violence, War, and Their Impact: On Visible and Invisible Effects of Violence*, in *Polylog: Forum for Intercultural Philosophy*, Berlin, 2004.

¹³⁰ *Ibid.*

¹³¹ S. HANI, *Muslims of Rohingya: The journey to escape from Death to Death*, in *Arakan News Agency (ANA)*, Riad, 2014.

¹³² B. ABID, *Racism to Rohingya in Burma*, in *Arakan Monthly* (on line magazine), 2012.

¹³³ C. AYE, *The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)*, in *SOAS Bulletin of Burma Research*, Vol. 3, No. 2, p. 403, London, 2005.

¹³⁴ *Ibid.*

¹³⁵ J. LEIDER, *Arakan Studies: Challenges and Contested Issues, mapping a field of historical and cultural research*, p. 15, Bangkok, 2005.

violence, when 1947 during the sessions for writing the contract of independence, Muslims of the region of Arakan were not invited, cutting them out of the process of the building of the nation, which they have seen developing, and in which they have always live, and where they want to live¹³⁶; in the same year Arakan Muslims were prevented from voting because considered as citizens of suspects¹³⁷.

3.1.2 Current situation and its causes

In 1962 Myanmar was declared a socialist state and the Communist government announced its fight against Muslims and Islam. Communist government feared the will of independence of the Rohingya people and for this reason Rohingya were deprived of the right to acquire citizenship of Myanmar and also of the rights of education, employment, travel, and the Communist government imposed on them unemployment and isolation in the woods, left living in primitive ways. In 1967, the government withdrew the citizenship of thousands of Muslims of Arakan region, and it expelled 28 thousand Muslims to the near border of Bangladesh, and these actions continued also in 1974¹³⁸. In 1978 the military junta decided to start a large-scale program with military precision named “operation Dragon King”¹³⁹. The operation aimed at persecuting Rohingya people especially, with false allegation of violation of nationality laws, illegal immigration, leading to mass killing and expulsion from their land¹⁴⁰. One of the first decisions was the confiscation of more than 90% of the territory of Muslims and their properties. Rohingyas fled to Bangladesh, in order to escape this regime of violence. In Bangladesh they have lived in poor, overcrowded and bad-equipped camps where the basic needs were not met. The government of Bangladesh tried to negotiate an agreement with Myanmar, in order to send thousands of Rohingyas back in the Burmese borders. Rohingyas refused fearing what could have happened returning in Myanmar. In response Bangladeshi authorities started to cut food off and other supplies to the camps. In order to escape death, many Rohingyas decided to return to Myanmar, but many other violent actions followed¹⁴¹. In 1988, Muslims of the Arakan region were evacuated from their homes and properties, in order to build villages and homes for Buddhists, and in some cases, they were involved in the construction of these new houses, under forced labor, so in a status of slavery¹⁴². Another exodus of Rohingya population occurred in 1991 and 1992 during the State

¹³⁶ M. CHARNEY, *Buddhism in Arakan: Theories of Historiography of the Religious Basis of Ethnonyms*, in *Arakan History Conference*, p. 53, Bangkok, 2005.

¹³⁷ F. BLUM, *In their own voice – Democracy – as perceived in Burma/Myanmar 1921-2010*, in *South East Asian Studies*, Passau, 2014.

¹³⁸ E. BIVER, *Religious Nationalism: Myanmar and the role of Buddhism in anti-Muslim narratives, An analysis of Myanmar's ethnic conflicts through the lens of Buddhist nationalism*, Lund, 2014.

¹³⁹ B. LINTNER, *Outrage: Burma's Struggle for Democracy*, Bangkok, 1990.

¹⁴⁰ *Ibid.*

¹⁴¹ HUMAN RIGHTS WATCH, *Burma: Rape, Forced Labor and Religious Persecution in Northern Arakan*, New York 1992.

¹⁴² C. LEWA, *North Arakan: An open Prison for the Rohingya*, in *Forced Migration Review*, Issue 32, Oxford, 2009.

Law and Order Restoration (SLORC) military government. Those people fled to Bangladesh, still today refuse to return and be repatriated in Myanmar¹⁴³.

In 2001, the wave of direct violence became to be organized and rationalized in all the cities of Myanmar, under the control of the Movement named 969, and through the hatred speeches of its leader, the Buddhist extremist monk Ashin Wirathu¹⁴⁴. Monks are very participating in the targeting of Rohingyas as enemy of the states, and they are able to shape populations opinions, thanks to their great influence on the society. In September 2012, after the break out of new violence against Rohingyas, groups of monks in Mandalay demonstrated asking for the removal of the internment of Rohingya in Myanmar¹⁴⁵. In October, a week before the second outbreak of violence, hundreds of people living in the Rakhine state, including monks, demonstrated for the reallocation of Muslims living in the zone of Sittwe, a city in the Rakhine district¹⁴⁶. These demonstrations were then followed by a ten-point document circulated by the All-Arakanese Monks' Solidarity Conference, defining Rohingyas sympathizers as traitors, and asking for the expulsion of Rohingyas by the state¹⁴⁷. In the same month, Buddhist groups prevented doctors from delivering medicines and cures to camps of Rohingyas, threatening them, in order to prevent them from continuing their work¹⁴⁸.

3.2 The infringements of Human Rights in the case of Rohingya

After the event in June 2012, the president of Myanmar, Thein Sein, stated that the Rohingya were not welcome in Myanmar, "we will take care of our own nationalities, but Rohingya who came to Myanmar illegally are not of our ethnic nationalities and we cannot accept them here"¹⁴⁹. Here it is evident the basis of discrimination on which the Myanmar government builds its relationship and its role towards the Rohingya people. This sentence exemplifies the policy undertaken towards Rohingya by the government, and it is composed by several violations and restrictions of human rights. Every limitation has been codified and therefore they are legal obstacles that put more and more space between the State of Myanmar and the Rohingya.

¹⁴³ W. MCGOWAN, *Burmese hell*, in *World Policy Journal*, Vol. 10, Is. 2, p. 47-56, New York, 1993.

¹⁴⁴ Y. MOSHE, *The Muslims of Burma a study of a Minority group*, in *Journal of South East Asian Studies*, Vol. 4, Is. 2, Heidelberg, 2002.

¹⁴⁵ *Monks in Myanmar rally to show support for president's anti-Rohingya plan*, in *Associated Press*, New York, September 4th, 2012.

¹⁴⁶ A. BOTTOLIER-DEPOIS, *Muslims trapped in ghetto of fear in Myanmar city*, in *Agence-France Press*, Paris, October 19th, 2012.

¹⁴⁷ H. HINDSTROM, *Monk group calls on locals to target 'Rohingya sympathizers'*, in *Democratic Voice of Burma*, Oslo, October 23rd, 2012.

¹⁴⁸ T. FULLER, *Threats Hinder Aid Myanmar, Doctors Without Borders*, in *New York Times*, New York, November 5th, 2012.

¹⁴⁹ RADIO FREE ASIA, *Call to put Rohingya in Refugee Camps*, Washington D.C. 2012.

3.2.1 *Infringements of International Human Rights Document*

One of the major burden to which Rohingya people are subject is that they are under the condition of statelessness and lack of citizenship, although this condition violates the Article 15 of the Universal Declaration of Human Rights, which expressively refers to the right to citizenship, since nationality is the legal tie that allows an individual to fully enjoy a range of protections and rights by the state. Furthermore, it also violates Article 2 of UDHR which says that “no one can be arbitrarily deprived of his nationality nor the right to change his nationality”, and in this sense it prohibits racial and ethnic discrimination as a basis for depriving nationality. This restriction is at the heart of the systemic discrimination against the Rohingya people. The government pretended to portray them as outsiders, and worse, as illegal immigrants, so as people who have no cultural, religious, or social ties with Myanmar, and therefore not belonging to the country. The aim of picturing Rohingya people like this is to avoid any duty of the Myanmar government towards them, and furthermore, to be able not to take into account violence and abuses towards this people, since they are not under the protection of the state of Myanmar. This characterization has been the basis for other unjustified regulations by the government.

They are also restricted on the right to family life, since 1994, when the government authorities decided to stop issuing and to refuse any birth certificate to Rohingya’s children¹⁵⁰. Time after, Rohingya were required to obtain official marriage authorizations from special authorities in their region, which can take also two years to be properly done, and in addition from 2005, couples should also sign an undertaking in which they would promise not to have more than two children¹⁵¹. The government tried to avoid any increase in the number of Rohingya people, also because it is interested in their territory. Furthermore, these policies push people to flee the country, which is the aim of the Myanmar government. These requirements violate Article 16 of UDHR which states: “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to find a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”, and they also violate Article 12 of UDHR: “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

They are restricted on movements, although Article 13 of UDHR assures that: “(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country”. However, the Lieutenant

¹⁵⁰ HUMAN RIGHTS WATCH, *Burma: Revoke the two- child policy*, New York, 2013.

¹⁵¹ *Ibid.*

General Mya Thinn stated that since Rohingya are foreigners inside Myanmar, they could not move and travel, and for this reason, they are required to obtain, or in most of the cases obliged to illegally acquire, travel passes from their local authorities to move from their village or region¹⁵².

They are restricted on education and employment field, since the government provided secondary education only to Myanmar citizens, while Rohingya can only attend primary schooling programs. This is against Article 26(1) of UDHR: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”. This policy aimed at avoiding any development for Rohingya people in any field, and it aims also to the disruption of the basis of their culture, since children can only participate to primary state school, and any Islamic school is prohibited. And on the same basis of lack of citizenship, they cannot join the civil service or participate actively in the government, which go against Article 21 of UDHR: “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country”. They are completely alienated from the participation to the society of the state in which they live.

They are obliged to force labor according data recorded by several well-qualified sources. According to Human Rights Watch and the UN, Rohingya are obliged to work for state-run, profit-making industries and for the construction of “model villages” on the territory of Rohingya, but that are reserved for Buddhist citizens¹⁵³. They are expropriated of their territory in which they have always lived and in which they have their properties, without any kind of compensations, as reasonably would have prescribed any law system in these cases.

The cited list of violations is connected to government policies that make the life of Rohingya full of obstacles for a decent life. However, since Rohingya are not recognized as citizens of Myanmar under 1982 Citizenship Law, they are invisible under state law, and they are not able to claim for any right or any protection. For this reason, it is possible to say that the government of Myanmar has created a legal structure of discrimination that make the Rohingya eligible to be identified as a minority in need of protection.

3.2.2 Categorization of infringements

¹⁵² *Supra* note 48.

¹⁵³ *Supra* note 128.

The events described above are caused by a systemic discrimination against Rohingya people, this is a political, social and economic system, that through law, policy and practice, discriminate this minority. This discrimination makes the violence justifiable in the eyes of the Burmese authorities¹⁵⁴.

This system anchored in the Citizenship law of 1982, which design three classes of citizens, and that indeed cut off the right of Rohingya to aspire to Myanmar citizenship. They are rendered in this way stateless, unable to be protected by the laws of the states and therefore subject to any kind of abuse. This system ensures discrimination, also in absence of persons discriminating. The statelessness has harsh consequences inside Myanmar, but also out of the territory. Inside Burmese borders, discrimination renders Rohingyas stateless, but statelessness also validates other violence and discrimination. However, all human rights belong to citizens of a state in the same way they belong to stateless people, so the Myanmar discrimination in the light of presumed statelessness is unacceptable. In the same way immigration law, which can distinguish among those with or without nationality, cannot discriminate on the ground of ethnicity, at the expenses of human rights. This aspect has effect on Rohingyas also in other territories, where thousands of them fled fearing persecution in their homeland. In none, of these countries (Bangladesh, Thailand, Malaysia, India, Saudi Arabia), including Myanmar, rights of Rohingyas are respected, in the light of the fact that their ‘right to have rights’, this is to say nationality, is absent¹⁵⁵.

Most of the problems relies in the fact that statelessness makes violations of any sort possible, among which some scholars see the grounds for defining them as crimes against humanity, and therefore in need for the protection of the international community. As Professor William Schabas notes: “the Rohingyas are the *prima facie* victims of the crime against humanity of persecution”¹⁵⁶, but beyond that, other nine crimes, stated in the Statute of Rome listing Crimes against Humanity¹⁵⁷, can be certified for the violence suffered by Rohingyas in Myanmar, and in other countries: murder, forcible deportation or transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, enforced sterilization or any other

¹⁵⁴ B. ZAWACHI, *Defining Myanmar's Rohingya Problem*, in *Human Rights Brief*, Vol. 20, Is. 18, Washington, 2012.

¹⁵⁵ *Ibid.*

¹⁵⁶ W. SCHABAS, *Crime against Humanity in Western Burma: The Situation of the Rohingya*, in *Irish Centre for Human Rights*, Dublin, 2010.

¹⁵⁷ The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court. Adopted in 1998 and it entered into force in 2002, the statute established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Under the duties prescribed by the statute, the Court can only decide on the four crimes when states are “unable”, or “unwilling” to do so. The jurisdiction of the Court is limited to the territories of the State Parties, or in some cases it can extend its jurisdiction when the Security Council authorizes to do so.

sexual violence compared in gravity, enforced disappearance of persons, the crime of apartheid, other acts intentionally causing suffering and injury¹⁵⁸.

Defining the crimes perpetrated against Rohingya people as crimes against humanity has strong ties with the very words of the Statute of Rome, since it defines crimes against humanity any of the act listed in Article 7(1) “when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack”¹⁵⁹. Action by ethnic Buddhist in Rakhine state and the inaction of the Burmese authorities suggests that there is a shared will to remove Rohingya from the area, as stated, more than one time, by political members, among which the president Thein Sein himself, who stated that the Rohingya could and would not be accepted as either citizens or residents of Myanmar, and he asked to the UN High Commissioner for Refugee (UNHCR), to place them in camps outside the territory of Myanmar¹⁶⁰.

In the light of the presumed perspective of the Burmese government, a growing number of experts asserted that Rohingya community face a high risk of genocide. Under Article 2 of the Genocide Convention, genocide is defined as:

“Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures to prevent births within the group;
- Forcibly transferring children of the group to another group”¹⁶¹.

According to Professor Schabas, “under the circumstances, it does not seem useful at this stage to pursue an analysis that necessarily depends on an expansive approach to the definition of genocide”¹⁶², to which the international community still attach a very special resonance. However, the circumstance to which Professor Schabas refers, are those back in 2010, so before the last attacks on Rohingya, that poses them under a more impressing risk. So, establishing a procedure to face high risk of genocide should be envisaged by the international community, also in the light of the R2P

¹⁵⁸ *Supra* note 140.

¹⁵⁹ Rome Statute of International Criminal Court, Rome, 2002.

¹⁶⁰ DVB MULTIMEDIA GROUP, *Government will not recognize Rohingya*, in *Democratic Voice of Burma*, Oslo, July 12th, 2012.

¹⁶¹ Convention on the Prevention and Punishment of the Crime of Genocide, Geneva, 1948.

¹⁶² *Supra* note 142.

doctrine, or in the more concrete wording of the Genocide convention according to which “any Contracting Party may call upon the competent organs of the United Nations to take such actions under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide”¹⁶³.

3.3 Possible outcomes and recommendations of the international community

Past and current events urge an effective response by the international community. Although few actions have been undertaken, many international members have already expressed their concern, and ask for the action of the appropriate organs of the United Nations.

3.3.1 Past actions by relevant national, regional and international actors

After the most recent waves of violence in Myanmar, the government criticized by various human rights associations decided to establish a 16-member committee to investigate the incident of June 2012, where 10 Rohingya were killed by a Buddhist group after a woman was raped¹⁶⁴. The president Thein Sein appealed to the respect of the rule of law and ask for the cooperation of the population¹⁶⁵. The Committee concluded that violent actions were not to be linked to religious discrimination, but to mutual cultural and religious differences among the Buddhist and the Rohingya group. In any case, a state of emergency was declared in the Rakhine state. Myanmar government received many accusations of abuses by the authorities towards Rohingyas during that period¹⁶⁶. To discard any doubt about the transparency of the government’s actions, president Thein Sein established a second 27-member committee of investigation, in which Muslim representatives were included. The committee arrived at the same conclusion of the previous group¹⁶⁷.

Little efforts by the Myanmar government to settle down the crisis, in pacific and definitive way, are evident; however, at regional level the Association of the Southeast Asian Nations (ASEAN) has expressed its voice few times about Rohingya situation, in Myanmar, but also in the other nations belonging to this regional association. Rohingya discrimination indeed touches other countries of the region, such as Bangladesh first and foremost, but also Thailand and Malaysia, where Rohingya live a protracted refugee situation, causing damages to the persons itself, but also to the host state, which must face several problems, among which also higher criminality¹⁶⁸. Concerning this aspect, ASEAN

¹⁶³ *Supra* note 147.

¹⁶⁴ N. KIPGEN, *Addressing the Rohingya Problem*, in *Journal of Asian and African Studies*, Vol. 49, Is. 2, p. 234-247, Thousand Oaks, CA, 2014.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ A. ASHRAFUL, J. FAREHA, *Durable Solutions to the Protracted Refugee Situation: The case of Rohingyas in Bangladesh*, in *Journal of Indian Research*, Vol. 1, Is. 4, p. 25-35, New-Delhi, 2013.

warned that sectarian violence in Rakhine state could radicalize the Rohingya Muslims, which could potentially threaten peace and stability in the region, and could also jeopardize the economic stability of South and East Asia¹⁶⁹. However, the failure to address the Rohingya crisis, as regional problem undermines the authority and the effectiveness of the State, Peace and Development Council (SPDC) and of the whole ASEAN organization¹⁷⁰.

At international level, the undergoing crisis in Myanmar was known since the first wave of violence carried out by the military junta in the state. However, after the passage to democracy of the country, Europe and USA removed sanctions posed when protesting against the terrible conditions of Rohingya people¹⁷¹. Nonetheless, although the process of democratization proceeds in Myanmar, the violence grew in the last few years, becoming an effective system of discrimination, aimed at the removal of Rohingya from the territory of Myanmar. Also, important personality, as Aung San Suu Kyi, avoids taking a clear stance in the issue, and especially she avoids defining discrimination against Rohingya as a matter of religious discrimination leading to crimes against humanity, while she is insisting on defining the situation as an ethnic conflict among different groups, limited in territory to the borders of Rakhine state¹⁷². This uncertainty about the definition of the conflict lead to uncertainty in the responses of the appropriate bodies. After the 2005 agreement that stipulates that the Security Council can act under the Responsibility to Protect if governments manifestly fail to protect their populations, the Security Council had done very little to address Rohingya situation, mostly because of the veto of both Russia and China to a 2007 draft Security Council resolution, asserting that situation in Myanmar did not pose a threat to peace, not authorizing therefore the Security council to act¹⁷³. However, the situation has evolved a lot since that date, and indeed, after the events of June 2012, the UN Special Rapporteur on human rights on Myanmar, Tomàs Ojea Quintana, recognized the long-lasting problem of discrimination toward Rohingyas by many in Myanmar, including people in the government, and asked to Myanmar, that it really wants the process of democratization to succeed, the question of human rights must be addresses effectively¹⁷⁴. In the same way, the United Nations independent expert on minority issues, Rita Izsàk, affirmed that Rohingyas have been historically marginalized and suffered terrible human rights abuses, and together with the UN Special Rapporteur on human rights of internally displaced persons, Chaloka Beyani, urged the government

¹⁶⁹ *Supra* note 150.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² K. SOUTHWICK, *Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions*, in *Journal of International Affairs*, Vol. 68, Is. 2, New York, 2015.

¹⁷³ S. N. PARNINI, *The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh*, in *Journal of Muslim Minority Affairs*, Vol. 33, Is. 2, p. 281-297, London, 2013.

¹⁷⁴ *Supra* note 150.

for the safe return of Rohingyas to their homes and the prevention of further discrimination¹⁷⁵. Following the opinions of scholars and officials of the United Nations, the third committee of the UN, SOCHUM committee, which focuses on rights issues, adopted a non-binding resolution urging Myanmar to improve the living conditions of Rohingyas, protecting their human rights, through especially donating them Myanmar citizenship¹⁷⁶. Representatives of Myanmar to the UN, accepted the message of the resolution, but they denied the existence of Rohingyas as an ethnic group, and stated that the Myanmar government will consider citizenship for any member or community living in the territory in accordance with the law of the state¹⁷⁷. In these words, it is evident how Myanmar government has no intention to recognize Rohingyas as an ethnic minority residing in the territory of the state, and that it has no intention to grant them citizenship, through amendments of the 1982 Citizenship law.

3.3.2 *Recommendations and possible solutions*

Deficits in political will and the ineffectiveness of the international bodies lead to rethink the procedure of action and to establish clear principle for the protection of minorities and for the prevention of abuses.

The path that will lead to a long-term solution should have three well-defined aspects: legal, political and social. First, international community should recognize to Rohingyas the definition of ethnic minority, in this way the community is entitled to the rights described above. This definition must clear and precise, accepting Rohingyas as citizens of Myanmar, so amending the infamous 1982 Citizenship Law, in order to device territorial policies able to restore order and peace in Rakhine state. Recognition of Rohingyas as ethnic minority could also be a compromise between the requests of the community and the decisions of the government, indeed as a minority Rohingyas do not have right to self-determination, so they are not entitled to create an independent state, as the first community was intended of after the of colonization period.

Recognition is a necessary step and needs to be combined by actions of the appropriate UN organs capable of recognizing internationally to Rohingyas this status. An international recognition will obviously put pressure not only on the state in question, Myanmar, but also on the states that have relationships of any sort with it. It would be created an international understanding of the community of Rohingyas and of their situation too. In case of opposition by the Myanmar government, as already happened, and in continuation of human rights violations against Rohingyas, the international organs

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

should proceed with the tools they have; specifically, the Security Council can propose again a draft resolution, as the one proposed in 2006¹⁷⁸, reaffirming the principle of R2P, which summing up imposes to the states the responsibility to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing, this task must be encouraged by the international community, which assists the state in question, and finally, in case the state manifestly fails to fulfill this responsibility, the international community has the duty to intervene. In the same way, according to the other international treaties and convention, the organs entitled to their application and respect must apply the appropriate measures against any sort of violations relating the convention or the treaty, as the case of Rome Statute which affirms that crimes against humanity and genocide are among “the most serious crimes of concern to the international community as a whole”¹⁷⁹, followed “[they] must not go unpunished and (...) their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”¹⁸⁰. In absence of new tools for the effective protection of human rights, the international community must be together in using the tools already in practice.

Second, from a political perspective, the government of Myanmar should receive pressures from several sources. ASEAN, as the organization interested in the stability and the order of the region of South East Asia, should be the most involved for the resolution of the conflict, and the restoration of human rights protection. It has economic, legal and political reasons for asking to one of its members to respect the rule of law and the basic human rights, and furthermore to operate for a compromise among the majority and the minority of the populations living in Myanmar. Pressures should also come from eminent members of the Burmese society, as the Nobel Prize Aung San Suu Kyi, who should take a clear stance, not for any of the two factions, but in the name of the protection of human rights. Furthermore, head of states and head of governments from all over the world should express solidarity with the abused community and encourage, through any type of help, the government of Myanmar in reaching a compromise, and finally adhere to its responsibility of state towards the international community.

Third, it must be reminded that any legal or political change should be accompanied by a social one. For this reason, the government, but also UN agencies and NGOs should intervene in the territory to develop civil society groups, to conduct training and awareness campaigns on conflict prevention, to

¹⁷⁸ Resolution 1674/2006, by the UN Security Council, 28th April 2006, on Protection of Civilians in Armed Conflicts.

¹⁷⁹ *Supra* note 145.

¹⁸⁰ *Ibid.*

take actions necessary to develop both Rohingya and Rakhine communities, to provide orientations on native culture and traditions¹⁸¹. The aim is to enhance exchanges among the two communities¹⁸².

Settling the situation inside Myanmar, should not cut the attention of the international community off another aspect: Rohingyas refugees in other countries. According to United Nations High Commissioner for Refugees (UNHCR), Rohingyas lived in a protracted refugee situation in the countries in which they have tried to find safety¹⁸³. This situation has backlashes for Rohingyas themselves and the host countries. Often Rohingyas are obliged to live in camps, in bad hygiene and life conditions, reduced to seek for little earn in criminal activity like narco-trafficking¹⁸⁴. Host countries have not enough resources to donate to refugees, and most of the time they have problems with higher rate of criminality, especially near camps, suffocated with violence by the police forces¹⁸⁵. Viable solutions for this crisis with touches Bangladesh, Thailand, Malaysia and India are: local integration and resettlement. The first option is already working but not through legal ways, Rohingyas indeed buy illegal passports, in order to have new citizenship and create a new life, this encourage criminal activities and corruption in the host countries, therefore it must be defined a legal and effective way to introduce refugees in the local society¹⁸⁶. The second option concerns the help of other countries, able to share the burden of assisting refugees. This is the most viable option, since most of the countries affected by the exodus of Rohingya are developing countries, unable to cope with huge numbers of people in need¹⁸⁷.

In conclusion, the international community has enough tools to handle the situation of Myanmar and of the Rohingyas in general. The starting point should be the will to proceed and to accomplish effective results.

¹⁸¹ *Supra* note 150.

¹⁸² *Ibid.*

¹⁸³ *Supra* note 154.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

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SOMMARIO

La presente tesi triennale ha il fine di fornire una panoramica per quanto riguarda il delicato tema dei diritti riservati alle minoranze. Nell'ambito del Diritto Internazionale, tale argomento prende corpo e forma, durante un lasso di tempo molto ampio e tuttora ha una giurisprudenza frammentata, nonostante la grande importanza sottolineata più volte dalla comunità internazionale. Il tema delle minoranze viene affrontato successivamente alla prima guerra mondiale, e ha grande eco soprattutto in Europa, dove la commistione di varie culture, nazionalità, lingue ed etnie è evidente, soprattutto a causa della divisione dei territori dopo la dissoluzione dei grandi imperi. Tuttavia, recentemente, il tema delle minoranze sta avendo grande rilievo riguardo alla sicurezza dei principali soggetti del diritto internazionale, cioè gli stati. Molti dei conflitti, riguardanti singoli stati, ma anche internazionali, passati e presenti, sono stati scatenati da agenti interni agli stati stessi, molti dei quali riconducibili a disgregazione e ad uno scadimento sociale. Tale fenomeno si manifesta quando frammenti della società percepiscono di essere tagliati fuori dai contesti sociali e politici, e pertanto contestano l'autorità chiedendo maggiori diritti, e in alcuni casi l'indipendenza. Le minoranze sono quindi nuclei di popolazione che si distinguono dalla maggioranza per caratteristiche evidenti, come il sentimento di solidarietà verso i componenti del gruppo e per una situazione di soggiogamento politico e sociale da parte della maggioranza. Tuttavia, affrontare questo tema al livello internazionale è ancora molto complicato a causa di problematiche legali e politiche. Infatti, manca una definizione di minoranza riconosciuta globalmente, nonostante siano stati fatti parecchi tentativi, gli stati sono i primi ad ostacolare un accordo, temendo che maggiori diritti e autonomia possano ledere alla propria sovranità. Per tali motivazioni, questo documento, nella prima parte analizza le opzioni più importanti che, durante gli anni, si sono succedute per definire globalmente cos'è una minoranza. Si prosegue con l'analisi dei documenti per la protezione delle minoranze che hanno avuto vita dai maggiori organi internazionali, i quali, in determinate situazioni e nei propri documenti, hanno adottato una definizione piuttosto che un'altra. Per la grande rilevanza che ha il discorso europeo in questo ambito, una sezione della seconda parte è dedicata ai documenti stilati e approvati da organi politici e legali europei. Infine, nella terza parte si affronta uno dei motivi per cui è necessario definire un sistema di protezione efficace per le minoranze. In Myanmar, la minoranza musulmana dei Rohingyas, ha subito, e continua a subire, ogni tipo di violenza da parte del governo birmano. La loro situazione non coinvolge solamente lo stato del Myanmar, ma anche tutti gli stati vicini, colpiti da un enorme flusso migratorio di individui in cerca di salvezza. Il collegamento tra protezione delle minoranze e sicurezza internazionale diventa evidente e lampante in questo esempio.

Definire il termine "minoranza" al livello legale non è solamente un esercizio verbale, ma specialmente in campo internazionale ricopre un significato molto importante. Definire un soggetto è necessario per capire a quali doveri deve sottostare e quali sono i diritti spettanti. Nonostante le caratteristiche delle varie opzioni proposte siano tutte molto simili, un accordo non è stato ancora totalmente raggiunto. L'imprecisione del termine e delle sue caratteristiche porta ad una imprecisione del sistema di protezione collegato alla definizione stessa. Tra i motivi della difficoltà nel trovare un accordo vi è la molteplicità di situazioni in cui le minoranze si vengono a trovare e per le diverse caratteristiche che distinguono un gruppo da un altro. Proprio per questo si è trovato un evidente disaccordo sulla natura dei diritti riservati alle minoranze e se essi siano individuali o collettivi. Nel primo caso si applicherebbero alle singole persone, nel secondo caso sarebbero diritti che appartengono ad un gruppo di individui. La seconda visione contrasta il sistema di diritti individuali su cui si basano i principali documenti del diritto internazionale, come la Dichiarazione Universale dei Diritti Umani, oppure la Convenzione Internazionale sui Diritti Politici e Civili, e inoltre mette in condizione le minoranze di aspirare anche a diritti come auto-determinazione, e quindi indipendenza. Una possibile soluzione a tale conflitto ideologico è stata proposta nella definizione del Relatore Speciale per la Sotto-Commissione delle Nazioni Unite per la Prevenzione della Discriminazione e la Protezione delle Minoranze, Francesco Capotorti, che ha specificato come tali diritti siano individuali nella loro natura, ma abbiano la capacità di essere esercitati in gruppo, senza il quale, il concetto di minoranza sarebbe incompleto. Tale definizione ha tagliato fuori le minoranze dalla possibilità di aspirare a diritti collettivi come il diritto di auto-determinazione. Inoltre, lo stesso Capotorti ha fornito anche un elenco delle principali caratteristiche che definiscono un gruppo come una minoranza:

- Inferiorità numerica;
- Non-dominanza politica e sociale;
- Status di nazionalità o cittadinanza;
- Caratteristiche etniche, religiose e linguistiche distinguibili;
- Un senso di solidarietà – diretto a preservare la cultura, le tradizioni, la religione e la lingua.

La definizione descritta, nonostante non sia accettata globalmente e legalmente da tutti i soggetti del diritto internazionale, comunque ha influenzato la maggior parte dei documenti che intendono stabilire e proteggere i diritti delle minoranze. Tali documenti quindi riportano le caratteristiche evinte dall'analisi di Capotorti nel suo studio, ma anche l'attestazione che tali diritti sono individuali, e non collettivi. Tuttavia, l'incertezza della comunità internazionale ad accettare come definitiva la

definizione utilizzata, porta questi documenti ad essere sospesi, tanto che la maggior parte di essi, o non ha forza vincolante, o ha valore di soft law. Tuttavia, nei principali documenti, nonostante l'ambiguità del loro valore legale, sono presenti cataloghi di diritti a favore delle minoranze che si ispirano per lo più ai concetti di non discriminazione e di inclusione sociale. Tali sistemi comprendono in alcuni casi anche la capacità da parte degli individui di riportare alle autorità competenti (Commissione per i Diritti Umani delle Nazioni Unite, Corte Europea dei Diritti Umani) casi di violazione dei loro diritti. I documenti fondamentali, per quanto riguarda l'argomento dei diritti delle minoranze al livello internazionale, sono sicuramente la Convenzione Internazionale sui Diritti Civili e Politici del 1966, tra i cui articoli spicca l'articolo 27, per la prima volta totalmente dedicato al concetto di minoranza, e inoltre anche la Dichiarazione Universale delle Persone che appartengono a Minoranze Nazionali, Etniche, Religiose o Linguistiche del 1992, documento totalmente concentrato sul tema. In entrambi i casi, come già specificato, la definizione utilizzata per scrivere tali documenti è stata quella fornita da Francesco Capotorti, che ancora una volta si conferma la più congeniale a dirimere le tante contraddizioni e divergenze nel tema delle minoranze. La protezione di tali diritti in ambito regionale fa riferimento sicuramente alla Convenzione Quadro per la Protezione delle Minoranze Nazionali entrata in forza nel 1998. In essa si fa riferimento alle minoranze nazionali, tema molto complesso, relativo all'area europea e determinato dagli stravolgimenti che i conflitti mondiali hanno apportato ai confini degli stati, soprattutto nel centro e nell'est europeo. Pur essendo il campo d'azione più ristretto, anche in questo documento, gli stati membri del Consiglio d'Europa nel redigerlo, fanno riferimento alla definizione di Francesco Capotorti, che di nuovo si dimostra valido, anche in situazioni diverse, di esprimere efficacemente il concetto di minoranza. Ciò nonostante, i cataloghi di diritti compresi in questi e altri documenti, non prevedono sistemi per combattere o evitare violazioni nei confronti delle minoranze. Per questo motivo, si è avvertita la necessità di introdurre nuovi metodi, per evitare gravi violazioni dei diritti umani, in cui rientrano sicuramente anche le violazioni subite dalle minoranze di tutto il mondo. Questo metodo vuole ripensare l'idea di intervento umanitario così come si era andata affermando negli anni, e cioè come un'eccezione agli standard di intervento definiti nella Carta delle Nazioni Unite Capitolo VII articolo 42, secondo cui ogni intervento di tipo militare in uno degli stati membri debba essere deciso dal Consiglio di Sicurezza. Quindi nel 2001 entra nel discorso internazionale il concetto di *Responsibility to Protect*, o *R2P*. Questo concetto vuole proporsi come innovazione della nozione di intervento umanitario, velocizzando e facilitando l'intervento della comunità internazionale per evitare o fermare le gravi violazioni dei diritti umani. Si propone inoltre di farlo tramite la revisione del concetto di sovranità dello stato, non più concentrata sul controllo che ha lo stato, ma sulla responsabilità di esso nei confronti dei propri cittadini, o di chiunque risieda nel suo

territorio. Nel momento in cui questa responsabilità viene meno, la comunità internazionale ha il diritto morale di intervenire. Certamente, alcuni aspetti di questa nuova dottrina sono originali, e proprio per questa ragione, molti studiosi si sono posti interrogativi su alcune caratteristiche peculiari. Innanzitutto, non è totalmente chiaro come si possa porre rimedio alla possibile, nonché probabile, inazione degli stati. Nel Documento Risolutivo del Summit Mondiale del 2005, non vi è alcun riferimento a possibili sanzioni, né tantomeno il concetto di R2P viene considerato un obbligo dei singoli stati, per questo, una possibile inazione, non risulterebbe, in nient'altro che in una condanna morale. In tal senso, Thomas Weiss si riferisce alla dottrina della R2P proprio come una responsabilità morale. Seguendo queste peculiarità, molti si chiedono che valore dare alla nuova dottrina, mentre alcuni la inseriscono tra gli strumenti di soft law, altri spingono perché venga considerata come effettiva norma emergente. La Commissione Legale Internazionale, si è dichiarata favorevole a questa ultima visione, per cui l'applicazione della dottrina e i suoi risultati possono riflettere un progressivo sviluppo del diritto internazionale.

Dal momento che l'esistenza di una responsabilità morale è stata attestata più o meno largamente dalla comunità internazionale, è evidente che tale responsabilità è venuta meno nel caso dello Stato del Myanmar nei confronti della minoranza musulmana dei Rohingya, che da sempre abitano nella regione settentrionale del Rakhine. Il governo birmano si rifiuta di accettare come cittadini le persone che fanno parte di questa minoranza, definendoli immigrati illegali provenienti dal Bangladesh, quando al contrario vi sono prove storiche della loro presenza in Myanmar, prima della colonizzazione britannica. Proprio a cominciare dal periodo della colonizzazione, i Rohingya hanno dovuto subire violazioni dei propri diritti necessari per mantenere il legame con la propria comunità e le proprie tradizioni, nonché violazioni dei più basilari diritti umani in genere. Successivamente alla creazione dello stato socialista in Myanmar, e al governo militare poi, la situazione dei Rohingya è peggiorata sempre più, sotto gli occhi di tutta la comunità internazionale. Tra le altre violenze, gli è stata rifiutata la cittadinanza e ogni diritto politico, in conseguenza anche i diritti civili sono venuti meno, come quello di contrarre matrimonio, oppure aspirare ad un grado d'istruzione superiore. Da questa discriminazione voluta dallo stato del Myanmar, ne deriva una vera e propria crisi umanitaria, che tocca anche tutti gli altri grandi paesi della regione, come Thailandia, Malesia, India e soprattutto Bangladesh, dove migliaia di persone appartenenti alla minoranza dei Rohingya vivono in campi profughi senza nessun grado di protezione o di cura, costretti a fuggire, oppure espatriati. A questo tipo di violazioni, dal 2012 si sono aggiunte attacchi fisici, molto spesso organizzate dalle comunità di monaci buddhisti. Questa violenza riguarda molti di quei crimini che vengono citati nello Statuto di Roma per la creazione della Corte Penale Internazionale, e alcuni di questi sono: omicidio, deportazione forzata, prigionia o altre gravi privazioni della libertà fisica, stupro, sterilizzazione

forzata, scomparsa forzata di persone, il crimine di apartheid, altri crimini volti a procurare sofferenza e violenza. Tali crimini, definiti come crimini contro l'umanità, posso innescare il concetto di R2P, e infatti già nel 2006 era stata proposta una risoluzione al Consiglio di Sicurezza delle Nazioni Unite perché fossero varate delle misure contro lo stato del Myanmar, tuttavia, il veto di Russia e Cina ha bloccato le possibili ripercussioni. Ciò nonostante, le condizioni per chiedere ed ottenere un permesso dal Consiglio di Sicurezza ci sono e sono ancora più gravi rispetto al 2006, e la dottrina della R2P acquista ogni giorno più valore, anche grazie alla capacità di mettere fine ad alcuni conflitti come quelli in Darfur, Libia, Costa d'Avorio, Sud Sudan e Yemen. Quindi per affrontare al meglio e cercare di risolvere la questione dei Rohingya, è necessario che la comunità internazionale si imponga nel definire tale comunità, come una minoranza e che quindi i suoi membri possano essere tutelati dai diritti riservati alle persone che fanno parte di minoranze, e al tempo stesso agisca tempestivamente per fermare le violenze perpetrate contro la stessa. Insieme ad un'azione legale, che deve non solo partire dai singoli stati, ma anche dall'intenzione delle maggiori organizzazioni internazionali, si devono aggiungere iniziative politiche e sociali. A livello politico sono necessarie delle pressioni regionali ed internazionali, affinché le privazioni e le violenze contro i Rohingya cessino il prima possibile, ed in questo l'intervento della Associazione delle Nazioni del Sud-Est Asiatico è fondamentale, dato il suo primario interesse nell'equilibrio economico e politico del territorio, dove la crisi umanitaria, sta già mettendo in pericolo la crescita economica. Al livello sociale, è necessario che gli organi locali e internazionali si adoperino per sviluppare e aumentare gli scambi interculturali tra le varie etnie, al fine di favorire un reinserimento pacifico dei Rohingya nella società.

In conclusione, la tesi vuole evidenziare le problematiche inerenti ai diritti delle minoranze, più precisamente: mancanza di chiarezza nella definizione, mancanza di forza vincolante dei documenti che trattano di diritti delle minoranze, mancanza di un chiaro sistema di contromisure da adottare in caso di violazioni dei diritti umani. Tuttavia, la presenza di una possibile definizione, più volte utilizzata, la presenza di diversi documenti in cui sono elencati i diritti riservati alle minoranze, e infine la presenza di una nuova dottrina che rivoluziona il rapporto tra stato e cittadini, ci induce a sperare che il pensiero internazionale si stia evolvendo verso posizioni più chiare e precise, capaci anche di azioni più incisive atte a difendere i principi fondamentali del diritto internazionale.